

# RECENT DEVELOPMENTS IN CAMPAIGN FINANCE LAW



April 30, 2014

## Objectives

- ▣ Review guidance on corporate/labor expenditures, Super PACs & Hybrid PACs
- ▣ Update status of pending litigation and review recent court decisions
- ▣ Highlight latest policy developments
  - Technology: Text Contributions, Disclaimers, Bitcoins
  - Administrative Fines Extension and Expansion

## CORPORATE/LABOR EXPENDITURES, SUPER PACs AND HYBRID PACs

### Corporate/Labor Expenditures

- ▣ Now permitted (after *Citizens United*):
  - Independent Expenditures
  - Electioneering Communications
- ▣ Contributions remain prohibited
- ▣ Disclaimers and disclosure required

#### I. Corporate and Labor Expenditures, Super PACs and Hybrid PACs

##### A. Corporate and Labor Expenditures

1. Corporations and labor organizations are now permitted to make independent expenditures and electioneering communications. (*Citizens United v. FEC*)
2. The communications must contain disclaimers and corporations and labor organizations making must file disclosure reports. For independent expenditures, they file on FEC **Form 5**, and must also file **48-Hour** and **24-Hour Reports** for certain pre-election independent expenditures.
3. Congress had prohibited corporations and unions from using treasury funds to make independent expenditures or electioneering communications, but the Supreme Court struck down the ban when challenged by a corporation in *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010).

## ***Citizens United* Rulemaking**

- ▣ Commission published Notice of Proposed Rulemaking in December 2011
- ▣ Held public hearing in March 2012

### **B. *Citizens United* Rulemaking**

#### **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 online at

<http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>

#### **2. Notice of Proposed Rulemaking (published December 2011)**

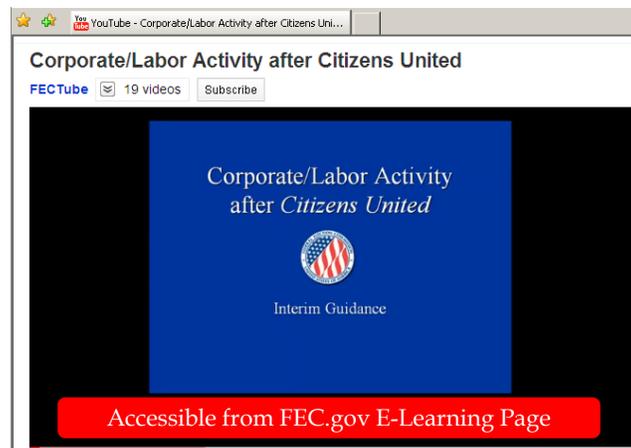
- a) The Commission issued an NPRM and received comments on proposed changes to Commission regulations to implement the Supreme Court’s ruling.
- b) Hearing was held on March 7, 2012.
- c) NPRM published in Federal Register at 76 Fed. Reg. 80803 (December 27, 2011). Available online at <http://sers.fec.gov/fosers/showpdf.htm?docid=99892>.

3. **More information:**

<http://www.fec.gov/law/recentdevelopments.shtml#CorpLaborExpenditures>  
and  
<http://www.fec.gov/info/elearning.shtml>

## Corporate/Labor Expenditures

Additional interim guidance on FECTube



## Super PACs

- ▣ Groups making only independent expenditures are permitted to:
  - Accept unlimited contributions from individuals (*SpeechNow*)
  - Accept unlimited contributions from corporations and labor organizations (AO 2010-11 (Commonsense Ten))

### II. Super PACs

- A. Groups making only independent expenditures are permitted to accept unlimited contributions from individuals, corporations and labor organizations.
- B. There had been contribution limits for all PACs, but following *Citizens United*, the U.S. Court of Appeals for the D.C. Circuit struck down the limits as applied to independent expenditure-only groups in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).
- C. Following those two decisions and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), the Commission determined in Advisory Opinion 2010-11 (Commonsense Ten) that limits on contributions from corporations, labor organizations, and other political committees to independent expenditure-only groups were also unconstitutional.

## Super PACs

Must register and report (*SpeechNow*)

- File FEC Form 1 + IE-Only Letter

The image displays two documents related to Super PAC reporting. On the left is the top portion of an FEC Form 1, 'STATEMENT OF ORGANIZATION'. It includes fields for 'NAME OF COMMITTEE (if NA)', 'ADDRESS (number and street)', 'CITY', 'COMMITTEE'S E-MAIL ADDRESS', and 'COMMITTEE'S WEB PAGE ADDRESS (URL)'. On the right is an 'IE-Only Letter' from the Federal Election Commission, dated 9/9/10. The letter is addressed to the Treasurer and discusses the 'SpeechNow v. FEC' case, stating that the committee intends to make independent expenditures and raise funds in unlimited amounts, and that it will not use these funds to make contributions to federal candidates or committees. The letter is signed by the Treasurer.

### D. Super PAC Reporting

1. Independent expenditure-only/Super PACs must register with the Commission and file disclosure reports.
2. To register with the Commission, must file FEC Form 1 and an IE-Only Letter, as shown in Advisory Opinion 2010-09 (Club for Growth).
3. The court upheld the organizational and reporting requirements for independent expenditure-only political committees in *SpeechNow.org*.

## Super PACs

- ❑ Federal candidates may only solicit funds subject to federal limits (AO 2011-12 (Majority PAC))
- ❑ Corporations may establish and administer; costs are reportable contributions  
(AO 2010-09 (Club for Growth), 2012-18 (NRLC))
- ❑ Leftover campaign funds  
(AO 2012-34 (Freedom PAC, Friends of Mike H))

### E. Super PAC Advisory Opinions

In the wake of the *Citizens United*, *SpeechNow*, and *EMILY's List* cases, the Commission was presented with other advisory opinion requests that explored the boundaries of those cases and, in some cases, what they meant when read together. All AOs are available at the Commission's searchable system at <http://saos.fec.gov/saos/searchao>.

1. **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.
2. **AO 2010-09 (Club for Growth) and 2012-18 (National Right to Life Committee, Inc.)**  
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 reportable contribution to the IE-only committee.
3. **2012-34 (Freedom PAC and Friends of Mike H)**  
A former Senate candidate’s campaign committee may use leftover campaign funds to contribute \$10,000 or more to an IE-only political committee.

## Hybrid PACs

PAC with separate bank accounts that operates as both a regular nonconnected PAC and as a Super PAC.

- Account 1: FECA-limited funds used for contributions to federal candidates and committees
- Account 2: Unlimited contributions used to finance independent expenditures

*(EMILY's List and Carey)*

### III. Hybrid PACs

- A. Nonconnected political committees are permitted to maintain separate accounts for independent expenditures and contributions. Unlimited contributions from individuals, corporations, and labor organizations may be accepted to finance independent expenditures, while FECA-limited contributions must be used to make contributions.
- B. Under *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), and *Carey v. FEC*, 791 F. Supp. 2d (D.D.C. 2011), the contribution limits that would otherwise apply to all bank accounts of a nonconnected committee are unconstitutional.

## Hybrid PACs

### Commission Guidance:

- Notify FEC by letter or electronic submission
- Report all receipts and disbursement for both accounts
- Allocate administrative expenses based on activity for each account

#### C. **Commission guidance on Hybrid PACs**

1. The Commission issued a Statement on 10/5/11 that provides reporting guidance for hybrid PACs. The statement is available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.
2. **More information:**  
<http://www.fec.gov/law/recentdevelopments.shtml#HybridPACs>.

## Hybrid SSFs?

- ▣ AO 2012-01 (Stop This Insanity, Inc. Employee Leadership Fund)
- ▣ 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 (*Stop This Insanity, Inc. Employee Leadership Fund et al v. FEC*)

### D. Hybrid SSFs?

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 appealed to the Court of Appeals for the D.C. Circuit and oral argument was held on November 19, 2013.

## PACs Americana

	SSF	Nonconnected	Super PAC	Hybrid PAC
<b>Paying Admin Expenses</b>	Connected Organization	Limited Contributions	Unlimited Contributions	Allocation corresponding to Activity
<b>Funding Sources</b>	Restricted Class of Individuals	Public, but no Corp/Union \$	Public, including Corp/Union \$	Account #1- Public, but no Corp/Union \$ Account #2 - Public, Corp/Union \$ okay
<b>Limits &amp; Prohibitions</b>	All Federal Limits and Prohibitions	All Federal Limits and Prohibitions	No Limits or Corp/Labor Ban	Acct. #1- All Limits and Prohibitions Acct.#2- No Limits or Corp/Labor Ban
<b>Supporting Candidates</b>	Contributions & Ind Exp's	Contributions & Ind Exp's	Ind Exp's Only	Acct.#1 - Contrib's & Ind Exp's Acct.#2 - IE's Only

## Key Results

- ▣ Corporations & unions can spend treasury funds on independent expenditures and electioneering communications
- ▣ SuperPACs & Hybrid PACs can use unlimited contributions, including corporate/union funds, to finance independent expenditures

## LITIGATION UPDATE

### **Litigation Topics**

- ▣ Contributions
- ▣ Express Advocacy & PAC Status
- ▣ Electioneering Communications
- ▣ Administrative Fines

## I. Contributions

### *McCutcheon v. FEC*

- ▣ Supreme Court strikes down biennial aggregate limits on overall individual contributions to:
  - ▣ Candidates
  - ▣ Party Committees
  - ▣ PACs
  
- ▣ Limits violate First Amendment

- A. *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 Republican National Committee 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.
  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. Plaintiffs filed a notice of appeal to the U.S. Supreme Court, which agreed to review the case. In October 2013, the Supreme Court heard oral argument.
5. On April 2, 2014, the Supreme Court issued its decision, concluding that the biennial contribution limits are unconstitutional under the First Amendment.

## *McCutcheon v. FEC*

For 2013-14 Elections	Candidate per election	National Party per year	State, District & Local Party per year	Any PAC per year	Special Limits
Individual	\$2,600	\$32,400	\$10,000 (combined)	\$5,000	<del>\$123,200 biennial limit</del>
National Party	\$5,000	No Limit	No Limit	\$5,000	\$45,400 per Senate campaign
State, District & Local Party	\$5,000 (combined)	No Limit	No Limit	\$5,000 (combined)	None
PAC: multicandidate	\$5,000	\$15,000	\$5,000 (combined)	\$5,000	None
PAC: not multicandidate	\$2,600	\$32,400	\$10,000 (combined)	\$5,000	None

- B. *James v. FEC*, 914 F. Supp. 2d 1 (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. In September 2012, 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. Plaintiffs filed a notice of appeal to the U.S. Supreme Court. In February 2013, the FEC filed a motion to dismiss or affirm.
  4. On April 7, 2014, the Supreme vacated the district court's judgment and remanded the case for further consideration in light of its decision in *McCutcheon*.

***Stop Reckless Economic Instability  
caused by Democrats PAC v. FEC***

- ▣ Challenges to:
  - Six-month waiting period for multicandidate PAC status
  - Limits on contributions from multicandidate PACs to federal party committees
  
- ▣ Limits violate First and Fifth Amendments

- C. ***Stop Reckless Economic Instability caused by Democrats PAC, et al. v. FEC***, Civil No. 1:14-397 (AJT-IDD) (E.D. Va. filed Apr. 14, 2014)
1. On April 14, 2014, Stop Reckless Economic Instability caused by Democrats PAC (“Stop PAC”), federal candidate Niger Innis, Niger Innis for Congress, Tea Party Leadership Fund and the Alexandria Republican City Committee claim that the limits infringe upon their First Amendment rights of association and expression and the Fifth Amendment’s guarantee of equal protection.
  2. They seek to have:
    - a) the six-month waiting period for multicandidate PAC status struck down, so that the limit on contributions from Stop PAC to candidates would be raised from \$2,600 per election (and indexed for inflation) to \$5,000 per election;
    - b) the limit on contributions from multicandidate PACs to state party committees raised from \$5,000 per calendar year to \$10,000 per calendar; and
    - c) the limit on contributions from multicandidate PACs to national party committees raised from \$15,000 per calendar year to \$32,400 per calendar year.

3. In each case, they seek whichever contribution limit is higher between 2 U.S.C. §441a(a)(2) (the statutory limits for multicandidate candidate committees) and 2 U.S.C. §441a(a)(1) (the statutory limits for other persons).

***Stop Reckless Economic Instability  
 caused by Democrats PAC v. FEC***

For 2013-14 Elections	Candidate per election	National Party per year	State, District & Local Party per year	Any PAC per year	Special Limits
Individual	\$2,600	\$32,400	\$10,000 (combined)	\$5,000	None
National Party	\$5,000	No Limit	No Limit	\$5,000	\$45,400 per Senate campaign
State, District & Local Party	\$5,000 (combined)	No Limit	No Limit	\$5,000 (combined)	None
PAC: multicandidate	\$5,000	\$15,000	\$5,000 (combined)	\$5,000	None
PAC: not multicandidate	\$2,600	\$32,400	\$10,000 (combined)	\$5,000	None

## ***Wagner v. FEC***

- ▣ Challenge to:
  - Prohibition on contributions by individual federal government contractors
- ▣ District court finds ban does not violate:
  - First Amendment
  - Equal Protection aspect of Fifth Amendment
- ▣ Remand: Jurisdictional issue

- D.** *Wagner v. FEC*, 901 F. Supp. 2d 101 (D.D.C. Nov. 2, 2012), *vacated*, 717 F.3d 1007 (D.C. Cir. May 31, 2013), *questions certified by*, No. 11-1841 (D.D.C. June 5, 2013).
1. This case is a constitutional challenge to the prohibition on contributions by federal government contractors, 2 U.S.C. § 441c as applied to individual contractors.
  2. In November 2012, the United States District Court for the District of Columbia upheld statute. The district court held that the ban does not violate:
    - a. the First Amendment, because it is closely drawn to serve the government's important interest in preventing actual and apparent corruption, or
    - b. the equal protection component of 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).
  3. In May 2013, the United States Court of Appeals for the District of Columbia Circuit vacated the district court's ruling. FECA contains a special judicial-review provision: 2 U.S.C. § 437h. The court held that the parties named in that provision — the Commission, national party committees, and individual voters — *must* initiate litigation over the constitutionality of the Act under that provision. The unique provision

requires the district court to certify nonfrivolous legal questions about FECA to the Court of Appeals sitting *en banc*.

4. Because the plaintiffs in *Wagner* (who are individual voters) did not invoke section 437h, the Court determined that it lacked jurisdiction, and remanded to the district court.
5. In June 2013, the district court issued an order certifying the following two questions to the *en banc* D.C. Circuit: (1) whether the contractor contribution ban violates the First Amendment; and (2) whether the ban violates the equal-protection guarantee of the Fifth Amendment.
6. Following the Supreme Court's ruling in *McCutcheon*, the parties are in the process of submitting supplemental briefing to the *en banc* D.C. Circuit.

## ***FEC v. Craig***

### ▣ Preliminary ruling:

- Using campaign funds for legal expenses that would have existed irrespective of duties as officeholder = prohibited personal use

### **E. *FEC v. Craig*, 933 F. Supp. 2d 111 (D.D.C Mar. 28 2013)**

1. This case is an FEC enforcement action alleging that former Senator Larry Craig and his campaign committee violated FECA's ban on the personal use of campaign funds, 2 U.S.C. §439a(b). The Complaint alleges that defendants spent more than \$200,000 in campaign funds to pay for then-Senator Craig's personal legal expenses resulting from an arrest for disturbing the peace in an airport.

2. Defendants moved to dismiss the suit arguing that the use of campaign funds for Craig's legal expenses was not personal, and related to his officeholder duties because his arrest occurred while he was on a layover en route to Washington, D.C.
3. In March 2013, the United States District Court for the District of Columbia denied the defendants' motion to dismiss. The Court found that the campaign funds at issue were converted to Senator Craig's personal use because the legal bills would have existed irrespective of his duties as an officeholder.
4. In September 2013, the Commission moved for summary judgment, and requested that the court impose a civil penalty and require Craig to disgorge the converted funds.

### ***Libertarian Nat'l Comm. v. FEC***

- ▣ Challenge to limit on contributions to national party committees as applied to bequests
- ▣ D.C. Circuit: In general, limiting bequests to national party does not violate First Amendment
- ▣ On March 26, D.C. Circuit dismissed as moot the as applied challenge re: \$217,734 bequest to LNC

**F.** ***Libertarian Nat'l Comm. v. FEC***, 930 F. Supp. 2d 154 (D.D.C Mar. 18, 2013), *aff'd in part*, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014).

1. Challenge to the annual limit on contributions to national party committees, 2 U.S.C. § 441a(a)(1)(B), of \$32,400 (and indexed for inflation) as applied to bequests.
2. In 2007, a Libertarian National Committee ("LNC") supporter bequeathed about \$217,000 to the LNC. The LNC wanted to accept that entire amount immediately instead of in annual amounts complying with the contribution limit.

3. In March 2013, the United States District Court for the District of Columbia held that, generally, the contribution limit is constitutional as applied to bequeathed contributions to national party committees. In February 2014, a three-judge panel of the D.C. Circuit summarily affirmed this portion of the district court's ruling.
4. In a separate portion of its March 2013 ruling, the district court asked the D.C. Circuit sitting *en banc* (all active judges) to consider whether section 441a(a)(1)(B) validly limited the \$217,000 bequest to the LNC.
5. On March 26, 2014, the *en banc* D.C. Circuit dismissed as moot the as-applied challenge re: \$217,734 bequest to LNC.
6. The deadlines for the Libertarian National Committee to ask the Supreme Court to consider the two portions of its case have not passed.

## II. Express Advocacy and PAC Status

### *Free Speech v. FEC*

- ▣ AO 2012-11 (Free Speech)
- ▣ 10<sup>th</sup> Circuit Rejected Challenges to:
  - Only-reasonable-interpretation test in FEC's definition of express advocacy
  - Enforcement approach to political committee status
  - Clear indication test for determining solicitations under FECA
- ▣ Petition for Supreme Court review pending

### *Free Speech v. FEC*

Example: “Environmental Policy”



“President Obama opposes the Government Litigation Savings Act. This is a tragedy for Wyoming ranchers and a boon to Obama’s environmentalist cronies. Obama cannot be counted on to represent Wyoming values and voices as President. This November, call your neighbors. Call your friends. Talk about ranching.”

- A. ***Free Speech v. FEC***, Civ. No. 12-127 (D. Wy. March 19, 2013), *aff'd*, 720 F.3d 788 (10th Cir. June 25, 2013).
1. This case challenges the regulatory definition of express advocacy in 11 C.F.R. § 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. Before the litigation, 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 challenged regulation and enforcement practices violate the First Amendment.
  4. The district 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. In June 2013, the U.S. Court of Appeals for the 10th Circuit affirmed the district court's dismissal of Free Speech's complaint and adopted the district court's opinion as its own.
  6. Free Speech's petition for certiorari to have the case heard by the Supreme Court is pending.

## ***Public Citizen v. FEC***

Challenge to FEC dismissal of complaint alleging Crossroads GPS should have registered and reported as Super PAC

- Must the Commission count non-express advocacy ads critical of candidates towards political committee status?
- Must the Commission analyze spending per calendar year?

- B.** *Public Citizen v. FEC*, No. 14-cv-00148 (D.D.C. filed Jan. 31, 2014)
1. Plaintiffs Public Citizen, Craig Holman, ProtectOurElections.org, and Kevin Zeese challenge the Commission's dismissal of their allegation that Crossroads GPS, an entity organized under Section 501(c)(4) of the Internal Revenue Code, violated FECA by failing to register and report as a political committee.
  2. Plaintiffs contend that the group of Commissioners whose votes prevented the Commission from moving forward with an investigation acted contrary to law.
  3. The case raises a number of issues regarding the determination of political committee status, including whether it was reasonable for the controlling group of Commissioners to decline to count ads that were not express advocacy towards political committee status and whether it was reasonable to examine Crossroads GPS's spending according to the entity's fiscal year rather than by calendar year.

### III. Electioneering Communications

#### ***Hispanic Leadership Fund v. FEC***

- ▣ See AO 2012-19 (American Future Fund)
- ▣ Challenge to:
  - FECA's regulation of certain electioneering communications
- ▣ Whether advertisements included references to “clearly identified” federal candidate

- A. ***Hispanic Leadership Fund, Inc. v. FEC***, 897 F. Supp. 2d 407 (E.D. Va. 2012).
1. In this case, the plaintiff asked a federal district court in Virginia to determine whether five TV advertisements it said it wished to air qualified as electioneering communications.
  2. To be an electioneering communication, one of the requirements is that an ad must clearly identify a federal candidate. 2 U.S.C. § 434(f)(3)(A). A candidate is clearly identified if his or her identity is apparent by unambiguous reference in the ad. 2 U.S.C. § 431(18).
  3. Four of the plaintiff's five ads contained phrases such as “this Administration” and “the White House.” The fifth ad featured an unidentified audio clip of President Obama's voice. The plaintiff argued that these ads did not unambiguously reference the identity of any federal candidate.

## ***Hispanic Leadership Fund v. FEC***

### Examples:

“Since this Administration began, gas prices are up 104%. . . . The White House says . . . . Tell the White House . . . .”

“Since 2008 began, gas prices are up 104%. . . . The government says . . . . Tell the government it’s time . . . .”

4. The five ads were identical to ads that were the subject of an advisory opinion request made before the litigation. But in AO 2012-19 (American Future Fund), the Commission was unable to obtain the necessary four votes to determine whether the ads were electioneering communications.
5. In October 2012, the District Court for the Eastern District of Virginia held that three of the five ads did clearly identify a federal candidate — President Obama — and thus were electioneering communications. The district court said that phrases such as “the White House” were unambiguous references to the President when read in the full context of the ads.
6. The district court, however, held that the ad featuring audio of the President’s voice did not clearly identify him absent an evidentiary showing that his voice would be well-recognized by the public.
7. The court also rejected the plaintiff’s constitutional challenge to the FECA’s reporting requirements for electioneering communications as applied to plaintiff’s ads.
8. Neither party appealed the ruling.

## ***Van Hollen v. FEC***

- ▣ Challenge to rules on:
  - Disclosure of contributors to corporations and unions making electioneering communications
- ▣ Alleges:
  - Regulation requires too little disclosure because
    - Only persons giving “for the purpose of furthering electioneering communications” must be disclosed
- ▣ D.C. Circuit decision and remand

- B.** *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 C.F.R. § 104.20(c)(9) is contrary to FECA. The regulation 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.”
  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. In March 2012, the U.S. District Court for the District of Columbia found that FECA 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 the Act’s disclosure requirement through agency rulemaking.

5. In September 2012, however, the U.S. Court of Appeals for the District of Columbia Circuit reversed. It found that the Act's disclosure requirement is ambiguous, thus leaving room for FEC interpretation. The appeals court remanded 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. In October 2012, the Commission notified the district court that the agency would not initiate a rulemaking and would continue to defend the current regulation at 11 C.F.R. § 104.20(c)(9). Following additional briefing and a hearing, the matter remains pending with the district court.

#### IV. Administrative Fines

### *Conway v. FEC*

- ▣ Challenge to administrative fine against campaign for filing year-end report late
- ▣ District Court: Where FEC has considered all relevant evidence and makes one of two equally plausible factual determinations, FEC's decision will be upheld

- A. *Conway v. FEC*, 3:12-cv-244-S (W.D. Ky. Aug. 20, 2013)
1. The principal campaign committee for a 2010 Senate candidate filed this action challenging the FEC's assessment of a \$4,950 civil monetary penalty against the committee for failing to timely file a year-end report.

2. The FEC assessed the penalty pursuant to its administrative fines program. Under that program, the penalty for filing an untimely report is determined by a schedule of penalties in the FEC's regulations. 11 C.F.R. § 111.43(a)-(c). A committee may challenge a penalty in federal district court, 2 U.S.C. § 437g(a)(4)(C)(iii), which may overturn the FEC's decision if it was arbitrary and capricious.
3. The committee submitted an affidavit stating that several days prior to the deadline, it had mailed a package of reports including the year-end report to the Secretary of the Senate (who was then required to forward any reports to the FEC within two business days).
4. The year-end report, however, was not among the committee's reports that the FEC received from the Secretary of the Senate. And the Senate's Office of Public Records informed the FEC that the year-end report was not among the reports in the package the committee sent to the Secretary of the Senate.
5. The district court upheld the FEC's determination that the committee failed to mail the report to the Senate. The court found that the Commission had considered the evidence submitted by the committee, and that "[w]here an agency gives consideration to all relevant evidence and then makes one of two equally plausible factual determinations, the agency has not acted arbitrarily or capriciously."

## **POLICY UPDATE**

### **Policy Topics**

- ▣ Technology-Related Developments
- ▣ Reporting
- ▣ Corporate and Labor Activity
- ▣ Contributions by Same-Sex Spouses

#### **I. Technology-Related Developments**

### **Using Technology**

- ▣ Contributions by Text
- ▣ Electronic Contribution Redesignation
- ▣ Text and Internet Disclaimers
- ▣ Tech Modernization
- ▣ Bitcoins

## Contributions by Text

- 2012-17 (m-Qube I)
- 2012-26 (m-Qube II)
- 2012-28 (CTIA II)
- 2012-30 (Revolution Messaging)
- 2012-31 (AT&T)
- 2012-35 (GTSG)



### A. 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.

## Electronic Redesignation

### Interpretive Rule

- ▣ Redesignation of contributions:
  - Must be written
  - Must be signed
- ▣ Electronic redesignation should ensure:
  - Contributor identity
  - Contributor intent

- B. Interpretive Rule on Electronic Contributor Redesignations**  
The interpretive rule describes 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](http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-02.pdf)

## Internet/Text Disclaimers

- ▣ Advance Notice of Proposed Rulemaking
  
- ▣ Regulations on disclaimers in certain Internet and text communications

**C. 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 online at <http://sers.fec.gov/fosers/showpdf.htm?docid=97168>.

## Technological Modernization

- ▣ ANPRM possible updates to address electronic transactions, including:
  - Credit and debit cards
  - Internet-based payment processing
    - ▣ *See also:* AOs 2012-08 (Repledge), 2012-22 (skimmerhat), 2012-09 (Points for Politics), 2012-03 (ActRight)
  - Text Contributions
  - “Signatures” and “writings,” including electronic redesignations

### D. Advance Notice of Proposed Rulemaking (ANPRM) on Technological Modernization

1. ANPRM asks whether the Commission should begin a formal rulemaking to revise its regulations to address contributions and expenditures made by electronic means (such as by credit card, debit card, internet-based payment processing and text messaging); to eliminate or update references to outdated technologies; and to address other technological modernization issues.
2. Published in the *Federal Register* on May 2, 2013. See <https://www.federalregister.gov/articles/2013/05/02/2013-10326/technological-modernization>
3. The comment period closed on June 3, 2013. Comments received are available at <http://sers.fec.gov/fosers/viewreg.htm?regno=2013-01>.

## Using Bitcoins

AOs 2013-15 (Conservative Action Fund) & 2014-02 (Make Your Laws)

- Permissibility
- Valuation
- Reporting
- Disbursements



### **E. Bitcoins**

1. **AO 2013-15 (Conservative Action Fund)**  
Addresses whether political committees may accept Bitcoin contributions and, if so, how to value, report, and disburse them.
2. **Pending AO 2014-02 (Make Your Laws PAC)**  
Presents similar question as to whether a political committee may accept Bitcoins as contributions, and, if so, how to value, report, and disburse them.

## II. Reporting

### Reporting Ultimate Payees

Interpretive Rule clarifies reporting of:

- ☐ Reimbursements to individuals for out of pocket expenses
- ☐ Payments to credit card companies
- ☐ Unreimbursed payments by candidate

#### A. **Interpretive Rule on Political Committee Reporting of Ultimate Payees of Disbursements (78 FR 40625 July 8, 2013)**

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

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

## Administrative Fines

- ▣ Legislation enacted December 26, 2013 authorizes extension and expansion
  - AFP to cover reporting periods through December 31, 2018; and
  - May cover certain reports not previously subject to administrative fines
- ▣ Commission approves rules on January 13, 2014 to extend AFP through 2018
- ▣ Expansion considered in separate rulemaking

**B. Extension of Administrative Fines Program (79 FR 3302 January 21, 2014)**

Extends AFP to cover reporting periods through December 31, 2018.

1. Implements Public Law 113-72, sec. 1 (December 26, 2013), which also authorizes Commission to expand scope of AFP to cover additional categories of reporting violations.
2. Future rulemaking will address possible expansion.

## Administrative Fines

- ▣ Expansion may include:
  - IE reports filed by individuals and others (Form 5)
  - Certain FEA reports filed by parties (Form 3X)
  - Electioneering Communication reports (Form 9)
  - 24- and 48-Hour IE reports filed by political committees (Schedule E) and by individuals and others (Form 5)
  - Lobbyist bundling reports (Form 3L)
  - Convention reports filed by convention/host committees

## **Reporting Nationwide IEs in Presidential Primaries**

- ▣ Three draft notices of interpretive rule available for public comment offer alternative:
  - Triggers for 24- and 48-hour notices
  - Methods for reporting
- ▣ Available at [www.fec.gov/law/policy.shtml](http://www.fec.gov/law/policy.shtml)
- ▣ Comment deadline: 2/20/14

### III. Corporate/Labor Activity

## Restricted Class & SSF Administration

- ▣ 2012-02 (Wawa)
- ▣ 2012-15 (American PT Assn.)
- ▣ 2013-12 (SEIU)

#### A. **SSF: 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.

**2. 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 member-employees to contribute to the membership organization's SSF. The membership organization must pay the corporations in advance for their services.

**3. AO 2013-12 (SEIU)**

A labor organization may obtain its restricted class members' authorizations for payroll-deduction contributions to the organization's SSF through recorded telephone calls.

## SSF Affiliation

- ▣ 2012-12 (Dunkin' Brands)
- ▣ 2012-21 (Primerica, Inc.)
- ▣ 2012-23 (Snake River)
- ▣ 2013-08 (AVMA)

### B. 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.
4. **AO 2013-08 (AVMA)**  
Veterinary students who join student chapters of the American Veterinary Medical Association while in veterinary school are members of the AVMA's restricted class.

## Limited Liability Partnerships

### Notice of Proposed Rulemaking:

- AO 2008-05 (Holland & Knight)
- Rules for LLPs electing corporate tax status
- Comments were due February 11, 2013

### 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.fec.gov/fosers/showpdf.htm?docid=103514>.

#### IV. Contributions by Same-Sex Spouses

### Contributions by Same-Sex Spouses

- ▣ AO 2013-02 (Winslow I)
- ▣ AO 2013-06 (DSCC)
- ▣ AO 2013-07 (Winslow II)
  - Spousal contribution rule
  - Candidates' spousal assets
  - Restricted-class membership

- A. AO 2013-02 (Winslow I)**  
This AO concluded that the Commission's rule regarding attribution of joint spousal contributions could not be applied to same-sex spouses because of the Defense of Marriage Act.
- B. AO 2013-06 (DSCC) and AO 2013-07 (Winslow II)**
1. Shortly after the Supreme Court declared the Defense of Marriage Act unconstitutional, the Commission superseded AO 2013-02 (Winslow I) in AOs 2013-06 (DSCC) and 2013-07 (Winslow II).
  2. These AOs explained that the Commission would look to state law to define the terms "spouse" and "family" in the Act and in Commission regulations. Same-sex couples legally married under state law are therefore spouses and families for these purposes, which include the Commission's regulations regarding spousal contributions, a candidate's use of spousal assets, and membership in a restricted class.

**V. Stay Up to Date:**

- A. FEC RECORD:** <http://www.fec.gov/pages/fecrecord/fecrecord.shtml>
- B. FEC Weekly Digest:** [http://www.fec.gov/press/weekly\\_digests.shtml](http://www.fec.gov/press/weekly_digests.shtml)
- C. Twitter Feed:** @FECUpdates
- D. FECMail:** website subscription service; email updates on topics of your choice
- E. 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](http://www.fec.gov/law/law_rulemakings.shtml)
  - 4. Updates:** <http://www.fec.gov/law/recentdevelopments.shtml>

## Workshop Evaluation

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