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PARTY GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to political party committees. The following is a compilation of articles from the FEC's monthly newsletter covering relevant changes. It should be used in conjunction with the FEC's July 2009 *Campaign Guide for Political Party Committees*, which provides more comprehensive information on compliance for party committees.

Note: Portions of this publication may be affected by the Supreme Court's decision in *Citizens United v. FEC*. Essentially, the Court's ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications. For more information, see page 9.

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Regulations

Final Rules on Participation by Federal Candidates and Officeholders at Nonfederal Fundraising Events

On April 29, 2010, the Commission approved final rules addressing participation by federal candidates and officeholders at nonfederal fundraising events. These rules were promulgated in response to the decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III*), which invalidated the portion of the old regulations that permitted federal candidates and officeholders to speak at state, district or local party committee fundraising events "without restriction or regulation." 11 CFR 300.64(b).

Scope

The final rule covers participation by federal candidates and officeholders at nonfederal fundraising events, which are those fundraising events that are in connection with an election for federal office or any nonfederal election where funds outside the amount limitations and source prohibitions of the Federal Election Campaign Act (the Act) are solicited. The rule addresses participation at the fundraising event and in publicizing the event. It does not cover fundraising events at which only funds within the limitations and prohibitions of the Act are solicited or those in which funds outside the limitations and prohibitions of the Act are not solicited but are, nevertheless, received. 11 CFR 300.64(a).

Participation at Nonfederal Fundraising Events

A federal candidate or officeholder may attend, speak at and be a featured guest at a nonfederal fundraiser. 11 CFR 300.64(b)(1). He or she is also free to solicit funds at the fundraising event, provided that the solicitation is for funds that are within the limitations and prohibitions of the Act and are consistent with state law.

When the federal candidate or officeholder makes such a solicitation, he or she may limit the solicitation by displaying at the fundraiser a clear and conspicuous written notice, or by making a clear and conspicuous oral statement, that the solicitation is not for Levin funds (when applicable) and does not seek funds in excess of federally permissible amounts or from corporations, labor organizations, national banks, federal government contractors and foreign nationals. 11 CFR 300.62(b)(2). If the federal candidate or officeholder chooses to make an oral statement, it need only be made once.

Publicity for Nonfederal Fundraising Events

New 11 CFR 300.64(c) addresses the publicity for nonfederal fundraisers including, but not limited to, ads, announcements or pre-event invitation materials, regardless of format or medium of the communication.

If the publicity does not contain a solicitation or solicits only federally permissible funds, then the federal candidate or officeholder (or agent of either) is free to consent to the use of his or her name or likeness in the publicity for the nonfederal fundraiser. 11 CFR 300.64(c)(1)-(2).

If the publicity contains a solicitation for funds outside the limitations or prohibitions of the Act or Levin funds, the federal candidate or officeholder (or agent of either) may consent to the use of his or her name or likeness in the publicity, only if:

- The federal candidate or officeholder is identified in any other manner not specifically related to fundraising, such as a featured guest, honored guest, special guest, featured speaker or honored speaker; and
- The publicity includes a clear and conspicuous oral or written disclaimer that the solicitation is not being made by the federal candidate or officeholder. 11 CFR 300.64(c)(3)(i). Examples of disclaimers are provided in the regulation at 11 CFR 300.64(c)(iv).

However, a federal candidate or officeholder (or agent of either) may not agree to the consent of his or her name or likeness in publicity that contains a solicitation of funds outside the limitations and prohibitions of the Act or of Levin funds if:

- The federal candidate or officeholder is identified as serving in a manner specifically related to fundraising, such as honorary chairperson or member of a host committee; or is identified in the publicity as extending the invitation to the event; or

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• The federal candidate or officeholder signs the communication.

These restrictions apply even if the publicity contains a disclaimer. 11 CFR 300.64(c)(v).

In addition, the federal candidate or officeholder is prohibited from disseminating publicity for nonfederal fundraisers that contains a solicitation of funds outside the limitations or prohibitions of the Act or of Levin funds.11 CFR 300.64(c)(iv).

Additional Information

The final rules and Explanation and Justification were published in the May 5, 2010, *Federal Register* (75 FR 24375). They are available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-11.pdf. The rules are effective June 4, 2010.

—Katherine Wurzbach

Final Rules on Campaign Travel

On November 19, 2009, the Commission approved final rules implementing provisions of the Honest Leadership and Open Government Act of 2007 (HLOGA) relating to travel on non-commercial aircraft in connection with federal elections.

General Rule

HLOGA amended the Federal Election Campaign Act (the Act) to prohibit candidates for the U.S. House of Representatives, their authorized committees and their leadership PACs[1] from making any expenditure for non-commercial air travel, with an exception for travel on government aircraft and on aircraft owned or leased by a candidate or an immediate family member of the candidate. 2 U.S.C. §439a(c)(2) and (3). HLOGA also specified new reimbursement rates that Senate, Presidential and Vice-Presidential candidates and their authorized committees must pay when making expenditures for flights aboard non-commercial aircraft. HLOGA did not alter rules for travel on commercial flights. All candidates must still pay the "usual and normal charge" for all campaign travelers aboard such flights to avoid receiving an in-kind contribution. 11 CFR 100.52(a) and (d).

For purposes of HLOGA, the term "campaign traveler" refers to individuals traveling in connection with an election for federal office on behalf of a candidate or political committee, and candidates who travel on behalf of their own campaigns. The term campaign traveler also includes any member of the news media traveling with a candidate. Candidates are only considered campaign travelers when they are traveling in connection with an election for federal office. This term does not include Members of Congress when they engage in official travel or candidates when they engage in personal travel or any other travel that is not in connection with an election for federal office. 11 CFR 100.93(a)(3)(i).

Presidential, Vice-Presidential and Senate Candidate Travel

New 11 CFR 100.93(c)(1) requires candidates for President, Vice-President and the U.S. Senate to pay the pro rata share of the fair market value of non-commercial flights. The pro rata share is determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable aircraft of comparable size by the number of campaign travelers flying on behalf of each candidate on the flight.[2]

The pro rata share is calculated based on the number of candidates represented on a flight, regardless of whether the individual candidate is actually present on the flight. A candidate is represented on a flight if a person is traveling on behalf of that candidate or the candidate's authorized committee. Accordingly, when an individual is traveling on behalf of another political committee (such as a political party committee or a Senate leadership PAC), rather than on behalf of the candidate's own authorized committee, the reimbursement for that travel is the responsibility of the political committee on whose behalf the travel occurs. The reimbursement must be made to the service provider within seven calendar days after the date the flight began to avoid the receipt of an in-kind contribution.

Travel on behalf of Leadership PACs of Senate, Presidential and Vice-Presidential Candidates

For non-commercial travel on behalf of leadership PACs of Senate, Presidential and Vice-Presidential candidates, the new regulations apply the same reimbursement rates as in the prior regulations:

• The lowest unrestricted and non-discounted first-class airfare in the case of travel between cities served by regularly scheduled first-class commercial airline service;
• The lowest unrestricted and non-discounted coach airfare in the case of travel between a city served by regularly scheduled coach commercial airline service, but not

[1] *HLOGA and Commission regulations define "leadership PAC" as a political committee that is directly or indirectly established, financed, maintained or controlled by a federal candidate or federal officeholder, but which is not a candidate's authorized committee or a political party committee. 2 U.S.C. §434(i)(8)(B) and 11 CFR 100.5(e)(6).*

[2] *The term "comparable aircraft" means an aircraft of similar make and model as the aircraft that actually makes the trip, with similar amenities as that aircraft. The Commission's new regulations interpret HLOGA to include helicopters when determining "comparable aircraft." 11 CFR 100.93(a)(3)(vi).*

regularly scheduled first-class commercial airline service, and a city served by regularly scheduled coach commercial airline service (with or without first-class commercial airline service); or
- The normal and usual charter fare or rental charge for a comparable commercial aircraft of sufficient size to accommodate all campaign travelers and security personnel, if applicable, in the case of travel to or from a city not regularly served by regularly scheduled commercial airline service.

To avoid the receipt of an in-kind contribution, the committee must reimburse the service provider no later than seven calendar days after the date the flight began. 11 CFR 100.93(c)(3).

Travel by or on Behalf of House Candidates and House Leadership PACs

New 11 CFR 100.93(c)(2) generally prohibits House candidates and individuals traveling on behalf of House candidates, their authorized committees or the leadership PACs of House candidates from engaging in non-commercial campaign travel on aircraft. This prohibition cannot be avoided by payments to the service provider, even by payments from the personal funds of a House candidate.

This prohibition does not apply when the travel would be considered an expenditure by someone other than the House candidate, the House candidate's authorized committee or House candidate's leadership PAC (for example, if the House candidate were traveling on behalf of a Senate candidate instead of on behalf of his or her own campaign).

Non-Commercial Air Travel on Behalf of Other Committees

The Commission is retaining its current reimbursement rate structure for campaign travelers who are traveling on behalf of political party committees, separate segregated funds (SSFs), nonconnected committees and certain leadership PACs. Thus, the reimbursement rates (first class, coach or charter, as described above) will apply to campaign travelers who are traveling on behalf of these types of committees on non-commercial flights.

Other Means of Transportation

For non-commercial travel via other means, such as limousines and all other automobiles, trains and buses, a political committee must pay the service provider the normal and usual fare or rental charge for a comparable commercial conveyance of sufficient size to accommodate all campaign travelers, including members of the news media traveling with a candidate and security personnel, if applicable. See 100.93(d). This regulation remains the same as the prior regulation regarding other means of transportation.

Government Conveyances

Candidates and representatives of political committees may make campaign travel via government conveyances, such as government aircraft, subject to specific reimbursement requirements. HLOGA provides an exception to the prohibition on non-commercial air travel by House candidates and their authorized committees and leadership PACs, but does not specify any particular reimbursement rate for travel aboard government aircraft.

The Commission is amending its regulations to require that candidates, their authorized committees or House candidate leadership PACs reimburse the federal, state or local government entity providing the aircraft at either of the two following rates:

- "Per candidate campaign traveler" reimbursement rate, which is the normal and usual charter fare or rental charge for a comparable aircraft of sufficient size to accommodate all of the campaign travelers. The pro rata share is calculated by dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of candidates, authorized committees or House candidate leadership PACs, including members of the news media, and security personnel. No portion of the normal and usual charter fare or rental charge may be attributed to any other passengers, except for members of the news media and government-provided security personnel, as provided in 100.93(b)(3). 11 CFR 100.93(e)(1)(i); or
- "Private traveler reimbursement rate," as specified by the governmental entity providing the aircraft, per campaign traveler. 11 CFR 100.93(e)(1)(ii).

For campaign travelers who are traveling on government aircraft but are not traveling with or on behalf of a candidate or candidate's committee (for example, a person traveling on behalf of a political party committee or an SSF), the Commission is retaining its previous reimbursement rate, which provides that the reimbursement be equal either to the lowest unrestricted and non-discounted first class airfare to or from the city with regularly scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used, or, for all other travel, the applicable rate from among the rates specified in 100.93(c)(3). 11 CFR 100.93(e)(2).

Members of the news media who are traveling with a candidate on government aircraft and security personnel not provided by a government entity must be included in the number of campaign travelers for the purposes of identifying a comparable aircraft of sufficient size to accommodate all campaign travelers. A comparable aircraft, however, need not be able to accommodate all government-required personnel or government-required equipment (such as security communication

devices, etc.). All security personnel, including government-provided security personnel, are included in determining the number of campaign travelers for purposes of calculating each candidate's pro rata share.

A political committee must reimburse the governmental entity providing the conveyance within the time frame specified by the governmental entity. 11 CFR 100.93(e)(1).

Aircraft Owned or Leased by Candidate or Immediate Family

The Commission is also amending its regulations to conform with HLOGA's exception from the payment and reimbursement requirements for travel aboard aircraft that are "owned or leased" by a candidate or a candidate's immediate family, including an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that 1) the entity is not a public corporation, and 2) the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows."

HLOGA allows expenditures on candidate-owned aircraft, but it still requires a candidate to reimburse the service providers (candidates, members of their immediate family or entities in which either owns an interest) if the candidate seeks to avoid receiving an in-kind contribution from the service provider for the candidate's use of the aircraft. Although federal candidates may make unlimited contributions to their campaigns, such contributions must be reported by their authorized committees. 11 CFR 110.10. Contributions from all other persons, including family members, are subject to the applicable amount limits and source prohibitions. 11 CFR 110.1.

New Commission regulations at 11 CFR 100.93(g) provide for instances where a candidate or immediate family member wholly owns the aircraft and where a candidate or his or her immediate family have a shared-ownership arrangement. In instances where the candidate uses the aircraft within the limits of a shared-ownership arrangement, the candidate's committee must reimburse the candidate, the candidate's immediate family member or the administrator of the aircraft for the applicable rate charged to the candidate, immediate family member or corporation or other entity through which the aircraft is ultimately available to the candidate. This amount is treated as a personal contribution from the candidate if the candidate is the owner or lessee.

House candidates are prohibited from exceeding the candidate's proportional share of ownership interest in the aircraft. 11 CFR 100.93(g). For Senate, Presidential and Vice Presidential candidates, the reimbursement rate would be based upon the pro rata share of the charter rate where the proportional share of the ownership interest is exceeded. See 11 CFR 100.93(c)(1).

In instances where a candidate or a candidate's immediate family member wholly owns the aircraft, the candidate's authorized committee need reimburse only the pro rata share per campaign traveler of the costs associated with the trip. Such costs include, but are not limited to, the cost of fuel and crew and a proportionate share of annual and recurring maintenance costs. 100.93(g)(1)(iii).

The new regulations do not require a specific time frame for repayment, except that such repayment must be made by the candidate's committee in accordance with the normal business practices of the entity administering the shared-ownership or lease agreements.

Recordkeeping Requirements

Political committees are required to maintain appropriate records for non-commercial travel. Commission regulations also require candidate committees to obtain and keep copies of any shared-ownership or lease agreements, as well as the pre-flight certifications of compliance with those agreements.

Additional Information

The final rules and Explanation and Justification were published in the December 7, 2009, issue of the *Federal Register* (74 FR 63951). They are available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-27.pdf. The rules took effect on January 6, 2010.

—Myles Martin

Final Rules on Coordinated Communications

On August 26, 2010, the Commission approved final rules and Explanation and Justification regarding coordinated communications. These rules comply with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*"). See the July 2008 *Record*. The new rules take effect December 1, 2010.

The new rules add to the existing definition of coordinated communications a content standard for communications that are the "functional equivalent of express advocacy." The new rules also create a safe harbor for certain business and commercial communications and provide further explanation and justification for two "conduct standards" in the existing regulations.

Background

Commission regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) established a three-prong test for determining whether a communication is coordinated with a candidate, a candidate's authorized committee, a political party committee or the agents of any of these. Coordinated communications generally result in an in-kind contribution. The test includes a payment prong, a content prong and a conduct prong. The con-

tent and conduct prong each include several standards, and satisfying any one of the standards within a prong satisfies that prong of the test. 11 CFR 109.21(a)(1)-(3).

Various aspects of the coordinated communications test were challenged in court. The new regulations respond to the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Shays III Appeal*. In that decision, the court held that the Commission's decision to have an "express advocacy" standard as the only content standard that applies outside of 90-day and 120-day windows before an election runs counter to the purpose of BCRA and the Administative Procedure Act. The court noted that the FEC "must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside [the Act's] expenditure definition.'" In addition, the court invalidated the 120-day period used in the existing conduct prong to determine whether a common vendor or former campaign employee's relationship with a candidate committee or party committee would satisfy the prong. 11 CFR 109.21(d)(4) and (d)(5). The court found that the Commission failed to justify its decision to apply a 120-day window.

New Content Standard

Functional Equivalent of Express Advocacy. The Commission is revising the content prong by adding a new standard to cover public communications that are the "functional equivalent of express advocacy." See new 11 CFR 109.21(c)(5). A communication is the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." This new standard applies without regard to the timing of the communication or the targeted audience.

In its application of the functional equivalent of express advocacy test, the Commission will be guided by the Supreme Court's reasoning and application of the test to the communications at issue in *Wisconsin Right to Life v. FEC* (*WRTL*) 551 U.S. 449 (2007) and *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. Jan 21, 2010).

The new content standard is an objective, well-established standard. The functional equivalent of express advocacy test has been developed by the Supreme Court to apply to a wide range of speakers as a stand-alone test for separating election-related speech that is not express advocacy from non-election related speech. The new content standard applies to all speakers subject to the coordinated communications rules at 11 CFR 109.21, including individuals and advocacy organizations, without regard to when a communication is made or its intended audience. As required by *Shays III Appeal*, the new content standard also captures more communications than the express advocacy content standard outside of the 90-day and 120-day time windows.

Conduct Standards

The "common vendor" and "former employee/independent contractor" standards of the conduct prong were challenged in *Shays III Appeal*.

Current Commission regulations provide that the "common vendor" standard of the conduct prong is satisfied if the person paying for the communication had contracted or employed a commercial vendor who provided certain specified services to the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee during the previous 120 days. Also, the commercial vendor must use or convey to the person paying for the communication information about the plans, projects, activities or needs of the candidate, the candidate's opponent or political party committee, and that information must be material to the creation, production or distribution of the communication. 109.21(d)(4).

The former employee/independent contractor conduct standard is satisfied if the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee during the previous 120 days. Additionally, the former employee or independent contractor must use, or convey to the person paying for the communication, information about the plans, projects, activities or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. 109.21(d)(5).

The Commission is not revising the common vendor or former employee conduct standards at this time. In order to comply with the *Shays III Appeal* decision, the Commission has decided to provide a more detailed explanation and justification for the 120-day period.

Based on the record, 120 days has been shown to be a sufficient time period to prevent circumvention of the Act. Many commenters, in written and oral testimony, agreed that campaign information must be both current and proprietary (i.e. non-public) to be subject to the coordinated communications regulation. The information in the rulemaking record shows the widespread public availability of certain types of campaign information that used to remain confidential for much longer in years past. The record also demonstrates that changes in technology have significantly reduced the duration of the news cycle, further decreasing the time that campaign information remains relevant.

There is no information in the rulemaking record showing that use or conveyance by common vendors

and former employees of information material to public communications outside of the 120-day period has become problematic in the time the 120-day period has been in effect. The Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

Safe Harbor for Certain Business and Commercial Communications

The Commission is also adopting a safe harbor to address certain commercial and business communications. The new safe harbor excludes from the definition of a coordinated communication any public communication in which a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not promote, attack, support or oppose (PASO) that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made by the business prior to the candidacy in terms of the medium, timing, content and geographic distribution. New 11 CFR 109.21(i). The new safe harbor is meant to exclude communications that have *bona fide* business and commercial purposes from the definition of coordinated communication.

Additional Information

The final rules and Explanation and Justification were published in the *Federal Register* on September 15, 2010. The full text of the *Federal Register* Notice is available at http://www.fec.gov/law/cfr/ej_compilation/2010/notice2010-17.pdf.

—Myles Martin

Final Rules for Definition of Federal Election Activity

On August 26, 2010, the Commission approved final rules revising the regulations at 11 CFR 100.24 regarding federal election activity (FEA). The final rules modify the definitions of "voter registration activity" and "get-out-the-vote-activity" (GOTV activity) and make other changes in response to the decision of the U.S. Court of Appeals for the District of Columbia in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*").

Scope

Under the new definitions, voter registration and GOTV activities that urge, encourage or assist potential voters in registering to vote or voting must be paid for with federal funds or with a combination of federal and Levin funds regardless of whether the message is delivered individually or to a group of people via mass communication. However, the Commission created exceptions to the new definitions for:

- Brief, incidental exhortations to register to vote or to vote;
- GOTV and voter identification activities conducted solely in connection with a nonfederal election; and
- Certain *de minimis* activities.

Definition of "Voter Registration Activity"

In compliance with the court of appeals' decision in *Shays III Appeal*, the Commission revised the definition of "voter registration activity" to cover activities that assist, encourage or urge potential voters to register to vote. The revised definition lists the following activities as voter registration activity:

- Encouraging or urging potential voters to register to vote, whether by mail, e-mail, in person, by telephone or by any other means;
- Preparing and distributing information about registration and voting;
- Distributing voter registration forms or instructions to potential voters;
- Answering questions about or assisting potential voters in completing or filing voter registration forms;
- Submitting or delivering a completed voter registration form on behalf of a potential voter;
- Offering or arranging to transport, or actually transporting, potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
- Any other activity that assists potential voters to register to vote.

The Commission provided two examples of voter registration activity falling under the new definition:

- Sending a mass mailing of voter registration forms; and
- Submitting completed voter registration forms to the appropriate state or local office handling voter registration.

The Commission emphasized that the new definition is a comprehensive list of activities designed to cover all means of contacting potential voters to assist, encourage or urge them to register to vote, regardless of the means used to deliver the message. However, consistent with the *Shays III Appeal* decision, the Commission carved out an exception to the new definition for brief, incidental exhortations to register to vote (discussed below).

Definition of "GOTV Activity"

The Commission also revised the definition of "GOTV activity" to comply with the court of appeals' decision in *Shays III Appeal*. The new definition covers activities that assist, encourage or urge potential voters to vote. The revised definition identifies the following activities as GOTV activity:

- Encouraging or urging potential voters to vote;
- Informing potential voters about the hours and location of polling

places, or about early voting or voting by absentee ballot;
- Offering or arranging to transport voters to the polls, as well as actually transporting voters to the polls; and
- All activities that assist potential voters in voting.

The Commission provided two examples of GOTV activities falling under the new definition:

- Driving a sound truck through a neighborhood that plays a message urging listeners to "Vote next Tuesday at the Main Street community center"; and
- Making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day.

The Commission emphasized that the new definition is a comprehensive list of activities designed to cover all means of contacting potential voters to assist, encourage or urge them to vote. However, consistent with the *Shays III Appeal* decision, the Commission carved out an exception to the new definition for brief, incidental exhortations to vote (discussed below).

Brief, Incidental Exhortation

The Commission created a new exception to the definitions of voter registration activity and GOTV activity that allows for a brief exhortation to register to vote or to vote, so long as the exhortation is incidental to a communication, activity or event. The exception applies to brief, incidental exhortations regardless of the forum or medium in which they are made. Also, the exception does not inoculate speeches or events that otherwise would meet the definition of voter registration activity or GOTV activity, but is intended to ensure that communications that would not otherwise be voter registration activity or GOTV activity do not become so merely because they include a brief, incidental exhortation to register to vote or to vote.

To qualify for the exception, the exhortation must be both brief and incidental. For example, exhortations to register to vote or to vote that consume several minutes of a speech, or that occupy a large amount of space on a mailer, are not brief and will not qualify for the exception. Also, a message in a mailer that stated only "Register to Vote by October 1st!" or "Vote on Election Day!" with no other text would not be incidental and would not qualify for the exception from the definition of GOTV activity. Additional examples of exhortations that would qualify for the exception are provided in the final rules.

Voter Identification and GOTV Activity Solely in Connection with a Nonfederal Election

In an attempt to better distinguish between voter identification and GOTV activities that are FEA, and those activities that do not affect elections in which a federal candidate appears on the ballot, the Commission created new exceptions to 11 CFR 100.24(c) for activities exclusively in connection with nonfederal elections. Under the new provisions, FEA does not include any amount expended or disbursed by a state, district or local party committee for:

- Voter identification that is conducted solely in connection with a nonfederal election held on a date no federal election is held, and which is not used in a subsequent election in which a federal candidate is on the ballot; 100.24(c)(5); and
- Certain GOTV activity that is conducted solely in connection with a nonfederal election held on a date on which no federal election is held. 100.24(c)(6).

Activities involving De Minimis Costs

Finally, mindful of the administrative complexities that state, district and local party committees and associations of state and local candidates would face in tracking nominal, incidental costs, the Commission carved out an exception for *de minimis* costs associated with certain enumerated activities. The Commission excluded the following activities from the FEA funding restrictions:

- On the website of a party committee or association of state or local candidates, posting a hyperlink to a state or local election board's web page containing information on voting or registering to vote;
- On the website of a party committee or association of state or local candidates, enabling visitors to download a voter registration form or absentee ballot application;
- On the website of a party committee or association of state or local candidates, providing information about voting dates and/or polling locations and hours of operation; and
- Placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee or association of state or local candidates.

The Commission emphasized that the exception is only for the specific activities listed and that costs associated with activities not on the list, no matter how small the amount or how closely related the activities, do not qualify for the exception. In addition, amounts incurred for the enumerated activities that are not *de minimis* do not qualify for the exception.

Additional Information

The Final Rules were published in the *Federal Register* on September 10, 2010, and take effect on December 1, 2010. The Federal Register Notice is available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice2010-18.pdf.

—Zainab Smith

Court Cases

Citizens United v. FEC

On January 21, 2010, the Supreme Court issued a ruling in *Citizens United v. Federal Election Commission* overruling an earlier decision, *Austin v. Michigan State Chamber of Commerce* (*Austin*), that allowed prohibitions on independent expenditures by corporations. The Court also overruled the part of *McConnell v. Federal Election Commission* that held that corporations could be banned from making electioneering communications. The Court upheld the reporting and disclaimer requirements for independent expenditures and electioneering communications. The Court's ruling did not affect the ban on corporate contributions.

Background

The Federal Election Campaign Act (the Act) prohibits corporations and labor unions from using their general treasury funds to make electioneering communications or for speech that expressly advocates the election or defeat of a federal candidate. 2 U.S.C. §441b. An electioneering communication is generally defined as "any broadcast, cable or satellite communication" that is "publicly distributed" and refers to a clearly identified federal candidate and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. §434(f)(3)(A) and 11 CFR 100.29(a)(2).

In January 2008, Citizens United, a non-profit corporation, released a film about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. Citizens United wanted to pay cable companies to make the film available for free through video-on-demand, which allows digital cable subscribers to select programming from various menus, including movies. Citizens United planned to make the film available within 30 days of the 2008 primary elections, but feared that the film would be covered by the Act's ban on corporate-funded electioneering communications that are the functional equivalent of express advocacy, thus subjecting the corporation to civil and criminal penalties. Citizens United sought declaratory and injunctive relief against the Commission in the U.S. District Court for the District of Columbia, arguing that the ban on corporate electioneering communications at 2 U.S.C. §441b was unconstitutional as applied to the film and that disclosure and disclaimer requirements were unconstitutional as applied to the film and the three ads for the movie. The District Court denied Citizens United a preliminary injunction and granted the Commission's motion for summary judgment. The Supreme Court noted probable jurisdiction in the case.

Supreme Court Decision

The Supreme Court found that resolving the question of whether the ban in §441b specifically applied to the film based on the narrow grounds put forth by Citizens United would have the overall effect of chilling political speech central to the First Amendment. Instead, the Court found that, in exercise of its judicial responsibility, it was required to consider the facial validity of the Act's ban on corporate expenditures and reconsider the continuing effect of the type of speech prohibition which the Court previously upheld in *Austin*.

The Court noted that §441b's prohibition on corporate independent expenditures and electioneering communications is a ban on speech and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." Accordingly, laws that burden political speech are subject to "strict scrutiny," which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. According to the Court, prior to *Austin* there was a line of precedent forbidding speech restrictions based on a speaker's corporate identity, and after *Austin* there was a line permitting them. In reconsidering *Austin*, the Court found that the justifications that supported the restrictions on corporate expenditures are not compelling.

The Court in *Austin* identified a compelling governmental interest in limiting political speech by corporations by preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." However, in the current case the Court found that *Austin*'s "antidistortion" rationale "interferes with the 'open marketplace of ideas' protected by the First Amendment." According to the Court, "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech." The Court held that the First Amendment "prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." The Court further held that "the rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."

The Court also rejected an anti-corruption rationale as a means of banning independent corporate political speech. In *Buckley v. Valeo*, the Court found the anti-corruption interest to be sufficiently important to allow limits on contributions, but did not extend that reasoning to overall expenditure limits because there was less of a danger that expenditures would be given as a *quid*

pro quo for commitments from that candidate. The Court ultimately held in this case that the anti-corruption interest is not sufficient to displace the speech in question from Citizens United and that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

The Court furthermore disagreed that corporate independent expenditures can be limited because of an interest in protecting dissenting shareholders from being compelled to fund corporate political speech. The Court held that such disagreements may be corrected by shareholders through the procedures of corporate democracy.

Finally, Citizens United also challenged the Act's disclaimer and disclosure provisions as applied to the film and three ads for the movie. Under the Act, televised electioneering communications must include a disclaimer stating responsibility for the content of the ad. 2 U.S.C. §441d(d)(2). Also, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the Commission identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed and the names of certain contributors. 2 U.S.C. §434(f)(2). The Court held that, although disclaimer and disclosure requirements may burden the ability to speak, they impose no ceiling on campaign activities and do not prevent anyone from speaking. As a result, the disclaimer and disclosure requirements are constitutional as applied to both the broadcast of the film and the ads promoting the film itself, since the ads qualify as electioneering communications.

Additional Information

The text of the Supreme Court's opinion is available on the Commission's website at http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf.

U.S. Supreme Court No. 08-205.

—Myles Martin

Commission Statement on Citizens United v. FEC

On February 5, 2010, the Commission announced that, due to the Supreme Court's decision in *Citizens United v. FEC*, it will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications. The Commission also announced several actions it is taking to fully implement the *Citizens United* decision.

In *Citizens United v. FEC*, issued on January 21, 2010, the Supreme Court held that the prohibitions in the Federal Election Campaign Act (the Act) against corporate spending on independent expenditures or electioneering communications are unconstitutional. The Supreme Court upheld statutory provisions that require political ads to contain disclaimers and be reported to the Commission. Provisions addressed by the decision are described below:

- The Court struck down 2 U.S.C. §441b, which prohibits, in part, corporations and labor organizations from making electioneering communications and from making independent expenditures—communications to the general public that expressly advocate the election or defeat of clearly identified federal candidates;
- The Court upheld 2 U.S.C. §441d, which requires that political advertising consisting of independent expenditures or electioneering communications contain a disclaimer clearly stating who paid for such communication; and
- The Court upheld 2 U.S.C. §434, which requires certain information about electioneering communications and independent expenditures, and the contributions received for such spending, to be disclosed to the Commission and to be made public.

The Commission is taking the following steps to conform to the Supreme Court's decision:

- The Commission will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications;
- The Commission is reviewing all pending enforcement matters to determine which matters may be affected by the *Citizens United* decision and will no longer pursue claims involving violations of the invalidated provisions. In addition, the Commission will no longer pursue information requests or audit issues with respect to the invalidated provisions; and
- The Commission is considering the effect of the *Citizens United* decision on its ongoing litigation.

The Commission intends to initiate a rulemaking to implement the *Citizens United* opinion. It is reviewing the regulations affected by the invalidated provisions, including but not necessarily limited to the following:

- 11 CFR 114.2(b)(2) and (3), which implement the Act's prohibition on corporate and labor organization independent expenditures and electioneering communications;
- 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
- 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures

and electioneering communications under certain conditions;
- 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for electioneering communications; and
- 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.

The Commission is also considering the effect of *Citizens United* on the ongoing Coordinated Communications rulemaking. 74 FR 53893 (Oct. 21, 2009). The Commission also issued a Supplemental Notice of Proposed Rulemaking (SNPRM) regarding issues presented by *Citizens United*. See page 7 for more information. The additional comment period closed on February 24, 2010. The Commission intends to hold a hearing on the Coordinated Communications rulemaking on March 2 and 3, 2010. The text of the SNPRM is available at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice2010-01.pdf.

Revisions to Commission reporting requirements, forms, instructions and electronic software may be required.

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:
- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

The Commission notes that the prohibitions on corporations or labor organizations making contributions contained in 2 U.S.C. §441b remain in effect.

The full text of the Commission's statement is available at http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

Unity08 v. FEC

On March 2, 2010, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *Unity08 v. FEC* (Case No. 08-5526) and ruled in favor of the Plaintiff, Unity08. The appeals court found that Unity08 is not subject to regulation as a political committee unless and until it selects a "clearly identified" candidate.

Background

Unity08, a nonprofit corporation organized under the laws of the District of Columbia, described itself as a "political movement" formed for the purpose of nominating and electing a "Unity Ticket" in the 2008 Presidential election. Unity08 intended to solicit funds via the Internet in order to qualify for a position on the ballot in approximately 37 states and planned to hold an "Internet online nominating convention" to select its candidates for President and Vice President. Unity08 submitted an advisory opinion (AO) request asking whether it would be considered a "political committee" before the conclusion of its online convention in the summer of 2008. In AO 2006-20 (See November 2006 *Record*, page 4), the Commission concluded that Unity08 would be a political committee once it spent more than $1,000 for ballot access, since spending money for ballot access is considered an expenditure under the Federal Election Campaign Act (the Act), Commission regulations and prior advisory opinions. See 11 CFR 100.111(a). Additionally, the Commission determined that Unity08's "major purpose" was the nomination or election of federal candidates, and therefore the FEC was not prevented by the First Amendment from finding that Unity08's activities qualified it as a political committee. Unity08 filed suit seeking to enjoin the FEC from enforcing AO 2006-20 against it and seeking a declaratory judgment that the advisory opinion violated its First Amendment rights. The FEC filed for summary judgment, arguing that Unity08 lacked standing to bring the action and that, even if Unity08 had standing, the FEC's decision was neither arbitrary nor capricious, nor did the decision infringe on the Plaintiff's First Amendment rights.

District Court Decision

On October 16, 2008, the district court held that, since Unity08 sought to obtain ballot access merely as a placeholder for its candidates, it was reasonable for the Commission to conclude that any monies Unity08 spent to qualify for the ballot would be considered expenditures under the Act. The court held that Unity08's ballot access was certain to benefit its candidates, who would be identified by party affiliation and office sought, and who would have declared their intentions to run for federal office when this benefit was conferred upon them. Large, unregulated disbursements made to obtain such access would therefore present the possibility of actual or apparent corruption that the Act was intended to limit. The court also concluded that the FEC's determination that Unity08 would qualify as a political committee did not violate the First Amendment because Unity08's major purpose was to nominate and support candidates for federal office. U.S. District Court for the District of Columbia, 1:07-cv-00053-RWR.

Appellate Court Decision

The appeals court reversed the district court's decision and ruled in favor of the Plaintiff.

The appeals court rejected the Commission's argument that the case was moot once Unity08 ceased activity. The court noted that Unity08 claims it will continue operations if it wins this appeal. The

court also rejected the Commission's argument that the Administrative Procedure Act does not authorize review of advisory opinions because the opinion is not "final agency action." The court, quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp*, 333 U.S. 103, 113 (1948), noted that administrative orders are final when "they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." In this case, the court found that the advisory opinion procedure is complete and deprives the Plaintiff of a legal right—2 U.S.C. § 437f(c)'s reliance defense, which the Plaintiff would enjoy if it had obtained a favorable resolution in the advisory process. Additionally, the court rejected the Commission's argument that the text and structure of the Act indicated Congressional intent to preclude judicial review of Commission advisory opinions. The court stated it was "improbable that Congress's imposition of some procedural rules for investigations should, with little else, be read as an intention to implicitly preclude judicial review, particularly in contexts implicating First Amendment values." Slip op. at 10.

Additionally, the court agreed with the Plaintiff's argument that Unity08 is not subject to regulation as a political committee unless and until it selects a "clearly identified" candidate. The court applied its ruling in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), which found that draft groups were outside of the scope of the Act. In *Machinists*, the court used the "major purpose" test in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), to determine that draft groups "whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate'" enjoyed protection from regulation under the Act. 655 F.2d at 393. Similar to *Machinists,* Unity08 did not fulfill the "major purpose" test from *Buckley*. The court also found the risk of corruption from Unity08's activities no greater than the risk presented by the draft groups in *Machinists*.

Finally, the court rejected the Commission's argument that accepting Unity08's reading of *Machinists* would exempt political parties from regulation as political committees each election cycle until they actually nominated their candidates. According to the court, Unity08's request for an AO "presented only the question of whether a group that has never supported a clearly identified candidate—and so far as appears will not support any candidate after the end of its 'draft' process—comes within the holding of *Machinists*." The court found that Unity08 stands in contrast to political parties that have previously supported "clearly identified" candidates and almost invariably intend to support their nominees.

The text of the court's opinion is available at http://www.fec.gov/law/litigation/u08_ac_opinion.pdf

U.S. Court of Appeals for the District of Columbia Circuit (No. 08-5526).

—Stephanie Caccomo

Inflation Adjustments

Contribution Limits for 2011-2012

Under the Federal Election Campaign Act (the Act), certain contribution limits are indexed for inflation every two years, based on the change in the cost of living since 2001, which is the base year for adjusting these limits.[1] The inflation-adjusted limits are:

1 The applicable cost of living adjustment amount is 1.23152.

Contribution Limits for 2011-2012

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates per Election	$2,500
Individuals/Non-multicandidate Committees to National Party Committees per Year	$30,800
Biennial Limit for Individuals	$117,000[1]
National Party Committee to a Senate Candidate	$43,100[2]

[1] This amount is composed of a $46,200 limit for what may be contributed to all candidates and a $70,800 limit for what may be contributed to all PACs and party committees. Of the $70,800 portion that may contributed to PACs and parties, only $46,200 may be contributed to state and local party committees and PACs.

[2] This limit is shared by the national committee and the Senate campaign committee.

- The limits on contributions made by persons to candidates and national party committees (2 U.S.C. §441a(a)(1)(A) and (B));
- The biennial aggregate contribution limits for individuals (2 U.S.C. §441a(a)(3)); and
- The limit on contributions made by certain political party committees (2 U.S.C. §441a(h)).

Please see the chart on the next page for the contribution amount limits applicable for 2011-2012. The inflation adjustments to these limits are made only in odd-numbered years. The per-election limits on contributions to candidates are in effect for the two-year election cycle beginning the day after the general election and ending on the date of the next general election (i.e., November 3, 2010 – November 6, 2012). All other contribution limits are in effect for the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even-numbered year (i.e., January 1, 2011 – December 31, 2012).

Please note, however, that these limits do not apply to contributions raised to retire debts from past elections. Contributions may not exceed the contribution limits in effect on the date of the election for which those debts were incurred. 11 CFR 110.1(b)(3)(iii).

The Act also includes a rounding provision for all of the amounts that are increased by the indexing for inflation.[2] Under this provision, if the inflation-adjusted amount is not a multiple of $100, then the amount is rounded to the nearest $100.

—Elizabeth Kurland

[2] *This provision also affects the indexing of coordinated party expenditure limits and Presidential expenditure limits in 2 U.S.C. §§441a(b) and 441a(d), as well as the disclosure threshold for lobbyist bundled contributions in 2 U.S.C. §434(i)(3)(A).*

Authority to Make Coordinated Party Expenditures on Behalf of House and Senate Nominees

National Party Committee	May make expenditures on behalf of House and Senate nominees. May authorize[1] other party committees to make expenditures against its own spending limits. National Congressional and Senatorial campaign committees do not have separate limits.
State Party Committee	May make expenditures on behalf of House and Senate nominees seeking election in the committee's state. May authorize[1] other party committees to make expenditures against its own spending limits.
Local Party Committee	May be authorized[1] by national or state party committee to make expenditures against its limits.

Calculating 2011 Coordinated Party Expenditure Limits

	Amount	Formula
Senate Nominee	See table on page 8	The greater of: $20,000 x COLA or 2¢ x state VAP[2] x COLA[3]
House Nominee in States with Only One Representative	$88,400	$20,000 x COLA
House Nominee in Other States	$44,200	$10,000 x COLA
Nominee for Delegate or Resident Commissioner[4]	$44,200	$10,000 x COLA

[1] *The authorizing committee must provide prior authorization specifying the amount the committee may spend.*

[2] *VAP means voting age population.*

[3] *COLA means cost-of-living adjustment. The applicable COLA is 4.42246.*

[4] *American Samoa, the District of Columbia, Guam, the Virgin Islands and the Northern Mariana Islands elect Delegates; Puerto Rico elects a Resident Commissioner.*

2011 Coordinated Party Expenditure Limits

The 2011 coordinated party expenditure limits are now available. The limits are:

- $88,400 for House nominees in states that have only one U.S. House Representative;
- $44,200 for House nominees in states that have more than one U.S. House Representative; and
- A range from $88,400 to $2,458,500 for Senate nominees, depending on each state's voting age population.

Party committees may make these special expenditures on behalf of their 2011 general election nominees. National party committees have a separate limit for each nominee. The national Senatorial and Congressional committees do not have separate coordinated party expenditure limits, but may receive authorization to spend against the national limit or state party limits. Each state party committee has a separate limit for each House and Senate nominee in its state. Local party committees do not have their own separate limit. One party committee may authorize another committee of that party to make an expenditure against the authorizing committee's limit. Local committees may only make coordinated party expenditures with advance authorization from another committee within the party.

Coordinated party expenditure limits are separate from the contribution limits; they also differ from contributions in that the party committee must spend the funds on behalf of the candidate rather than give the money directly to the campaign. Although these expenditures may be made in consultation with the candidate, only the party committee making the expenditure—not the candidate committee—must report them. (Coordinated party expenditures are reported on FEC Form 3X,

Coordinated Party Expenditure Limits for 2011 General Election Senate Nominees

State	Voting Age Population	Expenditure Limit
Alabama	3,599,303	$318,400
Alaska*	527,205	$88,400
Arizona	4,940,296	$437,000
Arkansas	2,195,465	$194,200
California	27,795,779	$2,458,500
Colorado	3,865,036	$341,900
Connecticut	2,727,907	$241,300
Delaware*	685,978	$88,400
Florida	14,616,271	$1,292,800
Georgia	7,324,792	$647,900
Hawaii	1,006,338	$89,000
Idaho	1,143,651	$101,200
Illinois	9,777,437	$864,800
Indiana	4,861,307	$430,000
Iowa	2,313,538	$204,600
Kansas	2,133,356	$188,700
Kentucky	3,323,606	$294,000
Louisiana	3,397,965	$300,500
Maine	1,048,523	$92,700
Maryland	4,385,947	$387,900
Massachusetts	5,203,385	$460,200
Michigan	7,623,767	$674,300
Minnesota	4,038,685	$357,200
Mississippi	2,194,892	$194,100
Missouri	4,589,980	$406,000
Montana*	764,058	$88,400
Nebraska	1,359,656	$120,300
Nevada	1,977,693	$174,900
New Hampshire	1,043,155	$92,300
New Jersey	6,691,782	$591,900
New Mexico	1,514,872	$134,000
New York	15,167,513	$1,341,600
North Carolina	7,188,327	$635,800
North Dakota*	511,050	$88,400
Ohio	8,840,340	$781,900
Oklahoma	2,796,489	$247,300
Oregon	2,986,164	$264,100
Pennsylvania	9,880,374	$873,900
Rhode Island	833,168	$88,400
South Carolina	3,515,754	$311,000
South Dakota*	620,912	$88,400
Tennessee	4,847,129	$428,700
Texas	18,210,592	$1,610,700
Utah	1,951,049	$172,600
Vermont*	500,054	$88,400
Virginia	6,103,947	$539,900
Washington	5,170,543	$457,300
West Virginia	1,439,342	$127,300
Wisconsin	4,372,515	$386,700
Wyoming*	417,319	$88,400

** In these states, which have only one U.S. House Representative, the spending limit for the House nominee is $88,400. In other states, the limit for each House nominee is $44,200.*

line 25, and are always itemized on Schedule F, regardless of amount.)

The accompanying tables on pages 7-8 include:

- Information on which party committees have the authority to make coordinated party expenditures;
- The formula used to calculate the coordinated party expenditure limits; and
- A listing of the state-by-state coordinated party expenditure limits.

—Elizabeth Kurland

2011 Lobbyist Bundling Threshold

The Federal Election Campaign Act, as amended by the Honest Leadership and Open Government Act of 2007 (HLOGA), requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant PACs once the contributions exceed a specified threshold amount.

The Commission must adjust the threshold amount at the beginning of each calendar year based on the change in the cost of living since 2006, which is the base year for adjusting this threshold.[1] The resulting amount is rounded to the nearest multiple of $100. 2 U.S.C. §441a (c)(1)(B)(iii). Based on this formula, the lobbyist bundling disclosure threshold for 2011 is $16,200.

—Elizabeth Kurland

1 The applicable cost of living adjustment amount is 1.08163.

Advisory Opinions

AO 2009-22

National Party Committee may File Lobbyist Bundling Reports Quarterly

The Democratic Senatorial Campaign Committee (DSCC), a national committee of a political party, may file Lobbyist Bundling Reports on a quarterly basis instead of monthly. The applicable covered periods for these reports in election years would be semi-annually, quarterly and any applicable pre-and post-election reporting periods. In non-election years, the covered periods would be the semi-annual periods beginning on January 1 and July 1.

Background

As a national committee of a political party, the DSCC is required by the Federal Election Campaign Act (the Act) to file monthly campaign finance reports with the Commission. 2 U.S.C. §434(a)(4)(B) and 11 CFR 104.5(c)(4). It may also need to file Lobbyist Bundling reports periodically and has the option of filing those reports on a quarterly basis instead of monthly. 11 CFR 104.22(a)(5)(iii).

Analysis

The Act and Commission regulations require certain political committees ("reporting committees")[1] to disclose information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of a certain amount within a specified period of time ("covered period"). 2 U.S.C. §434(i) and 11 CFR 104.22. The covered periods for Lobbyist Bundling Reports generally correspond to the reporting periods for the reporting committee's regular campaign finance reports. However, reporting committees that file monthly campaign finance reports may elect to file their Lobbyist Bundling reports "pursuant to the quarterly covered period…instead of the monthly covered period…" 11 CFR 104.22(a)(5)(iv). Overlapping semi-annual covered periods apply to all reporting committees.

A reporting committee required to file campaign finance reports quarterly with the Commission must file its Lobbyist Bundling reports for the quarters beginning January 1, April 1, July 1 and October 1 of each calendar year and the applicable pre-and post-election reporting periods in election years; in a non-election year, reporting committees not authorized by a candidate [i.e. a political party committee] need only observe the semi-annual reporting period. 11 CFR 104.22(a)(5)(ii). This schedule applies both to reporting committees who file campaign finance reports quarterly and to those that file campaign finance reports monthly, but choose to file Lobbyist Bundling reports on a quarterly basis.

Thus, if the DSCC elects to file its Lobbyist Bundling Report on a quarterly basis, the reporting schedule is as follows: in election years, semi-annually, quarterly and the applicable pre-and post-election reporting periods, as appropriate; in nonelection years, the DSCC need observe only the semi-annual covered periods beginning on January 1 and July 1, as appropriate. Additionally, the Committee must file Lobbyist Bundling Reports for any special election covered periods in which it receives bundled contributions above the threshold amount from

[1] "Reporting committees" means political party committees, political committees authorized by candidates (i.e., candidate committees) and leadership PACs. 11 CFR 104.22(a)(1).

lobbyists/registrants and lobbyist/registrant PACs. 11 CFR 104.22(a)(5)(v).

Date Issued: October 9, 2009; Length: 3 pages.

—*Myles Martin*

AO 2009-32

Proposed Sale of Art on Behalf of Committees is Not a Contribution

An individual who conducts a web-based business as a sole proprietor may sell artwork as fundraising items for political committees and provide the political committees with solicitation e-mails. The sale of these fundraising items, and the provision of the solicitation e-mails, would not constitute contributions from the sole proprietor to the political committees as long as the fee received by the sole proprietor is the usual and normal charge.

Background

The requestor, Richard Jorgensen, operates a web-based business as a sole proprietor. Through this website, Dr. Jorgensen sells, among other things, prints of President Barack Obama and Secretary of State Hillary Clinton. Dr. Jorgensen sells these prints for $49.95 plus $5 for shipping and handling.

Dr. Jorgensen proposes to enter into agreements with political committees to sell these prints as fundraising items. Dr. Jorgensen plans to draft solicitation e-mails promoting the artwork and provide those solicitation e-mails to the committees he deals with. The political committees can request changes to the solicitation e-mails or customize them. Dr. Jorgensen will charge the political committees a fee for providing the solicitation e-mails, and the committees will disseminate the e-mails through their own distribution lists.

The e-mails will contain images of the products offered for sale and hyperlinks to purchase the products from Dr. Jorgensen's website. The hyperlinks will contain an embedded ID tag, unique to each political committee, so that purchases resulting from each committee's fundraising efforts can be appropriately credited to that committee and contributor information can be collected and forwarded to the political committee for reporting purposes. Dr. Jorgensen will request and provide to the committees information from contributors, including their names, addresses and the amount of their purchases and, for contributors whose purchases exceed $200, their occupations and employers.

For sales made through the proposed arrangements with political committees, the price will be marked up by an amount that Dr. Jorgensen and the political committee agree upon, so that Dr. Jorgensen will receive the same dollar amount he would receive from any other sale. When purchases are made from the website, payment will be collected via PayPal Pro, and deposited on a weekly basis into a separate bank account for each political committee. From those accounts, funds will be sent to the artist for the prints and shipping costs, to PayPal Pro for transaction fees and to Dr. Jorgensen for his commissions. The political committees will retain the remaining amount.

Analysis

Dr. Jorgensen asked the Commission whether he could provide solicitation e-mails to the political committees without the provision of those e-mails constituting a contribution to the political committees. The Commission determined that Dr. Jorgensen could provide solicitation e-mails to the political committees, and that his provision of those e-mails would not constitute contributions to the political committees as long as Dr. Jorgensen receives the usual and normal charge for such services. Under Commission regulations, the "usual and normal charge" for services means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.52(d)(2). As long as the fee for drafting the solicitation e-mail is commercially reasonable at the time the service is provided, it will constitute the "usual and normal charge" and therefore not result in a contribution. The Commission also determined that Dr. Jorgensen could sell artwork on behalf of political committees as fundraising items, and that his provision of the artwork will not constitute a contribution to the purchasing committees because the commission Dr. Jorgensen proposes to receive is the usual and normal charge in a commercially reasonable transaction.

Dr. Jorgensen proposes to sell the artwork for $49.95 in addition to a markup to be agreed upon with the political committees and a $5 fee for shipping and handling. The Commission determined that Dr. Jorgensen will not be making contributions to the political committees because the amount he will receive on sales to the political committees would be the same amount he would receive on sales that are not made to political committees. 11 CFR 100.52(d). Because the political committees will receive funds from individual contributors and not from Dr. Jorgensen's sole proprietorship, the transactions will not result in contributions from Dr. Jorgensen. See, e.g., AO 2008-18.

The Commission noted that the political committees participating in this proposed plan will authorize Dr. Jorgensen as their agent to receive contributions, and, therefore, Dr. Jorgensen will be subject to certain recordkeeping and reporting obligations. 11 CFR 102.9. Dr. Jorgensen will have to request and forward to the political committees the name and address of any person contributing more than $50, and the date and full amount of the contribution, as well as the occupation and employer

of anyone who contributes more than $200 to a particular committee. 2 U.S.C. §432(c); 11 CFR 102.9(a). Also, Dr. Jorgensen will have to forward the contributions, along with the required contributor information, to the treasurer of the recipient committee within the required time period. 2 U.S.C. §432(b)(1); 11 CFR 102.8(a).

Date Issued: January 29, 2010; Length: 5 pages.

—Isaac J. Baker

AO 2010-01

State Party Activity on Behalf of Presumptive Nominee

Payments by the Nevada State Democratic Party (the State Party) for campaign materials may be exempt from the definitions of "contribution" and "expenditure" if the materials are distributed by volunteers on behalf of the State Party's presumptive nominees.

Background

The State Party plans to purchase campaign materials to be used in connection with volunteer activities on behalf of candidates seeking to become the State Party's nominees in the general election. Specifically, the State Party plans to have volunteers distribute campaign materials on behalf of federal candidates whom the State Party believes will either run unopposed in the Nevada primary election, or whom the State Party believes are "assured of winning the nomination." The State Party asked whether these proposed disbursements will be exempt from the Federal Election Campaign Act's (the Act's) definitions of "contribution" and "expenditure."

Analysis

Under the Act and Commission regulations, certain disbursements by a state or local committee of a political party are exempt from the definitions of "contribution" and "expenditure" when they are made in connection with volunteer activities. 2 U.S.C. §§431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and 100.147. This "volunteer materials exemption" is limited in several respects. In this instance, the most important limitation is that the materials purchased by the state or local party committee must be used in connection with volunteer activities "on behalf of nominees of such party." 2 U.S.C. §§431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87, 100.147.

Although neither the Act nor Commission regulations define the term "nominee," the Commission has previously determined that the volunteer materials exemption may apply before the nominee is formally selected through the primary process if the party is able to identify its nominee "as both a matter of fact and as a matter of state law." See Matter Under Review (MUR) 4471.

Under Nevada law, a candidate of a major political party must be nominated in the primary election. In 2010, the Nevada primary will be held on June 8th. However, the the period to file as a candidate in the primary closes on March 12, 2010, in effect closing the ballot and establishing the field of candidates seeking major party nominations. At this point, any candidate of the State Party who is on the state ballot and has no primary opponent will be the State Party's presumptive nominee. Any candidate who does have an opponent in the primary will not be the State Party's presumptive nominee.

Therefore, payments made by the State Party Committee, for materials that are used in connection with volunteer activities on behalf of candidates not facing primary challengers, will qualify for the volunteer exemption if those activities take place after March 12. These payments will not count against the State Party's coordinated party expenditure limit or $5,000 per candidate contribution limit. 2 U.S.C. §441a(a) and §441a(d). By contrast, payments made by the State Party, for materials that are used in connection with volunteer activities on behalf of candidates, will not qualify for the volunteer materials exemption if those activities take place before March 12, 2010. Such payments would either count against the State Party's contribution limit or its coordinated party expenditure limit, if the expenditures are in connection with the general election.

Date Issued: March 1, 2010; Length: 5 pages.

—Christopher B. Berg

AO 2010-02

State Party Committee May Use Nonfederal Funds To Purchase Office Building

A state party committee may use a building fund account containing nonfederal funds to purchase a state party office building if it enters into a land sale contract with the building's owner. However, since the State Party Committee does not yet know the key terms of the eventual contract, the Commission did not have sufficient information to determine if the particular contract would in fact constitute a land sale contract, and would therefore qualify as a "purchase" of an office building under federal law.

Background

The West Virginia Republican Party, Inc. (State Party Committee), is a political committee registered with the Commission as a state committee of a political party. 2 U.S.C. §431(15) and 11 CFR 100.14. The State Party Committee rents its current party headquarters under a lease with an option to purchase. To pay the rent on this building, it uses funds derived from the sale of its previous headquarters.

Shortly before November 6, 2002, the effective date of the Bipartisan Campaign Reform Act (BCRA), the West Virginia State Republican

Executive Committee, the predecessor committee to the current State Party Committee, received corporate contributions that it deposited in a building fund account to be used to purchase an office building to be used as the state party's headquarters, which it purchased in January 2003. In February 2008, the State Party Committee sold the building and some of the proceeds were placed in the building fund account, which is segregated from the State Party Committee's federal account. Beginning in September 2009, the State Party Committee began to lease a different office building. This lease included an option to purchase the building.

The State Party Committee proposes to use the proceeds from the sale of its previous headquarters (plus accrued interest on the proceeds) to pay the rent on the current lease. If the State Party Committee is unable to use solely nonfederal funds from the sales proceeds to pay for such rent, the state party committee proposes to exercise the option to purchase and enter into a "land sales contract" with the building's owner. The State Party Committee would then use the remaining proceeds in the building fund account to make payments on the land sales contract.

Under the land sales contract, the State Party Committee would hold the equitable title to the property, and the seller would retain legal title to the property until the final payment on the contract is made. The State Party Committee could not provide additional information about the possible land sale contract because the terms of the contract have not yet been negotiated with the owner of the building.

Analysis

The State Party Committee may use its building fund account, which contains nonfederal funds, to make the payments required on a land sales contract on the current office building. The Federal Election Campaign Act and Commission regulations permit a state party committee to use exclusively nonfederal funds to purchase an office building, provided that the use of such funds is permitted under state law. 2 U.S.C. §453(b) and 11 CFR 300.35. The Commission has previously treated a land sale contract as a contract to purchase a building. See AO 1993-9.

Since the State Party Committee has not yet entered into a contract, the Commission could not make a definitive conclusion as to whether an eventual contract between the current owner and the state party committee would qualify as a "purchase" for the purposes of 2 U.S.C. §453(b) and 11 CFR 300.35.

The Commission could not approve a response by the required four affirmative votes as to whether the State Party Committee could use only the proceeds of the sale of its previous office building (which consisted of nonfederal funds), to make payments on its lease with an option to buy its current office building.

Date Issued: March 12, 2010;
Length: 4 pages.

—Myles Martin

AO 2010-13
Libertarian Party of Florida Qualifies as State Party Committee

The Libertarian Party of Florida (the LPF) qualifies as a state party committee under the Federal Election Campaign Act (the Act) because: (1) the national Libertarian Party qualifies as a political party; (2) the LPF is part of the official Libertarian Party structure; and (3) the LPF is responsible for the day-to-day operations of the Libertarian Party at the state level in Florida.

Background

The Act defines a "state committee" as an organization that, by virtue of the bylaws of a "political party," is part of the official party structure and is responsible for the day-to-day operations of the political party at the state level, as determined by the Commission. 2 U.S.C. §431(15); 11 CFR 100.14(a). A "political party" is an "association, committee, or organization which nominates a candidate for election to any federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. §431(16); 11 CFR 100.15.

The determination of a state party organization's status as the state committee of a political party depends on three elements. First, the national party of which the state party organization is a part must itself be a "political party." Second, the state party organization must be part of the official structure of the national party. Third, the state party organization must be responsible for the day-to-day operations of the national party at the state level. See AOs 2009-16, 2008-16 and 2007-06.

Analysis

The Commission must first assess whether the national party qualifies as a "political party" under the Act and Commission regulations. 2 U.S.C. §431(15) and (16); 11 CFR 100.14 and 100.15. In advisory opinions from 1975 forward, the Commission has recognized the Libertarian Party as a political party and the Libertarian National Committee as the national committee of the Libertarian Party. See AO 1975-129; see also AOs 2009-16 and 2008-16. The Commission is aware of no changes that would alter that conclusion.

Second, the LPF must qualify as part of the official structure of the national party. 2 U.S.C. §431(15); 11 CFR 100.14(a). In past advisory opinions, the Commission has considered supporting documentation indicating that the state party is part of the official party structure. In this case, the memorandum from Robert S. Kraus, Director of Operations of the Libertarian National Committee, provides sufficient documentation to establish the LPF as part of the

Libertarian Party's official party structure.

Third, the LPF must maintain responsibility for the day-to-day operations of the national party at the state level. 2 U.S.C. §431(15); 11 CFR 100.14(a). In previous advisory opinions, the Commission has evaluated this element by considering two criteria:

- Whether the organization has placed a "candidate" on the ballot (thereby qualifying as a "political party"); and
- Whether the bylaws or other governing documents of the state party organization indicate activity commensurate with the day-to-day functions and operations of a political party at the state level.

Placing a "candidate" on the ballot is required because the requesting organization's existence as a political party is prerequisite for state committee status. A state party organization must actually obtain ballot access for one or more "candidates," as defined in the Act. See 2 U.S.C. §431(2), §431(15) and §431(16); 11 CFR 100.3(a), 100.14(a) and 100.15. The LPF has satisfied this criterion by placing Alex Snitker on the 2010 Florida general election ballot as the Libertarian Party's candidate for U.S. Senate. Reports filed with the Commission confirm that Mr. Snitker's principal campaign committee received contributions or made expenditures in excess of $5,000, thus satisfying the Act's definition of a "candidate." See 2 U.S.C. §431(2); 11 CFR 100.3(a). Accordingly, the LPF qualifies as a "political party" under the Act.

The Commission also determined that the LPF Constitution, Bylaws and Standing Rules establish specific responsibilities for the LPF's officers and committees and, taken together, delineate activity commensurate with the day-to-day functions and operations of a political party on the state level, thus satisfying the second criterion.

Because all three elements of the definition of "state committee" are satisfied, the Commission determined that the LPF qualifies as a state committee of a political party under the Act and Commission regulations.

Date Issued*:* August 2, 2010; Length: 5 pages.

—Christopher Berg

AO 2010-14

Using Recount Funds to Pay Recount Expenses Before Election Day

The Democratic Senatorial Campaign Committee (DSCC) may use its recount funds before the general election to pay expenses incurred preparing for possible general election recounts. Additionally, the DSCC may allocate the cost of certain expenses that are attributable to both recount and campaign activities between its principal campaign account and its recount fund.

Background

The DSCC asks if it may make disbursements from its recount fund before the date of the general election to prepare for potential recounts and election contests that may occur in connection with the results of the general election. Such planned expenses include retaining the services of attorneys and staff to research state laws on recounts and election contests, developing plans and budgets for anticipated recounts and recruiting volunteers to help with the recount process. All of these disbursements, and the activities funded with these disbursements, will be dedicated solely to post-election recounts and contests, and will not be usable for any pre-election campaign activities, such as get-out-the-vote activity, voter registration and polling. The DSCC also asks if it may use recount funds to defray the costs of soliciting donations to its recount fund.

Additionally, the DSCC asks if it may allocate the cost of certain expenses that are attributable to both recount activities and campaign activities between its principal campaign account and its recount fund. These expenses consist of: (1) the payment of salaries and benefits to staff who will divide their time between working on campaign activities and preparing for possible recounts or contests, and (2) the expenses of fundraising attributable to the solicitation of both recount funds and campaign funds. The DSCC asks whether it may allocate the fundraising expenses on a "funds received" basis. See*, e.g.* 11 CFR 106.1(a) and 106.7(d)(4).

Analysis

The DSCC may use recount funds before the date of the general election to retain attorneys and staff for possible recounts and election contests, to pay for legal and other research in preparation for a recount or election contest and to defray the costs of soliciting contributions to the recount fund. Additionally, the DSCC may allocate expenses attributable to the solicitation of recount funds and campaign funds based on the "funds received" formula in 11 CFR 106.1(a), and may also allocate the salary and benefits of staff who work on both recount and campaign activities. However, none of these activities, or their results, may be used for campaign activity before Election Day, and the DSCC must account for and report the use of these funds according to the procedures set forth below.

In 2009, the Commission concluded that the DSCC could create a recount fund and use that fund to pay for expenses incurred in connection with recounts and election contests of federal elections. Neither the Federal Election Campaign Act (the Act) nor Commission regulations and advisory opinions address when recount funds may be raised or spent. On its face, the exclusion of donations and disbursements "made

with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election" from the definitions of "contribution" and "expenditure" is not limited to the post-election period. 11 CFR 100.91, 100.151.

In contrast, Commission regulations do speak to the time frame during which other types of funds may be spent, such as the requirement that general election contributions be refunded if a candidate does not become a candidate in the general election. 11 CFR 102.9(e)(3). However, the Commission has, in limited circumstances, approved disbursements similar to those at issue here. In 1986, the Commission concluded that a candidate may spend general election funds prior to the date of his or her primary election in cases where it was "necessary to make advance payments to vendors for services that [would] be rendered . . . with respect to the [potential] general election" and that would not "influence the primary election or nominating process or . . . [be] for goods or services to be used in both the primary and general elections." AO 1986-17.[1] Likewise, the DSCC proposes to retain the services of attorneys and staff to conduct research and make preparations for a potential recount or contest that will take place (if at all) after the general election. Accordingly, the DSCC may use recount funds to pay recount-related expenses incurred before Election Day.

Commission regulations generally permit—and occasionally require—the proceeds of fundraising activities be used to defray the costs of those activities. For example, a joint fundraising committee is required to deduct the participants' allocable share of expenses before distributing proceeds from the event. 11 CFR 102.17(c)(7)(i)(A). The DSCC may therefore use recount funds to defray the costs of soliciting donations to the recount fund. However, when holding fundraising events at which the DSCC will raise contributions and recount funds, the recount solicitations must clearly state the purpose of the fund and note that no donations to the fund will be used to influence any federal election. See, *e.g.* 11 CFR 9003.3(a)(1)(A).

Neither the Act nor Commission regulations and advisory opinions address the allocation of expenses incurred for both recount and campaign activities. However, Commission regulations do generally permit (and in some cases require) the allocation of expenses attributable to more than one purpose. 11 CFR 102.5(a), Part 106, Part 300, and 9003.3(a)(2)(ii). Although these regulations do not apply here, they generally stand for the proposition that allocation is appropriate when funding activities with multiple purposes.

The DSCC's proposal to allocate its fundraising costs based on the ratio of funds received for its principal campaign account to its total receipts from each fundraising program or event is appropriate. See, *e.g.* 11 CFR 106.7(d)(4). The DSCC may make an initial payment for all of the fundraising expenses, both campaign-related and recount-related, from its principal campaign account, and then reimburse its principal campaign account from the recount fund for the proportion of the total fundraising expenses attributable to recount activities. The reimbursement must be made within sixty days after payment is made from the principal campaign account.

The allocation of salaries and wages between federal and nonfederal accounts of state and local party committees is determined by the percentage of time each employee spends in connection with a federal election, as shown in monthly logs. The DSCC's proposal to allocate staff salary and benefits between the recount fund and principal campaign account based upon a monthly log is permissible, so long as the DSCC keeps records indicating which duties are considered recount activities and which are considered election contest activities and a monthly log recording the percentage of time each employee spends on campaign activities as opposed to recount activities. See 11 CFR 106.7(d)(1) and 9003.3(a)(2)(ii)(C).

Reporting

The DSCC must report all disbursements from its recount fund in accordance with 2 U.S.C. §434(a) and (e) and 11 CFR 104.3 and 300.13(a). When reporting allocated activities, the DSCC must disclose the entire amount paid by the principal campaign account for the cost of fundraising and the salaries and benefits of employees who spend some of their time on recount activities and some of their time on campaign activities, as well as the reimbursement from the recount account.

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Length: 8 pages.

—*Christopher Berg*

AO 2010-18

Use of Recount Funds from Prior Election Cycle

A state party committee may request that donors to a recount fund redesignate their donations as contributions to the federal campaign account for the 2010 election. The party organization may also use any remaining recount funds to pay for recount activities in relation to future elections.

Background

The Minnesota Democratic-Farmer-Labor Party (the "DFL") is a state party committee affiliated with the national Democratic party. The DFL has $11,583.61 remaining in a recount fund raised for the 2008 recount and election contest involving Senator Al Franken and then-Senator Norm Coleman.

The DFL wants to transfer some or all of the remaining money from the recount fund to its federal cam-

paign account for use in connection with 2010 elections. The DFL will use the "first in, first out" accounting method to determine whose donations remain in the recount account to ensure that transfer does not cause any donor to exceed its 2010 limits for contributions to the federal account. Alternatively, it would like to ask some of the donors to the recount fund to redesignate their donations as contributions to the DFL's federal campaign account, again making sure that no redesignation would cause any donor to exceed its 2010 limits for contributions to the federal account. It also wants to use any funds remaining in the recount account to pay for recount activities relating to the 2010 elections.

Analysis

The Commission could not approve a response by the required four affirmative votes with regard to whether the DFL could transfer funds remaining in its recount fund to its federal campaign account for use in connection with 2010 elections.

The Commission determined that the DFL may ask donors to the recount fund to redesignate their donations as contributions to the DFL's federal account. The Commission noted that there are no regulations that govern redesignations of recount donations, and that, unlike the regulations concerning redesignations of excessive contributions made to candidates and authorized committees, donations to recount funds are not required to be redesignated or refunded. The Commission concluded that while the DFL, as a state party committee, is not covered by the existing redesignation regulations and that donations to the recount fund are permissible and may remain in the recount fund for future elections, the DFL may request that donors to the recount fund redesignate their donations to its federal account.

The Commission looked to the existing redesignation regulations for a procedure for the DFL to voluntarily request and to obtain redesignations of recount funds. It concluded that the DFL may use the written redesignation regulations at 11 CFR 110.1(b)(5)(ii)(A) as a guide, and may consider a recount donation redesignated if:

- The treasurer of the political party committee requests that the donor provide a written redesignation of the contribution;
- The donor is informed that he or she may request a refund, or if the donor neither redesignates the donation nor requests a refund, that the donation will remain in the recount fund for future use; and
- The donor provides the treasurer with a written redesignation of the donation as a contribution, signed by the donor.

The Commission noted that any donation that is redesignated in writing as a contribution must be aggregated with any other contributions made by the same contributor during that calendar year for the purpose of adhering to the contribution limits. The Commission also noted that once donations are redesignated to the DFL's federal account, they will be considered contributions for the purposes of the donors' biennial limits and encouraged the DFL to notify the donors of this fact for the donors' compliance purposes. The Commission added that since the DFL is not required to redesignate or refund the recount donations, it is not required to seek redesignations within a 60-day timeframe under 110.1(b)(5)(ii)(A)(*2*).

The Commission emphasized that all redesignations must be reported within the applicable reporting period, and that committees receiving redesignated contributions must report the redesignation in a memo entry on Schedule A of the campaign finance report covering the reporting period in which the redesignation is received. The memo entry for any redesignations of recount donations as contributions must include all of the information for the recount donation as it was originally reported on Schedule A, as well as all of the information for the contribution as it was redesignated by the donor, including that the donation was redesignated as a contribution to the federal account and the date on which the redesignation was received.

Finally, the Commission permitted the DFL to use the funds remaining in its recount fund to pay for recount activities in relation to future elections, as the use of recount funds is not restricted to recounts and election contests held in the calendar year in which donations to the recount fund are made.

Date: September 23, 2010;
Length: 5 pages.

—Zainab Smith

AO 2010-22 Connecticut Working Families Party Qualifies as State Party Committee

The Connecticut Working Families Party (CT WFP)[1] satisfies the requirements for state party committee status under the Federal Election Campaign Act (the Act), even though it is not affiliated with a national political party.

Background

The Act defines a "state committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission." 2 U.S.C. §431(15). See also 11 CFR 100.14(a).

When an organization is not affiliated with a national political party, it must meet three requirements to

[1] *CT WFP is registered with the FEC as the Connecticut Working Families Federal PAC d/b/a Take Back Congress CT.*

achieve state party committee status under Commission regulations.

First, the organization must itself qualify as a "political party." The Act and Commission regulations define a "political party" as an "association, committee, or organization that nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of the association, committee or organization." 2 U.S.C. §431(16); 11 CFR 100.15.

Second, the organization must possess an official party structure. 2 U.S.C. §431(15); 11 CFR 100.14(a).

Third, the organization must be responsible for the day-to-day operations of a political party at the state level. See 2 U.S.C. §431(15); 11 CFR 100.14(a). See also AOs 2008-12 and 2007-23.

Analysis

The Committee meets the three requirements and thus qualifies as a state committee of a political party within the meaning of the Act and Commission regulations.

First, CT WFP qualifies as a "political party" because two of its candidates qualify as federal candidates and appeared on the November 2010 Connecticut general election ballot as candidates of CT WFP.[2]

Second, CT WFP's Rules establish an official party structure and CT WFP has qualified for status as a "minor political party" under Connecticut law.

Finally, the Rules of CT WFP identify the role of the Committee and its responsibilities for the day-to-day functions and operations at the state level. The Committee's responsibility for the operations at the state level is commensurate with the responsibility of other state party committees that the Commission has previously recognized.

Date Issues: October 26, 2010; Length: 5 pages.

—Katherine Wurzbach

AO 2010-24

Party Committee Must Use Federal Funds for Certain Salaries Related to Voter Registration Activities

The Republican Party of San Diego County must use federal funds to pay the salary of an employee who spends more than 25 percent of her time on voter registration activity, during the last 120 days before a regularly-scheduled federal election. During that time period, voter registration activity is considered federal election activity (FEA).

Background

The Republican Party of San Diego County (the "Committee") is a local committee of the Republican Party. In May 2010, the Committee hired a Voter Registration Coordinator (the "Employee") to recruit, train and supervise contractors hired by the Committee to perform voter registration activities.

The Employee spends approximately 80 percent of her time on the following activities:

- Recruitment (20 percent): includes posting positions on job boards, meeting with clubs to encourage members to participate in registering voters, interviewing potential contractors, and scheduling orientations for contractors;
- Orientations (20 percent): includes meeting with potential contractors to communicate the Committee's voter registration program's requirements, and training contractors on voter eligibility requirements, legal rights to solicit, and table set-up instructions;
- Contractor management (20 percent): includes responding to requests from business owners for verification of contractor status and program details, and completing vendor applications on request; and
- Validation of completed registrations (20 percent): includes reviewing the voter registration cards for missing information or errors made by the voters, reviewing and verifying information on voter registration cards, reporting any suspicious information revealed on such review to the Registrar of Voters, and personally submitting the voter registration cards to the Registrar of Voters.

The remaining 20 percent of the Employee's time is spent on the following activities:

- Material preparation (10 percent): includes designing and preparing signs and other voter registration materials for the contractors;
- Events (5 percent): includes researching potential events for voter registration, determining the number of contractors to attend such events, setting up and tearing down voter registration booths; and
- Calculation of contractor payments (5 percent): includes all activities related to calculating the payments to be received from the California Republican Party, and the payments to be distributed to each contractor depending on the number of voter registrations in targeted State Assembly and State Senate districts.

The Committee has reported the Employee's activities as FEA, but wants to know whether the employee's work constitutes voter registration activity, and whether revised FEA regulations (effective December 1, 2010) would alter that conclusion. Finally, the Committee would like to know whether the Executive Director's supervision of the Employee also constitutes voter registration activity.

[2] *Note that both aforementioned federal candidates also appeared on the 2010 ballot as candidates of the Democratic Party. The Commission has concluded, in previous advisory opinions, that a candidate's association with more than one political party is irrelevant when reviewing a party's qualification for state committee status. See AO 2007-23 at n.6.*

Analysis

The Bipartisan Campaign Reform Act of 2002 (the Act) requires state, district and local party committees to pay for FEA with either federal funds or a combination of federal and Levin funds. 2 U.S.C. §441i(b). The Act's definition of FEA includes voter registration activity during the period beginning 120 days before the date of a regularly scheduled federal election, and ending on the date of the election.

Under Commission regulations in effect at the time, voter registration activity was defined as "contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote." 11 CFR 100.24(a)(2). It includes, but is not limited to, "printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms." Id.

In the advisory opinion, the Commission noted that the Employee spends 20 percent of her time validating complete registrations, including assisting individuals in registering to vote by reviewing their voter registration cards for missing information or errors, and taking the voter registration cards and turning them in to the Registrar of Voters. The Commission also noted that the Employee spends 10 to 15 percent of her time preparing materials for use in registering voters, such as signage, in-field voter registration materials, and setting up and tearing down voter registration booths. The Commission concluded that these activities, consuming 30 to 35 percent of the Employee's time, fall within the definition of voter registration activity during California's FEA periods. Further, the Commission concluded that, regardless of whether any of the Employee's other activities also fall within the definition of voter registration activity, 11 CFR 106.7(d)(1)(ii) and 300.33(d(2) require state, district and local party committees to use federal funds to pay for salaries, wages and fringe benefits of employees who spend more than 25 percent of their compensated time in any given month on FEA. Therefore, the Commission concluded that the Employee's services must be paid exclusively from the Committee's federal account within California's FEA periods.

On December 1, 2010, new regulations took effect that revised the definition of voter registration activity to eliminate the "individualized means" requirement and to include activities that encourage or urge people to register to vote, as well as activities that assist them in registering to vote. See Explanation and Justification for Final Rules on the Definition of Federal Election Activity, 75 FR 55257 (Sept. 10, 2010). See also the October 2010 *Record*, page 3. In its advisory opinion, the Commission determined that its answer to the above question would not change under the revised definition of voter registration activity.

The Commission could not determine by the required four affirmative votes whether the Executive Director's supervision of the Employee also constituted voter registration activity.

Date: November 22, 2010;
Length: 6 pages.

—Zainab Smith

AO 2010-28
State Party Refund to Federal Campaign Not a Contribution

A state party committee may refund all or a portion of funds transferred to it by a federal campaign committee without making a contribution subject to the limitations of the Act.

Background

Indiana Democratic Congressional Victory Committee (the State Committee) is registered with the Commission as a state committee of a political party. Hoosiers for Hill is the principal campaign committee of Representative Baron Hill, a candidate for the U.S. House of Representatives for the 9th Congressional District of Indiana.

On September 14, 2010, Hoosiers for Hill transferred $34,600 to the State Committee's federal account to be used for general party projects on behalf of its candidates in connection with the 2010 general election. Because the State Committee will not be engaging in the activities, Hoosiers for Hill requested a full refund of the transfer. The State Committee asks if it may refund all or a portion of the funds transferred to it by Hoosiers for Hill without making a contribution subject to the limitations of the Federal Election Campaign Act (the Act).

Analysis

A candidate's authorized committee may transfer an unlimited amount of campaign funds to a national, state or local party committee. *See* 2 U.S.C. §439a(a)(4) and 11 CFR 113.2(c). These provisions do not limit the purposes that any transferred funds may be put to, nor do they restrict the amount that may be transferred. Furthermore, such transfers are not subject to the contribution limitations of 2 U.S.C. §441a(a)(1)(D) or 11 CFR 110.1(c)(5).

Although the Act and Commission regulations provide for the refund of a contribution, the Commission acknowledged that the regulations do not address the specific question presented here. *See* 2 U.S.C. §434(b)(4)(F), 2 U.S.C. §434(b)(5)(E), 11 CFR 103.3(b). Instead, the Commission cited two advisory opinions where it previously held that a refund could be made notwithstanding the fact that the amount of the refund would exceed the applicable contribution limits. In Advisory Opinion 2002-08, the Commission permitted a state exploratory committee to refund $700,500 to the federal candidate's principal campaign committee. It concluded that the refund

was permissible because the federal committee raised the funds within the limits and prohibitions of the Act, and the state committee kept the funds in a segregated account and had not commingled the funds with nonfederal funds. In Advisory Opinion 1995-43, the Commission determined that a refund by a law firm of $150,000 in legal fees that were paid by a federal candidate would not be a contribution to the candidate because the scope of the services to be provided by the law firm had been "materially altered" from those originally contemplated by the parties.

In this case, the Commission found that Hoosiers for Hill transferred the funds from its federal account to the State Committee's federal account, and determined that the transferred funds had not been commingled with nonfederal funds. The Commission also concluded that the transfer was made with the understanding that the State Committee would undertake certain activities that it did not, which materially altered the circumstances justifying the transfer. Finally, the Commission concluded that, since the transfer occurred just weeks before the committees requested an advisory opinion and well within the 30- and 60-day deadlines for refunding contributions under 11 CFR 103.3(b), the parties were seeking a refund rather than making a contribution subject to the Act.

If the State Committee decides to refund the transferred funds to Hoosiers for Hill, the Commission advised the State Committee and Hoosiers for Hill to maintain appropriate documentation of the transaction and to disclose the refund in their reports. Since the reporting forms do not have a method for reporting the specific refund here, the Commission advised the State Committee to report its refund to Hoosiers for Hill on Form 3X, Schedule B, Line 28c. Hoosiers for Hill should report the receipt of the refund on Form 3, Schedule A, Line 15. The committees should also include memo text in their reports explaining the circumstances of the refund.

Date Issued: October 27, 2010;
Length: 4 pages.

—Zainab Smith

AO 2010-29
Working Families Party of Oregon Qualifies as State Party Committee

The Working Families Party of Oregon (WFP OR) qualifies as a state committee of a political party under the Federal Election Campaign Act (the Act), even though it is not affiliated with a national political party.

Background

The Act defines a "state committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the state level, as determined by the Commission." 2 U.S.C. §431(15). See also 11 CFR 100.14(a).

When an organization is not affiliated with a national political party, it must meet three requirements to achieve state party committee status under Commission regulations.

- First, the organization must itself qualify as a "political party." Under the Act and Commission regulations a "political party" must nominate at least one candidate for federal office whose name appears on the ballot as the candidate of the association, committee, or organization. 2 U.S.C. §431(16); 11 CFR 100.15.
- Second, the organization must possess an official party structure.
- Third, the organization must be responsible for the day-to-day operations of a party at the state level. See 2 U.S.C. §431(15); 11 CFR 100.14(a). See also AOs 2008-12 and 2007-23.

Analysis

WFP OR meets all three requirements, and therefore qualifies as a state committee of a political party under the Act and Commission regulations.

First, the WFP OR qualifies as a "political party" because it has nominated two federal candidates who appeared on the 2010 general election ballot in Oregon.

Second, the WFP OR bylaws establish an official party structure, and the Oregon Secretary of State has determined that WFP OR qualifies for status as a minor political party under Oregon law.

Third, the WFP OR's bylaws clearly identify the role and responsibilities of the WFP OR, through its state committee, for the day-to-day functions and operations of the party at the state level. The WFP OR's responsibility for the operations of the party at the state level is commensurate with the responsibility of other state party committees that the Commission has previously recognized. See, *e.g.*, AOs 2010-22 (Working Families Party of Connecticut) and 2008-12 (Independent Party of Oregon).

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—Isaac J. Baker

AO 2011-03
National Party Committees May Fund Litigation Expenses Using Recount Funds

Several requesting national party committees may use recount funds to pay costs associated with a lawsuit, filed under Texas law, which seeks disgorgement of contributions and donations that were allegedly the proceeds of a Ponzi scheme.

Background

The Democratic Senatorial Campaign Committee (DSCC), the National Republican Congressional Committee (NRCC), the Republican

National Committee (RNC), the Democratic Congressional Campaign Committee (DCCC) and the National Republican Senatorial Committee (NRSC) (collectively the national party committees) were sued in the U.S. District Court for the Northern District of Texas by Mr. Ralph Janvey, who was appointed receiver over the property, assets and records of Allen Stanford. Mr. Stanford, together with others, is alleged to have run a Ponzi scheme. Mr. Janvey claims that proceeds from this scheme were donated and contributed to the national party committees, and he seeks disgorgement of those donations and contributions along with payment of interest and attorney's fees.

Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), national party committees were allowed to accept funds outside of the limits and prohibitions of the Federal Election Campaign Act (the Act) into their nonfederal accounts. Mr. Janvey's litigation principally concerns whether nonfederal, also called "soft money," donations to the national party committees made prior to the BCRA's effective date constitute fraudulent transfers under applicable state law. Nearly all of Mr. Stanford's donations to the national party committees were "soft money" contributions made to the parties' nonfederal accounts prior to the enactment of BCRA. Thus, for the most part, Mr. Janvey seeks disgorgement of funds that the national party committees have been prohibited from raising and spending since 2002. 11 CFR 300.12(a) and (c).

The national party committees have moved to dismiss the Janvey litigation and wish to draw on their respective recount funds to finance expenses associated with that litigation. A recount fund is a separate fund maintained by a national party committee that may be used to pay expenses incurred in connection with recounts and election contests of federal elections. See AO 2009-04.

Analysis

Under the circumstances presented in this request, the Commission concluded that the national party committees may use their recount funds to defray expenses for defending against the Janvey litigation.

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—Myles Martin

AO 2011-06

Vendor May Collect and Forward Contributions Without Making Impermissible Contribution

A vendor may collect contributions from a group of subscribers and forward them to recipient political committees. The vendor's services in collecting and forwarding these contributions do not amount to impermissible corporate contributions from the vendor. A convenience fee paid by the contributor to the vendor does not constitute a contribution by the contributor to any of the recipient political committees.

Background

Democracy Engine, LLC (the vendor) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. is the connected organization of the separate segregated fund (SSF) Democracy Engine, Inc., PAC (the PAC). Mr. Jonathan Zucker and Mr. Erik Pennebaker are United States citizens who qualify as part of the restricted class of Democracy Engine, Inc., and therefore may be solicited by and contribute to the PAC. The vendor is a for-profit limited liability company offering a web-based payment service that provides "subscribers" with the opportunity to make contributions to federal political committees and donations to non-political entities. Mr. Zucker and Mr. Pennebaker plan to become subscribers and use the vendor's services.

A subscriber wishing to make a contribution using the vendor's service must first go to the vendor's website and choose the intended recipient political committee and the amount of the contribution. If the recipient political committee is not already included in the vendor's directory of potential recipients, the vendor will add that recipient political committee to its directory. If the recipient political committee is an SSF, the vendor ensures that the subscriber is a member of the restricted class of the SSF's connected organization. The vendor does not solicit contributions for any political committee or other entity, nor does the vendor exercise any direction or control over any subscriber's choice of recipient political committees. If a subscriber designates a political committee as a recipient, the vendor informs the subscriber of the contribution limits established by 11 CFR 110.1. The vendor will not process contributions that the vendor determines or believes will exceed those limits.

The subscriber is required to provide information to the vendor that the recipient political committee must maintain or report, including the subscriber's name, mailing address, employer and occupation. 11 CFR 104.8(a). The vendor will forward this information to the recipient political committee.

The vendor deducts a convenience fee from the subscriber's payment before transmitting the remaining amount to the recipient political committee. The convenience fee covers all of the costs of the financial institutions involved in the credit card transaction and the vendor's costs, and provides a reasonable profit to the vendor. The vendor, and not the recipient political committee, pays the fees and costs to those financial institutions.

The vendor indicates that it will set the convenience fee in a commer-

cially reasonable manner in accordance with market conditions with respect to all recipients, regardless of whether the recipient is a political committee or a non-political entity. This amount will reflect a complete payment of the vendor's costs plus an amount as profit. After the subscriber provides the vendor with the required information, attests to his or her ability to make the contribution and agrees to the terms of service, the vendor accepts the subscriber's payment by means of credit card, debit card or electronic check. The vendor then deposits the subscriber's contribution, via a vendor merchant account, into a vendor bank account that is completely separate from the vendor's corporate operating funds.

The vendor will transfer the subscriber's funds from its transfer account to the recipient political committee no later than ten days after the subscriber authorizes the contribution to the recipient political committee. The vendor will also forward all the necessary contributor information required for the recipient committees' reports.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations from making a contribution in connection with federal elections. 2 U.S.C. §441b(a); 11 CFR 114.2(b)(1). A "contribution" includes, among other things, the provision of goods or services without charge or at a charge that is less than the usual and normal charge.

In this case, the vendor's services in processing subscribers' contributions to the committee and other recipient political committees would not result in impermissible corporate contributions by the vendor to those political committees because the vendor is not providing services or anything else of value to any recipient political committee.

The payment of the convenience fee will not relieve the PAC or any other recipient political committee of a financial burden that it would otherwise have had to pay for itself. Therefore, a subscriber's payment of the convenience fee would not constitute a contribution by the subscribers to the PAC or any other recipient political committee. Because the subscriber's payment of the convenience fee is not a contribution or any other form of receipt, the convenience fee does not need to be reported to the Commission.

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—Isaac J. Baker

AO 2011-12

Fundraising by Candidates, Officeholders and Party Officials for Independent Expenditure-Only Political Committees

Federal candidates, officeholders and national party officers may solicit only those contributions that are subject to the Federal Election Campaign Act's (the Act's) amount limitations and source prohibitions when they solicit contributions on behalf of independent expenditure-only political committees (IEOPCs). Moreover, federal candidates, officeholders and officers of national party committees are limited to soliciting funds up to $5,000 for independent expenditure-only committees where those funds are from individuals and other sources not barred from making contributions.

Background

On January 21, 2010, the U.S. Supreme Court held in *Citizens United* that corporations may make unlimited independent expenditures and electioneering communications using corporate treasury funds. *Citizens United v. FEC*. 558 U.S. __, 130 S. Ct. 876 (2010). Shortly after the *Citizens United* decision, the U.S. Court of Appeals for the District of Columbia Circuit held that the Act's contribution limits are unconstitutional as applied to individuals' contributions to political committees that make only independent expenditures. *SpeechNow v. FEC,* 599 F.3d 686 (D.C. Cir. 2010). Consistent with the *Citizens United* and *SpeechNow* opinions, the Commission concluded in Advisory Opinion 2010-11 (Commonsense Ten) that IEOPCs may solicit and accept unlimited contributions from corporations, labor organizations, political committees and individuals, but must follow the Act's registration and reporting requirements.

In accordance with AO 2010-11 (Commonsense Ten), Majority PAC, formerly known as Commonsense Ten, and House Majority PAC (the Committees) registered with the Commission as IEOPCs.

The Committees asked the Commission whether federal officeholders, candidates and officers of national party committees may solicit unlimited contributions from individuals, corporations and labor organizations on the Committees' behalf. The Committees also asked if federal officeholders and candidates, and officers of national party committees, may participate in fundraisers at which unlimited individual, corporate and labor organization contributions will be solicited.

Analysis

The Commission found that federal officeholders, candidates and officers of national party committees may not solicit unlimited contributions from individuals, corporations or labor organizations on the Committees' behalf.

The Commission noted that Section 441i limits federal officeholders and candidates to soliciting funds for a federal election within the Act's limitations and prohibitions. 2 U.S.C. §441i(e)(1)(A). Section 441i also prohibits national party committees and their officers from soliciting funds that are outside the Act's limitations and prohibitions. 2 U.S.C. §441i(a)(1). Since neither *Citizens United* nor *SpeechNow* disturbed Section 441i, federal candidates,

officeholders and national party committee officers are prohibited from raising funds that are outside the limitations and prohibitions of the Act for IEOPCs.

Additionally, the Act limits contributions by any person to any other political committee to $5,000 per calendar year. 2 U.S.C. §441a(a)(1)(C). Therefore, federal candidates, officeholders and national party committee officers are limited to soliciting $5,000 per year for any political committee that is neither an authorized committee nor party committee.

Finally, the Commission noted that federal candidates, officeholders and national party committee officers cannot solicit contributions from sources prohibited by the Act from making contributions, including corporations, labor organizations, federal government contractors, national banks and foreign nationals. 2 U.S.C. §§441b(a), 441c and 441e.

Thus, federal officeholders and candidates, and officers of national party committees, may only solicit up to $5,000 from individuals and federal political action committees on behalf of an IEOPC.

Regarding the Committees' second question, the Commission found that federal officeholders and candidates and officers of national party committees, may attend, speak at or be featured guests at fundraisers for the Committees, at which unlimited individual, corporate and labor organization contributions will be solicited, so long as the officeholders, candidates and officers of national party committees restrict any solicitations they make to funds subject to limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64(b).

The Commission enacted new rules in April 2010 that allow federal candidates or officeholders to attend, speak at or be a featured guest at such a fundraising event. The new rules do not allow a federal candidate to solicit any funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64 (b). Rather a federal candidate or officeholder who solicits at such an event must limit any solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 11 CFR 300.64(b)

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—Stephanie Caccomo