

Legal Issues: Recent Developments in Federal Campaign Finance Law



February 22-23, 2012

Tab #2



Objectives

- Update status of FEC litigation;
- Discuss recent and upcoming rulemakings and policies; and
- Review recent legislative activity

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I. Recent Litigation



Litigation Update

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Citizens United v. FEC

- Electioneering Communication:
 - Broadcast (TV/radio)
 - Time period before election
 - Candidate reference
- Lawsuit challenging the constitutionality of:
 - Funding restriction as applied to broadcast of a film
 - Disclosure requirements for promotional ads and film

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A. *Citizens United v. FEC*, 558 U.S. ____, 130 S.Ct. 876 (2010).

1. **Background**

- Citizens United, a nonprofit 501(c)(4) membership organization, produces and distributes political films, including a film entitled “Hillary: The Movie” about Senator Hillary Clinton. Citizens United intended to broadcast television ads promoting “Hillary: The Movie” and wished to make the film available in theaters, through DVD sales and via home viewing through cable video-on-demand systems.
- On December 13, 2007, Citizens United, a nonprofit membership corporation, filed a complaint in the U.S. District Court for the District of Columbia claiming that its film itself—if broadcast through video-on-demand is constitutionally exempt from the restriction on corporate funding of ECs.
- Citizens United also challenged the constitutionality of the statutory provisions governing disclaimers on, and disclosure and funding of, certain electioneering communications (ECs) such as ads promoting “Hillary: The Movie.” Citizens United asserts that, since the ads are not subject to the EC corporate funding restriction, it is unconstitutional to require disclosure of the donors who paid for the advertisements or disclaimers on the advertisements.

2. **District Court Ruling**

- With regard to its claims about the movie itself, the court found that Citizens United’s claim lacked merit. The U.S. Supreme Court has previously found the EC provisions to be constitutional. Additionally, the district court found that the movie was the functional equivalent of express advocacy and thus fit within the ban on corporate funding of electioneering communications
- Although the ads about the movie can be funded with Citizens United’s corporate treasury funds, the Court denied plaintiff’s request for an exemption from the disclosure and disclaimer requirements applicable to electioneering communications.

3. **Supreme Court Consideration**

The Supreme Court noted probable jurisdiction in the case, and the parties filed their briefs on the merits in January and February, 2009. Oral argument was held on March 24. The Supreme Court then heard reargument in the case in a special session on September 9, 2009.



Citizens United v. FEC

- Supreme Court affirmed in part, reversed in part and remanded to District Court on January 21, 2010
- Court's ruling:
 - Permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund ECs
 - Upheld the reporting requirements for independent expenditures and ECs
 - Did not affect ban on corporate or union contributions

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4. **Supreme Court Ruling**

Supreme Court issued opinion on January 21, 2010, which reversed in part, affirmed in part, and remanded the case back to the district court. 558 U.S. ___ (2010).

- a) 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.
- b) The Supreme Court upheld the reporting requirements for independent expenditures and electioneering communications.
- c) The ruling did not affect the ban on corporate or union contributions.



RNC v. FEC

- Three-judge District Court panel upheld BCRA's soft money provisions, citing Supreme Court's decision in *McConnell*
- Supreme Court affirmed District Court decision in June 2010

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B. *Republican National Committee v. FEC* (08-1953, 2010 WL 1140721, (D.D.C. March 26, 2010))

1. Background

- Plaintiffs, who are political parties, have brought an “as-applied” challenge to the soft money rules enacted in BCRA. They allege that they want to engage in various activities that do not purportedly do not involve federal elections such as supporting candidates for state or local office, engaging in “grassroots lobbying,” and advocating for ballot initiatives.
- Although the soft money rules were upheld “on their face” in *McConnell*, plaintiffs alleged that these rules are unconstitutional as applied to the activities they describe and seek a ruling that they can accept soft money to fund these activities.
- The case was filed on November 13, 2008, and oral argument was held before a three-judge panel in the District of Columbia on August 27, 2009.

2. Outcome

- On March 26, 2010, the three-judge panel upheld soft money rules, citing Supreme Court's decision in *McConnell*.
- On June 29, 2010, the Supreme Court summarily affirmed the district court decision and upheld the soft money provisions.



Cao v. FEC

- Challenge to limits placed on party expenditures made in coordination with party's own candidates
- Plaintiffs' argued:
 - Limits are vague and overbroad
 - Unconstitutional – types of spending restricted by limits are not functional equivalent of contributions
- District court certified some constitutional claims against the limits on parties' coordinated expenditures and contributions, but denied other claims as frivolous.
- Argument before the en banc Fifth Circuit was held on May 25, 2010.

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C. *Cao v. FEC*

1. Background

- Plaintiffs in this case include Joseph Cao (a successful candidate for the House), the RNC, and Republican Party of Louisiana. They challenge the constitutionality of the limits on coordinated expenditures that parties can make in support of their own candidates.
- Plaintiffs based their challenge on a number of theories, including their argument that the provision is vague and overbroad and that it unconstitutionally restricts spending that is not functionally equivalent to contributions.
- The case was filed in Louisiana on November 13, 2008. The plaintiffs have invoked the procedures under 2 U.S.C. § 437h, under which their constitutional challenges would be decided in the first instance by the entire Fifth Circuit Court of Appeals sitting *en banc*.
- On November 9, 2009, the U.S. District Court for the Eastern District of Louisiana held oral argument on plaintiffs' motion to certify questions to the Fifth Circuit Court of Appeals *en banc* and the Commission's motion for summary judgment.

- On January 27, 2010, the district court certified the plaintiffs' question whether the Act's \$5,000 limit on contributions by parties to candidates is unconstitutional because it subjects parties to the same limit as other political committees. The Court also certified the question whether the same \$5,000 is unconstitutional because it is not adjusted for inflation. Other claims were denied as frivolous.
- Argument before the *en banc* Fifth Circuit was held on May 25, 2010.



Cao v. FEC

- 5th Circuit Appeals Court ruling on September 10, 2010 upheld constitutionality of:
 - Coordinated Party Expenditure limits
 - Contribution limits on contributions from parties to candidates.
- Supreme Court denies petition for *writ of certiorari* on March 21, 2011

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2. **Outcome**
5th Circuit Court of Appeals ruling on September 10, 2010 upheld constitutionality of
 - a) Coordinated party expenditure limits
 - b) Limits on contributions made by party committees to candidates
3. **Supreme Court**
Supreme Court denies Cao's petition for *writ of certiorari* on March 21, 2011.



SpeechNow v. FEC

- Unincorporated association planned to pay for independent communications containing express advocacy with funds raised from individuals
- On 3/26/10, court held contribution limits unconstitutional as applied to funds received by independent expenditure-only groups, but upheld Act's "organizational and reporting requirements"
- FEC did not appeal.

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- D.** *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008); 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).
1. SpeechNow, an unincorporated association registered as a "527" organization, alleges that it wants to make independent expenditures that contain express advocacy and that it will accept contributions for that purpose only from individuals.
 2. SpeechNow filed a complaint on February 14, 2008, in District Court, alleging that the Act's contribution limits and political committee disclosure requirements are unconstitutional as applied to its activities. Its main argument is that it presents no risk of corruption and therefore should not be limited to \$5,000 per year in the contributions it receives from individual donors.
 3. The District Court denied SpeechNow's request for a preliminary injunction.
 4. The constitutional questions raised in the complaint will be decided in the first instance by the entire U.S. Court of Appeals for the District of Columbia sitting *en banc*.
 5. The briefing before the *en banc* court was completed in December 2009, and oral argument before the full *en banc* court took place on January 27, 2010.

6. On March 26, 2010, the Appeals Court held contribution limits unconstitutional as applied to contributions received by independent expenditure-only groups (like SpeechNow), but upheld the Act's "organizational and reporting requirements" for political committees.
7. FEC did not seek Supreme Court review.



EMILY's List v. FEC

- Challenge to solicitation and allocation rules.
- D.C. Circuit ordered that the regulations be vacated; opinion had broad language about nonconnected PAC's First Amendment rights
- District court vacated challenged regulations (11/30/09)
- Commission did not seek further judicial review and adopted draft final rules (March 2010)

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- E.** *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), 569 F.Supp.2d 18 (D.D.C. 2008).
1. PAC challenge to solicitation and allocation rules at 11 CFR 100.57 and 106.6.
 2. Plaintiff argues that the regulations are arbitrary and capricious, beyond the scope of the Commission's statutory authority, not promulgated with the proper notice, and contrary to the First Amendment.
 3. Preliminary injunction denied by District Court (2/25/05); denial of that injunction affirmed by appellate court (12/22/05).
 4. District Court granted the Commission's motion for summary judgment, and EMILY's List appealed. Argued before the DC Circuit on May 4, 2009.
 5. Three-judge panel of the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court and ordered that the district court vacate the challenged

- regulations (9/18/09). The opinion includes a broad discussion of the First Amendment rights of nonconnected PACs.
6. The Commission decided not to seek rehearing en banc from the full Court of Appeals for the District of Columbia Circuit. The Solicitor General did not file a petition for a writ of certiorari with the Supreme Court.
 7. On 11/30/09, the United States District Court for the District of Columbia ordered that the following regulations be vacated:
 - 11 C.F.R. 100.57, concerning funds received in response to solicitations;
 - 11 C.F.R. 106.6(c), concerning the method for allocating administrative expenses, costs of generic voter drives, and certain public communications; and
 - 11 C.F.R. 106.6(f), concerning payments for public communications and voter drives that refer to one or more clearly identified federal or non-federal candidates.
 8. In March 2010, the Commission adopted draft final rules that removed the vacated regulations (75 FR 13223, March 19, 2010)



Carey v. FEC

- National Defense PAC sought advisory opinion allowing it to use separate bank accounts to:
 - accept unlimited contributions to finance independent expenditures and
 - accept FECA-limited contributions to be used to make contributions
- After not receiving the AO it sought, the PAC brought lawsuit
- District court granted preliminary relief for plaintiffs, relying on *EMILY's List*, and Commission then negotiated a final judgment in plaintiffs' favor

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- F. *Carey v. FEC***
1. National Defense PAC sought advisory opinion allowing it to use separate bank accounts to
 - Accept unlimited contributions to finance independent expenditures; and

- Accept FECA-limited contributions to be used to make contributions.
- 2. After not receiving the AO it sought, the PAC brought a lawsuit against the FEC.
- 3. Relying on the ruling in *EMILY's List* (summarized above), on 6/14/11, the U.S. District Court for the District of Columbia granted a limited preliminary injunction to the plaintiffs which enjoined the Commission from enforcing certain provisions of the Act which limit the amount of contributions individuals may make, and that the PAC may accept, into a separate bank account for the purpose of making independent expenditures.
- 4. The parties then negotiated a final resolution of the case and asked the court to enter a stipulated judgment and consent decree. The court signed that judgment on August 19, 2011. It provides permanent relief to the plaintiffs that is consistent with the temporary relief earlier provided in the preliminary injunction.
- 5. The Commission issued a Statement on *Carey v. FEC* on October 5, 2011, which provides reporting guidance for committees that maintain a non-contribution account. Statement is available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.



Bluman v. FEC

- Case brought by Canadian attorney and Israeli physician residing temporarily in U.S.
- Plaintiffs challenged ban on foreign national contributions and expenditures in connection with elections in United States
- In August 2011, District Court denied plaintiffs' motion for summary judgment and dismissed case
- Supreme Court summarily affirmed in January 2012

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G. *Bluman v. FEC* (No. 10-1766, D.D.C.)

1. Challenge to ban on foreign national contributions and expenditures (2 U.S.C. §441e) in connection with elections in the United States
2. Background:
 - a) Case brought by young Canadian attorney and Israeli physician residing temporarily in United States.
 - b) Plaintiffs allege an interest in making small contributions and expenditures in support of certain candidates and political committees.
3. Case argued before a three-judge district court in D.C. on May 12, 2011.
4. On August 8, 2011, the U.S. District Court for the District of Columbia denied the plaintiffs' motion for summary judgment and granted the FEC's motion to dismiss the case.
5. Supreme Court summarily affirmed in January 2012.



Van Hollen v. FEC

- Case brought by Congressman Van Hollen challenging the Commission's regulation concerning disclosure of contributors to corporations and unions that make electioneering communications
- Van Hollen alleges that the regulation requires too little disclosure because only persons giving "for the purpose of furthering electioneering communications" must be disclosed

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H. *Van Hollen v. FEC*

1. On 4/21/11, U.S. Representative Chris Van Hollen filed suit against the Commission in the U.S. District Court for the District of Columbia, challenging a Commission regulation that provides for the disclosure of donations given to fund electioneering communications.

2. Representative Van Hollen claims that the regulation at 11 CFR 104.20(c)(9), which requires the disclosure of any donation Office of Information Technology \$1,000 or more to corporations (including nonprofits) or labor organizations when the donation “was made for the purpose of furthering electioneering communications,” is arbitrary, capricious and contrary to law.
3. According to Van Hollen, FECA requires corporations and unions to disclose all donations they receive of \$1,000 or more unless the donations for electioneering communications have been segregated in a separate bank account.



Wagner v. FEC

- Challenge to prohibition on contributions by individual federal government contractors.
- Plaintiffs claim that 2 U.S.C. 441c violates the First Amendment and also the Equal Protection component of the Fifth Amendment to the United States Constitution.

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I. *Wagner v. FEC*

1. Wendy Wagner, an individual who holds a contract with a federal government agency, and other plaintiffs who are individual federal government contract-holders, filed suit with the District Court for the District of Columbia on October 19, 2011, challenging the constitutionality of the prohibition on contributions by federal government contractors.
2. Plaintiffs claim that 2 U.S.C. §441c violates the First Amendment and also the Equal Protection component of the Fifth Amendment to the United States Constitution.



Policy Update

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Topics

- Rulemakings & Guidance
 - Completed Rulemakings
 - Interpretive Rules
 - Potential/Ongoing Rulemakings
- Advisory Opinions

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II. Policy Update: Topics to be Covered:

- Completed Rulemakings
- Interpretative Rules
- Potential/Ongoing Rulemakings
- Advisory Opinions



Completed Rulemakings

- ▶ **Shays III Rulemakings:**
 - ▶ Nonfederal Fundraising (2010)
 - ▶ Coordinated Communications (2010)

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A. Completed Rulemakings

 <h2 style="text-align: center;">Participation at Nonfederal Fundraising Events</h2> <hr style="border: 1px solid red;"/>	
<p>Federal candidate or officeholder may:</p> <ul style="list-style-type: none">• Attend• Speak• Be a featured guest• Solicit funds within the limitations or prohibitions of the Act (“federal funds”)	<p>Federal candidate or officeholder may not:</p> <ul style="list-style-type: none">• Solicit funds outside the limitations or prohibitions of the Act (“soft money”)• Solicit Levin funds
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1. Candidate Involvement in Nonfederal Fundraisers (11 CFR 300.64)

a) General Rule:

- Federal candidates/officeholders cannot solicit, receive, direct, transfer, spend or disburse nonfederal funds, BUT they can participate in events (and publicity for events) where others do so.
- The rule provides guidance on how Federal candidates and officeholders can attend, speak at, or help publicize events where soft money is raised without having that participation result in unlawful solicitations by them.

b) Final Rules (75 FR 24375 (May 5, 2010))

- (1) Scope: The revised rules address participation by Federal candidates and officeholders at all non-Federal fundraising events that are in connection with an election for Federal office or any non-Federal election and in related publicity.
- (2) Effective December 1, 2010.



FEDERAL ELECTION COMMISSION

Administering and Enforcing Federal Campaign Finance Laws

Campaign Finance Maps. Campaign finance information is now available via easy to use maps of the USA for both **Presidential** and **House and Senate** Elections through the most recent reporting period.

2010 House and Senate Elections

2008 House and Senate Elections

2008 Presidential Elections

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Read the Explanation and Justification for the Final Rules on Nonfederal Fundraising at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-11.pdf.



Coordinated Communications

Three-Part Test:

- Payment Prong
- *Content Prong*
- Conduct Prong

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2. **Coordinated Communications (3 Prong Test)**
- a) Must satisfy all three prongs to be a coordinated communication:
 - (1) Payment Prong
 - (2) Content Prong
 - (3) Conduct Prong
 - b) A coordinated communication is treated as a contribution from the person paying for the communication. Funding for them is, therefore, subject to the amount and source limitations that apply to contributions.



Revised Content Prong

Five content standards:

1. Express Advocacy
2. Electioneering Communication
3. Republication of Campaign Materials
4. “Refers to” Standard
5. ***Functional Equivalent of Express Advocacy***

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“Functional Equivalent”

- Susceptible of no other reasonable interpretation
- Than an appeal to vote for or against
- Clearly identified Federal candidate

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- c) **Final Rules (75 FR 55947 (September 15, 2010))**
Final rules approved by the Commission on August 26 (Effective December 1, 2010) in response to Shays III litigation:
- Add a new standard to the content prong to cover public communications that are the functional equivalent of express advocacy.
 - New 11 CFR 109.21(c)(5) specifies that 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.
 - The new content standard applies without regard to the timing of the communication or the targeted audience
 - Applies outside the pre-election period used for ECs and other public communications.
 - The Explanation and Justification for the Final Rules provides the text of communications analyzed by the Supreme Court under a functional equivalent analysis.
 - Explanation and Justification for the Final Rules on Coordinated Communications available at http://www.fec.gov/law/cfr/ej_compilation/2010/notice2010-17.pdf.



Interpretive Rules

- ▶ Electronic Contributor Redesignations
- ▶ “Publicly Disseminated” Date

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- B. Interpretive Rules**
- **Electronic Contributor Redesignations**
 - **“Publicly Disseminated” Date**



Interpretive Rule: Electronic Contributor Redesignations

- Redesignations of contributions
 - Must be written
 - Must be signed
- Electronic redesignation may suffice if it assures
 - Contributor identity
 - Contributor intent

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- 1. Interpretive Rule on Electronic Contributor Redesignations**
Read the Interpretive Rule to learn the particular method of electronic redesignation approved by the Commission in the course of a recent audit:
http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-02.pdf.



Interpretive Rule: “Publicly Disseminated” Date

- Applies to Independent Expenditures disseminated on multiple dates, such as:
 - Yard signs, mini-billboards, handbills
 - T-shirts, hats, buttons
- Report as disseminated on “any reasonable date”
 - Starting with date filer receives or exercises control over the items
 - Ending at actual dissemination

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- 2. Interpretive Rule on When Certain Independent Expenditures are “Publicly Disseminated” for Reporting Purposes (76 FR 61254 (October 4, 2011))**
The Commission issued guidance on when independent expenditure communications that take the form of yard signs, mini-billboards, handbills, t-shirts, hats, buttons, and similar items are “publicly disseminated” for certain reporting purposes.
General Rule
 - a) The Commission issued the guidance to particularly address situations where items are disseminated in stages or where the Filer purchases the items from a vendor and retains the items for a period of time before distributing them.

- b) Filers may report these expenditures communications on any reasonable date starting with the date the Filer receives or exercises control over the items in the usual and normal course of dissemination, up to and including the date they are actually disseminated to the public.
- c) The guidance sets out five (5) example dates. Read these and more in the Interpretive Rule, available at http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-13.pdf.



Potential/Ongoing Rulemakings

- Internet Communication Disclaimers
- *Citizens United*
- *EMILY's List/SpeechNow*

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C. Potential/Ongoing Rulemakings

Include:

- 1. Internet Communication Disclaimers**
- 2. *Citizens United***
Review of regulatory provisions that prohibit either independent expenditures or electioneering communications by corporations or labor organizations.
- 3. *EMILY's List***
Repeal of solicitation rule at 100.57 and allocation provisions at 106.6(c) and 106.6(f)



ANPRM on Disclaimers for Certain Internet Communications

- ▶ Comments were due Nov. 14
- ▶ Grew out of several AOs:
 - 2010-19 (Google)
 - 2011-09 (Facebook)
 - See also: 2010-23 (CTIA) and 2011-13 (DSCC) for technology and disclaimer issues

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D. Commission Guidance on Texts and Internet Communications

Several recent AOs asked about texts and Internet communications:

1. **AO 2010-23 (CTIA)**
Contributions via text
2. **AO 2019-19 (Google)**
Disclaimer requirement application to small (90 character) internet ads that link to a landing page with a disclaimer
3. **AO 2011-13 (DSCC)**
Disclaimer requirements for national party committee website
4. **AO 2011-09 (Facebook)**
Disclaimer requirement application to small (0-160 character) internet ads that may not link to a landing page with a disclaimer

E. Advance Notice of Proposed Rulemaking (ANPRM) on Text and Internet Communication Disclaimers

1. ANPRM asks whether the Commission should begin a formal rulemaking to revise its regulations on disclaimers on certain Internet and text communications and, if so, what changes should be made to those regulations.
2. Comments due by November 14, 2011.
3. Published in the *Federal Register* on October 13, 2011. Available at <http://sers.nictusa.com/fosers/showpdf.htm?docid=97168>.

F. *Citizens United*



Citizens United

- Press release (Feb. 5, 2010) :
“Commission will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications”

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- 1. Press Release (Feb. 5, 2010):**
“The Commission will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications,” available at
<http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>



Citizens United

- Draft NPRMs (Jan. 20, 2011):
Considered by Commission, but
neither draft approved
- Draft NPRMs (June 15, 2011):
Considered by Commission, but
neither draft approved

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2. **Supreme Court found ban on corporate independent expenditures and electioneering communications to be unconstitutional.**



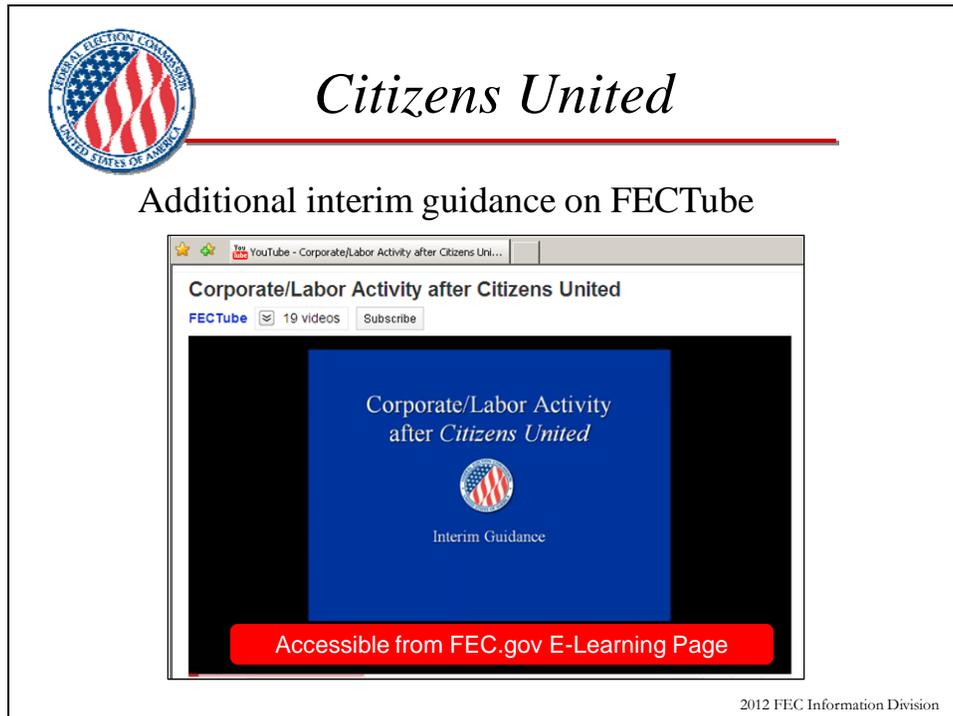
Citizens United

- NPRM approved and published in
Federal Register on Dec. 27, 2011
- Comments due February 3, 2012;
Reply comments due February 17
- Hearing scheduled for March 7, 2012

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3. Notice of Proposed Rulemaking

- a) NPRM asked for comments on proposed changes to 11 CFR 114.3 and 114.4, to implement the Supreme Court's ruling.
- b) Comments due by February 3, 2012; Reply comments due by February 17, 2011.
- c) Hearing scheduled for March 7, 2012.
- d) NPRM published in Federal Register on December 27, 2011 at 76 Fed. Reg. 80803; available online at <http://sers.nictusa.com/fosers/showpdf.htm?docid=99892>.



The image shows a screenshot of a YouTube video player. At the top left is the Federal Election Commission (FEC) logo. To the right of the logo, the text "Citizens United" is written in a large, italicized serif font. Below this, the text "Additional interim guidance on FECTube" is displayed. The video player itself shows a blue background with the text "Corporate/Labor Activity after Citizens United" and "Interim Guidance" below it, accompanied by a small FEC logo. A red banner at the bottom of the video player reads "Accessible from FEC.gov E-Learning Page". The browser address bar at the top shows "YouTube - Corporate/Labor Activity after Citizens Uni...".

4. Additional guidance: <http://www.fec.gov/info/elearning.shtml>



EMILY's List/SpeechNow

- Final Rules (March 19, 2010)
 - Removed 11 CFR 100.57, 106.6(c) and 106.6(f)
- Future rulemaking for other provisions potentially affected?
- FEC Statement on *Carey v. FEC*
 - Reporting guidance for committees with a “non-contribution account”

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G. *EMILY's List*

1. Provisions at issue:

- a) “Contributions” include funds received in response to certain communications (11 CFR 100.57).
- b) Allocation of expenses for Federal & non-Federal activity by separate segregated funds and nonconnected political committees (11 CFR 106.6(c) and 106.6(f))

2. The Commission removed 11 CFR 100.57 and 106.6(c) and (f).

- a) See Final Rules at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-08.pdf.
- b) Future NPRM addressing other provisions of the rules potentially affected by the *EMILY's List* decision.

3. Commission Statement on *Carey v. FEC*

The Commission issued a statement October 5, 2011, which provides reporting guidance for committees that maintain a non-contribution account. The full statement is available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

H. Advisory Opinions



Advisory Opinions

- Independent Expenditure Committees and Accounts
- Personal Use
- SSFs – Administration and Communications

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All advisory opinions are available at the Commission's searchable system at <http://saos.nictusa.com/saos/searchao>.

1. **Independent Expenditure Committees and Accounts**
2. **Personal Use**
3. **SSFs – Administration and Communications**



AOs – Independent Expenditure Committees and Accounts

- 2010-09 (Club for Growth)
- 2010-11 (Commonsense Ten)
- 2011-12 (Majority PAC)
- See also: 2010-20 (NDPAC) and 2011-21 (Constitutional Conservatives Fund PAC)
- Stop This Insanity, Inc. Employee Leadership Fund (pending)

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I. **Independent Expenditure Committees and Accounts:**

In the wake of the *Citizen's United*, *SpeechNow*, and *EMILY's List* cases, the Commission was presented with some advisory opinion requests that explored the boundaries of those opinions and, in some cases, what they meant when read together.

1. **AO 2010-09 (Club for Growth)**

A corporation may establish, administer, and pay the costs of an “independent expenditure-only” committee that solicits and accepts funds from only individuals for independent expenditures – much like the one at issue in the *SpeechNow* case. Corporate payments for the administration and solicitation costs would be a contribution to the IE-only committee.

2. **AO 2010-11 (Commonsense Ten)**

An IE-only committee can accept unlimited contributions not just from individuals (as was the case in *SpeechNow*) but also from other political committees, corporations and labor organizations.

3. **AO 2011-12 (Majority PAC)**

Federal officeholders, candidates, and officers of national party committees can solicit funds for IE-only committees, but only up to \$5,000.

4. **AO 2010-20 (ND PAC)**
The Commission could not decide whether a single political committee could, through separate accounts, make contributions to Federal candidates with hard money and accept unlimited contributions from individuals, corporations, labor organizations and other committees for the purpose of making independent expenditures. Resolved in the *Carey* litigation.
5. **AO 2011-21 (Constitutional Conservatives Fund PAC)**
A leadership PAC may neither receive unlimited contributions from individuals nor receive any contributions from corporations and labor organizations for the purpose of financing independent expenditures.
6. **AOR 2012-01 (Stop This Insanity, Inc. Leadership Employee Fund)**
Pending request concerning SSF's receipt of unlimited funds for independent expenditures.



AOs – Personal Use

- ▶ 2010-26 (Baird)
- ▶ 2011-02 (Brown)
- ▶ 2011-05 (Terry)
- ▶ 2011-07 (Fleischmann)
- ▶ 2011-17 (Giffords)

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- J. Personal Use**
Contributions accepted by a candidate may not be converted to “personal use.” Some uses of campaign funds are *per se* personal use; for other uses of campaign funds, the Commission makes a determination on a case-by-case basis. The Commission has issued the following recent AOs analyzing personal use of the following uses of campaign funds:

1. **AO 2010-26 (Baird)**
Cost of temporary storage and moving expenses of a retiring
Federal officeholder
2. **AO 2011-02 (Brown)**
Committee's purchase and promotion – including promotion on
committee website and social media sites – of the Senator's
autobiography
3. **AO 2011-05 (Terry)**
Home security system
4. **AO 2011-07 (Fleischmann)**
Legal fees of former campaign consultant
5. **AO 2011-17 (Giffords)**
Home security system



AOs – SSFs: Administration and Communications

- ▶ 2010-04 (Wawa I)
- ▶ 2010-12 (Proctor & Gamble)
- ▶ 2011-04 (AIPAC)
- ▶ 2011-25 (Atlas Air)
- ▶ 2012-02 (Wawa II)

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K. Administering a Separate Segregated Fund (SSF)

A corporation may solicit contributions from its restricted class – stockholders and their families, and executive or administrative personnel and their families – to its SSF.

- Three recent AOs addressed whether particular persons are included in the “executive or administrative personnel” part of the restricted class:
 - (1) salaried managers who supervised hourly employees (**Wawa I**)
 - (2) members of the board who receive their salary by retainer (**P&G**)
 - (3) salaried managers who are “administrative” personnel that supervise hourly employees (**Atlas Air**).
- Pending request AOR 2012-02 (**Wawa II**) on different group of salaried managers who supervise hourly employees.
- AO 2011-04 (**AIPAC**) addressed how an incorporated membership organization can communicate with its restricted class.



Legislative Update

2012 FEC Information Division



Pending Legislation

112th Congress

January 2011 to January 2013

2012 FEC Information Division

III. Pending Legislation (By Duane Pugh)



Citizens United v. FEC:
LEGISLATIVE RESPONSE

H.R. 4010, Rep. Van Hollen (MD)
DISCLOSE 2012 Act, Feb. 9, 2012



- Enhance Disclosure
- Extend Stand by Your Ad
- Require Corporate Disclosure to Shareholders
- Expand Lobbyist Disclosure of Campaign Expenditures

2012 FEC Information Division

A. **H.R. 4010, *DISCLOSE 2012 Act***
(Rep. Chris Van Hollen of Maryland (8th C.D.))
This bill is entitled the *Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012* or the *DISCLOSE 2012 Act*. It would:

- Require Additional Disclosure
Covered organizations would be required to disclose *campaign-related disbursements* of \$10,000 or more. *Covered organizations* include corporations, labor organizations, § 501(c)s, Super PACs and § 527s. *Campaign-related disbursements* include ECs, IEs, or transfers related to campaign related disbursements, which include transfers to or from entities that have made \$50,000 in ECs or IEs in last two years.
- Extend Stand by Your Ad
Super PACs and other entities would be subject to these requirements.
- Require Corporate Disclosure to Shareholders
- Expand Lobbyist Disclosure of Campaign Expenditures
Requires reporting of IEs and ECs under Lobbyist Disclosure Act.



Citizens United v. FEC:
LEGISLATIVE RESPONSE



The DISCLOSE Act
(2010 Version)
S. 3295 Sen. Schumer (NY) and
H.R. 5175 Rep. Van Hollen (MD)

In 111th Congress

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- B. 111th Congress: 2009-2010**
S. 3295, *DISCLOSE Act* (Sen. Charles Schumer of New York) and
H.R. 5175 (Rep. Chris Van Hollen of Maryland (8th C.D.)).

Bills addressed:

Government Contractors
Foreign-controlled Domestic Corporations
Coordinated Communications
Independent Expenditures
Electioneering Communications
Optional Separate Accounts for Campaign-Related Activity
Disclaimers
Lobbyist Reporting
Lowest Unit Rate for Candidates and Parties (S. 3295 only)

- C. 112th Congress: S. 9, *Political Reform and Gridlock Elimination Act***
(Sen. Harry Reid of Nevada)

Expresses the sense of the Senate that Congress should pass the DISCLOSE Act.



Pending Legislation:
Passed by the House of Representatives

H.R. 3463

- Terminates Public Funding for Presidential Campaigns and Nominating Conventions
- Terminates Election Assistance Commission
- Rep. Gregg Harper of Mississippi
- Passed the House on December 1, 2011
- Pending in the Senate

2012 FEC Information Division

- D. H.R. 3463 (Rep. Gregg Harper of Mississippi (3rd C.D.))**
This bill would terminate the Election Assistance Commission, assign most of its functions to the Federal Election Commission, and terminate the Presidential election public funding programs.

Passed the House of Representatives by vote of 235 to 190 on December 1, 2011; pending in the Senate.



Pending Legislation:
Passed by the House of Representatives

H.R. 359

- Terminates Public Funding for Presidential Campaigns and Nominating Conventions
- Rep. Tom Cole of Oklahoma (4th C.D.)
- Passed the House on January 26, 2011
- Pending in the Senate

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- E. H.R. 359 (Rep. Tom Cole of Oklahoma (4th C.D.))**
This bill would terminate the public funding programs for Presidential primary and general election candidates, as well as the national nominating conventions.

Passed the House of Representatives by vote of 239 to 160 on January 26, 2011; pending in the Senate.

S. 194 (Sen. Mitch McConnell (Kentucky))
Identical to H.R. 359, *referred to Senate Finance Committee.*

F. Appropriations Provisions

- 1. H.R. 1, Full-Year Continuing Appropriations Act, 2011, Amendment 208 (Rep. Tom Cole of Oklahoma (4th C.D.))**
This amendment would prohibit the use of appropriated funds to administer the Presidential public funding programs in Fiscal Year 2011.

H.R. 1 *Passed the House of Representatives by vote of 247 to 175 on February 17, 2011.*

H.R. 1473, *Department of Defense and Full-Year Continuing Appropriations Act, 2011*, enacted instead of H.R. 1 without any restriction on Presidential public funding programs.

2. **Spending Reduction Act of 2011**,
H.R. 408 (Rep. Jim Jordan of Ohio (4th C.D.))
S. 178 (Sen. James DeMint of South Carolina)

These bills would also terminate the public funding programs for Presidential campaigns and conventions.

3. **H.R. 2434**, *Financial Services and General Government Appropriations Act, 2012 (Rep. Jo Ann Emerson of Missouri (8th C.D.))*

This bill would prohibit the use of appropriated funds to administer the Presidential public funding programs in Fiscal Year 2012, which begins October 1, 2011 and ends September 30, 2012, and thus encompasses the 2012 primary elections and much of the general election campaign season.

H.R. 2434 was reported by the House Committee on Appropriations on July 7, 2011.

Obama administration issued a veto threat on July 13, 2011.

- S. 1573**, *Financial Services and General Government Appropriations Act, 2012 (Sen. Durbin of Illinois)*

The Senate's version of this bill does not include this restriction. S. 1573 was reported by the Senate Committee on Appropriations on September 15, 2011.

- H.R. 2055**, *Consolidated Appropriations Act, 2012 (Rep. John Culberson of Texas (7th C.D.))*

This bill enacted instead of H.R. 2434 or S. 1573 without any restriction on Presidential public funding.



Pending Legislation

Presidential Public Funding Act

- H.R. 414
- Rep. David Price of North Carolina (4th C.D.)
- Introduced January 25, 2011
- H.R. 6061 in 111th Congress

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G. H.R. 414, *Presidential Public Funding Act* (Rep. David Price of North Carolina (4th C.D.))

This bill would reform the Presidential public funding programs.

1. Provides 4 to 1 match for \$200 primary and general election contributions up to \$100 million in addition to general election grant of \$50 million
2. Repeals primary and general election expenditure limits
3. Requires agreement to \$1,000 primary election contribution limit and \$500 general election contribution limit
4. Requires agreement to refuse lobbyist contributions
5. Requires agreement to accept general election funding to get primary funding
6. Requires nominees to agree to refrain from joint fundraisers with political party committees
7. Provides 4 to 1 matching payments for general election up to \$150 million in addition to grant
8. Increases party coordinated expenditure limit to \$50 million
9. Eliminates General Election Legal and Accounting Compliance funds (GELACs)
10. Repeals Presidential Nominating Convention funding; provides a new contribution limit of \$25,000 per convention
11. Requires additional disclosure of bundled contributions

Referred to the Committee on House Administration.



Pending Legislation

Bill to terminate the Election Assistance Commission

- H.R. 672
- Rep. Gregg Harper of Mississippi (3rd C.D.)
- Hearing April 14, 2011 before Elections Subcommittee of Committee on House Administration
- House Vote on June 22, 2011—failed to get 2/3 majority

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H. H.R. 672 (Rep. Gregg Harper of Mississippi (3rd C.D.))

This bill would terminate the Election Assistance Commission and assign most of its functions to the Federal Election Commission.

Hearing held before Subcommittee on Elections of Committee on House Administration on April 14, 2011.

On June 22, 2011, the House of Representatives considered this bill under suspension of the rules, which requires 2/3 majority to pass bill. Under that standard, H.R. 672 failed by a party-line vote of 235 to 187.



Executive Order

- April 2011: Draft Executive Order on “Disclosure of Political Spending by Government Contractors,” became public
- May 12, 2011: the House Committees on Small Business and Oversight and Government Reform held a joint hearing about this draft Executive Order.

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F. Executive Order on Political Spending by Government Contractors

1. Background

In April 2011, a draft of an Executive Order, which was entitled “Disclosure of Political Spending by Government Contractors,” became public. On May 12, 2011, the House Committees on Small Business and Oversight and Government Reform held a joint hearing about this draft Executive Order. Materials related to this hearing, including witness testimony and a video of the hearing, are available at this link:

- <http://smallbusiness.house.gov/Calendar/EventSingle.aspx?EventID=239923>

2. FEC Actions

FEC 2010 Chair Cynthia L. Bauerly and 2010 Vice Chair Caroline C. Hunter both submitted written statements for the hearing, which are available on the FEC website here:

- <http://www.fec.gov/members/bauerly/statements.shtml>
- <http://www.fec.gov/members/hunter/statements.shtml>

3. **A copy of the draft Executive Order is available here:**
<http://pajamasmedia.com/files/2011/04/Draft-EO-Govt-Contr-Disclosure.pdf>
4. *Consolidated Appropriations Act, 2012* includes a provision that prohibits the use of appropriated funds to require an entity submitting an offer for a Federal contract to disclose information concerning political spending as a condition for submitting the offer. *Consolidated Appropriations Act, 2012*, Div. D, § 742, Public Law 112-74, 125 Stat. 786, 939 (2011).



Pending Legislation

Senate Campaign Disclosure Parity Act

- Requires electronic filing for Senate committees
- S. 219
- Sen. Jon Tester of Montana
- Introduced January 27, 2011
- 22 co-sponsors (as of Feb. 13, 2012)

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J. S. 219, *Senate Campaign Disclosure Parity Act* (Sen. Jon Tester of Montana)

This bill would amend FECA to require electronic filing by Senate candidates and committees that support only Senate candidates.

Referred to the Senate Committee on Rules and Administration.



Pending Legislation

Senate Campaign Disclosure Parity Act

- Requires electronic filing for Senate committees
- Offered as an Amendment to *STOCK Act*
- S. Amdt. 1503 to S. 2038
- Sen. Jon Tester (MT) and Thad Cochran (MS)
- Bill passed without consideration of this Amendment in Senate; bill pending in Conference

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- K. Amdt. 1503 (Sen. Jon Tester of Montana) to S. 2038, *Stop Trading on Congressional Knowledge of 2012 or STOCK Act***
This amendment would have amended the STOCK Act to include the *Senate Campaign Disclosure Parity Act*.

S. 2038 Passed the Senate without adopting this amendment; bill pending in Conference as of February 13, 2012.



Pending Legislation

Fair Elections Now Act

- S. 750
- Sen. Dick Durbin of Illinois
- Introduced April 6, 2011
- Hearing April 12, 2011 before Senate Judiciary Committee Subcommittee of Constitution, Civil Rights and Human Rights
- H.R. 1404 (Rep. Larson of Connecticut)

2012 FEC Information Division

- L. *Fair Elections Now Act, S. 750 (Sen. Dick Durbin of Illinois)***
This bill would provide public funding for Senate election campaigns.

Introduced April 6, 2011

Hearing held before Senate Judiciary Committee's Subcommittee on Constitution, Civil Rights and Human Rights on April 12, 2011

H.R. 1404 (Rep. John B. Larson of Connecticut (1st C.D.))

This corresponding bill would provide public funding for House election campaigns.

Introduced April 6, 2011



Pending Legislation

Permits candidates to designate an individual to disburse committee funds in event of candidate's death

- H.R. 406
- Rep. Walter Jones Jr. of N. Carolina (3rd C.D.)
- Introduced January 24, 2011
- *Passed* House in 111th Congress as H.R. 749
- *Passed* House in 110th Congress as H.R. 3032

2012 FEC Information Division

- M. H.R. 406 (Rep. Walter B. Jones, Jr., of North Carolina (3rd C.D.))**
This bill would amend the FECA to permit candidates to designate an individual who would be authorized to disburse funds of the authorized campaign committees of the candidate in the event of the death of the candidate.

*Referred to the Committee on House Administration.
Passed the House of Representatives in the 111th and 110th Congresses.*



Pending Legislation

- S. 1355
- Requires FEC to enforce restrictions on political robocalls
- Sen. Dianne Feinstein of California
- July 13, 2011
- H.R. 2788
- Prohibits candidates from using contributions raised during previous election cycles
- Rep. Rob Woodall of Georgia (7th C.D.)
- August 1, 2011

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N. S. 1355, *Robocall Privacy Act of 2011* (Sen. Dianne Feinstein of California)

This bill would require the FEC to enforce restrictions on political robocalls during pre-election periods. The bill would:

- prohibit such calls between 9 PM and 8 AM;
- prohibit more than two calls per day to any phone number;
- require a disclaimer begin the recorded call; and
- prohibit blocking caller ID services.

Referred to the Senate Committee on Rules and Administration.

O. H.R. 2788, *Competitive Elections Act of 2011* (Rep. Rob Woodall of Georgia (7th C.D.))

This bill would amend FECA to prohibit candidates from using contributions raised during previous election cycles. Candidates would be permitted to use contributions raised during previous election cycles if their opponents expend personal funds in excess of \$100,000.

Referred to the Committee on House Administration.



Pending Legislation

- S. 130
- Prohibits campaign committees and leadership PACs from employing candidate's spouse and family
- Sen. David Vitter of Louisiana
- January 25, 2011
- H.R. 269
- Prohibits conversion of leadership PAC funds to personal use
- Rep. Michael Capuano of Mass. (8th C.D.)
- January 12, 2011
- H.R. 4724 in 111th Congress

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P. S. 130 (Sen. David Vitter of Louisiana)

This bill would amend the FECA to prohibit campaign committee and leadership PACs from employing the candidate's spouse and family members. Also prohibits spouses of Members of Congress from lobbying, with an exception for spouses who were lobbyists one year prior to Member's election

S. 104 in 111th Congress.

Q. H.R. 269 (Rep. Michael Capuano of Massachusetts (8th C.D.))

This bill would amend the FECA to prohibit conversion of leadership PAC funds to personal use.



Pending Legislation

- H.R. 268 *Ethics in Foreign Lobbying Act of 2011*
- Reduces contribution limits
- Rep. Michael Capuano of Massachusetts (8th C.D.)
- January 12, 2011
- H.R. 4739 in 111th Congress
- H.R. 138
- Rep. Marcy Kaptur of Ohio (9th C.D.)
- In 111th Congress, H.R. 3859; one of many bills responding to *Citizens United v. FEC*

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- R. H.R. 268 (Rep. Michael Capuano of Massachusetts (8th C.D.))**
This bill would reduce the limit on contributions from individuals to candidates to \$1,000 per election. This amount would be indexed for inflation, with 2013 as a base year.
- S. H.R. 138, *Ethics in Foreign Lobbying Act of 2009* (Rep. Marcy Kaptur of Ohio (9th C.D.))**
This bill would prohibit contributions and expenditures by political committees controlled by foreign-owned corporations. It would also establish within the FEC a clearinghouse of public information on the political activities of foreign principals and agents.
- T. S. 1498 (Sen. David Vitter of Louisiana)**
This bill would amend FECA to require additional reporting for the 12 Members of Congress on the Joint Select Committee on Deficit Reduction. Any contributions of \$1,000 or more would be subject to reporting within 48 hours of receipt.
- U. H.R. 2038, *Restoring Confidence Through Smarter Campaigns Act of 2011* (Rep. Brian Higgins of New York (27th C.D.))**
This bill would impose a \$500,000 amount limit on expenditures by authorized committees of candidates for election to the House of Representatives to be divided between the primary and general elections, with additional funds for run-offs.

- V. H.R. 2728 (Rep. Gary Ackerman of New York (5th C.D.))**
This bill would require disclosure of political expenditures on documents under the Securities Exchange Acts of 1933 and 1934.
- W. H.R. 137 (Rep. Marcy Kaptur of Ohio (9th C.D.))**
This bill would require television stations to provide free airtime to candidates in even-numbered years.
- X. H.J.Res. 6, 7 and 8 (Rep. Marcy Kaptur of Ohio (9th C.D.))**
H.J. Res. 65 (Rep. Dan Boren of Oklahoma (2nd C.D.))
H.J. Res. 72 (Rep. Kurt Schrader of Oregon (5th C.D.))
H.J. Res. 78 (Rep. Donna Edwards of Maryland (4th C.D.))
H.J. Res. 82 and 90 (Rep. Theodore Deutch of Florida (19th C.D.))
H.J. Res. 86 (Rep. Betty Sutton of Ohio (13th C.D.))
H.J. Res. 88 (Rep. James McGovern of Massachusetts (3rd C.D.))
H.J. Res. 92 (Rep. Keith Ellison of Minnesota (5th C.D.))
H.J. Res. 97 (Rep. John Yarmouth of Kentucky (3rd C.D.))
H.J. Res. 100 (Rep. Dennis Kucinich of Ohio (10th C.D.))
S.J. Res. 29 (Sen. Tom Udall of New Mexico)
S.J. Res. 33 (Sen. Bernard Sanders of Vermont)
S.J. Res. 35 (Sen. Max Baucus of Montana)

These resolutions propose Constitutional Amendments that would permit Congress and the states to limit election-related contributions and expenditures



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VI. Stay Up to Date:

- A. **FEC RECORD:** <http://www.fec.gov/pages/fecrecord/fecrecord.shtml>
- B. **FEC Weekly Digest**
- C. **FEC Web Site**
 - 1. **Litigation:** <http://www.fec.gov/law/litigation.shtml>
 - 2. **New/Current Statutes:** <http://www.fec.gov/law/feca/feca.shtml>
 - 3. **Rulemakings:** http://www.fec.gov/law/law_rulemakings.shtml
 - 4. **Updates:** <http://www.fec.gov/law/recentdevelopments.shtml>



Workshop Evaluation

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Next Workshop



February 22: Committee Operations
February 23: FEC Jeopardy

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