

RECENT DEVELOPMENTS IN CAMPAIGN FINANCE LAW



April 24, 2013
9:30 a.m.
Tab 2

 Information Division
2013-14 Election Cycle

Recent Developments

Objectives – Part 1

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

 Information Division
2013-14 Election Cycle

Recent Developments

Litigation Topics

- ▣ Background: Independent Campaign Advocacy
 - Financing Restrictions
 - Disclosure Requirements
- ▣ Recent Challenges to FECA and FEC Regulations
 - Electioneering Communications Disclosure
 - Clearly Identified Federal Candidate
 - Biennial Aggregate Limits
 - Express Advocacy
 - Multicandidate PAC Status
 - Federal Contractor Contribution Ban

I. Litigation Update: Topics to be Covered

- **Background: Independent Campaign Advocacy**
 - Financing Restrictions
 - Disclosure Requirements
- **Recent Challenges to FECA and Commission Regulations**
 - Electioneering Communications Disclosure
 - “clearly identified federal candidate”
 - Biennial Aggregate Limits
 - Express Advocacy
 - Multicandidate PAC Status
 - Non-contribution Accounts
 - Federal Contractor Contribution Ban

Citizens United v. FEC

- ▣ Allows:
 - Corporations/Unions to make:
 - ▣ Independent Expenditures
 - ▣ Electioneering Communications
- ▣ Upholds:
 - Disclosure/Reporting requirements
 - Ban on direct Corp./Union contributions

- A.** ***Citizens United v. FEC***, 558 U.S. 310, 130 S. Ct. 876 (2010).
1. 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 as defined in 2 U.S.C. 434(f).
 2. The Supreme Court upheld the reporting requirements for independent expenditures and electioneering communications.
 3. The court did not rule on the ban on corporate or union contributions.

SpeechNow v. FEC

- ▣ Allows:
 - Unlimited contributions to IEO PACs
 - Corp/Union contributions to IEO PACs
- ▣ Upholds:
 - Limits on contributions to:
 - ▣ Candidates
 - ▣ Parties
 - ▣ PACs
 - Disclosure and Reporting requirements

- B.** *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008); 599 F.3d 686 (D.C. Cir. 2010) (en banc).
1. SpeechNow, an unincorporated association registered as a “527” organization, wanted to make independent expenditures that contained express advocacy and wanted to accept contributions for that purpose only from individuals.
 2. SpeechNow alleged that the Act’s contribution limits and political committee disclosure requirements are unconstitutional as applied to its activities. Its main argument was 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 U.S. Court of Appeals for the District of Columbia sitting *en banc* 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.

EMILY's List v. FEC

- Challenge to solicitation and allocation rules
- D.C. Circuit ordered regulations be vacated
 - Opinion had broad language about nonconnected PAC's First Amendment rights
- District court vacated challenged regulations
- Commission did not seek further judicial review and vacated the regulations

- C. ***EMILY's List v. FEC***, 569 F. Supp. 2d 18 (D.D.C. 2008), *rev'd*, 581 F.3d 1 (D.C. Cir. 2009).
1. Nonconnected PAC challenged rules about solicitation and allocation for federal and non-federal activities at 11 CFR 100.57 and 106.6 as arbitrary and capricious, beyond the scope of the Commission's statutory authority, not promulgated with the proper notice and contrary to the First Amendment.
 2. The United States Court of Appeals for the District of Columbia Circuit ordered that the district court vacate the challenged regulations (9/18/09). The majority opinion broadly discusses the First Amendment rights of nonconnected PACs and states that non-profit entities can receive unlimited contributions from individuals or other nonprofits to use for independent expenditures.
 3. On 11/30/09, the district court ordered that the regulations be vacated, and in March 2010, the Commission adopted rules that removed the vacated regulations (75 FR 13223, March 19, 2010).

Carey v. FEC

- ▣ National Defense PAC
 - Wanted to use separate bank accounts to:
 - Accept unlimited contributions to fund independent expenditures
 - Accept FECA-limited contributions to contribute to candidates
- ▣ Result:
 - District court granted preliminary relief for plaintiffs, relying on *EMILY's List*
 - Commission negotiated final judgment in plaintiffs' favor

- D.** *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).
1. National Defense PAC sought an 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 a lawsuit against the FEC.
 2. Relying on *EMILY's List* (summarized above), on 6/14/11 the U.S. District Court for the District of Columbia preliminarily 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.
 3. 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 the judgment on 8/19/11. The Commission issued a Statement on *Carey v. FEC* on 10/5/11 to provide reporting guidance for committees that maintain a non-contribution account. The statement is available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

Recent Challenges to FECA and Commission Regulations

Van Hollen v. FEC

- ▣ Plaintiff: Congressman Van Hollen
- ▣ Challenge to rules on:
 - Disclosure of contributors to corporations/unions making electioneering communications
- ▣ Alleges:
 - Regulation requires too little disclosure because
 - Only persons giving “for the purpose of furthering electioneering communications” must be disclosed

- E.** *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C.), *rev'd and remanded*, 694 F.3d 108 (D.C. Cir. 2012).
1. Challenge to FEC regulations on the disclosure of donations given to fund electioneering communications.
 2. Representative Van Hollen claims that 11 CFR 104.20(c)(9), which requires the disclosure of any donation of \$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. Van Hollen argues that 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.
 4. On 3/30/12, the U.S. District Court for the District of Columbia found that BCRA clearly requires every person who funds electioneering communications to disclose all contributors. The court also stated that Congress did not delegate authority to the FEC to narrow BCRA’s disclosure requirement through agency rulemaking.

5. But on 9/18/12, the U.S. Court of Appeals for the District of Columbia Circuit found that the lower court had erred in holding that Congress “spoke plainly” when it enacted BCRA, thus foreclosing any regulatory construction of the statute by the FEC. The appeals court reversed and remanded the case with instructions to “refer the matter to the FEC for further consideration.” The district court directed the Commission to inform the court whether the Commission “intends to pursue rulemaking or defend its current regulation.”
6. On 10/4/12, the Commission notified the district court that the agency would not initiate a rulemaking and would continue to defend the current regulation at 11 CFR 104.20(c)(9). But on 10/5/12, the Center for Individual Freedom filed a rulemaking petition asking the Commission to revise the regulation, and the district court stayed the case while the Commission considered the petition. On 3/11/13, the Commission informed the court that it would not do a rulemaking at this time, and on 3/12/13, the court lifted the stay. Supplemental briefing is now underway.

McCutcheon v. FEC

- ▣ Challenge to Biennial aggregate limits on:
 - Individual contributions to -
 - ▣ Candidates
 - ▣ Non-candidate committees
- ▣ District court dismissed case
- ▣ Now before United States Supreme Court

- F.** *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *noting probable jurisdiction*, 133 S. Ct. 1242 (U.S. Feb. 19, 2013).
1. Plaintiffs Shaun McCutcheon and the RNC argue that the biennial aggregate contribution limits at 2 U.S.C. 441a(a)(3), which currently mean individuals can give \$48,600 to candidates and \$74,600 to non-candidate committees, are unconstitutionally low and violate the First Amendment.
 2. A three-judge panel of the U.S. District Court for the District of Columbia dismissed the action. The district court re-affirmed that contribution limits are subject to intermediate scrutiny, not strict scrutiny, because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to express their associational interest in other ways.
 3. The district court held that the government had justified the aggregate contribution limits as a means of preventing circumvention of base contribution limits imposed to further the government's interest in deterring corruption and its appearance. The court found no "danger signs" that the limits were not closely drawn to achieve the governmental anti-corruption interest. The court also noted that despite the aggregate limits, individuals remain free to volunteer, join political associations and engage in independent expenditures.

4. On 10/9/12, Plaintiffs filed a notice of appeal to the U.S. Supreme Court, and on 2/19/13, the Supreme Court noted probable jurisdiction, agreeing to review the case.
- G.** *James v. FEC*, ___ F. Supp. 2d ___, 2012 WL 5353565 (D.D.C. 2012) (three-judge court), *appeal filed*, 81 U.S.L.W 3329 (U.S. Nov. 30, 2012).
1. Similar to *McCutcheon v. FEC*, in the *James* suit an individual challenges the constitutionality of 2 U.S.C. §441a(a)(3)(A) and its aggregate biennial limit on contributions to candidates, which is currently \$48,600.
 2. On 9/19/12, the U.S. District Court for the District of Columbia stayed the *James* suit until it resolved *McCutcheon*. After the district court dismissed *McCutcheon*, it also dismissed *James*, finding no basis to distinguish between the two cases.
 3. On 11/1/12, Plaintiffs filed a notice of appeal to the U.S. Supreme Court. On 2/4/13, the FEC filed its motion to dismiss or affirm.

RTAA (fka RTAO) v. FEC

- ▣ Challenge to:
 - FEC regulations and enforcement approach affecting independent groups
- ▣ Permissible:
 - FEC's definition of express advocacy
 - FEC's case-by-case approach to determining "major purpose"

H. *Real Truth about Abortion, Inc. (RTAA) v. FEC (formerly Real Truth about Obama, Inc. v. FEC)*, 796 F. Supp. 2d 736 (E.D. Va. 2011), *aff'd*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (U.S. Jan. 7, 2013).

1. The plaintiff brought a pre-enforcement challenge to several FEC regulations and its approach to determining political committee status. RTAA asserted that 11 CFR 100.22(b), defining when a communication "expressly advocates" the election or defeat of a candidate, and the FEC's application of the Supreme Court's "major purpose" test for political committee status are overbroad, too vague, and in violation of the First and Fifth Amendments.
2. The U.S. District Court for the Eastern District of Virginia granted the Commission's request for summary judgment. The court found that the Commission's definition of express advocacy at 11 CFR 100.22(b) is consistent with the Supreme Court's opinion in *FEC v. Wisconsin Right to Life, Inc.*, and that the Commission's "fact-intensive, case-by-case adjudication" of whether a group's major purpose is the election or defeat of federal candidates is lawful.

3. On 6/12/12, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling. The Fourth Circuit concluded that section 100.22(b)'s definition of express advocacy was consistent with *Wisconsin Right to Life* and *Citizens United* and not unduly vague, and also held that the agency's approach to determining "major purpose" was permissible.
4. On 1/7/13, the U.S. Supreme Court denied RTAA's request for certiorari.

Free Speech v. FEC

- ▣ Challenge to:
 - FEC's regulation of express advocacy
 - Enforcement approach to political committee status and FECA solicitations
- ▣ Similar to *RTAA v. FEC*

- I. ***Free Speech v. FEC***, Civ. No. 12-127 (D. Wy. March 19, 2013), *appeal filed*, No. 13-8033 (10th Cir. March 25, 2013).
1. Similar to *RTAA v. FEC*, this case challenges the regulatory definition of express advocacy in 11 CFR 100.22(b) and the FEC's approach to determining political committee status and when a "solicitation" for "contributions" subject to FECA is made.
 2. Free Speech submitted an advisory opinion request asking whether eleven proposed advertisements about President Obama were express advocacy, whether four proposed donation requests would be "solicitations," and whether the group's proposed activities would require it to register as a political committee. AO 2012-11: Two of eleven Free Speech ads are express advocacy, four are not, and two of the proposed donation requests are not "solicitations."
 3. Free Speech filed suit in the U.S. District Court for the District of Wyoming, arguing that the FEC's regulatory definition of express advocacy as well as its methods of determining "major purpose" and when "solicitations" occur violate the First Amendment.

4. The district court denied preliminary relief on 10/3/12 and permanent relief on 3/19/13. The court concluded that the FEC's regulatory definition of express advocacy and its case-by-case application of the major purpose test are essential in identifying the communications and entities that are subject to FECA disclosure requirements, which help the electorate make informed decisions. The court also ruled that the FEC's standard for determining when a request for funds "solicits" a "contribution" under FECA is not vague or overbroad.
5. Free Speech has appealed to the U.S. Court of Appeals for the Tenth Circuit. Oral argument is set for May 2013.

HLF v. FEC

- ▣ Challenge to:
 - FECA's regulation of electioneering communications

- ▣ Whether advertisements included references to “clearly identified” federal candidate

- J.** *Hispanic Leadership Fund, Inc. v. FEC*, ___ F. Supp. 2d ___, 2012 WL 4759238 (E.D. Va. Oct. 4, 2012).
1. This is another constitutional challenge based on whether FECA applies to a group of proposed advertisements, in this case whether proposed television ads qualified as "electioneering communications" based on whether they included references to "clearly identified" federal candidates under 2 U.S.C. 434(f). That in turn depends on whether the candidate's identity is "apparent by unambiguous reference" under 2 U.S.C. 431(18).
 2. AO 2012-19: The Commission was unable to approve a response about whether five of eight proposed television ads by American Future Fund referenced a clearly identified federal candidate. The five ads used phrases such as "this Administration" and "the White House" (with visual depictions of the White House), and one included an unidentified audio clip of President Obama's voice.
 3. HLF filed a complaint in the U.S. District Court for the Eastern District of Virginia. HLF wanted to produce essentially identical ads and claimed that its proposed ads were not electioneering communications because they did not reference a clearly identified candidate, but said it was harmed by uncertainty as to whether electioneering communication disclosure requirements applied.

4. On 10/4/12, the district court held that three of the five HLF ads referenced a clearly identified federal candidate and were thus electioneering communications. The court found that an ad criticizing the oil policies of “the White House” and “the Administration” and an ad that referred to “the parents of government run healthcare” together with a textual reference to “the White House” both clearly identified President Obama. But the court held that the ad with the audio clip of Obama’s voice did not clearly identify him unless there was an evidentiary showing that the candidate’s voice was well-recognized. The court rejected HLF’s as-applied challenge to the electioneering communications provisions.
5. Neither party appealed the district court’s decision.

Stop This Insanity, Inc. Employee Leadership Fund, et al v. FEC

- ▣ A corporation's SSF wanted to use a non-contribution account to fund independent expenditures free of the usual restrictions
- ▣ The district court dismissed the case, distinguishing between SSFs and non-connected PACs

- K.** ***Stop This Insanity, Inc. Employee Leadership Fund v. FEC***, ___ F. Supp. 2d. ___, 2012 WL 5383581 (D.D.C. Nov. 5, 2012), *appeal filed*, No. 13-5008 (D.C. Cir. Jan. 2, 2013).
1. AOR 2012-01: request by a corporation's separate segregated fund ("SSF") to establish a non-contribution account and to solicit unlimited contributions from members of its restricted class, as well as other persons, in order to fund independent expenditures. The Commission could not reach a majority response.
 2. Stop This Insanity, its SSF the Leadership Fund, and a group of potential contributors filed a complaint in the U.S. District Court for the District of Columbia challenging the application of contribution and solicitation restrictions to a non-contribution account of an SSF as an unconstitutional limit on their First Amendment rights of freedom of speech and association.
 3. On 11/5/12, the court denied the plaintiffs' request for a preliminary injunction and granted the Commission's motion to dismiss the case. The court distinguished between SSFs and nonconnected PACs, stating that an SSF may receive unlimited and undisclosed administrative support from a sponsoring organization, and in exchange, the SSF must limit its solicitations to a restricted class of individuals associated with the connected organization.
 4. The Plaintiffs filed a notice of appeal on 1/2/13, and briefing is now underway in the Court of Appeals for the D.C. Circuit.

Wagner v. FEC

- ▣ Challenge to:
 - Prohibition on contributions by individual federal government contractors
- ▣ Plaintiffs claim 2 U.S.C. §441c violates:
 - First Amendment
 - Equal Protection component of the Fifth Amendment

- L.** *Wagner v. FEC*, ___ F. Supp. 2d ___, 2012 WL 5378224 (D.D.C. Nov. 2, 2012), *appeal filed*, No. 12-5365 (D.C. Cir. Nov. 8, 2012).
1. Challenge to the prohibition on contributions by federal government contractors as applied to individual contractors.
 2. Plaintiffs claim that 2 U.S.C. § 441c violates the First Amendment and the Equal Protection component of the Fifth Amendment.
 3. On 11/2/12, the United States District Court for the District of Columbia upheld the Act's prohibition on contributions by individual federal contractors. The district court held that the ban is consistent with the First Amendment because it is closely drawn to serve the government's important interest in preventing actual and apparent corruption. The court also held that the contractor contribution ban does not violate the Fifth Amendment because individual contractors are not similarly situated to other persons who can generally make contributions, specifically federal employees and persons associated with corporations.
 4. The plaintiffs filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit on 11/8/12. Briefing is now complete, and oral argument is set for May 2013.

II. Policy Update

Topics

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

Interpretive Rule

- ▣ “Publicly Disseminated” Date

Interpretive Rule

“Publicly Disseminated” Date

- ▣ For Independent Expenditures disseminated on multiple dates



- ▣ Report as disseminated on “any reasonable date”
 - Start with date filer receives/exercises control over items
 - End at actual dissemination

A. Interpretive Rules

1. Interpretive Rule on when Certain Independent Expenditures are “Publicly Disseminated” for Reporting Purposes (76 FR 61254 (October 4, 2011))

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

- The Interpretive Rule addresses 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.
- 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.
- The guidance sets out five (5) example dates.

Read these and more in the Interpretive Rule:

http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-13.pdf.

Draft Interpretive Rule

Reporting Ultimate Payee of Disbursements

- ☐ Clarifies reporting requirements for:
 - Disbursements made through intermediaries
(Three specific situations)
- ☐ Comments were due
March 4, 2013



2. **Draft Interpretive Rule on Political Committee Reporting of Ultimate Payees of Disbursements**

Clarifies the reporting requirements for disbursements made through intermediaries in three specific situations:

- a) When a political committee reimburses an individual who used personal funds to pay committee expenses over \$200 to a vendor;
- b) When a candidate uses personal funds to pay committee expenses aggregating over \$200 to a single vendor without receiving reimbursement; and
- c) When a political committee's payment of its credit card bill includes charges of over \$200 to a single vendor.

Potential/Ongoing Rulemakings

- ▣ Treatment of LLPs
- ▣ Internet Communication Disclaimers
- ▣ *Citizens United*
- ▣ *EMILY's List/SpeechNow*

B. Potential/Ongoing Rulemakings

Include:

1. **Treatment of LLPs**
Treating all LLPs that have elected IRS corporate tax treatment as corporations for purposes of the Act.
2. **Internet Communication Disclaimers**
3. ***Citizens United***
Review of regulatory provisions that prohibit either independent expenditures or electioneering communications by corporations or labor organizations.
4. ***EMILY's List***
Repeal of solicitation rule at 100.57 and allocation provisions at 106.6(c) and 106.6(f).

NPRM on LLPs

- ▣ Grew out of AO 2008-05 (Holland & Knight)
- ▣ Treatment of LLPs electing corporate tax treatment as corporations under the Act
- ▣ Comments were due February 11

C. Treatment of LLPs

1. **AO 2008-05 (Holland & Knight)**
2. Revises rules on partnerships so that LLPs opting for association treatment (“Corporate LLPs”) would be treated as corporations under Part 114.
 - a) Would no longer be able to make contributions or attribute them to their partners;
 - b) Would be able to establish SSFs.
3. Comments were due by February 11, 2013.
4. NPRM published in Federal Register on at 77 FR 74121 (December 13, 2012). Available online at <http://sers.nictusa.com/fosers/showpdf.htm?docid=103514>.

ANPRM - Internet Disclaimers

- ▣ Grew out of several AOs:
 - 2010-19 (Google)
 - 2011-09 (Facebook)

- ▣ See also (for tech./disclaimer issues):
 - 2011-13 (DSCC)

- D. Commission Guidance on Disclaimers and Internet Communications**
Several recent AOs asked about disclaimers and Internet communications:
1. **AO 2010-19 (Google)**
Disclaimer requirement application to small (90 character) internet ads that link to a landing page with a disclaimer.
 2. **AO 2011-13 (DSCC)**
Disclaimer requirements for national party committee website.
 3. **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. Published in the *Federal Register* on October 13, 2011. Available at <http://sers.nictusa.com/fosers/showpdf.htm?docid=97168>.

Citizens United

- ▣ Commission not enforcing ban on:
 - Corporations/Labor Unions making
 - ▣ Independent expenditures
 - ▣ Electioneering communications

F. *Citizens United*

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>.

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

Citizens United

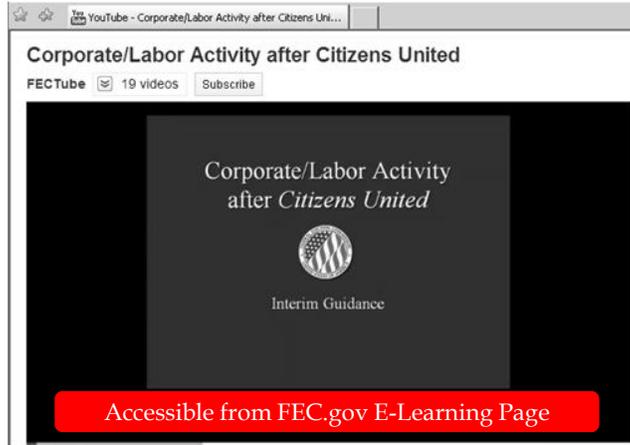
- ▣ Notice of Proposed Rulemaking
 - Approved & published in *Federal Register* on December 27, 2011

- ▣ Hearing was March 7, 2012

3. **Notice of Proposed Rulemaking**
 - a) NPRM asked for comments on proposed changes to Commission regulations to implement the Supreme Court's ruling.
 - b) Comments were due by February 3, 2012; Reply comments were due by February 17, 2012.
 - c) Hearing was March 7, 2012.
 - d) NPRM published in Federal Register at 76 Fed. Reg. 80803 (December 27, 2011). Available online at <http://sers.nictusa.com/fosers/showpdf.htm?docid=99892>.

Citizens United

Additional interim guidance on FECTube



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 non-contribution account

G. *EMILY's List*

1. Provisions at issue:

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

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>.

Advisory Opinions

- ▣ Independent Expenditure Committees and Accounts
- ▣ SSFs – Restricted Class/ Administration
- ▣ Affiliation
- ▣ “Express Advocacy” and Electioneering Communications
- ▣ Payroll Deduction
- ▣ Contributions by Text Message

H. **Advisory Opinions**

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. **SSFs – Restricted Class / PAC Administration**
3. **Affiliation**
4. **Express Advocacy and Electioneering Communications**
5. **Payroll Deduction**
6. **Contributions by Text Message**

IE Committees and Accounts

- ▣ 2010-09 (Club for Growth)
- ▣ 2010-11 (Commonsense Ten)
- ▣ 2011-12 (Majority PAC)
- ▣ 2012-01 (Stop This Insanity, Inc. Employee Leadership Fund)
- ▣ 2012-18 (National Right to Life Committee, Inc.)

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 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. AOR 2012-01 (Stop This Insanity, Inc. Employee Leadership Fund)

Request by an SSF to establish a non-contribution account and to solicit unlimited contributions from members of its restricted class, as well as other individuals, political committees, corporations and labor organizations in order to fund independent expenditures. The Commission could not reach a majority response. See *Stop This Insanity Employee Leadership Fund, et al. v. FEC*.

5. AO 2012-18 (National Right to Life Committee, Inc.)

Corporation's payment of establishment, administrative, and solicitation expenses of an IE-only political committee are contributions.

**SSFs:
Restricted Class/Administration**

▣ 2012-02 (Wawa)

J. Restricted Class / PAC Administration

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

1. AO 2012-02 (Wawa)

Salaried managers who supervise hourly employees are members of the restricted class.

Affiliation

- ▣ 2012-12 (Dunkin' Brands)
- ▣ 2012-21 (Primerica, Inc.)
- ▣ 2012-23 (Snake River)

K. Affiliation

1. AO 2012-12 (Dunkin' Brands)

SSF may solicit and accept contributions from non-corporate franchisees/licensees (and their executive and administrative personnel), because its franchisees/licensees are “affiliated.”

2. AO 2012-21 (Primerica, Inc.)

Corporations and their PACs are disaffiliated after spin-off.

3. AO 2012-23 (Snake River)

With prior approval, a group of trade associations may solicit their corporate members’ executives and stockholders for contributions to the SSF of an affiliated cooperative.

Express Advocacy & Electioneering Communications

- ▣ 2012-11 (Free Speech)
- ▣ 2012-19 (American Future Fund)

L. **Express Advocacy and Electioneering Communications**

1. **AO 2012-11 (Free Speech)**

Two advertisements by nonprofit association are express advocacy because they identify a federal candidate with a position on an issue (President Obama/financial bailouts) and instruct viewers to vote against those who take that position on the issue. See *Free Speech v. FEC*.

2. **AO 2012-19 (American Future Fund)**

Two broadcast advertisements referencing “Obamacare” and “Romneycare” are electioneering communications because they clearly identify a federal candidate during the electioneering time periods. See *Hispanic Leadership Fund v. FEC*.

Payroll Deduction

- ▣ 2012-15 (American Physical Therapy Assn.)

M. Payroll Deduction

AO 2012-15 (American Physical Therapy Assn.)

Corporations owned by individual members of a membership organization (that also qualifies as a trade association) may provide payroll deduction to enable employees of the member-owned corporations to contribute to the membership organization's SSF. The membership organization must pay the corporations in advance for their services.

Text Contributions

- ▣ 2012-17 (m-Qube I)
- ▣ 2012-26 (m-Qube II)
- ▣ 2012-30 (Revolution Messaging)
- ▣ 2012-31 (AT&T)
- ▣ 2012-35 (GTSG)



Recent Developments

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N. **Text Contributions**

The Commission issued AOs analyzing contributions made or initiated by text message.

1. AO 2012-17 (m-Qube I)

A vendor may provide political committees the option to accept individual contributions via text message because its business practices are consistent with the recordkeeping and reporting requirements of the Act.

2. AO 2012-26 (m-Qube II)

Campaigns that receive texted contributions are solely responsible for determining the eligibility of contributors, and must satisfy their responsibilities under the Act.

3. AO 2012-28 (CTIA-II)

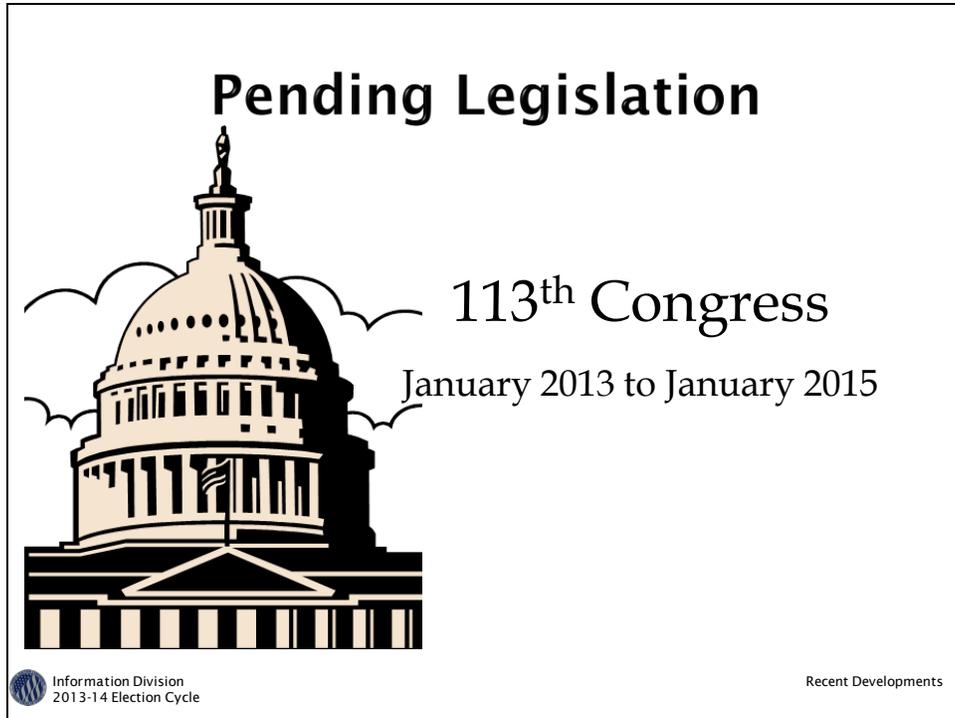
Trade association and its members may offer their text-to-donate services to political committees without assuming responsibility for the legality of the resulting contributions under the Act when the contributions are processed by a connection aggregator.

4. AO 2012-30 (Revolution Messaging)

A telecommunications company may use text messaging technology to process campaign contributions in excess of \$50 per billing cycle and \$200 per calendar year or election cycle. It may also share premium common short codes among various federal campaigns and committees when processing such transactions.

5. **AO 2012-31 (AT&T)**
A wireless cell phone service provider may charge political committees a lower rate for fundraising by text message than it charges to commercial content providers, without making a prohibited corporate contribution.
6. **AO 2012-35 (GTSG)**
An e-commerce transaction company may receive small-dollar contributions initiated via text message and paid for by credit or debit card, deduct its fee and forward the net amount to its political committee customers.

III. Pending Legislation



Response to *Citizens United*

H.R. 148, DISCLOSE 2013 Act

Rep. Van Hollen MD-8



- ▣ Introduced January 3, 2013
- ▣ Enhances Disclosure
- ▣ Extends Stand by Your Ad
- ▣ Revises IE and EC Definitions
- ▣ Requires Corporate Disclosure to Shareholders
- ▣ Expands Lobbyist Disclosure of Campaign Expenditures

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Recent Developments

A. **RESPONSE TO *CITIZENS UNITED***

1. **H.R. 148, *DISCLOSE 2013 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 2013* or the *DISCLOSE 2013 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 related transfers, which include transfers to or from entities that have made \$50,000 in ECs or IEs in last two years.
- Extend Independent Expenditure definition to functional equivalent of express advocacy
- Expand Electioneering Communications time period
- Extend Stand by Your Ad. Super PACs and other entities would be subject to these requirements, with new requirements for Top Five Funders list for TV ads and Top Two Funders for radio ads.
- Require Corporate Disclosure to Shareholders
- Expand Lobbyist Disclosure of Campaign Expenditures
- Requires reporting of IEs and ECs under Lobbyist Disclosure Act.

Response to *Citizens United*

H.R. 195, Ethics in Foreign Lobbying Act of 2013



Rep. Marcy Kaptur OH-9

- ▣ Introduced January 4, 2013
- ▣ Prohibits contributions/expenditures by committees controlled by foreign-owned corporations
- ▣ Requires FEC to establish a clearinghouse of public information

2. **H.R. 195, “*Ethics in Foreign Lobbying Act of 2013*”
(Rep. Marcy Kaptur of Ohio (9th C.D.))**

The bill would amend FECA to prohibit contributions and expenditures by multicandidate political committees controlled by foreign-owned corporations. Bill would also require the FEC to establish a clearinghouse of public information regarding the political activities of foreign principals and agents of foreign principals that includes all reports filed pursuant to the Lobbying Disclosure Act, the Foreign Agents Registration Act, and the Ethics in Government Act.

Referred to the Committee on House Administration and House Judiciary Committee.

Pending Bill: Senate E-Filing

S. 375, Senate Campaign Disclosure Parity Act



Senator Tester of Montana

- ▣ Introduced February 25, 2013
- ▣ Requires the electronic filing of Senate reports
- ▣ In 112th Congress, full Senate Rules Committee hearing held on S. 219 on April 25, 2012

- B. SENATE ELECTRONIC FILING**
S. 375, “Senate Campaign Disclosure Parity Act” (Senator Tester of Montana)
This bill would require Senate candidates to file designations, statements, and reports in electronic form. In 112th Congress, Senator Tester introduced same bill as S. 219 and a full Senate Rules Committee hearing on the bill was held on April 25, 2012.
- Referred to the Senate Rules and Administration Committee.*

Pending Bill: Public Funding

H.R. 260

Rep. Gregg Harper MS-3



- ▣ Terminates public funding for Presidential campaigns and nominating conventions
- ▣ Terminates Election Assistance Commission
- ▣ In 112th Congress, H.R. 3463 passed in House by vote of 235 to 190 on December 1, 2011

C. PUBLIC FUNDING

1. H.R. 260 (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. It also would terminate the Presidential election public funding programs. In 112th Congress, H.R. 3463 passed the House of Representatives by a vote of 235 to 190 on December 1, 2011.

Referred to the Committee on House Administration.

Pending Bill: Public Funding

H.R. 95

Rep. Tom Cole of OK-4



- ▣ Ends \$3 income tax check-off and convention funding
- ▣ Terminates the Presidential Election Campaign Fund and Presidential Primary Matching Payment Account
- ▣ In 112th, H.R. 359 passed House 239-160 on February 14, 2011

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2. **H.R. 95 (Rep. Cole of Oklahoma (4th C.D.))**

This bill would amend the Internal Revenue Code of 1986 to terminate the taxpayer election to designate \$3 of income tax liability for financing of presidential election campaigns, the Presidential Election Campaign Fund, and the Presidential Primary Matching Payment Account. This would also terminate the funding of party conventions. In the 112th Congress, H.R. 359 passed House 239-160 on February 14, 2011.

Referred to Committee on House Administration and the Committee on Ways and Means.

Pending Bill: Public Funding

H.R. 268

Rep. John P. Sarbanes MD -3



- ▣ Introduced January 15, 2013
- ▣ Establishes public funding for House candidates
- ▣ Revises disclosure period of ECs and certain taxes on political organizations

3. **H.R. 268, “*Grass Roots Democracy Act of 2013*”
(Rep. Sarbanes of Maryland (3rd C.D))**

This bill establishes public funding for House candidates, modifies bundler disclosure requirements and expands the Electioneering Communication period from 60 to 120 days. The bill also amends the Internal Revenue Code to repeal alternative tax on political organizations with taxable income and tax exemption on proceeds of political fundraisers. The bill also includes mandatory electronic filing of reports and statements with the FEC, which would include reports filed by Senate candidates.

Referred to the Committee on House Administration, House Ways and Means Committee, and Energy and Commerce Committees.

Pending Bill: Public Funding

H.R. 269, Fair Elections Now Act

Rep. John Yarmuth KY-3



- ▣ Introduced January 15, 2013
- ▣ Establishes public funding for House elections
- ▣ Identical to bill in 112th (Rep. Larson)

4. **HR 269, “Fair Elections Now Act”**
(Rep. Yarmuth of Kentucky (3rd C.D.))
This bill would provide for the public financing for Congressional campaigns.

Referred to the Committee on House Administration.

Pending Bill: Public Funding

H.R. 270, The Empowering Citizens Act

Rep. David Price NC-4



- ▣ Introduced January 15, 2013
- ▣ Reforms Presidential public funding
- ▣ Establishes public funding for House elections

5. **H.R. 270, “*The Empowering Citizens Act*”
(Rep. Price of North Carolina (4th C.D.)**

This bill would amend the Internal Revenue Code to reform the system of public financing for Presidential elections. The bill also establishes a system of public financing for Congressional elections and promotes the disclosure of disbursements made in coordination with campaigns for election for Federal office.

Referred to the Committee on House Administration and the House Ways and Means Committee.

Pending Bill: Party Conventions

S. 118, H.R.94

Senator Coburn and
Rep. Cole of Oklahoma



- ▣ Amends Internal Revenue Code to prohibit use of public funds for political party conventions
- ▣ In 112th, H.R. 359 passed House 239-160 on February 14, 2011

D. PARTY PRESIDENTIAL NOMINATING CONVENTIONS

1. S. 118 (Senator Tom Coburn of Oklahoma)

This bill would amend the Internal Revenue Code of 1986 to prohibit the use of public funds for political party conventions.

Referred to Senate Rules Committee.

2. H.R. 94 (Rep. Cole of Oklahoma (4th C.D.))

This bill amends the Internal Revenue Code of 1986 to prohibit the use of public funds for political party conventions. In 112th Congress, H.R. 359 was introduced on January 20, 2011; passed the House, 239-160, on February 14, 2011.

Referred to Committee on House Administration.

Pending Bills: Leadership PACs

S. 64

Senator Vitter of Louisiana

- Prohibits authorized committees and leadership PACs from employing spouse or immediate family of candidate



H.R. 465

Rep. Mike Capuano MA-7

- Prohibits the conversion of leadership PAC funds to personal use



E. LEADERSHIP PACS

1. **S. 64 (Senator Vitter of Louisiana)**

This bill would prohibit authorized committees and leadership PAC's from employing the spouse or immediate family members of any candidate or federal office holder connected to the committee.

Referred to the Senate Rules and Administration Committee.

2. **H.R. 465 (Rep. Capuano of Massachusetts (7th C.D.))**

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

Referred to the Committee on House Administration.

Pending Bill: FEC Website

H.R. 648

Rep. Ted Deutch FL -21



- ▣ Introduced February 13, 2013
- ▣ Requires FEC to disclose contents of political advertisements on its website

F. **FEC WEBSITE**

H.R. 648 (Rep. Ted Deutch of Florida (21st C.D.))

This bill would require the FEC to establish and operate a website through which members of the public may view the contents of certain political advertisements. It also would require the sponsors of such advertisements to furnish the contents of the advertisements to the FEC.

Referred to the Committee on House Administration.

Pending Bill: Death of Candidate

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

H.R. 186

Rep. Walter Jones Jr. NC-3



- ▣ Introduced January 4, 2013
- ▣ *Passed House in 112th Congress as H.R. 406*
- ▣ *Passed House in 111th Congress as H.R. 749*
- ▣ *Passed House in 110th Congress as H.R. 3032*

G. DEATH OF A CANDIDATE

H.R. 186 (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 112th, 111th and 110th Congresses.

Stay Current

FEC *Record* Newsletter,
FEC *Weekly Digest*
&
FEC Web Site

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Recent Developments

IV. 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

Help Us Help You!

Please complete an evaluation
of this workshop.

Corporate PAC Operations Part 1

11:15 a.m. – 12:45 p.m.

9th Floor Hearing Room
<http://fec.adobeconnect.com/connect9>