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# Recent Developments in Campaign Finance Law

May 11, 2016

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## Objectives



- ▣ Highlight Recent Litigation, Policy and Legislative Developments
  - Contributions
  - Reporting
  - Corporate/Labor Activity
  - Independent Spending
  - Technology-Related Developments
  - PACs / PAC Status
  - Personal Use of Campaign Funds
  - FEC Reform

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## UPDATES ON CONTRIBUTIONS (SOURCES, LIMITS AND PROHIBITIONS)

### Contributions: Public Funding

#### ***Gabriella Miller Kids First Research Act of 2014***

- ▣ Terminated public funding for Presidential nominating conventions:
  - Directed U.S. Treasury to transfer former convention funds to a 10-Year Pediatric Research Initiative Fund
  - President signed Act into law on April 3, 2014
  - In 2014, Treasury transferred \$37.8 million



### **I. Contributions – Political Party Accounts (including Public Funding of Presidential Elections, National Political Party Committee Accounts, Party Committee Independent Expenditure Accounts, and Federal Election Activity by State and Local Committees)**

#### **A. Legislative Update**

1. ***Gabriella Miller Kids First Research Act, Public Law 113-94, 128 Stat. 1085 (2014)***
  - a. This Act terminated public funding for Presidential nominating conventions.
  - b. This Act also directed the U.S. Treasury to transfer the funds formerly known as convention funds to a fund known as the 10-Year Pediatric Research Initiative Fund.
  - c. Introduced by Rep. Gregg Harper (MS-3), with a bipartisan group of 152 co-sponsors, H.R. 2019 passed the House of Representatives by a vote of 295 to 103, and passed the Senate by unanimous consent. The President signed it into law on April 3, 2014.
  - d. In 2014, U.S. Treasury transferred \$37.8 million to the Fund, of which \$12.6 million has been appropriated for use by the National Institutes of Health.

## Contributions: National Party Accounts

### ***Consolidated and Further Appropriations Act of 2015***

- ▣ Provisions of “cromnibus” permit national party committees to establish new accounts for:
  - Presidential nominating conventions
  - Election recounts and other legal expenses
  - Party headquarters buildings
- ▣ Contribution limit = 300% limit to national party
  - \$45,000/yr – multicandidate committees
  - \$100,200/yr – all other contributors (2015-16)



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### **B. Legislative Update**

#### **1. *Consolidated and Further Continuing Appropriations Act, 2015, Div. N, § 101, Public Law 113-235, 128 Stat. 2130, 2772-73 (2014).***

- a. One provision of the “cromnibus” provides that national party committees may establish accounts to defray certain expenses incurred with respect to:
  - (1) presidential nominating conventions;
  - (2) election recounts and other legal proceedings; and
  - (3) headquarters buildings.
- b. The contribution limits applicable to these accounts are 300% of the limit on contributions to national party committees, which means that the accounts may accept up to \$45,000 per year from multicandidate committees and \$100,200 per year from all other contributors during the 2015-2016 election cycle.
- c. Descriptions of these provisions appear in the *Congressional Record*: 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) and 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).
- d. Relevant articles:
  - *National Parties May Establish New Accounts*, **FEC Record** (Dec. 22, 2014)
  - *Contribution Limits for 2015-2016*, **FEC Record** (Feb. 3, 2015)
  - *FEC Issues Interim Guidance for National Party Accounts*, **FEC Record** (Feb. 18, 2015)

## Contributions: National Party Accounts

### ***H.R. 154, Close the Floodgates Act***

Rep. Derek Kilmer (WA-6)

- ☐ Would repeal “cromnibus” provisions that permit national parties to establish accounts for presidential nominating conventions, party headquarters buildings and recounts and other legal expenses

### ***H.R. 412***

Rep. Tom Cole (OK-4)

- ☐ Would terminate presidential public funding programs



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2. **H.R. 154, *Close the Floodgates Act*, Rep. Derek Kilmer (WA-6)**
  - a. Introduced on January 6, 2015.
  - b. A bill to repeal the provision of the Consolidated and Further Continuing Appropriations Act, 2015, that amended FECA to establish separate contribution limits for contributions made to national parties to support presidential nominating conventions, party headquarters buildings, and recounts and other legal proceedings.
  - c. *Referred to the Committee on House Administration.*
3. **H.R. 412, Rep. Thomas J. Cole (OK-4)**
  - a. Introduced on January 20, 2015.
  - b. A bill to terminate the presidential public funding programs.
  - c. *Reported by the Committee on House Administration, H.R. Rep. 114-362 (Dec. 3, 2015).*

## C. Policy Update

### 1. Party Contribution Limits

In response to the *Consolidated and Further Continuing Appropriations Act*, the Commission reviewed a draft outline Notice of Proposed Rulemaking. In December 2015, the Commission voted to refer this matter to the Regulation Committee for further work.

## Contributions: National Party Accounts

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

- ▣ First Amendment challenge to FECA's \$33,400 annual limit on individual contributions to national party committees for general, federal election uses.
- ▣ Plaintiff argues that the \$33,400 limit is invalid since national parties may now accept three times as much to use for conventions, headquarters and recounts.



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#### **D. Litigation Update**

##### **1. *Libertarian National Committee, Inc. v. FEC*, No. 16-cv-121 (D.D.C. filed Jan. 25, 2016)**

- a. The Libertarian National Committee challenges FECA's \$33,400 annual limit on individual contributions to national party committees for general, federal election uses.
- b. Plaintiff contends that the \$33,400 limit is a content-based speech restriction that violates the First Amendment on its face. Plaintiff argues that there is no justification for the \$33,400 limit now that the Consolidated and Further Continuing Appropriations Act allows parties to accept three times that amount to support presidential nominating conventions, party headquarters buildings, and recounts and other legal proceedings.
- c. In addition, plaintiff also brings a narrower First Amendment claim challenging the \$33,400 limit as it applies to a particular bequest of \$235,000 that a donor has left for the LNC.

## Contributions: Federal Election Activity

### *Republican Party of Louisiana v. FEC*

- ❑ Challenge to requirements that state and local parties pay for FEA with funds permitted under federal contribution restrictions or through an allocated mix of federal and “Levin funds,” and report the activity
- ❑ Plaintiffs contend the First Amendment requires that they be permitted to fund their planned GOTV, voter registration, and other activity using a greater percentage of funds raised under Louisiana law



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2. ***Republican Party of Louisiana v. FEC, No. 15-cv-1241, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 7574753 (D.D.C. Nov. 25, 2015)***
  - a. The Republican Party of Louisiana, the Jefferson Parish Republican Parish Executive Committee, and the Orleans Parish Republican Executive Committee challenge the requirement that state and local political parties pay for “federal election activity” with funds compliant with federal source and amount restrictions or, for certain activity, through an allocated mix of federal and “Levin funds.” 52 U.S.C. § 30125(b)(1), (c). “Federal election activity” includes certain get-out-the-vote activity, voter identification efforts, generic campaign activity promoting a political party, and voter registration conducted within a specified time prior to a federal election. (“Levin funds” are funds permissible under state law and subject to several other restrictions, but not all of the restrictions of federal law.) Plaintiffs also challenge the requirement that “federal election activity” be reported to the FEC. 52 U.S.C. § 30104(e)(2).
  - b. Plaintiffs contend that the First Amendment requires that they be permitted to fund the activity through an allocated mix of federal funds and funds raised under Louisiana law (including a contribution limit on individuals of \$100,000 per four years).
  - c. In addition to their claims to have the statute struck down facially, plaintiffs also bring in the alternative three narrower claims seeking to have the provisions declared unconstitutional as applied in certain specific circumstances.

- d. On November 25, 2015, the court granted plaintiffs' request for the case to be heard under a special judicial review provision under which a three-judge district court will hear the case and there is a right to appeal directly to the Supreme Court.

## Contributions: Biennial Aggregate Limits

### *McCutcheon v. FEC* Rulemaking

- ▣ In *McCutcheon v. FEC*, Supreme Court struck down biennial aggregate limits on overall individual contributions to candidates, parties & PACs
- ▣ Final rule deleted regulation that implemented FECA aggregate contribution limits; made technical and conforming changes to other regulations
- ▣ Effective December 24, 2014

## II. Contributions: Biennial Aggregate Limits

### A. Policy Update

#### 1. Removal of Aggregate Biennial Contribution Limits (*McCutcheon*), 79 Fed. Reg. 77373 (Dec. 24, 2014) (Final Rule)

- a. In April 2014, in *McCutcheon v. FEC*, the Supreme Court struck down FECA's biennial aggregate contribution limits, which had limited individuals to giving \$48,600 to candidates and \$74,600 to non-candidate committees during one election cycle.
- b. To conform its regulations to the *McCutcheon* decision, the Commission deleted 11 CFR 110.5, which implemented the FECA's aggregate contribution limits.
- c. The Final Rule also made technical and conforming changes to several other regulations.
- d. Effective date: December 24, 2014.

2. **Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (*McCutcheon*), 79 Fed. Reg. 62361 (Oct. 17, 2014) (Advance Notice of Proposed Rulemaking)**
  - a. Commission asked for public comment on whether to begin a rulemaking to revise other regulations following the *McCutcheon* decision.
  - b. Specifically, whether to revise its regulations regarding earmarking, affiliation, joint fundraising committees, and disclosure.
  - c. The Commission received more than 32,000 comments and held a day-long public hearing on February 11, 2015.
  - d. Comments received are available at <http://sers.fec.gov/fosers/viewreg.htm?regno=2014-01>
  - e. On May 21, 2015, the Commission voted 3-3 on a motion to open a rulemaking in this matter.

## Contributions: Per Election Limits

### *Holmes v. FEC*

- ▣ Challenge to contribution limits applied on a per election basis
- ▣ A D.C. Circuit panel held that plaintiffs' First Amendment claim could be heard by the entire D.C. Circuit, while their equal protection claim could not



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### III. Contributions: Per Election Limit

#### A. Litigation Update

1. *Holmes v. FEC*, \_\_ F.3d \_\_ (D.C. Cir. Apr. 26, 2016)
  - a. The plaintiffs here challenge FECA's individual, per-election contribution limit, asserting that the per-election structure of FECA's limit on individual campaign contributions unconstitutionally prevented them from contributing \$5,200 each to certain candidates in connection with those candidates' 2014 general election campaigns.

- b. On April 26, 2016, a panel of the U.S. Court of Appeals for the D.C. Circuit held that the plaintiffs' equal protection claim against FECA did not qualify to be heard by the entire D.C. Circuit under a special FECA judicial review provision. The plaintiffs had argued that FECA discriminated against them because they could not give \$5,200 to their favored candidates for the general election, while other candidates who were unopposed in primaries could use leftover primary-election funds for their general election campaigns. But the D.C. Circuit explained that the source of plaintiffs' complaints was an FEC regulation, 11 CFR 110.3(c)(3), which plaintiffs had not challenged, and not FECA.
- c. The D.C. Circuit also held that the plaintiffs' First Amendment claim did qualify to be heard by the entire D.C. Circuit because it was not obviously frivolous. The plaintiffs argue that the \$2,600 per election limit violates the First Amendment because a contribution of \$5,200 per election would not cause quid pro quo corruption. The D.C. Circuit recognized that the district court had found that this argument contradicted settled Supreme Court precedent, but explained that even so this did not render plaintiffs' argument obviously frivolous.

## Contributions: Per Election Limits

### AO 2016-03 (George Holding for Congress)

- ☐ Shortly before the March 15, 2016, NC primary election, a federal court found that two NC congressional districts were improperly gerrymandered and ordered the state to enact a remedial plan. In response, NC scheduled a new congressional primary election on June 7, 2016.
- ☐ The Commission concluded that Rep. Holding may raise additional contributions subject to a new contribution limit for the June 7 primary.



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## B. Policy Update

### 1. AO 2016-03 (George Holding for Congress)

- a. George Holding represents North Carolina's 13th congressional district. He was running unopposed for his party's nomination for reelection in the primary scheduled for March 15, 2016.
- b. On February 5, 2016, a federal district court found that two congressional districts in North Carolina were impermissibly racially gerrymandered and the court ordered the North Carolina legislature to enact a remedial plan. In response, North Carolina redrew the district lines and moved the congressional primary from March 15, 2016, to June 7, 2016. Now Representative Holding is running for his party's nomination in state's new 2nd congressional district on June 7, 2016, against the district's incumbent.
- c. Representative Holding's campaign committee asked whether it may raise additional contributions subject to a new contribution limit for the June 7, 2016 primary.
- d. The Commission concluded that it may do so because the June 7 primary is a different election from the March 15 election.

## Contributions: Contractors

### *Wagner v. FEC*

- ▣ D.C. Circuit Court of Appeals rejected challenges to prohibition on contributions by individual federal government contractors under:
  - First Amendment
  - Equal Protection



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#### IV. Contributions: Federal Government Contractors

##### A. Litigation Update

1. ***Wagner v. FEC*, 793 F.3d 1, (D.C. Cir. July 7, 2015) (en banc), cert. denied sub nom., *Miller v. FEC*, No. 15-428, 2016 WL 207263 (Jan. 19, 2016)**
  - a. This case is a constitutional challenge under the First Amendment and equal protection component of the Fifth Amendment to the prohibition on contributions by federal government contractors, 52 U.S.C. § 30119, as applied to individual contractors.
  - b. Pursuant to a FECA special judicial review provision, the constitutional issues were considered by all eleven active judges of the United States Court of Appeals for the District of Columbia Circuit (an *en banc* sitting). In July 2015, the court upheld the statute.
  - c. The court found there are important government interests in combatting quid pro quo corruption and its appearance and in merit-based public administration, and that the contractor prohibition furthers those purposes.
  - d. The ban on contributions is “closely drawn to avoid unnecessary abridgment of associational freedoms,” the court found, given the heightened risk of quid pro quo corruption and interference with merit-based public administration associated with government contracts.

- e. The statute was also not unconstitutionally underinclusive or a denial of equal protection of the laws, the court concluded, even though it does not reach certain entities and individuals associated with firms that have government contracts, federal employees, and recipients of other government benefits such as grants. Plaintiffs failed to establish that the contractor provision was not serving the government's cited purposes and was instead serving an impermissible one, such as disfavoring a particular speaker or viewpoint.
- f. The Supreme Court denied plaintiffs' petition for certiorari on October 2, 2015. The case at that point had a different name, *Miller v. FEC*.

## Contributions: Contractors

### Notice of Availability

- ☐ FEC Regulations, 11 CFR Part 115
  - Prohibition on "knowingly soliciting" a federal contractor
- ☐ Petition for Rulemaking
  - Include list of factors to determine when entities of same corporate family are distinct businesses

## B. Policy Update

### 1. Amendment of 11 C.F.R 115, 80 Fed. Reg. 16595 (March 30, 2015) (Notice of Availability)

- a. Petition for Rulemaking from Public Citizen received Nov. 18, 2014.
  - (1) 11 CFR Part 115 prohibits federal contractors from making contributions or expenditures to any political party, political committee, or federal candidate, or to any person for any political purpose or use. 11 CFR 115.2(a)
  - (2) Regulations also prohibit any person from knowingly soliciting a contribution from any federal contractor. 11 CFR 115.2(c)
  - (3) MUR 6726 (Chevron Corporation): complaint involving corporate contractor parent and corporate non-contractor subsidiary

- (4) Petition asks Commission to promulgate specific factors for determining whether entities of the same corporate family are distinct business entities for purposes of these prohibitions.
- b. Comment period closed May 29, 2015
- c. Comments received are available at:  
<http://sers.fec.gov/fosers/viewreg.htm?regno=2014-09>

## Contributions: Multicandidate Status

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

- ▣ Fourth Circuit rejected First and Fifth Amendment challenges to:
  - Six-month waiting period for multicandidate status (dismissed as moot)
  - Limits on contributions from multicandidate PACs to federal party committees

## V. Contributions: Multicandidate Status

### A. Litigation Update

1. ***Stop Reckless Economic Instability caused by Democrats PAC, et al. v. FEC, \_\_\_ F.3d \_\_\_, 2016 WL 715540 (4th Cir. Feb. 23, 2016).***
  - a. Stop Reckless Economic Instability caused by Democrats PAC (“Stop PAC”), Tea Party Leadership Fund, the Alexandria Republican City Committee, and American Future PAC claim that certain limits infringe upon their First Amendment rights of association and expression and the Fifth Amendment’s guarantee of equal protection.
  - b. They seek to have:
    - (1) the six-month waiting period for multicandidate PAC status struck down, so that the limit on contributions from newly formed PACs to candidates would be raised from \$2,700 per election (and indexed for inflation) to \$5,000 per election once a new PAC has more than 50 contributors and makes at least five contributions;

- (2) the limit on contributions from multicandidate PACs to state party committees raised from \$5,000 per calendar year to \$10,000 per calendar; and
  - (3) the limit on contributions from multicandidate PACs to national party committees raised from \$15,000 per calendar year to \$33,400 per calendar year (and indexed for inflation).
- c. In each case, plaintiffs seek whichever contribution limit is higher between 52 U.S.C. § 30116(a)(1) (the statutory limits for persons, including newly formed PACs) and 52 U.S.C. § 30116(a)(2) (the statutory limits for multicandidate PACs).
  - d. On February 23, 2016, the Fourth Circuit Court of Appeals dismissed the challenge to the six-month waiting period as moot, since the plaintiffs asserting that challenge had become multicandidate PACs during the litigation. The Court also rejected the challenge to the limits on multicandidate PAC contributions to parties, because plaintiffs failed to demonstrate that FECA discriminates against multicandidate committees.
  - e. In April 2016, the Fourth Circuit rejected the plaintiffs' request for rehearing.

## Contributions: Multicandidate Status

For 2015-16 Elections	Candidate Committee per election	PAC (SSF and Nonconnected) per year	State, District & Local Party Committee per year	National Party Committee per year	Additional National Party Committee Accounts per year
Individual	\$2,700	\$5,000	\$10,000 (combined)	\$33,400	\$100,200 (per account)
Candidate Committee	\$2,000	\$5,000	Unlimited Transfers	Unlimited Transfers	
<b>PAC: multicandidate</b>	<b>\$5,000</b>	<b>\$5,000</b>	<b>\$5,000 (combined)</b>	<b>\$15,000</b>	<b>\$45,000 (per account)</b>
<b>PAC: Nonmulticandidate</b>	<b>\$2,700</b>	<b>\$5,000</b>	<b>\$10,000 (combined)</b>	<b>\$33,400</b>	<b>\$100,200 (per account)</b>
State, District & Local Party Committee	\$5,000 (combined)	\$5,000	Unlimited Transfers	Unlimited Transfers	
National Party Committee	\$5,000	\$5,000	Unlimited Transfers	Unlimited Transfers	



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## Contributions: In the Name of Another

### *FEC v. Johnson, et al.*

- ▣ FEC alleges:
  - Utah businessman Jeremy Johnson used straw donors to contribute >\$70,000 to two candidates for U.S. Senate in 2010
  - Violations of (1) ban on making contributions in the name of another, and (2) limit on individual contributions to federal candidates
  - Former Utah Attorney General John Swallow also made contributions in the name of another by causing, helping, & assisting Johnson's contributions



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## VI. Contributions: Contributions in the Name of Another

### A. Litigation Update

1. ***FEC v. Johnson, et al.*, No. 15-cv-439 (D. Utah filed Jun. 19, 2015)**
  - a. In this case, the FEC alleges that Utah businessman Jeremy Johnson and former Utah Attorney General John Swallow used straw donors to contribute in excess of \$70,000 to two candidates for United States Senate during the 2009-2010 election cycle.
  - b. As a result, the Commission's complaint asserts claims against Johnson for knowing and willfully violating FECA's ban on making a contribution in the name of another, 52 U.S.C. § 30122, and FECA's per-election limit on individual contributions to a federal candidate, 52 U.S.C. § 30116(a)(1)(A). The Commission also alleges that Swallow knowingly and willfully violated FECA's ban on making a contribution in the name of another by causing, helping, and assisting Johnson to make his illegal contributions.

## Contributions: Exempt Activities

### Payments for Food, Beverages and Valet Parking at Campaign Events

- ▣ AO 2015-07 (Hillary for America)
  - Attendees at campaign events may pay for their own food, beverages and valet parking without making in-kind contributions to the campaign committee.

## VII. Contributions: Payments for Food, Beverages, and Valet Parking at Campaign Events

### A. Policy Update

#### 1. AO 2015-07 (Hillary for America)

- a. A campaign committee asked whether attendees at the committee's campaign events may pay their own food, beverages, and valet parking without making in-kind contributions to the committee.
- b. The Commission concluded that attendees at the campaign events may do so because the committee did not plan to provide food, beverages, or valet parking for any attendees. Thus the attendees' payments to attend did not include these expenses, and the attendee's purchases for their own food, beverages, or valet parking would not relieve the committee of any expenses it would otherwise incur.

## UPDATES ON REPORTING AND DISCLOSURE

### Reporting: Electioneering Communications

#### *Van Hollen v. FEC*

- ▣ Challenge to rules on:
  - Disclosure of contributors to corporations and unions making electioneering communications
- ▣ Alleges:
  - Regulation requires too little disclosure
    - Only persons giving “for the purpose of furthering electioneering communications” must be disclosed
- ▣ Appeals court upholds regulation; Van Hollen seeks rehearing *en banc*



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## I. Reporting: Electioneering Communications

### A. Litigation Update

1. ***Van Hollen v. FEC*, 811 F. 3d 486 (D.C. Cir. Jan. 21, 2016)**
  - a. Challenge to FEC regulations on the disclosure of donations given to fund electioneering communications.
  - b. Representative Van Hollen claims that 11 CFR 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.”
  - c. 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.
  - d. On November 25, 2014, following an earlier remand from the Court of Appeals, the district court found the Commission’s rationale for the regulation unreasonable and unsupported by the evidence in the rulemaking record, and also found that the regulation frustrated the statute’s disclosure objective. The court vacated the regulation.

- e. Intervenor-defendants Center for Individual Freedom and Hispanic Leadership Fund have appealed the decision.
- f. On January 21, 2016, the Court of Appeals for the D.C. Circuit reversed the district court and upheld the regulation. The Court found the Commission's interpretation a persuasive one that was consistent with other parts of FECA and reasonably filled in a gap left by Congress.
- g. The court concluded the purpose requirement was a justified response to changed circumstances after a Supreme Court decision, and not an "arbitrary and capricious" one when reviewed under the Administrative Procedure Act. The court also found that the Commission had adequately explained its decision.
- h. On March 4, 2016, Plaintiff filed a petition for rehearing en banc with the Court of Appeals.

## Reporting: Electioneering Communications

### ***H.R. 430, DISCLOSE 2015 Act***

Rep. Chris Van Hollen (MD-8)

- Enhances Disclosure
- Extends "Stand by Your Ad"
- Revises IE and EC Definitions
- Requires Corporate Disclosure of Shareholders
- Expands Lobbyist Disclosure of Campaign Expenditures

### ***S. 229, DISCLOSE 2015 Act***

Sen. Sheldon Whitehouse of Rhode Island

- Similar to H.R. 430 with a few exceptions

## **B. Legislative Update**

1. ***H.R. 430, Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2015 (DISCLOSE 2015 Act), Rep. Chris Van Hollen (MD-8)***
  - a. Introduced January 21, 2015.
  - b. Provides for additional disclosure requirements for corporations, labor organizations, Super PACs, 501(c) and 527 organizations.

- c. Specifically, covered organizations would be required to disclose campaign-related disbursements, which would include electioneering communications, independent expenditures and related transfers.
  - d. Additionally, the bill would:
    - (1) Extend the definition of “independent expenditure” to functional equivalent of express advocacy;
    - (2) Expand the electioneering communications time period;
    - (3) Extend “stand by your ad” disclaimer requirements to include top five funders;
    - (4) Require corporate disclosure to shareholders; and
    - (5) Expand lobbyist disclosure of campaign expenditures under Lobbying Disclosure Act of 1995.
  - e. *Referred to the Committees on House Administration, Judiciary and Ways & Means.*
  - f. *History:*
    - *113<sup>th</sup> Congress (2013-14): H.R. 148, S. 2516*
    - *112<sup>th</sup> Congress (2011-12): H.R. 4010, S. 2219 and S. 3369*
    - *111<sup>th</sup> Congress (2009-10): H.R. 5175, S. 3295 and S. 3628. H.R. 5175 was subject of H.R. Rept. 111-492 (May 25, 2010) and passed the House of Representatives by 219-206 on June 24, 2010.*
- 2. S. 229, Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2015 (DISCLOSE 2015 Act), Sen. Sheldon Whitehouse of Rhode Island**
- a. Introduced on January 21, 2015.
  - b. The Senate version of the DISCLOSE 2015 Act is similar to the House bill, H.R. 430, with a few exceptions.
    - (1) S. 229 would not extend “stand by your ad” disclaimer requirements.
    - (2) S. 229 would not require additional corporate disclosure to shareholders.
    - (3) S. 229 would not expand lobbyist disclosure under Lobbying Disclosure Act of 1995.
  - c. *Referred to the Committee on Rules & Administration.*

## Reporting: Independent Expenditures

### ***CREW v. FEC***

- ▣ This suit challenges the FEC’s dismissal of a complaint alleging that Crossroads GPS failed to disclose contributors in certain of the group’s independent expenditure reports.
- ▣ Plaintiffs allege that an FEC regulation governing the reporting of independent expenditures is too narrow and thus invalid.



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## II. Reporting: Independent Expenditures

### A. Litigation Update

#### 1. ***CREW v. FEC*, No. 16-cv-259 (D.D.C. filed Feb. 16, 2016)**

- a. In this case, plaintiffs challenge the Commission’s dismissal of their administrative complaint claiming that Crossroads GPS, a 501(c)(4) organization, failed to disclose contributors in certain independent expenditure reports the group filed with the Commission.
- b. FECA and Commission regulations require persons who spend in excess of certain amounts on independent expenditures to report that spending to the FEC. 52 U.S.C. § 30104(c)(1), (g); 11 CFR 109.10. Under the FEC’s regulations, the filer must identify in that report each person from whom the filer received a contribution in excess of \$200 that was “made for the purpose of furthering *the reported* independent expenditure.” 11 CFR 109.10(e)(1)(vi) (emphasis added).
- c. Plaintiffs allege that the Commission arbitrarily and capriciously dismissed their complaint, because there was reason to believe Crossroads GPS violated 11 CFR 109.10(e)(1)(vi).

- d. Additionally, plaintiffs argue that this FEC regulation is invalid, since it allegedly conflicts with the statute's allegedly broader reporting requirement. That statutory provision requires the reporting of a donor who gave "for the purpose of furthering *an* independent expenditure." 52 U.S.C. § 30104(c)(2)(C) (emphasis added). CREW argues that the FEC should have found reason to believe Crossroads GPS violated that statutory provision as well.
- e. Finally, plaintiffs also argue that the Commission arbitrarily and capriciously failed to find reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2), which plaintiffs claim requires the disclosure of any persons making contributions to the filer "for the purpose of influencing a federal election generally."

## Reporting: 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 may be considered in separate rulemaking



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### III. Reporting: Administrative Fines

#### A. Policy Update

##### 1. Extension of Administrative Fine Program (79 Fed. Reg. 3302, Jan. 21, 2014) Extends AFP to cover reporting periods through December 31, 2018.

- a. Implements Public Law 113-72, 127 Stat. 1210, sec. 1 (Dec. 26, 2013), which also authorizes Commission to expand scope of AFP to cover additional categories of reporting violations.
- b. Future rulemaking may address possible expansion.

## Reporting: 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



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## Reporting: Administrative Fines

### Notice of Availability

- ▣ Expand AFP program
- ▣ Revise forms and instructions
  - Streamline Form 3X
  - Super PACs
  - Hybrid PACs
  - Corporate/labor contributions to Super PACs
  - Separate form for political party committees



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2. **Administrative Fines and Forms, 80 Fed. Reg. 16594 (March 30, 2015) (Notice of Availability)**
  - a. Petition for Rulemaking received January 23, 2015. Asks Commission to make changes including:

- (1) Expand scope of AFP to the areas approved for expansion by Congress
  - (2) Use approach that considers the criteria in current penalty schedule at 11 CFR 111.43 and similar factors but eschews strict formulaic penalty
  - (3) Revising forms and instructions to: 1) streamline Form 3X for reporting in-kind contributions; 2) reflect existence of Super PACs; 3) reflect existence of hybrid committees (*Carey* accounts); 4) reflect that corporations and labor organizations may make contributions to Super PACs and hybrid committees; 5) create separate reporting form for political party committees
- b. Comment deadline was May 29, 2015.
- c. Comments received are available at:  
<http://sers.fec.gov/fosers/viewreg.htm?regno=2015-01>

## Reporting: Administrative Fines

### *Combat Veterans PAC v. FEC*

- ▣ Challenge to FEC administrative fine assessed for late filed report
- ▣ Any procedural error by Commission was harmless
- ▣ Penalties against committee and office of treasurer reasonable despite allegations of wrongdoing by former treasurer

## B. Litigation Update

### 1. **Combat Veterans for Congress Political Action Committee, et al. v. FEC, 795 F. 3d 151 (D.C. Cir. July 28, 2015)**

- a. Combat Veterans for Congress PAC filed three FEC reports late and the Commission assessed a total of \$8,690 in civil penalties on the committee and its treasurer in his official capacity. The committee filed a petition seeking review of the administrative fine.

- b. Plaintiffs contended that the Commission had not complied with the Federal Election Campaign Act when it used a “no-objection” voting procedure when initiating agency proceedings against the defendant despite the Act’s requirement that there be “affirmative votes.” The D.C. Circuit Court of Appeals concluded that any such error was harmless because it had not prejudiced the defendants and the Commission later found the defendants liable using marked ballots.
- c. Plaintiffs made a number of other contentions rejected by the court, including that the committee should not be held liable because its former treasurer had recklessly left his post and prevented the committee from filing timely. The court concluded that the Commission was not required to find that only the former treasurer should be held liable in his personal capacity, and that the Commission had reasonably fined both the committee and its treasurer in his official capacity.

## Reporting: Contributions

### Notice of Availability

- Petition for Rulemaking
  - New reporting requirements for any person “other than a natural person” who makes aggregate contributions in excess of \$1,000 per calendar year
  - Require “original source” of all contributions and expenditures
- Comment period closed October 27, 2015

#### IV. Reporting: Contributions

##### A. Policy Update

##### 1. Contributions from Corporations and Other Organizations to Political Committees, 80 Fed. Reg. 45115 (July 29, 2015) (Notice of Availability)

- a. Petition for Rulemaking received on May 14, 2015. Asks Commission to modify regulations requiring disclosure of contributions from corporations and other organizations to political committees:
  - (1) Require any person, “other than a natural person,” making contributions aggregating in excess of \$1000 in a calendar year to any political committee, whether directly or indirectly, to do so from an account subject to certain reporting requirements;
  - (2) Require disclosure of “original source of all election-related contributions and expenditures, traceable through all intermediary entities to a natural person, regardless of the amounts or entities involved.”
- b. Comment deadline was October 27, 2015.
- c. 14 comments received.

## UPDATES ON CORPORATE//LABOR ACTIVITY

### Corporate/Labor Activity

#### ***Citizens United* Rulemaking**

- ▣ Final Rule on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations – October 21, 2014
- ▣ Final Rule amends Commission regulations in response to the *Citizens United* decision
- ▣ Effective January 27, 2015



#### **I. Corporate/Labor Activity: *Citizens United***

##### **A. Policy Update**

##### **1. Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797 (Oct. 21, 2014) (Final Rule)**

- a. Removes the regulatory prohibition on the use of corporate and labor organization general treasury funds to finance independent expenditures and electioneering communications.
- b. Appends a note to 11 CFR 114.2 to recognize that corporations and labor organizations may contribute to nonconnected committees that make only independent expenditures (Super PACs), and to separate accounts maintained by nonconnected committees for making only independent expenditures (hybrid committees).
- c. Revises several other regulatory provisions in 11 CFR Part 114 concerning the making of independent expenditures and electioneering communications by corporations and labor organizations.
- d. Took effect January 27, 2015.

## Corporate/Labor Activity

### Legislative Responses to *Citizens United*

- ▣ SEC Disclosure Changes
  - S. 214 - Sen. Robert Menendez of New Jersey
  - H.R. 446 – Rep Michael E. Capuano (MA-7)
  - H.R. 418 – Rep. Grace Meng (NY-6)
- ▣ H.R. 450 – Rep. Keith Ellison (MN-5)
- ▣ Proposed Constitutional Amendments
  - Three in the Senate
  - Ten in the House



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#### B. Legislative Update

1. **S. 214, *Shareholder Protection Act of 2015*, Sen. Robert Menendez** of New Jersey
  - a. Introduced on January 21, 2015.
  - b. Amends the Securities Exchange Act of 1934 to require a shareholders' vote to authorize making an independent expenditure, electioneering communication or payment of dues that could be used for either.
  - c. *Referred to the Committee on Banking, Housing & Urban Affairs.*
2. **H.R. 446, *Shareholder Protection Act of 2015*, Rep. Michael E. Capuano (MA-7)**
  - a. Introduced on January 21, 2015.
  - b. Amends the Securities Exchange Act of 1934 to require a shareholders' vote to authorize making an independent expenditure, electioneering communication or payment of dues that could be used for either.
  - c. *Referred to the Committee on Financial Services.*
3. **H.R. 418, *Corporate Politics Transparency Act*, Rep. Grace Meng (NY-6)**
  - a. Introduced on January 20, 2015.
  - b. Amends the Securities Act of 1933 and the Securities Exchange Act of 1934 to require disclosure of payment of independent expenditures, electioneering communications or dues that could be used or transferred for either during the previous six years.
  - c. The disclosure would be required in SEC registration statements, quarterly reports and annual reports.
  - d. *Referred to the Committee on Financial Services.*

4. **H.R. 450, *Protect Democracy from Criminal Corporations Act*, Rep. Keith Ellison (MN-5)**
  - a. Introduced on January 21, 2015.
  - b. Prohibits corporations that have been convicted of certain felonies or paid \$1 million or more pursuant to an agreement with the Attorney General related to a felony charge from making contributions, independent expenditures or electioneering communications.
  - c. *Referred to the Committee on House Administration.*
5. **Proposed Constitutional Amendments**
  - a. **S. J. Res. 4, Sen. Bernard Sanders** of Vermont
    - (1) Introduced on January 21, 2015,
    - (2) Joint resolution proposing a constitutional amendment to limit the ability to make contributions or expenditures intended to affect elections to natural persons.
    - (3) *Referred to the Committee on the Judiciary.*
  - b. **S. J. Res. 5, Sen. Tom Udall** of New Mexico
    - (1) Introduced on January 21, 2015.
    - (2) Joint resolution proposing a constitutional amendment permitting Congress and the states to regulate contributions and expenditures intended to affect Federal and state elections.
    - (3) *Referred to the Committee on the Judiciary.*
  - c. **S. J. Res. 7, Sen. Tester** of Montana
    - (1) Introduced on February 4, 2015.
    - (2) Joint resolution proposing a constitutional amendment providing that the rights extended by the Constitution are the rights of natural persons only.
    - (3) *Referred to the Committee on the Judiciary.*
  - d. **H. J. Res. 22, Rep. Theodore E. Deutch (FL-21)**
    - (1) Introduced on January 20, 2015.
    - (2) Joint resolution proposing a constitutional amendment related to contributions and expenditures intended to affect elections.
    - (3) *Referred to the Committee on the Judiciary.*
  - e. **H. J. Res. 23, Rep. James P. McGovern (MA-2)**
    - (1) Introduced on January 21, 2015.
    - (2) Joint resolution proposing a constitutional amendment to reserve the rights protected in the Constitution to natural persons.
    - (3) *Referred to the Committee on the Judiciary.*
  - f. **H. J. Res. 24, Rep. John C. Carney, Jr. (DE-At Large)**
    - (1) Introduced on January 21, 2015.
    - (2) Joint resolution proposing a constitutional amendment permitting Congress and the states to regulate contributions and expenditures intended to affect Federal elections.
    - (3) *Referred to the Committee on the Judiciary.*
  - g. **H. J. Res. 31, Rep. Jerry McNerney (CA-9)**
    - (1) Introduced on February 11, 2015.

- (2) A joint resolution proposing a constitutional amendment that would: (i) limit candidate's contributions to those from individuals or public funding, (ii) limit funds spent on ballot measures to those raised from eligible voters for the measures, and (iii) limit the contributions a candidate may accept from those not eligible to vote the candidate.
- (3) *Referred to the Committee on the Judiciary.*
- h. H. J. Res. 36, Rep. Donna Edwards (MD-4)**
  - (1) Introduced on February 26, 2015.
  - (2) Joint resolution proposing a constitutional amendment permitting Congress and the states to regulate corporate contributions and expenditures intended to affect elections.
  - (3) *Referred to the Committee on the Judiciary.*
- i. H. J. Res. 38, Rep. Marcia C. Kaptur (OH-9)**
  - (1) Introduced on March 17, 2015.
  - (2) Joint resolution proposing a constitutional amendment waiving the application of the First Amendment to the political speech of corporations in federal and state elections.
  - (3) *Referred to the Committee on the Judiciary.*
- j. H. J. Res. 46, Rep. Kurt Schrader (OR-5)**
  - (1) Introduced on April 21, 2015.
  - (2) Joint resolution proposing a constitutional amendment permitting Congress and the states to regulate contributions and expenditures intended to affect elections and to prohibit contributions from foreign nationals.
  - (3) *Referred to the Committee on the Judiciary*
- k. H. J. Res. 48, Rep. Rick Nolan (MN-8)**
  - (1) Introduced on April 28, 2015.
  - (2) Joint resolution proposing a constitutional amendment providing that the rights extended by the Constitution are the rights of natural persons only.
  - (3) *Referred to the Committee on the Judiciary*
- l. H. J. Res. 53, Rep. John A. Yarmuth (KY-3)**
  - (1) Introduced on April 21, 2015.
  - (2) Joint resolution proposing a constitutional amendment stating that financial expenditures with respect to a federal candidate shall not constitute protected speech and permitting Congress to impose a mandatory public funding system for election campaigns.
  - (3) *Referred to the Committee on the Judiciary*
- m. H. J. Res. 58, Rep. Adam Schiff (CA-28)**
  - (1) Introduced on June 24, 2015.
  - (2) Joint resolution proposing a constitutional amendment that would permit Congress and the states to regulate campaign contributions and expenditures and to adopt a public financing program for campaigns.
  - (3) *Referred to the Committee on the Judiciary*

## Corporate/Labor Activity

### Stipend for Intern

- ▣ AO 2015-14 (Hillary for America II)
  - 501(c)(3) non-profit university may provide a stipend and academic credit to a student that interned at PCC without resulting in a prohibited corporate contribution
  - Stipend provided to student for *bona fide* educational objectives and not for the provision of personal services to federal campaigns

## II. Corporate/Labor Activity: Stipend for Campaign Intern

### A. Policy Update

#### 1. AO 2015-14 (Hillary for America II)

- a. On October 29, 2015, Hillary for America asked whether DePauw University, a 501(c)(3) non-profit corporation, may provide a stipend and academic credit to a student that interned in the committee's vetting and compliance departments without a contribution resulting.
- b. This AO concluded that DePauw may provide a stipend because the stipends here are provided to students for *bona fide* educational objectives and not for the provision of personal services to federal campaigns.
- c. This AO also concluded that the provision of academic credit was permissible.

## Corporate/Labor Activity

### Matching Charitable Contributions

- ▣ AO 2015-02 (Grand Trunk Western Railroad – Illinois Central Railroad PAC)
  - SSF’s connected organizations may make a matching donating to a Canadian registered charity

### III. Corporate/Labor Activity: Matching Charitable Contributions

#### A. Policy Update

##### 1. AO 2015-02 (Grand Trunk Western Railroad – Illinois Central Railroad PAC)

- a. An SSF operating a “charity-match” program asked whether its connected organizations may match contributions made to the SSF with charitable donations to a Canadian registered charity.
- b. The AO concluded that the SSF’s connected organizations may make matching donations as proposed.

## Corporate/Labor Activity

### SSF Affiliation

- ▣ AO 2016-02 (Enable Midstream Services)
- ▣ AO 2014-21 (Cambia Health Solutions)
- ▣ AO 2014-11 (Health Care Services Corporation Employees)
- ▣ AO 2014-18 (Rayonier Advanced Materials)
- ▣ AO 2014-17 (Berkadia Commercial Mortgage)



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#### IV. Corporate/Labor Activity: SSF Affiliation

##### A. Policy Update

###### 1. AO 2016-02 (Enable Midstream Services)

- a. The advisory opinion considered whether an SSF of an entity established through a complex business restructuring would be affiliated with SSFs of two corporations involved in the restructuring.
- b. The Commission concluded that the requestor's SSF would not be affiliated with one of the SSFs, but the Commission could not approve a response by the required four affirmative votes as to the other SSF.

###### 2. AO 2014-11 (Health Care Services Corporation Employees) and AO 2014-21 (Cambia Health Solutions)

- a. The advisory opinions considered whether the SSFs of two health insurance corporations were affiliated with the SSFs of the Blue Cross and Blue Shield Association.
- b. The Commission concluded in both instances that SSFs were disaffiliated after a change in the business relationship between the corporations.

###### 3. AO 2014-18 (Rayonier Advanced Materials)

SSFs of two corporations are disaffiliated after corporate spin-off.

###### 4. AO 2014-17 (Berkadia Commercial Mortgage)

An LLC wholly owned by two corporations and affiliated with each of them may authorize a trade association of which it is a member to solicit its administrative and executive personnel.

## Corporate/Labor Activity

### State Laws Regulating SSF Activities and Federal Preemption

- ▣ AO 2014-04 (Enterprise Holdings)
- ▣ AO 2014-05 (Henry Ford Health System Government Affairs Services)

#### V. Corporate/Labor Activity: State Laws Regulating SSF Activities and Federal Preemption

##### A. Policy Update

##### 1. AO 2014-04 (Enterprise Holdings)

- a. A corporation asked whether federal law preempted New York law regarding the corporation's use of payroll deductions to process voluntary contributions to its SSF.
- b. The Commission concluded that the deductions were permissible under the Act and did not reach the preemption question because the state clarified that the state law did not apply to payroll deductions made in accordance with the Act and Commission regulations to facilitate contributions to a federal SSF.

##### 2. AO 2014-05 (Henry Ford Health System Government Affairs Services)

- a. An SSF asked whether it may solicit contributions from employees of its connected organization's corporate parent and that parent's other subsidiaries, and whether the Act preempted Michigan law on this issue.
- b. The Commission concluded that the solicitations were permissible under the Act, and it did not reach the preemption issue because the state officially interpreted the law as not regulating contributions made to support or oppose federal candidates.

## Corporate/Labor Activity

### Web-based Platforms Providing Candidate Information and Processing Contributions to Political Committees

- ▣ AO 2015-15 (WeSupportThat.com)
- ▣ AO 2015-11 (FYP)
- ▣ AO 2015-12 (Ethiq) and AO 2016-01 (Ehtiq)



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## VI. Corporate/Labor Activity: Web-based Platforms Providing Information About Candidates and Processing Contributions to Political Committees

### A. Policy Update

#### 1. AO 2015-15 (WeSupportThat.com)

- a. The Commission approved a proposal by a for-profit corporation to offer an internet-based service through which users would be able to support or oppose certain actions of federal candidates, including by making contributions to candidates whose actions the users support.
- b. The Commission concluded that the requestor would process contributions as a service to contributors, and not to the recipient political committees, and would not be making contributions to those committees.

#### 2. AO 2015-11 (FYP)

- a. The Commission approved an LLC's proposal for processing contributions to political committees through its web-platform. FYP proposed to "round up" a participating user's credit or debit card transactions to the next whole dollar amount and provide the difference between the original transactions and the resulting rounded up amounts to political committees or other nonprofit organizations designated by the user.
- b. Although the Commission approved the request, it could not agree on the legal basis for its conclusion.

**3. AO 2015-12 (Ethiq)**

- a. The Commission approved a proposal by a for-profit corporation that sought to provide factual information about candidates to its users, including the candidates' voting records, statements, and campaign finance information.
- b. The Commission concluded that Ethiq's proposal was similar to traditional voter guides and other web-based proposals the Commission previously approved. Disbursements for such distributions do not constitute contributions.

**4. AO 2016-01 (Ethiq)**

- a. Ethiq subsequently asked whether its distribution of news content via its website and mobile application qualified for the media exemption under FECA.
- b. The Commission concluded that the costs incurred by Ethiq in covering or carrying news stories, commentary, and editorials on its website and app were encompassed by FECA's media exemption and therefore did not constitute "expenditures" or "contributions" under the FECA and Commission regulations.

## UPDATES ON INDEPENDENT SPENDING

### Independent Spending

#### Notice of Availability

- Revise existing rules/promulgate new rules on:
  - Disclosure of independent expenditures/electioneering communications
  - Election-related spending by foreign nationals
  - Solicitations of corporate/labor organization employees and members
  - Expenditures by IEOPCs (Super PACs) and Hybrid PACs
- Comment period closed on October 27, 2015
- The Commission received 11,759 comments



## I. Independent Spending

### A. Policy Update

#### 1. Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*), 80 Fed. Reg. 45116 (July 29, 2015) (Notice of Availability)

- a. Two Petitions for Rulemaking received June 19 and June 22, 2015. Ask Commission to promulgate new rules and revise existing rules concerning:
  - (1) The disclosure of certain financing information regarding independent expenditures and electioneering communications;
  - (2) Election-related spending by foreign nationals;
  - (3) Solicitations of corporate and labor organization employees and members; and
  - (4) Independence of expenditures made by independent-expenditure-only committees and accounts.
- b. Comment deadline was October 27, 2015.
- c. The Commission received 11, 759 comments which are available for review on the Commission's website.

## Independent Spending

### Super PAC Interaction with Candidate

- ▣ AO 2015-09 (Senate Majority PAC and House Majority PAC)
  - Using soft money for testing-the-waters would violate FEC regulations if the individual becomes a candidate
  - Agents of candidate may fundraise for Super PAC
  - Federal candidate may attend, speak or be featured guest at nonfederal fundraising event



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## 2. AO 2015-09 (Senate Majority PAC and House Majority PAC)

- a. Presented questions regarding:
  - (1) Whether and under what circumstances an individual's formation of a super PAC whose purpose is to support his or her potential candidacy requires the individual to register as a candidate
  - (2) Whether and how a super PAC may use material and information that it obtains from an individual before that individual becomes a candidate to support the individual's campaign after he or she becomes a candidate
  - (3) Whether and how a candidate or his or her agents can raise funds for a super PAC whose purpose is to support that candidate
- b. The Commission was not able to approve a response as to all of the questions asked, but concluded, among other things, that:
  - (1) If an individual ultimately becomes a candidate, payments made for testing-the-waters activities must have been made with funds that are permissible under the Act, including those spent by 527 organizations and super PACs;
  - (2) Individuals who are agents of federal candidates may solicit nonfederal funds for the requestors; and
  - (3) Federal candidates can attend, speak, or be featured guests at the nonfederal fundraising events described in the request.

## Independent Spending

### ***H.R. 425, Stop Super PAC Candidate Coordination Act***

Rep. David Price (NC-4)

- ▣ Revises definition of coordinated expenditures
- ▣ Prohibits candidates from fundraising on behalf of Super PACs, denying safe harbor for use of “firewalls”
- ▣ Repeals FEC regulations on coordination

### ***S. 1838, Stop Super PAC Candidate Coordination Act***

Sen. Patrick Leahy of Vermont

- ▣ Similar to H.R. 425



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## **B. Legislative Update**

1. **H.R. 425, *Stop Super PAC-Candidate Coordination Act*,  
Rep. David E. Price (NC-4)**
  - a. Introduced on January 21, 2015.
  - b. Defines coordinated expenditures as expenditures “*not* made entirely independently of the candidate, committee, or agents.”
  - c. Prohibits candidates from fundraising on behalf of super PACs, deny a safe harbor for use of “firewalls” and repeal FEC regulations on coordination.
  - d. *Referred to the Committee on House Administration.*
2. **S. 1838, *Stop Super PAC-Candidate Coordination Act*,  
Sen. Patrick Leahy of Vermont**
  - a. Introduced on July 22, 2015.
  - b. Defines coordinated expenditures as expenditures “*not* made entirely independently of the candidate, committee, or agents.”
  - c. Prohibits candidates from fundraising on behalf of super PACs, deny a safe harbor for use of “firewalls” and repeal FEC regulations on coordination.
  - d. *Referred to the Committee on Rules & Administration.*

## UPDATES ON TECHNOLOGY-RELATED DEVELOPMENTS

# Technology-Related Developments

## Technological Modernization

- ▣ ANPRM possible updates to address electronic transactions, including:
  - Credit and debit cards
  - Internet-based payment processing
  - Text Contributions
  - “Signatures” and “writings,” including electronic redesignations



### I. Technology-Related Developments: Technological Modernization

#### A. Policy Update

##### 1. Technological Modernization, 78 Fed. Reg. 25635 (May 2, 2013) (Advance Notice of Proposed Rulemaking)

- a. ANPRM asked 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.
- b. The comment period closed on June 3, 2013. Comments received are available at <http://sers.fec.gov/fosers/viewreg.htm?regno=2013-01>
- c. The Commission considered a draft NPRM last fall and referred it to the Regulations Committee for further work.

## Technology-Related Developments

### **S. 366**

Sen. Jon Tester of Montana

- ▣ Requires Senate candidates to file with FEC, subject to electronic filing requirements

### **S. 2212 / H.R. 3854, *Real Time Transparency Act***

Sen. Angus King of Maine / Rep. Beto O'Rourke (TX-16)

- ▣ Makes FEC point of entry for all campaign finance reports, subjecting Senate reports to mandatory electronic filing



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## II. Technology-Related Developments: Electronic Filing

### A. Legislative Update

1. **S. 366, *Senate Campaign Disclosure Disparity Act*, Senator Jon Tester of Montana**
  - a. Introduced on February 4, 2015.
  - b. Requires Senate candidates and committees to file designations, statements, and reports with FEC, which would make them subject to electronic filing requirements.
  - c. *Referred to the Committee on Rules & Administration.*
2. **S. 2212, *Real Time Transparency Act*, Senator Angus King of Maine**
  - a. Introduced on October 28, 2015.
  - b. Requires political committees to report contributions of \$1,000 or more within 48 hours of receipt. The bill would also make the FEC the point of entry for all campaign finance reports, which would make Senate reports subject to mandatory electronic filing requirements.
  - c. *Referred to the Committee on Rules & Administration.*
3. **H.R. 3854, *Real Time Transparency Act*, Rep. Beto O'Rourke (TX-16)**
  - a. Introduced on October 28, 2015.
  - b. Requires political committees to report contributions of \$1,000 or more within 48 hours of receipt. The bill would also make the FEC the point of entry for all campaign finance reports, which would make Senate reports subject to mandatory electronic filing requirements.
  - c. *Referred to the Committee on House Administration.*

## UPDATES ON PACS

### PACs: PAC Status

#### ***Public Citizen v. FEC / CREW v. FEC (x2)***

- ▣ Challenges to dismissals of complaints alleging a number of groups should have registered and reported as Super PACs
  - Must the Commission count non-express advocacy ads critical of candidates towards political committee status?
  - Must the Commission analyze spending on a per calendar year basis?



## I. PACs: PAC Status

### A. Litigation Update

1. ***Public Citizen v. FEC*, No. 14-cv-148 (D.D.C. filed Jan. 31, 2014); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. June 5, 2015)**
  - a. 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.
  - b. Plaintiffs contend that the group of Commissioners whose votes prevented the Commission from moving forward with an investigation acted contrary to law.
  - c. 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.
  - d. Crossroads GPS sought to intervene in the case and that request was granted by the D.C. Circuit Court of Appeals on June 5, 2015.

2. ***Citizens for Responsibility and Ethics in Washington v. FEC, No. 14-cv-1419-CRC (D.D.C. filed Aug. 20, 2014)***
  - a. Plaintiffs Citizens for Responsibility and Ethics in Washington (CREW) and its executive director, Melanie Sloan challenge the Commission's dismissal of their administrative complaints alleging that two entities violated FECA by failing to register and report as political committees: American Action Network and Americans for Job Security.
  - b. The case raises the same issues discussed in regard to *Public Citizen*, above.
  - c. CREW also contends that the Commission has issued policies and/or a "de facto regulation" regarding these issues without following the procedural requirements of notice and an opportunity to comment for making regulations. Because FECA provides an alternative, exclusive avenue for challenging Commission enforcement decisions, the Commission's motion to dismiss that part of the case was granted on August 13, 2015.
  - d. The Commission has moved for summary judgment.
3. ***Citizens for Responsibility and Ethics in Washington v. FEC, No. 15-cv-2038-CRC (D.D.C. filed Nov. 23, 2015)***
  - a. The same plaintiffs from the previous case challenge the Commission's dismissal of their administrative complaint about a different entity, the Commission on Hope, Growth and Opportunity.
  - b. The Commissioners who voted to dismiss the administrative complaint cited the statute of limitations and the dissolution in the interim of the entity at issue. The reasonableness of that determination is at issue in this case.

## PACs: PAC Status

### **S. 274**

Sen. R. Edward Cruz of Texas

- ▣ Amends IRS code to redefine 527 political organization
- ▣ Revises definition of social welfare to include FECA expenditures up to 50% of organization's activity



Recent Developments in the Law



## **B. Legislative Update**

### **1. S. 274, Sen. R. Edward Cruz of Texas**

- a. Introduced on January 28, 2015.
- b. A bill that would amend the Internal Revenue Code to redefine a 527 political organization as an organization that:
  - (1) is registered with the FEC as a political committee,
  - (2) is determined by the FEC or a court to be required to register with the FEC as a political committee, or
  - (3) is registered with a state agency as a political committee.
- c. The bill would also revise the definition of "promotion of social welfare" in the Internal Revenue Code to include Federal Election Campaign Act expenditures up to 50% of organization's activity.
- d. *Referred to the Committee on Finance.*

### **2. H.R. 1798, Rep. R. Randolph Neugebauer (TX-19)**

- a. Introduced on April 15, 2015.
- b. A bill that would amend the Internal Revenue Code to redefine a 527 political organization as an organization that:
  - (1) is registered with the FEC as a political committee,
  - (2) is determined by the FEC or a court to be required to register with the FEC as a political committee, or
  - (3) is registered with a state agency as a political committee.
- c. The bill would also revise the definition of "promotion of social welfare" in the Internal Revenue Code to include Federal Election Campaign Act expenditures up to 50% of organization's activity.
- d. *Referred to the Committee on Ways & Means.*

## PACs: PAC Status

### ***S. 367 / H.R. 2695, Sunlight for Unaccountable Non-profits (SUN) Act***

Sen. Jon Tester of Montana / Rep. David Cicilline (RI-1)

- ☐ Amends IRS code to require 501(c) and 527 organizations to disclose contributor information on money spent to influence elections, including independent expenditures and electioneering communications

### **H.R. 153**

Rep. Walter B. Jones, Jr. (NC-3)

- ☐ Amends IRS code to repeal prohibition on 501(c)(3)s from participating in political campaigns



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3. ***S. 367, Sunlight for Unaccountable Non-profits (SUN) Act, Sen. Jon Tester of Montana***
  - a. Introduced on February 4, 2015.
  - b. A bill that would amend the Internal Revenue Code to require that tax return information from § 501(c) and § 527 tax-exempt organizations be made available in a searchable format and to provide the disclosure of the identity of contributors to § 501(c) tax-exempt organizations that: (i) spent money attempting to influence elections, (ii) participated or intervened in a political campaign, (iii) filed an independent expenditure report, or (iv) filed an electioneering communication report.
  - c. *Referred to the Committee on Finance.*
4. ***H.R. 2695, Sunlight for Unaccountable Non-profits (SUN) Act, Rep. David Cicilline (RI-1)***
  - a. Introduced on June 9, 2015.
  - b. A bill that would amend the Internal Revenue Code to require that tax return information from § 501(c) and § 527 tax-exempt organizations be made available in a searchable format and to provide the disclosure of the identity of contributors to § 501(c) tax-exempt organizations that: (i) spent money attempting to influence elections, (ii) participated or intervened in a political campaign, (iii) filed an independent expenditure report, or (iv) filed an electioneering communication report.
  - c. *Referred to the Committee on Ways & Means.*

5. **H.R. 153, Rep. Walter B. Jones, Jr. (NC-3)**
  - a. Introduced on January 6, 2015.
  - b. Amends the Internal Revenue Code to repeal the prohibition on 501(c)(3) organizations from participating or intervening in political campaigns for office.
  - c. *Referred to the Committee on Ways & Means.*
6. **H.R. 5053, Preventing IRS Abuse and Protecting Free Speech Act, Rep. Peter J. Roskam (IL-6)**
  - a. Introduced on April 28, 2016.
  - b. Amends the Internal Revenue Code to prohibit the IRS from collecting identifying information about contributors to section 501(c).
  - c. *Ordered to be Reported by the Committee on Ways & Means (April 28, 2016).*

## PACs: Committee Names

- ▣ **AO 2015-04 (Collective Actions PAC)**
  - Use of candidate names
  - Super PAC supporting Bernie Sanders created websites/social media accounts using names such as “Run Bernie Run” and “Believe in Bernie”
- ▣ **AO 2016-04 (Grand Trunk Western Railroad – Illinois Central Railroad PAC)**
  - Proposal by an SSF to use an abbreviation of its connected organizations’ parent company

## II. PACs: Committee Names

### A. Policy Update

#### 1. AO 2015-04 (Collective Actions PAC)

Commission determined that an unauthorized committee could not use a candidate’s name in the titles of its projects, including online activities such as website names or URLs or social media accounts.

2. **AO 2016-04 (Grand Trunk Western Railroad – Illinois Central Railroad PAC)**

The Commission is currently considering a proposal by an SSF to use an abbreviation of its connected organizations' parent company.

## PACs: Committee Names

### *Pursuing America's Greatness v. FEC*

- Challenge to the Commission's interpretation of its regulations in AO 2015-04 (Collective Actions PAC) under the Administrative Procedure Act and First Amendment
  - District Court denied preliminary injunction; PAG has appealed

## B. Litigation Update

1. ***Pursuing America's Greatness v. FEC*, No. 1:15-cv-01217 (D.D.C. filed July 27, 2015)**

- a. Pursuing America's Greatness, an independent expenditure-only Super PAC, contends that the Commission's interpretation of its regulations in Advisory Opinion 2015-04 (Collective Actions PAC) is contrary to the Federal Election Campaign Act and violates its First Amendment rights. The entity wishes to operate a website, Facebook page, and Twitter account supporting a candidate and using that candidate's name in the title of each.
- b. On September 24, 2015, the District Court denied plaintiff's motion for preliminary injunction. Plaintiff has appealed the decision. Oral argument was held before the U.S. Court of Appeals for the D.C. Circuit on February 23, 2016.

## PACs: Committee Names

### ***Stop Hillary PAC v. FEC***

- ❑ Facial challenge to restriction on unauthorized committees' use of candidate's name
- ❑ As applied to names which reflect opposition to the candidate
- ❑ Preliminary injunction denied
- ❑ Plaintiffs have voluntarily dismissed their suit



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2. ***Stop Hillary PAC, et al. v. FEC, No. 1:15-cv-01208 (E.D. Va. filed September 22, 2015)***
  - a. Stop Hillary PAC and Dan Backer facially challenge the restriction on unauthorized committees including candidate names in the official names of committees. See 52 U.S.C. 30102(e)(4); 11 CFR 102.14. They contend the requirement violates the First Amendment rights of all unauthorized committees.
  - b. In addition, plaintiffs challenge the statutory requirements as applied to entities whose names show unambiguous opposition to the named candidates. In addition to the First Amendment, plaintiffs contend the requirements as applied violate their right to equal protection under law.
  - c. Plaintiffs also contend 11 CFR. 102.14, which creates three exceptions to the statutes, constitutes speaker- and content-based restrictions in violation of the First Amendment.
  - d. The district court denied plaintiffs' motion for preliminary injunction on December 21, 2015.
  - e. On March 28, 2016, the plaintiffs agreed to voluntarily dismiss their lawsuit without prejudice.

## UPDATES ON PERSONAL USE OF CAMPAIGN FUNDS

### Personal Use of Campaign Funds

#### *FEC v. Craig for U.S. Senate*

- ▣ FEC alleged that a U.S. Senator spent campaign funds spent on his personal legal expenses resulting from a disturbing the peace arrest
- ▣ District court imposed a \$45,000 civil penalty and required \$242,535 to be paid to the US Treasury
- ▣ D.C. Circuit affirmed district court decision



## I. Personal Use of Campaign Funds

### A. Litigation Update

#### 1. *FEC v. Craig for U.S. Senate*, \_\_ F.3d \_\_, 2016 WL 850823 (D.C. Cir. Mar. 4, 2016)

- a. 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, 52 U.S.C. § 30114(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.
- b. On September 30, 2014, the United States District Court for the District of Columbia 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.
- c. The court ordered Senator Craig to disgorge \$197,535 and pay a civil penalty of \$45,000 to the United States Treasury.

- d. Defendant appealed. On March 4, 2016, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court decision. The appellate court agreed with the FEC that the correct test for determining if legal expenses are personal use depends on if the allegations of the legal proceeding at issue were related to the candidate's campaign activities or the officeholder's duties. Because the allegations of Senator Craig's legal proceeding related to his disturbing the peace arrest, and not his officeholder duties, his resulting expenses were personal. The Court also affirmed the penalties ordered by the district court.

## Personal Use of Campaign Funds

### *FEC v. O'Donnell*

- ☐ Use of campaign funds to pay rent and utilities for town house that was candidate's residence and campaign headquarters

## 2. *FEC v. O'Donnell, No. 1:15-cv-00017-RGA (D. Del.)*

- a. On January 5, 2015, the Commission filed suit against former Senate candidate Christine O'Donnell, her campaign committee, and her treasurer (in his official capacity as treasurer) for a violation of the prohibition on personal use, 52 U.S.C. § 30114(b).
- b. O'Donnell's campaign committee spent at least \$20,000 to pay for rent and utilities at a townhouse that served as both her residence and campaign headquarters.

## Personal Use of Campaign Funds

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### **S. 18**

Sen. David Vitter of Louisiana

- ▣ Prohibits campaign committees and Leadership PACs from employing immediate family of any candidate or federal officeholder connected to the committee



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### **B. Legislative Update**

- 1. S. 18, Sen. David Vitter** of Louisiana
  - a. Introduced on January 6, 2015.
  - b. Prohibits authorized committees and leadership PACs from employing the immediate family members of any candidate or federal office holder connected to the committee.
  - c. *Referred to the Committee on Rules & Administration.*

## Personal Use of Campaign Funds

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### **H.R. 150**

Rep. Walter Jones (NC-3)

- ▣ Prohibits all political committees from converting contributions to personal use

### **H.R. 714**

Rep. Michael E. Capuano (MA-7)

- ▣ Prohibits conversion of Leadership PAC funds to personal use



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2. **H.R. 150, *No Political Funds for Personal Use*, Rep. Walter B. Jones, Jr. (NC-3)**
  - a. Introduced on January 6, 2015.
  - b. Prohibits the conversion to personal use of contributions accepted by any political committee.
  - c. *Referred to the Committee on House Administration.*
3. **H.R. 714, Rep. Michael E. Capuano (MA-7)**
  - a. Introduced on February 4, 2015.
  - b. Prohibits the conversion of leadership PAC funds to personal use.
  - c. *Referred to the Committee on House Administration.*

## UPDATES ON FEC REFORM

### FEC Reform

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#### ***H.R. 2931, Restoring Integrity to America's Elections Act***

Rep. Derek C. Kilmer (WA-6)

- ☐ Reduce number of FEC Commissioners to five (5)
- ☐ 10-year term for FEC Chair; 6-year terms for others
- ☐ Establish Blue Ribbon Advisory Panel

#### **S. 2611, Federal Election Administration Act of 2016**

Sen. Thomas S. Udall of New Mexico

- ☐ Replace FEC with Federal Election Administration
- ☐ Five (5) member panel with Chairman serving 10-year term
- ☐ Add administrative law judges to enforcement process



## I. Federal Election Commission Reform Bills

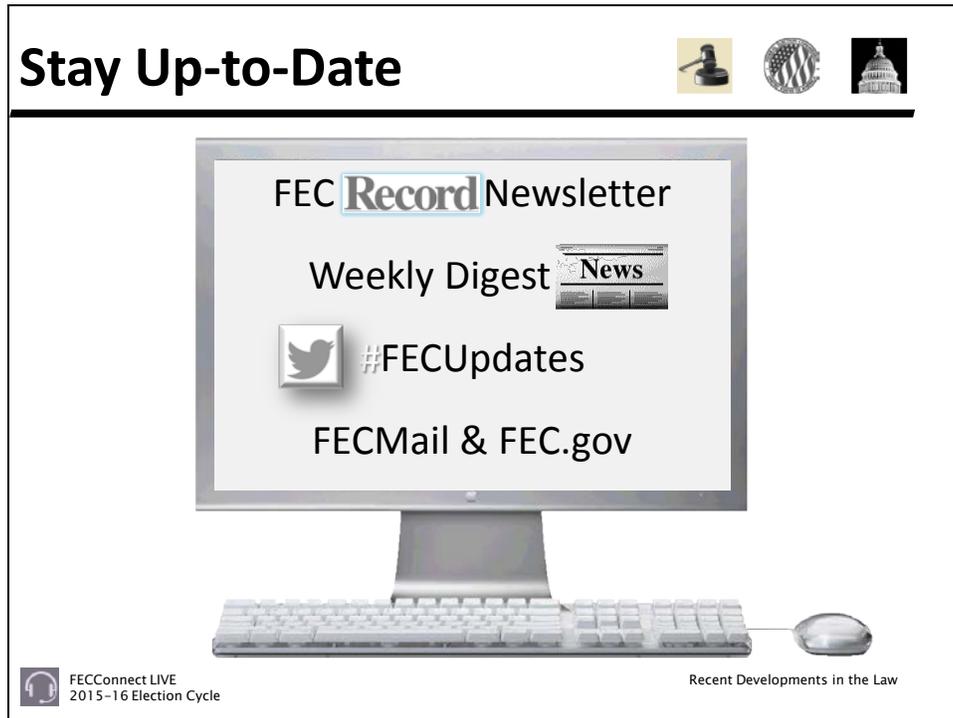
### A. Legislative Update

#### 1. **H.R. 2931, *Restoring Integrity to America's Elections Act*, Rep. Derek C. Kilmer (WA-6).**

- a. Introduced on June 25, 2015
- b. A bill to overhaul the Federal Election Commission. It would reduce the number of Commissioners to five, and provide a 10-year term for a Chair and six-year terms for others, with limits of one year of service after expiration of term. It would also establish Blue Ribbon Advisory Panels to advise the President on Commissioner nominations, provide for third-party appearances during consideration of advisory opinions, and authorize the FEC's Office of General Counsel to represent it before the Supreme Court of the United States.
- c. *Referred to the Committee on House Administration.*

2. **S. 2611, *Federal Election Administration Act of 2016*,  
Sen. Thomas S. Udall** of New Mexico.
  - a. Introduced on March 1, 2016
  - b. A bill to replace the FEC with the Federal Election Administration, a five member panel with a Chairman serving a 10-year term. The bill would also add administrative law judges to the enforcement process, and enhance the Chairman's role in the enforcement process. Additionally, the bill would eliminate the role of the Office of Management & Budget in formulating the FEA's budget, provide the FEA with authority to participate in the Senior Executive Service program, and provide for additional salary for the Staff Director and General Counsel.
  - c. *Referred to the Committee on Rules & Administration.*

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## Workshop Evaluation

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