Record

August 2011 | Federal Election Commission | Volume 37, Number 8

CORPORATE/LABOR GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to candidate committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of corporations, labor unions, membership and trade organizations and their PACs. It should be used in conjunction with the FEC's January 2007 *Campaign Guide for Corporations and Labor Organizations*, which provides more comprehensive information on compliance for these organizations.

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Laws & Regulations

Honest Leadership and Open Government Act of 2007

On September 14, 2007, President Bush signed into law the Honest Leadership and Open Government Act of 2007 (HLOGA), which amends the House and Senate Ethics Rules and the Federal Election Campaign Act (FECA). In addition to making broad changes to the ethics rules for officeholders and candidates, the HLOGA also introduces new disclosure requirements for certain committees that receive bundled contributions from lobbyists and committees established or controlled by any lobbyist and new rules relating to travel on private jets.

The provisions of HLOGA that amend the FECA are briefly summarized below. The Commission will initiate rulemakings in the coming months to promulgate regulations to implement these statutory changes.

Disclosure of Bundled Contributions

The new law requires candidates' authorized committees, leadership PACs and party committees to disclose the name, address, employer of, and the bundled contribution amount credited to, each lobbyist (or lobbyist's committee) who has provided the committee with bundled contributions aggregating over $15,000 during specified time periods. The report discloses the fundraising activities of registered lobbyists, individuals listed on current lobbying reports filed under the Lobbying Disclosure Act of 1995

and political committees established or controlled by such individuals.

"Bundled" contributions include both contributions physically forwarded by a lobbyist and contributions for which a lobbyist receives credit by the candidate recipient through record, designation or some other form of recognition. For example, if a lobbyist were to receive an honorary title within the recipient's committee or gain access to an event reserved exclusively for those who generate a certain amount of contributions, he or she might be considered to have received "credit" for the bundled contributions. The provision applies to fundraising for a candidate's principal campaign committee, any Leadership PAC established, maintained, financed or controlled by a candidate or a federal officeholder and any party committee. This reporting obligation is in addition to the Commission's existing rules for disclosing earmarked contributions forwarded to a candidate's authorized committee through a "conduit." See 11 CFR 110.6(b) and 102.8. The new reporting requirement will take effect 90 days after the FEC promulgates final regulations implementing these provisions of §204.

Travel on Private Jets

HLOGA amends the FECA to prohibit Senate and Presidential candidates, and their authorized committees, from spending campaign funds for travel on non-commercial aircraft, unless they pay the charter rate. House candidates, and their authorized committees and Leadership PACs, are prohibited from spending any campaign funds for travel on private, non-commercial aircraft. Thus, candidates will no longer be permitted to pay the first-class or coach airfare, as appropriate, for travel on a private plane.[1] See 11 CFR 100.93(c)). This provision took effect on September 14, 2007. §601.

For additional information, see the FEC Press Release, dated September 24, 2007, at http://www.fec.gov/press/press2007/20070924travel.shtml.

Additional Provisions

HLOGA also makes a number of changes to laws other than the FECA, and to House and Senate rules, that affect the way that federal candidates conduct their campaigns. The complete text of the Honest Leadership and Open Government Act of 2007 is available on the FEC web site at http://www.fec.gov/law/feca/s1legislation.pdf.

—Gary Mullen

Final Rules and Explanation for Electioneering Communications

On December 14, 2007, the Commission voted to modify its regulations governing the funding of "electioneering communications" (ECs) by corporations and labor organizations and to apply the EC reporting and disclaimer requirements to ECs made by corporations and labor organizations. The new rule is in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.* (WRTL II). The revised rules allow corporations and labor organizations to distribute ECs, provided that they are not the "functional equivalent of express advocacy," and took effect December 26, 2007.

Background

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (the Act) to add a new type of political communication called "electioneering communications." The BCRA defined an EC as a broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary election or within 60 days of a general election and is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29(a). Corporations and labor organizations are prohibited from using their general treasury funds to finance ECs. 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(2)(iii). Those making ECs are subject to several reporting and disclosure requirements. 2 U.S.C. §§434(f)(1)-(2) and 441d(a).

In WRTL II, the Supreme Court reviewed an "as-applied challenge" to the EC funding prohibitions[1] where Wisconsin Right to Life, Inc., a nonprofit corporation, sought to use its own general treasury funds, which included donations it had received from other corporations, to pay for broadcast ads during the EC period that referred to both U.S. Senators from Wisconsin, one of whom was a clearly identified candidate for federal office in that election. The plaintiff argued that these communications were genuine issue ads run as part of a grassroots lobbying campaign on the issue of Senate filibusters of judicial nominations.

The Supreme Court held that because the ads in question were not the "functional equivalent of express advocacy," the prohibition on corporate or labor organization funding of ECs was unconstitutional as applied to the plaintiff's ads. The

[1] *Travel on aircraft that is owned or leased by the candidate or his or her immediate family members (or non-public corporations in which the candidate or his or her immediate family members have an ownership interest) is exempted.*

[1] *In* McConnell v. FEC*, the Supreme Court held that BCRA's prohibition on corporate or labor organization funding of ECs was not facially overbroad. However, in* FEC v. Wisconsin Right to Life I (WRTL I)*, the Court held that McConnell did not preclude further "as applied" challenges to the corporate and labor organization funding prohibitions.*

Court further held that a communication is the "functional equivalent of express advocacy" only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court determined that the content of WRTL's advertisements was "consistent with that of a genuine issue ad" and the communications lacked "indicia of express advocacy," because they did not mention an election, candidacy, political party or challenger, and the communications did not take a position on a candidate's character, qualifications or fitness for office.

In response to the Supreme Court's decision, the Commission published a Notice of Proposed Rulemaking (NPRM) on August 31, 2007, proposing changes to the EC regulations and held public hearings on the NPRM on October 17-18, 2007.

Final Rule

New section 11 CFR 114.15 provides a general exemption from the prohibition on corporate and labor organization funding of ECs unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate. The new rules create an exemption that allows the use of corporate and labor organization funds to finance ECs, but does not exempt such communications from the overall EC definition or the EC reporting and disclaimer requirements. Accordingly, corporations and labor organizations that finance ECs are required to file EC disclosure reports once they spend more than $10,000 in a calendar year on such communications. 11 CFR 104.20. ECs must also carry a disclaimer notice. 11 CFR 110.11.

Safe Harbor. The revised rules provide a safe harbor provision intended to give guidance regarding which ECs would qualify for the general exemption. Satisfying the safe harbor provision demonstrates that an EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a federal candidate, and thus is not the functional equivalent of express advocacy. If a communication satisfies the safe harbor provision, it may be paid for with corporate or labor organization funds. It is important to note, however, that this provision is merely a safe harbor, and an EC that does not qualify for the safe harbor still may come within the general exemption.

The safe harbor provision has three prongs. An EC qualifies for the safe harbor if it 1) does not mention "any election, candidacy, political party, opposing candidate, or voting by the general public"; 2) does not take a position on the candidate's character, qualifications or fitness for office; and 3) either focuses on a legislative, executive or judicial matter or issue, or proposes a commercial transaction. 11 CFR 114.15(b)(1)-(3).

The third prong of the final rule's safe harbor will be satisfied by certain lobbying communications or commercial advertisements. An EC meets this prong if it "focuses on a legislative, executive or judicial matter or issue" and either "urges a candidate to take a particular position or action with respect to the matter or issue" or "urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue." 11 CFR 114.15(b)(3)(i)(A)-(B). Additionally, the last part of the safe harbor's third prong applies to an EC that proposes a commercial transaction such as the purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event. 11 CFR 114.15(b)(3)(ii). This prong of the safe harbor can be satisfied regardless of whether the product or service is provided by a business owned or operated by, or employing, the candidate referred to in the EC. Both ECs advertising a federal candidate's appearance to promote a business or other commercial product or service, and ECs in which the federal candidate is referred to as the subject of a book, video or movie, will be eligible for the safe harbor.

Rules of Interpretation. Corporations and labor organizations may still finance certain ECs that do not qualify for the safe harbor. If an EC does not qualify for the safe harbor, the Commission will consider two factors. The first is whether the communication includes any indicia of express advocacy, meaning that it mentions any election, candidacy, political party, opposing candidate or voting by the general public or takes a position on the candidate's character, qualifications or fitness for office. The second is whether the communication has content that would support a determination that it has an interpretation other than as an appeal to vote for or against a clearly identified federal candidate. A communication would meet this factor if it:

- Focused on a public policy issue and either urged a candidate to take a position on the issue or urged the public to contact the candidate about the issue;
- Proposed a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
- Included a call to action or other appeal that, interpreted in conjunction with the rest of the communication, urged an action other than voting for or against or contributing to a clearly identified federal candidate or political party. 11 CFR 114.15(c)(1)-(2).

The Commission will consider these two factors to determine whether, on balance, the communication has a reasonable interpretation other than as an appeal to vote for or against a federal candidate. If there is any doubt about whether

the communication qualifies for the general exemption, the Commission will permit the communication. 11 CFR 114.15(c)(3).

Information Permissibly Considered. In making its determination the Commission will only consider the communication itself and basic background information necessary to put the communication into context. For example, the Commission may consider whether a named individual is a candidate and whether the communication describes a public policy issue. 11 CFR 114.15(d).

Examples. The Commission will provide a list of examples of permissible and impermissible communications on its web site at www.fec.gov. 11 CFR 114.15(e).

Reporting Requirements. The new final rule states that corporations and labor organizations that finance permissible ECs aggregating in excess of $10,000 in a calendar year must file reports with the Commission. The Act and current Commission regulations require any person that has made ECs aggregating in excess of $10,000 in a calendar year to file a disclosure statement. 2 U.S.C. §434(f)(1) and 11 CFR 104.20(b). Generally, these statements must disclose the identities of the persons making the EC, the cost of the EC, the clearly identified candidate appearing in the EC and the election in which he or she is a candidate and the disclosure date. 11 CFR 104.2(c)(1)-(6). Persons making ECs must also disclose the names and addresses of each person who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. 11 CFR 104.20(c)(8).

The Act and current Commission regulations permit persons making ECs to establish and maintain a segregated bank account for the purpose of funding ECs in order to limit the reporting of donors' identities to only the donors to that segregated account. 2 U.S.C. §434(f)(2)(E) and 11 CFR 104.20(c)(7). If a person does not create a segregated bank account and funds ECs from its general account, that person must disclose all donors of $1,000 or more to the entity during the current and preceding calendar years. 11 CFR 104.20(c)(8).

The Commission revised the EC reporting rules to require corporations and labor organizations making ECs under the new rule to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs made by that corporation or labor organization. 11 CFR 104.20(c)(9). All of the other reporting requirements that apply to persons making ECs also apply to corporations and labor organizations making ECs under the new regulations.

The Commission also revised the rules regarding segregated bank accounts. Individuals, unincorporated associations and qualified nonprofit corporations may continue to use a segregated bank account containing only funds from individuals to fund ECs that are outside the new exemption in 114.15. 11 CFR 104.20(c)(7)(i) and 114.14(d)(2)(ii). Any person, other than corporations and labor organizations, may also establish a segregated bank account containing donations from corporations or labor organizations to fund ECs and fall within the new exemption in 114.15. 11 CFR 104.20(c)(7)(ii) and 114.14(d)(2)(i). Corporations and labor organizations funding ECs under the new exemption are not permitted to use a segregated bank account, but are instead governed by the new reporting rules in 104.20(c)(9).

The full text of the Final Rule and Explanation and Justification is available in the *Federal Register* (72 FR 72899) and is also posted on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml#ec07.

—Myles Martin

Final Rules on Reporting Contributions Bundled by Lobbyists, Registrants and Their PACs

On December 18, 2008, the Commission approved final rules regarding disclosure of contributions bundled by lobbyists/registrants and their political action committees (PACs). These rules implement Section 204 of the Honest Leadership and Open Government Act of 2007 (HLOGA) by requiring "reporting committees" (authorized committees of federal candidates, Leadership PACs and political party committees) to disclose certain information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of the reporting threshold within a "covered period" of time. These requirements apply to both in-kind and monetary contributions. The reporting threshold for 2009 is $16,000 and is indexed annually for inflation.

Lobbyist/Registrants and Their PACs

The rules define a lobbyist/registrant as a current registrant (under section 4(a) of the Lobbying Disclosure Act of 1995 (the LDA)) or an individual listed on a current registration or report filed under sections 4(b)(6) or 5(b)(2)(C) of the LDA. 11 CFR 104.22(a)(2). A lobbyist/registrant PAC is any political committee that a lobbyist/registrant "established or controls." 11 CFR 100.5(e)(7) and 104.22(a)(3). For the purposes of these rules, a lobbyist/registrant "established or controls" a political committee if he or she is required to make a disclosure to that effect to the Secretary of the Senate or Clerk of the House of Representatives. 11 CFR 104.22(a)(4)(i). If the political committee is not able to obtain definitive guidance from the Senate or House regarding its status, then it must consult additional criteria in FEC regulations. Under these crite-

ria, a political committee is considered a lobbyist/registrant PAC if:

- It is a separate segregated fund whose connected organization is a current registrant; (11 CFR 104.22(a)(4)(ii)(A)); or
- A lobbyist/registrant had a primary role in the establishment of the committee *or* directs the governance or operations of the committee. (Note that the mere provision of legal compliance services or advice by a lobbyist/registrant would not by itself meet these criteria.) (11 CFR 104.22(a)(4)(ii)(B)(1) and (2)).

Disclosure is triggered based on the activity of persons "reasonably known" by the reporting committee to be lobbyist/registrants or lobbyist/registrant PACs. In order for reporting committees to determine whether a person is reasonably known to be a lobbyist/registrant or lobbyist/registrant PAC, the rules require reporting committees to consult the Senate, House and FEC web sites. 11 CFR 104.22(b)(2)(i). The Senate and House web sites identify registered lobbyists and registrants, while the FEC web site identifies whether a political committee is a lobbyist/registrant PAC. A computer printout or screen capture showing the absence of the person's name on the Senate, House or FEC web sites on the date in question may be used as conclusive evidence demonstrating that the reporting committee consulted the required web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(ii). Nevertheless, the reporting committee is required to report bundled contributions if it has actual knowledge that the person in question is a lobbyist/registrant or lobbyist/registrant PAC even if the committee consulted the Senate, House and FEC web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(iii).

Covered Periods

An authorized committee, Leadership PAC[1] or party committee (collectively "reporting committees") must file new FEC Form 3L when it receives two or more bundled contributions aggregating in excess of $16,000 from a lobbyist/registrant or lobbyist/registrant PAC during a specified time period. That time period, called a "covered period," is defined in HLOGA as January 1 through June 30, July 1 through December 31 and any reporting period applicable under the Federal Election Campaign Act (the Act). 2 U.S.C. §434(i)(2); 11 CFR 104.22(a)(5). As a result, covered periods will typically coincide with a committee's regular FEC reporting periods, except that bundling reports filed in July and January will also cover the preceding six months. One exception, noted below, permits monthly filers to file Form 3L on a quarterly basis, if they choose.

Semi-annual Covered Period. All reporting committees with bundled contributions to disclose must file a report covering the semi-annual periods of January 1 through June 30 and July 1 through December 31. 11 CFR 104.22(a)(5)(i). Totals for the first six months of the year will appear on quarterly filers' July 15 report and on monthly filers' July 20 report.[2] All reporting committees will disclose totals for the second half of the year on their January 31 Year-End Report.

Quarterly Covered Period. The covered period for reporting committees that file campaign finance reports on a quarterly schedule in an election year includes the semi-annual periods above and also the calendar quarters beginning on January 1, April 1, July 1 and October 1, as well as the pre- and post-election reporting periods (including runoff or special elections), if applicable. 11 CFR 104.22(a)(5)(ii) and (v). Authorized committees of House and Senate candidates have the same quarterly covered period for a non-election year as in an election year. However, Leadership PACs or party committees that file quarterly in an election year file campaign finance reports semi-annually in a non-election year. Therefore, in a non-election year, these reporting committees must file lobbyist bundling disclosure only for the semi-annual covered periods, and the pre- and post-special election reporting periods, if applicable. Some authorized committees of Presidential candidates may also file quarterly reports.

Monthly Covered Period. For reporting committees that file campaign reports on a monthly basis, the covered period includes the semi-annual periods above and each month in the calendar year, except that in election years they file for the pre- and post-general election reporting periods in lieu of the November and December reports. 11 CFR 104.22(a)(5)(iii). As noted above, reporting committees that file campaign finance reports monthly may elect to file their lobbyist bundling disclosure on a quarterly basis. 11 CFR 104.22(a)(5)(iv). Reporting committees wishing to change their lobbyist bundling disclosure from monthly to quarterly must first notify the Commission in writing. Electronic filers must file this request electronically. A reporting committee may change its filing frequency only once in a

[1] *A Leadership PAC is defined as a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate or individual holding federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that Leadership PAC does not include a political committee of a political party. 11 CFR 100.5(e)(6).*

[2] *In a non-election year, committees that file only semi-annually will file Form 3L on July 31 and January 31.*

calendar year. 11 CFR 104.22(a)(5)(iv).

Bundled Contributions

The disclosure requirements apply to two distinct types of bundled contributions: those that are forwarded to the reporting committee by a lobbyist/registrant or lobbyist/registrant PAC and those that are received directly from the contributor and are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC.

A forwarded contribution is one that is delivered, either physically or electronically, to the reporting committee by the lobbyist/registrant or lobbyist/registrant PAC, or by any person that the reporting committee knows to be forwarding a contribution on behalf of a lobbyist/registrant or lobbyist/registrant PAC. These contributions count toward the bundling disclosure threshold regardless of whether the committee awards any credit to the lobbyist/registrant or lobbyist/registrant PAC.[3] 11 CFR 104.22(a)(6)(i).

Bundled contributions also include those received from the original contributor when the contributions are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC through records, designations or other means of recognizing that a certain amount of money has been raised by that lobbyist/registrant or lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(ii). The final rules outline ways that a reporting committee may be considered to "credit" a lobbyist/registrant or lobbyist/registrant PAC for raising contributions.

For example, a reporting committee may credit lobbyist/registrants or lobbyist/registrant PACs through records (written evidence, including writings, charts, computer files, tables, spreadsheets, databases or other data or data compilations stored in any medium from which information can be obtained). 11 CFR 104.22(a)(6)(ii)(A).

Designations or other means of recognizing that a lobbyist/registrant or lobbyist/registrant PAC has raised a certain amount of money include, but are not limited to:

- Titles given to persons based on their fundraising;
- Tracking identifiers assigned by the reporting committee and included on contributions or contribution-related material that may be used to maintain information about a person's fundraising;
- Access, for example through invitations to events, given to lobbyist/registrants or lobbyist/registrant PACs as a result of their fundraising levels; or
- Mementos given to persons who have raised a certain amount of contributions. 11 CFR 104.22(a)(6)(ii)(A)(1)-(4).

Note, however, that the rules exclude from the definition of "bundled contribution" any contribution made from the personal funds of the lobbyist/registrant or his or her spouse, or from the funds of the lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(iii).

Disclosure Requirements

As noted above, the Commission has created new FEC Form 3L, Report of Contributions Bundled by Lobbyists/Registrants and Lobbyist/Registrant PACs, to accommodate the new disclosure requirements. Reporting committees must use the form to disclose:

- Name of each lobbyist/registrant or lobbyist/registrant PAC;
- Address of each lobbyist/registrant or lobbyist/registrant PAC;
- Employer of each lobbyist (if an individual); and
- The aggregate amount of bundled contributions forwarded by or received and credited to each.

Electronic filers are required to file Form 3L electronically. A new release of FECFile will be available from the FEC.

Reporting committees must maintain records of any bundled contributions that aggregate in excess of the reporting threshold and are reported on Form 3L. Reporting committees must keep sufficient documentation of the information contained in the reports to check their accuracy and completeness and must keep those records for three years after filing FEC Form 3L. 11 CFR 104.22(f).

The Commission has additionally revised FEC Form 1, Statement of Organization, to allow political committees to identify themselves as Leadership PACs or lobbyist/registrant PACs. As of March 29, 2009, political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC must identify themselves as such when filing FEC Form 1 with the Commission. Political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC that have already filed FEC Form 1 must amend their FEC Form 1 no later than March 29, 2009, to identify themselves as such.

Additional Information

The new rules will take effect on March 19, 2009, and recordkeeping requirements begin on this date. Reporting committees must also begin tracking their bundled contributions as of this date. Compliance with the reporting requirements for reporting committees is required after May 17, 2009. Reports filed in accordance with these rules need not include contributions bundled by lobbyist/registrants if the contributions are received before March 19. Contribu-

[3] *These rules do not affect the existing recordkeeping and reporting provisions that require each person who receives and forwards contributions to a political committee to forward certain information identifying the original contributor and, for contributions received and forwarded to an authorized committee, the reporting and recordkeeping requirements by persons known as "conduits" or "intermediaries." See 11 CFR 102.8 and 110.6.*

tions bundled by lobbyist/registrant PACs need not be reported if they are received by April 18.

The final rules and their Explanation and Justification were published in the *Federal Register* on February 17, 2009, and are available on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-03.pdf.

—*Elizabeth Kurland*

Final Rules on Campaign Travel

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

General Rule

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

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

Presidential, Vice-Presidential and Senate Candidate Travel

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

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

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

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

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

To avoid the receipt of an in-kind contribution, the committee must reimburse the service provider no

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

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

later than seven calendar days after the date the flight began. 11 CFR 100.93(c)(3).

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

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

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

Non-Commercial Air Travel on Behalf of Other Committees

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

Other Means of Transportation

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

Government Conveyances

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

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

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

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

Members of the news media who are traveling with a candidate on government aircraft and security personnel not provided by a government entity must be included in the number of campaign travelers for the purposes of identifying a comparable aircraft of sufficient size to accommodate all campaign travelers. A comparable aircraft, however, need not be able to accommodate all government-required personnel or government-required equipment (such as security communication devices, etc.). All security personnel, including government-provided security personnel, are included in determining the number of campaign travelers for purposes of calculating each candidate's pro rata share.

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

Aircraft Owned or Leased by Candidate or Immediate Family

The Commission is also amending its regulations to conform with HLOGA's exception from the payment and reimbursement requirements for travel aboard aircraft that

are "owned or leased" by a candidate or a candidate's immediate family, including an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that 1) the entity is not a public corporation, and 2) the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows."

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

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

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

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

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

Recordkeeping Requirements

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

Additional Information

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

—Myles Martin

Final Rules on Funds Received in Response to Solicitations; Allocation of Expenses by PACs

On March 11, 2010, the Commission approved final rules regarding funds received in response to solicitations and the allocation of certain expenses by separate segregated funds (SSFs) and nonconnected political action committees (PACs). The rules were adopted in response to a decision by the United States Court of Appeals for the District of Columbia Circuit in *EMILY's List v. FEC* (*EMILY's List*). See the November 2009, *Record*, page 1.

Background

On September 18, 2009, the court of appeals held that Commission regulations at 11 CFR 100.57, 106.6(c) and 106.6(f) violated the First Amendment and also held that 100.57, 106.6(f) and one provision of 106.6(c) exceeded the Commission's authority under the Federal Election Campaign Act (the Act). At the direction of the court of appeals, the U.S. District Court for the District of Columbia ordered that these rules be vacated.

On December 29, 2009, the Commission published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* in which it sought public comment on the proposed removal of the rules vacated by the court. The Commission received two comments on the proposed rules, which are available on the Commission's website at http://www.fec.gov/law/law_rulemakings.shtml#emilyslistrepeal.

Final Rules

Funds Received in Response to Solicitations. Commission regulations at 11 CFR 100.57 specified that funds provided in response to a communication were to be treated as contributions if the communications indicated that any portion of the funds received would be used to support or oppose the election of a

clearly identified federal candidate. 11 CFR 100.57(a). All of the funds received in response to a solicitation that referred both to a clearly identified federal candidate and a political party, but not to any nonfederal candidates, were to be treated as contributions. 100.57(b)(1). Finally, if a solicitation referred to at least one clearly identified federal candidate and one or more clearly identified nonfederal candidate(s), then at least fifty percent of the funds received in response to that solicitation had to be treated as contributions. 100.57(b)(2). The regulation provided an exception for certain solicitations for joint fundraisers conducted between or among authorized committees of federal candidates and the campaign organizations of nonfederal candidates. 100.57(c).

The Commission removed 11 CFR 100.57 in its entirety because the court of appeals held that it is unconstitutional and that it exceeded the Commission's statutory authority under the Act.

Allocation of Expenses. Commission regulations at 11 CFR 106.6 provided SSFs and nonconnected PACs making disbursements in connection with both federal and nonfederal elections with instructions as to how to allocate their administrative expenses and costs for federal and nonfederal activities.

The rule at 106.6(c) required nonconnected committees and SSFs to use at least fifty percent federal funds to pay for administrative expenses, generic voter drives and public communications that referred to a political party, but not to any federal or nonfederal candidates. The rule at 106.6(f) specified that nonconnected committees and SSFs had to pay for public communications and voter drives that referred to both federal and nonfederal candidates using a percentage of federal funds proportionate to the amount of the communication that was devoted to the federal candidates.

The Commission removed 106.6(c) and 106.6(f) in their entirety, as the court of appeals held that both provisions are unconstitutional. The deletion of the regulations apply both to nonconnected committees and to SSFs.

Additional Information

The Final Rules were published in the *Federal Register* on March, 19, 2010, and are effective on April 19, 2009. The Federal Register Notice is available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-08.pdf.

—Myles Martin

Final Rules on Coordinated Communications

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

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

Background

Commission regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) established a three-prong test for determining whether a communication is coordinated with a candidate, a candidate's authorized committee, a political party committee or the agents of any of these. Coordinated communications generally result in an in-kind contribution. The test includes a payment prong, a content prong and a conduct prong. The content and conduct prong each include several standards, and satisfying any one of the standards within a prong satisfies that prong of the test. 11 CFR 109.21(a)(1)-(3).

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

New Content Standard

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

the timing of the communication or the targeted audience.

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

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

Conduct Standards

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

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

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

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

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

There is no information in the rulemaking record showing that use or conveyance by common vendors and former employees of information material to public communications outside of the 120-day period has become problematic in the time the 120-day period has been in effect. The Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

Safe Harbor for Certain Business and Commercial Communications

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

Additional Information

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

—Myles Martin

Final Rules on Definition of Federal Election Activity

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

Scope

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

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

Definition of "Voter Registration Activity"

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

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

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

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

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

Definition of "GOTV Activity"

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

- Encouraging or urging potential voters to vote;
- Informing potential voters about the hours and location of polling places, or about early voting or voting by absentee ballot;
- Offering or arranging to transport voters to the polls, as well as actually transporting voters to the polls; and
- All activities that assist potential voters in voting.

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

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

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

Brief, Incidental Exhortation

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

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

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

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

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

Activities involving De Minimis Costs

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

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

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

Additional Information

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

—Zainab Smith

FEC Web Site Offers Podcasts

In an effort to provide more information to the regulated community and the public, the Commission is making its open meetings and public hearings available as audio recordings through the FEC web site, as well as by podcasts. The audio files, and directions on how to subscribe to the podcasts are available under *Audio Recordings* through the *Commission Meetings* tab at http://www.fec.gov.

The audio files are divided into tracks corresponding to each portion of the agenda for ease of use. To listen to the open meeting without subscribing to the podcasts, click the icon next to each agenda item. Although the service is free, anyone interested in listening to podcasts must download the appropriate software listed on the web site. Podcast subscribers will automatically receive the files as soon as they become available–typically a day or two after the meeting.

Inflation Adjustments

Contribution Limits for 2011-2012

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

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

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

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

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

—Elizabeth Kurland

1 The applicable cost of living adjustment amount is 1.23152.

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

Contribution Limits for 2011-2012

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

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

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

2011 Lobbyist Bundling Threshold

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

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

—Elizabeth Kurland

1 The applicable cost of living adjustment amount is 1.08163.

Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1986 are available on the FEC web site as PDF files. Visit the FEC web site at http://www.fec.gov/pages/record.shtml to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1992. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

You will need Adobe® Acrobat® Reader software to view the publication. The FEC's web site has a link that will take you to Adobe's web site, where you can download the latest version of the software for free.

Court Cases

FEC v. Wisconsin Right to Life, Inc.

On June 25, 2007, the Supreme Court upheld a district court ruling that the electioneering communication (EC) financing restrictions of the Bipartisan Campaign Reform Act were unconstitutional "as applied" to ads that Wisconsin Right to Life, Inc., a 501(c)(4) nonprofit corporation, intended to run before the 2004 elections. The Supreme Court concluded that the EC financing restrictions are unconstitutional as applied to these ads because:

- The ads are not express advocacy or its functional equivalent; and
- The Court found no sufficiently compelling governmental interest to justify burdening WRTL's speech.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an EC is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. Corporations may not make ECs using their general treasury funds.[1] 2 U.S.C. 441b(a)-(b) and 11 CFR 114.2 and 114.14.

WRTL originally filed suit in the U.S. District Court for the District of Columbia on July 28, 2004, asking the court to find the prohibition on the use of corporate funds to pay for ECs unconstitutional as applied to what it calls "grassroots lobbying" communications planned for the period before the 2004 elections. After the district court both denied WRTL's motion for a preliminary injunction and dismissed WRTL's complaint, WRTL appealed to the Supreme Court. On January 23, 2006, the Supreme Court vacated the judgment and remanded to the district court to reconsider the merits of WRTL's "as applied" challenge.

District Court Decision

The three communications in question were two radio advertisements and one television advertisement WRTL had planned to run before the 2004 primary and general elections concerning anticipated filibusters of President Bush's federal judicial nominees. The ads encouraged Wisconsin listeners and viewers to contact their Senators (Senators Feingold and Kohl) to urge them to oppose the filibusters. Senator Feingold was up for reelection in 2004, but Senator Kohl was not.

A three-judge panel of the District Court considered the "as applied" challenge to the EC provisions based on two main arguments: whether the ads contained express advocacy for or against a federal candidate or the "functional equivalent" of express advocacy; and, if they did not, whether the government had demonstrated a compelling interest in regulating these ads.

Express advocacy. To determine whether WRTL's 2004 anti-filibuster ads contained express advocacy, or its functional equivalent, the court considered only the text and images of the ads and declined to consider contextual factors bearing on the ads' purpose or likely effect. The court's evaluation was based upon whether the ads:

1. Described an issue that was or "likely" soon would be a "subject of legislative scrutiny";
2. Referred to the prior voting record or current position of the named candidate on the described issue;
3. Exhorted the audience to do anything other than contact the candidate about the described issue;
4. Promoted, attacked, supported or opposed the named candidate; and
5. Referred to an upcoming election, candidacy or party of the candidate.

Considering those five factors, the court found that the anti-filibuster ads did not contain express advocacy or its functional equivalent and thus were not "intended to influence the

[1] *Commission regulations provide an exception allowing "qualified nonprofit corporations" to pay for electioneering communications. 11 CFR 114.2(b)(2). However, WRTL alleges that it does not meet the definition of a qualified nonprofit corporation. 11 CFR 114.10.*

voters' decisions." The court noted that the ads did not mention an election, a candidacy or the individual's "fitness for office." While the ads discussed the filibuster issue, the court stated that they did not reference the Senators' voting records, current or past, on this issue, and that they did not promote, attack, support or oppose either Senator. Additionally, the court noted the ads asked the audience to contact both Senators, not just the Senator up for reelection.

Government interest in regulating issue ads. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court found that the compelling government interest in regulating the communications covered by the definition of electioneering communication was sufficient to uphold the statute on its face. However, the district court stated that by permitting "as applied" challenges to the provisions of the BCRA, the Supreme Court left open the question as to whether there is a compelling government interest in regulating "genuine issue ads" covered by the statute. In light of its finding that WRTL's anti-filibuster ads did not contain express advocacy, or its functional equivalent, the three-judge panel evaluated the government interest in regulating these ads. The court found no compelling government interest and rejected the argument that the need for a "bright line" test is a basis for regulating "genuine issue ads," noting that the "virtues of the bright line test cannot alone justify regulating constitutionally protected speech."

On December 29, 2006, the Commission filed a Notice of Appeal to the Supreme Court.

Supreme Court Decision

On June 25, 2007, the Supreme Court issued a decision upholding the District Court ruling that the EC financing restrictions of the Bipartisan Campaign Reform Act were unconstitutional as applied to WRTL's ads. The Supreme Court also rejected the FEC's argument that the case was moot.

Mootness. The FEC argued that the cases involving WRTL's ads were moot because the 2004 election has passed and WRTL has no continuing interest in running its ads. The Court rejected this argument, noting that the case fits within the established exception to mootness for actions "capable of repetition, yet evading review." The Court noted that WRTL could not have obtained complete judicial review of its claims in time to air its ads in the period prior to the 2004 election and that WRTL had credibly claimed that it intended to run materially similar ads during future EC periods.

Electioneering communication financing restrictions unconstitutional "as applied" to WRTL ads. The Court rejected the FEC's argument that WRTL has the burden of demonstrating that the EC provisions are unconstitutional as applied to its ads. The Court reasoned that the EC provisions burden political speech and, as such, are subject to strict scrutiny. Therefore, the government must prove that applying the EC provisions to WRTL's ads "furthers a compelling governmental interest and is narrowly tailored to achieve that interest."

The Court stated that while in *McConnell v. FEC* the EC provisions had satisfied the standard of strict scrutiny for the regulation of express advocacy and its functional equivalent, the Court in *McConnell* did not formulate a test for future as-applied challenges. The Court rejected the use of an intent-and-effect test for determining when an ad is the functional equivalent of express advocacy and instead explained that the inquiry should focus on the substance of the communication.

The Court found that WRTL's ads may reasonably be interpreted as something other than an appeal to vote for or against a specific federal candidate and, as such, did not constitute the functional equivalent of express advocacy. The Court noted that the content of the ads was consistent with that of a "genuine issue ad" focused on a specific legislative issue and urging the public to take action regarding that issue. Also, the Court noted, the ads' content lacked "indicia of express advocacy" because they made no mention of "an election, candidacy, political party, or challenger . . . and [took no] position on a candidate's character, qualifications, or fitness for office."

In the decision, the Court cited its long recognition of the governmental interest in preventing corruption and the appearance of corruption in elections. The Court acknowledged that *McConnell* had upheld the EC financing restrictions on their face, but the Court determined that that anti-corruption interest did not justify application of the restrictions to the advertisements proposed by WRTL.

The Court concluded that because WRTL's ads are not express advocacy or its functional equivalent, and because the Court found no compelling governmental interest to justify the burden on WRTL's speech, the EC financing restrictions are unconstitutional as applied to these ads. The Court also noted that this case does not present the occasion to revisit *McConnell's* facial upholding of the EC financing restrictions.

—*Gary Mullen*

Note: Portions of the decision in *FEC v. Wisconsin Right to Life, Inc.* have been affected by the Unites States Supreme Court decision in *Citizen's United v. FEC*. For a summary of the court's decision in this case, see page 19.

Shays v. FEC (III)

On June 13, 2008, a three-judge panel of the U.S. Court of Appeals for the District of Columbia affirmed in part and reversed in part the district court's judgment in the *Shays III* case. Specifically, the appeals court agreed with the district court in finding deficient regulations regarding the content standard for coordination, the 120-day coordination window for common vendors and former campaign employees and the definitions of "GOTV activity" and "voter registration activity." The appeals court reversed the district court's decision to uphold the provision allowing federal candidates to solicit funds without restriction at state and local party events. These regulations were remanded to the FEC to issue "regulations consistent with the Act's text and purpose."

The court did not vacate the regulations, so they remain in effect, pending further action. The appeals court upheld the FEC's regulations regarding the firewall safe harbor for coordination by former employees and vendors, which the district court had found deficient.

Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a number of its Bipartisan Campaign Reform Act (BCRA) regulations. On July 11, 2006, U.S. Representative Christopher Shays and then-Representative Martin Meehan (the plaintiffs) filed another complaint in district court. The complaint challenged the FEC's recent revisions to, or expanded explanations for, regulations governing coordinated communications, federal election activity (FEA) and solicitations by federal candidates and officeholders at state party fundraising events. The plaintiffs claimed that the rules did not comply with the court's judgment in *Shays I* or with the BCRA. The complaint also alleged the FEC did not adequately explain and justify its actions.

On September 12, 2007, the district court granted in part and denied in part the parties' motions for summary judgment in this case. The court remanded to the FEC a number of regulations implementing the BCRA, including:

- The revised coordinated communications content standard at 11 CFR 109.21(c)(4);
- The 120-day window for coordination through common vendors and former employees under the conduct standard at 11 CFR 109.21(d)(4) and (d)(5);
- The safe harbor from the definition of "coordinated communication" for a common vendor, former employee, or political committee that establishes a "firewall" (11 CFR 109.21(h)(1) and (h)(2)); and
- The definitions of "voter registration activity" and "get-out-the-vote activity" (GOTV) at 11 CFR 100.24(a)(2)-(a)(3).

On October 16, 2007, the Commission filed a Notice of Appeal seeking appellate review of all of the adverse rulings issued by the district court. On October 23, 2007, Representative Shays cross-appealed the district court's judgment insofar as it denied the plaintiff's "claims or requested relief."

Appeals Court Decision

The appellate court upheld the majority of the district court's decision, including the remand of the content standard for coordination, the 120-day common vendor coordination time period and the definitions of GOTV activity and voter registration activity. While the district court had held the firewall safe harbor for coordination by former employees and vendors invalid, the court of appeals reversed the district court and upheld the safe harbor provision. The court of appeals reversed the district court's decision to uphold the provision permitting federal candidates to solicit funds without restriction at state or local party events.

Coordination Content Standard. The court of appeals held that, while the Commission's decision to regulate ads more strictly within the 90- and 120-day periods was "perfectly reasonable," the decision to regulate ads outside of the time period only if they republish campaign material or contain express advocacy was unacceptable. Although the vast majority of communications are run within the time periods and are thus subject to regulation as coordinated communications, the court held that the current regulation allows "soft money" to be used to make election-influencing communications outside of the time periods, thus frustrating the purpose of the BCRA. The appellate court remanded the regulations to the Commission to draft new regulations concerning the content standard.

Coordination by Common Vendors and Former Employees. The appellate court affirmed the district court's decision concerning the 120-day prohibition on the use of material information about "campaign plans, projects, activities and needs" by vendors or former employees of a campaign. The court held that some material could retain its usefulness for more than 120 days and also that the Commission did not sufficiently support its decision to use 120 days as the acceptable time period after which coordination would not occur.

Firewall Safe Harbor. Contrary to the decision of the district court, the court of appeals approved the firewall safe harbor regulation to stand as written. The safe harbor is designed to protect vendors and organizations in which some employees are working on a candidate's campaign and others are working for outside organizations making independent expenditures. The ap-

pellate court held that, although the firewall provision states generally as to what the firewall should actually look like, the court deferred to the Commission's decision to allow organizations to create functional firewalls that are best adapted to the particular organizations' unique structures.

Definitions of GOTV and Voter Registration Activity. The court of appeals upheld the district court's decision to remand the definitions of "GOTV" and "voter registration activity." The court held that the definitions impermissibly required "individualized" assistance directed towards voters and thus continued to allow the use of soft money to influence federal elections, contrary to Congress' intent.

Solicitations by federal candidates at state party fundraisers. While the district court had upheld the regulation permitting federal candidates and officeholders to speak without restriction at state party fundraisers, the court of appeals disagreed. The court stated that Congress did not explicitly state that federal candidates could raise soft money at state party fundraisers; rather, Congress permitted the federal candidates to "appear, speak, or be a featured guest." Congress set forth several exceptions to the ban on federal candidates raising soft money, and state party events were not included in the exceptions. Thus, the court found the regulation impermissible.

U.S. District Court of Appeals for the District of Columbia Circuit, 07-5360.

—Meredith Metzler

Citizens United v. FEC

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

Background

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

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

Supreme Court Decision

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

The Court noted that §441b's prohibition on corporate independent expenditures and electioneering communications is a ban on speech and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." Accordingly, laws that burden political speech are subject to "strict scrutiny," which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. According to the Court, prior to *Austin* there was a line of precedent forbidding speech restrictions based on

a speaker's corporate identity, and after *Austin* there was a line permitting them. In reconsidering *Austin*, the Court found that the justifications that supported the restrictions on corporate expenditures are not compelling.

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

The Court also rejected an anti-corruption rationale as a means of banning independent corporate political speech. In *Buckley v. Valeo*, the Court found the anti-corruption interest to be sufficiently important to allow limits on contributions, but did not extend that reasoning to overall expenditure limits because there was less of a danger that expenditures would be given as a *quid pro quo* for commitments from that candidate. The Court ultimately held in this case that the anti-corruption interest is not sufficient to displace the speech in question from Citizens United and that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

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

Additional Information

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

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

—*Myles Martin*

Commission Statement on Citizens United v. FEC

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

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

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

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

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

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

- 11 CFR 114.2(b)(2) and (3), which implement the Act's prohibition on corporate and labor organization independent expenditures and electioneering communications;
- 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
- 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures and electioneering communications under certain conditions;
- 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for electioneering communications; and
- 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.

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

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

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:

- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

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

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

Advisory Opinions

AO 2007-10 Campaign May Not Use Corporate Names, Trademarks or Service Marks at Golf Fundraiser

A candidate's committee may not recognize the corporate employers of individual contributors at a golf tournament fundraiser because the use of the corporation's name, trademark or service mark would result in the corporate facilitation of contributions, which is prohibited by the Federal Election Campaign Act (the Act).

Background

Congressman Silvestre Reyes and his authorized committee (the Reyes Committee) plan to host a golf-tournament fundraiser for the committee. Individuals or political action committees (PACs) will sponsor each of the 18 holes for the golf tournament and each hole will feature a sign that recognizes the particular sponsor of that hole. The Reyes Committee also wishes to increase participation in the fundraiser by displaying the name, trademark or service mark of the corporation that employs each individual who sponsors a hole at the tournament. Each individual would pay for the sponsorship, and the contribution would apply to that individual's contribution limit to the Reyes Committee.

Analysis

Corporations are prohibited from using corporate resources to facilitate the making of contributions to federal political committees other than the corporation's separate segregated fund (SSF). 11 CFR 114.2(f)(1) and (f)(4)(ii).

The names, trademarks and service marks of corporations are considered to be corporate resources. Neither a corporation nor its agents

are permitted to use corporate resources to facilitate the making of a contribution to any political committee, nor may a political committee knowingly accept or receive prohibited contributions. 11 CFR 114.2(d).

In this case, the Reyes Committee's stated reason for including the corporate name, trademark or service mark is to encourage contributions to the fundraiser. A corporation would be using its resources to facilitate such contributions if it allowed the Reyes Committee to use its resources in this way. In addition, an individual employee of a corporation would act as the corporation's agent if he or she approved or accepted the Reyes Committee's use of the corporation's resources. Accordingly, if agents of a corporation were to allow the Reyes Committee to use the corporation's resources at the tournament, the corporation would be impermissibly facilitating the making of a contribution. Such corporate facilitation is prohibited, and the Reyes Committee may not accept facilitated contributions. Therefore, the Reyes Committee may not recognize the corporate employers of individual contributors at its fundraiser.

Date Issued: August 21, 2007
Length: 3 pages.

—Myles Martin

AO 2007-12 Disaffiliation of SSFs After Corporate Spin-Off

Tyco US PAC, the separate segregated fund (SSF) of Tyco International Management Company (Tyco), is disaffiliated from the SSFs of Covidien U.S. and Tyco Electronics Corporation, which are subsidiaries of parent corporations spun-off from Tyco International Ltd. as of the close of business on June 29, 2007.

Background

Tyco US is a wholly owned U.S. subsidiary of Tyco International Ltd. (Tyco International). On June 29, 2007, Tyco International separated into three publicly traded corporations: Covidien Ltd. (Covidien), Tyco Electronics Ltd. (Tyco Electronics) and Tyco International Ltd. At the time of the spin-off, Covidien and Tyco Electronics each had wholly owned U.S. subsidiaries, now identified as Covidien (U.S.) and Tyco Electronics Corporation, respectively.

In the spin-off, Tyco International distributed all of its shares of common stock in Covidien and Tyco Electronics to the shareholders of Tyco International's common stock. Upon completion of the spin-off, the shareholders of Tyco International owned almost 100 percent of Covidien and Tyco Electronics, and none of the three companies owned any shares in either of the other companies. The three companies also executed a Separation and Distribution Agreement to effect the separation and provide a framework for the relationship among the companies after the spin-off.

Tyco US PAC has been registered as a political committee since 1979. Covidien US PAC and TELPAC are, respectively, the SSFs of Covidien (U.S.) and Tyco Electronics Corporation. Both SSFs were created in anticipation of the spin-off and filed their Statements of Organization with the Commission when Tyco US was still the connected organization for all three SSFs.[1] Tyco US PAC asked the Commission whether Tyco International, Covidien and Tyco Electronics are disaffiliated from each other under the Federal Election Campaign Act (the Act) and Commission regulations as of June 29, 2007, so that the SSFs of their respective U.S. subsidiaries are no longer affiliated with each other as of that date.

Legal Analysis and Conclusions

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. See 11 CFR 100.5(g)(2); 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, hence, whether, the respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). The Commission considered eight of these circumstantial factors, plus the issue of common shareholders after the spin-offs, in determining that Tyco US PAC, Covidien US PAC and TELPAC are not affiliated.

Organization owns a controlling interest in voting stock or securities. One affiliation factor considers whether a sponsoring organization owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A). None of the three companies owns any stock in the other two companies. Before the spin-off, Tyco US PAC, Covidien US PAC and TELPAC were *per se* affiliated because Covidien and Tyco Electronics were wholly owned

[1] *Tyco US PAC, Covidien US PAC and TELPAC will comply with the prohibitions placed on foreign national participation in the funding and the decision-making processes of the SSFs by the Federal Election Campaign Act, Commission regulations and advisory opinions. 2 U.S.C. §441e; 11 CFR 110.20. AOs 2006-15, 2004-42 and 2000-17.*

by Tyco International, and hence the SSFs' respective connected organizations were also wholly owned by Tyco International. Immediately after the spin-off, Covidien and Tyco Electronics, and their wholly owned U.S. subsidiaries, were owned by Tyco International's shareholders, not by Tyco International. This lack of ownership interest by one company in another points toward disaffiliation.

Authority or ability to direct or participate in governance or to control officers. The law also considers the authority or ability of one corporate sponsor to participate in the governance of another corporate sponsor or to hire, appoint, demote or otherwise control the officers, or other decision-making employees, of another sponsoring organization . 11 CFR 100.5(g)(4)(ii)(B); 110.3(a)(3)(ii)(B); 100.5(g)(4)(ii)(C); 110.3(a)(3)(ii)(C).

The bylaws of Covidien and Tyco Electronics do not contain provisions granting authority to Tyco International over operations of Covidien and Tyco Electronics. Before the spin-off, Tyco International, as the lone shareholder, selected the current boards of directors of Covidien and Tyco Electronics. The governing documents of Covidien and Tyco Electronics contain certain anti-takeover provisions that would tend to preserve these board members' positions, but also lack other significant provisions of this type. The Commission concluded that the effect on Covidien and Tyco Electronics of the pre-spin-off selection of the boards was outweighed by the minimal nature of director, officer and employee overlap, the background of the board members selected and vigorous trading of the shares in the companies resulting in a diversification in the groups of persons holding shares in the three companies. The Commission also considered the provisions of the spin-off agreement that make Tyco International the managing party for all legal matters related to Tyco International, contingent on other corporate liabilities assumed by Covidien and Tyco Electronics, and the companies may decide on an annual basis to change the managing party. The Commission noted that this arrangement would be a natural part of a separation arrangement in view of the fact that the involvement of Covidien and Tyco Electronics in such legal affairs would stem from activities before the spin-off or from the separation itself.

Common or overlapping officers or employees indicating a formal or ongoing relationship or the creation of a successor entity. The affiliation factors also address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization indicating a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(E); 110.3(a)(3)(ii)(E). An additional factor asks whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F); 110.3(a)(3)(ii)(F). The eleven-member boards of each of the companies have been independent of each other since the spin-off. In addition, since the spin-off, there has been only a minimal personnel overlap between the parent companies. One individual serves on both Tyco Electronics' and Tyco International's boards of directors, and Tyco International's Chief Financial Officer serves on Covidien's board of directors. Since the spin-off, these two individuals represent the only overlap between the group of directors, officers and employees of one company and its subsidiaries and the corresponding group of either of the other two companies and their subsidiaries.

In addition, only two of the eleven Covidien directors in place since the spin-off and only three of the eleven Tyco Electronics directors in place since the spin-off previously served as directors or officers of any pre-spin-off Tyco International entities. Moreover, there are no plans for any future transfer of officers or employees from one company or its subsidiaries to another company or its subsidiaries. The Commission also noted that, after the spin-off occurred, amended statements of organization were filed indicating no overlap among Tyco US PAC, Covidien US PAC and TELPAC with respect to officers or to other SSF personnel.

Providing funds or goods in a significant amount or on an ongoing basis. The affiliation factors also address whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Tyco International ceased providing either Covidien or Tyco Electronics with funds to finance their working capital or other cash requirements once the spin-off occurred. After the spin-off, the three parent corporations will, in accordance with percentages agreed to in the Separation Agreement, share responsibility for Tyco International's contingent liabilities regarding securities litigation and actions brought by third parties as to the separation or stock distribution, but not with regard to any liabilities related to any one of the three companies. However, if any one of the companies defaults on its payments, each of the other companies will be required to pay equally the amounts in default.

Separation agreements after corporate spin-offs often entail restrictions on the activities of the

companies involved and provide for some continuing transactions between the companies. The Commission concluded in past advisory opinions that such continuing transactions were outweighed by other facts or were merely aimed at sorting out the companies' post-spin-off obligations that existed as an outgrowth of the previous relationship and were not aimed at continuing one company's control over another. AOs 1996-42 and 1993-23. Similarly, any transfers between the companies provided for in the Separation and other agreements would be part of the normal separation process and the contingent liabilities would relate to activities occurring before the spin-off or to the separation itself.

Having an active or significant role in the formation of another sponsoring organization or committee. The factors also address whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I); 110.3(a)(3)(ii)(I). Although Covidien and Tyco Electronics were once part of Tyco International, they are now subject to agreements separating them into separate publicly traded corporations. The previous relationship between sponsoring organizations is part of the context for assessing the overall relationship between such organizations. 11 CFR 100.5(g)(4)(ii); 110.3(a)(3)(ii); see also AO 1996-23. The Commission noted that a sponsoring organization's involvement in the formation of a spun-off sponsoring organization does not require a finding of continued affiliation when significant changes in the relevant relationships have occurred, such as arrangements separating the operations of the companies and apportioning their assets and obligations, and the nearly complete separation of corporate leadership and personnel.

Common Shareholder Base. Commission regulations provide for *per se* affiliation between committees established by "the same person or group of persons." 11 CFR 100.5(g)(3)(v); 110.3(a)(2)(v). In past advisory opinions, the Commission has recognized that a sizeable break in the common identity of persons owning shares in two companies supported a conclusion that two companies were no longer affiliated after a spin-off, when vigorous public trading was anticipated. AOs 1996-42 and 1993-23; see also AO 1997-25.

Upon completion of the spin-off, Tyco International shareholders owned almost all of the shares of Covidien and Tyco Electronics, and there was almost a complete overlap among the shareholders of the three companies. However, this situation involves a spin-off by a large publicly traded company of subsidiaries, resulting in three large, separately listed, publicly traded companies with very specific plans for operations that are separate from each other and that involve differing business sectors. Given that, in general, each of the shareholders of these companies will buy and sell shares in accordance with such shareholder's own financial interests, it would be very difficult for one group of shareholders to maintain purposefully a large common ownership in more than one publicly traded company. The usual consequence of such spin-offs is vigorous public trading by shareholders attempting to maximize their own profit, resulting in a sizeable diversification between the identity of the shareholders of the former parent and each of the spun off companies.

The Commission determined that, in this case, there is ample evidence to show that significant shareholder diversification will result from the spin-off. The post-spin-off active trading indicates that the large, but ever diminishing, overlap still existing in the first few weeks after the spin-off date should not delay disaffiliation past that date. It confirms that a large common identity of shareholders in two large publicly traded corporations does not, by itself, indicate common control of the corporations. This common identity does not reflect any effort by such a large group of shareholders to control the stocks of the corporations and dissipates rapidly because of the shareholders' independent interests.

Conclusion

The Commission noted that, in some important respects, the case for the current disaffiliation of the three companies compares favorably with past advisory opinions where the Commission found organizations to be disaffiliated. AOs 2003-21, 2002-12 and 1996-23. In this case, based on the application of the affiliation factors described above, the Commission concluded that Tyco US PAC, Covidien US PAC and TELPAC are disaffiliated as of the completion of the spin-off at the close of business on June 29, 2007.

Date Issued: September 12, 2007; Length: 11 pages.

—*Gary Mullen*

AO 2007-13
Union and Association SSFs Not Affiliated

The United American Nurses, AFL-CIO (the Union) and the American Nurses Association (the Association) are not affiliated under the Federal Election Campaign Act and Commission regulations. Thus, a separate segregated fund (SSF) established by the Union would not be affiliated with the Association's SSF.

Background

The Association. The Association is a national professional organization dedicated to advancing the standing and interests of registered nurses (RNs). It is composed of 75 disparate nursing-related organizations," including the Association's 54 constituent member associations (state nursing associations), the Union, the Center for American Nurses, 16 national nursing organizations and three related entities. In addition, 1,182 individuals who are not otherwise members of a state nursing association are members of the Association.

The Association's governmental structure consists of a House of Delegates with 675 delegates, including 600 who are elected by the state nursing associations, fifteen Association directors and officers and 60 delegates from other Association affiliates, including only one delegate from the Union (the Union president). Of the 675 delegates, approximately 630 have voting rights. The Association's Board of Directors, elected by the delegates, handles the Association's day-to-day operations.

While the Association itself has never made union representation of RNs a significant focus, 27 of its state nursing association members are considered "labor organizations" under the National Labor Relations Act. 29 U.S.C. §152(5). These 27 state nursing associations engage in collective bargaining on behalf of their eligible RN members.

In 1999, the RNs represented for collective bargaining by the state nursing associations created the Union as an independent organization within the Association to serve as the national union for the state nursing associations that engaged in collective bargaining. The Association granted the Union autonomy in all things required by law to be addressed by a labor union.

The Union. The Union is an unincorporated national labor organization. Its highest governing body is its National Labor Assembly, comprising delegates elected by individual RNs represented in collective bargaining by the state nursing associations and the national bargaining councils. The National Labor Assembly has the authority, among other things, to develop labor policies for Union members, collect Union dues and develop the Union's strategic plan. The National Labor Assembly also elects, from among the Union-represented RNs, the Union's Executive Council, which sets Union priorities, policies and procedures and determine membership status within the Union.

Originally, the Association's Executive Director had the authority to "manage" the Union, including implementing National Labor Assembly and Executive Council policies and appointing the Union's Program Director. The Association also provided the Union with staff and financial support.

In 2001 the AFL-CIO granted a charter to the Union as a direct affiliate. This charter was granted only to the Union, and not to the Association.[1] In 2002 the Union and the Association negotiated a new relationship in which the Union became a wholly autonomous organization with its own finances, governance, staff and direction. The Association created new bylaws following the agreement, and the Union drafted its own constitution, which now excludes the Association from any participation in the Union's governance.

Analysis

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In some cases, organizations are considered to be *per se* affiliated under Commission regulations. For example, a national or international union is considered *per se* affiliated with its local or subordinate organizations, and a membership organization is considered *per se* affiliated with its state or local subordinate organizations. 11 CFR 100.5(g)(3)(ii), (iv) and (v); 110.3(a)(2)(ii), (iv) and (v).

In this case, the Association is not a "labor organization" and therefore is not a local union or subordinate organization of the Union. 11 CFR 100.134(b). Similarly, while the Association might qualify as a membership organization, the Union is not a related state or local subordinate organization. 11 CFR 100.134(e). Thus, the Union and the Association are not *per se* affiliated.

When entities do not meet any definition of *per se* affiliation, Com-

[1] *The AFL-CIO charters only labor organizations whose principal function is collective bargaining representation. The Association, a professional organization, was and is ineligible for a charter.*

mission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, thus, whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J) and 110.3(a)(3)(ii) and (ii)(A)-(J). The most relevant affiliation factors in this case are discussed below.

Directing or participating in governance. One affiliation factor addresses whether a sponsoring organization has the authority or ability to direct or participate in the governance of the other through provisions of their rules or by laws, or through their formal or informal practices. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B). Under the Union's constitution and the Association's bylaws, the Association cannot participate in the governance of the Union, and the Union can only minimally participate in the governance of the Association. The Union President has an *ex officio* seat on the Association's Board of Directors and, in this capacity, may vote on certain matters before the Association's House of Delegates, representing 0.16 percent of the votes cast by delegates. The Union President may not vote in the election of the Association's officers and directors.

The Union President is also one of the Association's 17 Directors on the Board. The Association President may exclude the Union President from business or confidential matters. Apart from the Union President's participation on the Board, no Union representative may direct or participate in the governance of the Association's SSF. The Union's current Vice President was elected to the Association's Board of Directors in her individual capacity and does not represent the Union on the Association's Board. The Union Vice President, like the Union President, is described as being excluded from discussions regarding the Union. Overall, each organization has, at best, a minimal ability to participate in the governance of the other, giving neither organization direction over, or control of, the governance of the other organization.

Common or overlapping membership. Another significant affiliation factor in this case is whether a sponsoring organization has common or overlapping membership with another sponsoring organization, which indicates a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(D) and 110.3(a)(3)(ii)(D).

The only Union members who are eligible to join the Association directly are those who are not also members of a state nursing association—fewer than 500 of the Union's 97,000 members are currently described as falling into this category. Thus, assuming that each eligible Union member becomes an individual member of the Association, only 0.5 percent of the Union's membership would directly overlap with the Association's membership.

There is also some indirect overlap between the individual members in the Union and individual members in the state nursing associations that are, themselves, members of the Association. Approximately 97,000 individual members of the Union are members of the 27 state nursing associations that engage in collective bargaining. There are approximately 157,000 individual members in the 54 state nursing association members of the Association, creating a maximum possible indirect overlap of about 62 percent.

In this case, the Commission determined that any direct or indirect overlap in membership between the Union and the Association results from the negotiated agreement separating the two organizations. The Union's Constitution provides that any RN who is a member of the Association's state nursing associations that engage in collective bargaining will be eligible for Union membership. The RN is then described as being free to join or not to join the Union as an individual member, and is free to maintain or terminate his or her membership in the Association through the state nursing association. Thus, even if there is significant overlap in membership, the overlap alone is not sufficient evidence that one organization currently finances, maintains or controls the other. See AO 2004-41.

Overlapping officers and employees. Two additional affiliation factors address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization, which indicates a formal or ongoing relationship, and whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(E) and (F) and 110.3(a)(3)(ii)(E) and (F).

Initially, the Association's staff performed all of the staff functions for the Union. However, the organizations stopped sharing staff after their relationship was re-negotiated. Now the Union and the Association have only one official overlapping decision-maker, the Union President, and one unofficial overlapping officer, the Union Vice-President. Any Union member who runs for one of the 15 elected seats on the Association's Board of Directors at the House of Delegates meeting is described as serving in an individual capacity, not as a Union representative. Moreover, only three of the Union's twenty-four staff members were formerly employed by the Association.

Provision of goods and funds. The affiliation factors also address whether a sponsoring organiza-

tion provides goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Although the two organizations share office space and the Association performs some administrative tasks for the Union, the Union pays the Association for the space and services, and these payments do not represent a significant portion of the Association's receipts. These payments do not suggest affiliation.

The Association also agreed to make a one-time grant of $740,000 in working capital and transitional support to the Union upon the restructuring of the two organizations. The Commission has in past advisory opinions recognized that these types of transactions can be part of the transition to independence for one organization, rather than a sign of affiliation. See AO 2000-28. Here, the one-time grant is part of the process of establishing the Union's independence and separation from the Association.

Role in the formation of another organization. Finally, an affiliation factor considers whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I). In past advisory opinions, the Commission has recognized that one organization's creation of another does not, in and of itself, make the two organizations permanent affiliates. See AOs 2004-41 and 2000-36. Considering the steps taken in this case to sever operational and financial ties, this factor alone does not indicate current affiliation.

Conclusion

The Association and the Union are not affiliated under the factors discussed above, including the separation of the staffs, treasuries and functions of the two organizations, the minimal overlap in governance and the minimal direct overlap in membership. Accordingly, if the Union were to establish an SSF, that political committee would not be affiliated with the Association's SSF.

Date Issued: September 25, 2007; Length: 12 pages.

—Amy Kort

AO 2007-14 Trade Associations' Sponsorship of Joint Telephone Conferences to Restricted Classes

The Associated Builders and Contractors, the National Federation of Independent Business and the National Restaurant Association (the Trade Associations) may pay for a series of jointly sponsored telephone conferences featuring Presidential candidates, which will be made available simultaneously to the three Trade Associations' restricted classes. The Trade Associations must split the costs of the conferences on a pro rata basis determined by restricted class participation (or by another reasonable method if it is not possible to track participation) to ensure that no trade association pays the costs of candidate appearances to a restricted class other than its own.

Background

The Trade Associations plan to host telephone conferences open to the restricted class members of each association. The three restricted classes will have access to the conferences either by dialing in and providing a password or by receiving a phone call connecting them to the conference. The Trade Associations will invite several Presidential candidates to participate, and the candidates will be free to solicit contributions and campaign volunteers by asking conference participants to visit a web site or call a phone number. The Trade Associations will split the costs of the conferences, and may be able to track restricted class participation in order to split costs based on the number of restricted class members from each trade association participating in the conferences.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from using their general treasury funds to make contributions and expenditures in connection with a federal election, including giving "anything of value" to a campaign. 2 U.S.C. §441b(a); 11 CFR 114.2(b). Under an exception to this general prohibition, an incorporated trade association may sponsor candidate campaign appearances, but only if:

- The audience is limited to the trade association's restricted class and to employees who are necessary to administer the meeting; or
- The audience is limited to the trade association's employees and their families.

Other guests of the corporation who are being honored or speaking or participating in the event, and representatives of the news media, may also attend. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(c)(2) and 11 CFR 114.4(b)(1).

In this case, each trade association would use its general treasury funds to sponsor candidate appearances to its own restricted class. Because the Trade Associations would sponsor the same candidate to address their restricted classes simultaneously, each trade association must pay only the portion of the costs of the conferences incurred because of its restricted class's participation. So long as the Trade Associations split the costs of the conferences on a pro rata basis according to the participation of each

trade association's restricted class, or on another reasonable method calculated to closely approximate the pro rata participation, the proposed conferences will come within the exemptions from the definitions of "contribution" and "expenditure" for corporate-sponsored candidate campaign appearances to the restricted class.[1]

Date Issued: September 25, 2007; Length: 4 pages.

—*Amy Kort*

AO 2007-15 Payment for Administration of SSF by LLC Treated as Partnership; Name and Abbreviation of SSF

A subsidiary corporation of a partnership may establish a separate segregated fund (SSF) and use the name of the corporation in the title of the SSF. An acceptable abbreviation may also be used in the name of the SSF.

Background

GMAC is a financial services corporation that has elected partnership status with the Internal Revenue Service (IRS). It is owned 49 percent by General Motors, Inc. and 51 percent by FIM Holdings LLC. FIM Holdings LLC is an investment consortium led by Cerberus FIM Investors, LLC, which is its sole managing member, and several corporate principals. GMAC owns a number of subsidiaries, one of which is GMAC Insurance Holdings, Inc., which intends to establish an SSF.

Analysis

The Commission considered, but did not reach a conclusion by the required four votes, whether GMAC could pay the expenses associated with administering the SSF of its corporate subsidiary.[1]

The SSF may include the name "GMAC LLC" in its official name and may use "GMAC PAC" as its abbreviation. Commission regulations require that the name of an SSF must include the full name of its connected organization. 11 CFR 102.14(c). Although the name of the connected organization is GMAC Insurance Holdings, Inc., Commission regulations do not require that an SSF established by a subsidiary include the name of its parent or another subsidiary.

Commission regulations also permit an SSF to use a clearly recognizable abbreviation or acronym by which the connected organization is known. In previous advisory opinions, the Commission has examined whether the abbreviations or acronyms give adequate notice to the public as to the identity and sponsorship of the SSF. The Commission concluded that the name "GMAC PAC" is permissible because it reflects the name of the SSF's connected organization and the parent of the connected organization.

Date Issued: October 19, 2007; Length: 4 pages

—*Myles Martin*

[1] *The situation presented here is similar to that considered by the Commission in AO 1984-13, where the Commission concluded that a corporation could host candidates as speakers at a conference for its restricted class and jointly sponsor the conference with another entity.*

[1] *Partnerships and LLCs that are treated as partnerships are generally prohibited from serving as the connected organization of an SSF, with the exception of partnerships that are owned entirely by corporations. The tax status of Cerberus was not made available by the requestor and, accordingly, some Commissioners concluded that they did not have sufficient information to determine whether GMAC is "owned entirely by corporations." Some Commissioners, however, concluded that the exception described above for partnerships owned entirely by corporations did not necessarily provide the appropriate analysis under the facts presented in this advisory opinion.*

AO 2007-16 Affiliation of Membership Organizations

The American Kennel Club (AKC) and its voting clubs and accredited clubs are membership organizations under the Federal Election Campaign Act (the Act) and Commission regulations, and both the voting clubs and the accredited clubs are affiliated with the AKC. Therefore, any SSF the AKC establishes may solicit contributions from the individual members of its affiliated voting clubs and accredited clubs.

Background

The AKC is composed of about 600 voting clubs and 4,000 accredited clubs. Voting clubs have the right to designate a delegate to vote on the club's behalf at AKC meetings and are required to pay modest annual dues. Accredited clubs do not have voting representation and are not obligated to pay dues.

The AKC is governed by a board of 13 directors elected by the delegates at large. Only delegates are eligible to serve as directors on the board, and the board appoints two of its members to serve as its principal officers—the Chairperson and the Vice Chairperson. The board oversees the AKC's property and assets, reviews proposed amendments to its Charter and has final authority on issues related to dog shows. The board can adjudicate charges that any club or person has violated AKC rules and can impose penalties.

Clubs applying for membership must enclose a copy of their constitutions, bylaws and membership lists for AKC review. If the board approves the applicant club for membership, then the question is submitted to the delegates at large for voting. The AKC acknowledges its acceptance of membership by sending the new voting club a letter and publishing its name in the AKC's publication. Voting clubs have a continuing duty to submit proposed changes to their governing

documents to the AKC's board for approval and to apprise the AKC's Executive Secretary of any changes in their officers. The AKC Charter also prescribes criteria for determining eligibility for the position of delegate, and its board has the authority to approve or disapprove a voting club's designation of a delegate. If the board disapproves the designation, the delegates at large vote on the issue.

The delegates of the voting clubs make and modify the rules for AKC-approved dog shows, which provide for comprehensive supervision of every aspect of a show. Both voting and accredited clubs must apply to the AKC for permission to hold a dog show and must adhere to the dog show rules.

Both voting and accredited clubs have their own constitutions and bylaws. The bylaws of the various clubs display similar structure and content because the clubs substantially follow sample bylaws provided by the AKC in designing their own. Each voting club's bylaws provide that its delegate to the AKC is also a member of its own board of directors and an officer of the club. Both kinds of bylaws have provisions for the types of memberships and the governance of the club, announce that a purpose is to conduct AKC-sanctioned dog shows, define dues for most levels of membership and provide that any member whose AKC privileges are suspended are equally suspended from the privileges of the voting or accredited club. The AKC board must approve any amendments to a voting club's constitution or bylaws. Although not technically required, virtually all accredited clubs submit their constitutional amendments for prior AKC approval.

Membership Organizations

A corporation without capital stock qualifies as a membership organization if it meets six requirements detailed in FEC regulations and is composed of persons who qualify as members under the regulations. 11 CFR 114.1(e)(1) and (2). See also 11 CFR 100.134(e) and (f).

The AKC and the vast majority of its voting and accredited clubs are non-profit corporations without capital stock, and the AKC meets the six enumerated requirements:

- It is composed partly of voting clubs vested with the power and authority to operate or administer the organization pursuant to the AKC Charter;
- The AKC Charter expressly states the requirements and qualifications for membership;
- The AKC Charter and bylaws are available to its members on its web site and upon request;
- The AKC expressly solicits membership by advertising the benefits of AKC registration on its web site and providing guidance on how to form a new club;
- The AKC acknowledges acceptance of membership by sending a letter to the voting club and publishing the names of new voting clubs;
- The AKC Charter shows that it is not organized primarily for the purpose of influencing federal elections, but instead for the purpose of ensuring the purity of specific breeds of dogs and of promoting the fitness of the dogs. 11 CFR 114.1(e)(1)(i)-(vi).

In addition, the AKC is composed of persons that are "members" under Commission regulations. 11 CFR 114.1(e)(2). The voting clubs are members because they satisfy the membership requirements set forth in the AKC Charter, affirmatively accept invitations to become members and pay annual dues of a predetermined amount.[1] 11 CFR 114.1(e)(2)(ii).

Both the voting clubs and the accredited clubs also meet all six requirements for being a membership organization and are composed of persons who are "members" under Commission regulations, as described above.

Solicitation and Affiliation

A membership organization or its SSF may solicit its individual members for contributions to the SSF. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.7(a). When a membership organization has several levels, such as national, regional, state and/or local affiliates, then a member of any entity or affiliate within the multilevel structure automatically qualifies as a member of all affiliates. 11 CFR 114.1(e)(5). In addition, a membership organization or its SSF may solicit the individual members of the membership organization's affiliates. AO 2005-03.

Per se affiliation. Under Commission regulations, organizations that are established, financed, maintained or controlled by a single corporation and/or its subsidiaries, or by the same person or group of persons, are *per se* affiliated. 11 CFR 100.5(g)(3)(i) and (v). In this case, neither the AKC, nor the voting clubs and accredited clubs, owns any portion of the others, and thus no organization is a subsidiary of either of the others. Moreover, the AKC and the voting and accredited clubs are not established, financed, maintained or controlled by the same person or group of persons.

Under Commission regulations, organizations established by a membership organization, including related state and local entities of the organization, are also *per se* affiliated. 11 CFR 100.5(g)(3)(iv). The AKC and its voting clubs and

[1] *Accredited clubs, in contrast, are not "members" of the AKC under Commission regulations.*

accredited clubs, however, are not *per se* affiliated under this provision because the voting and accredited clubs are not state or local chapters or entities within the AKC.

Affiliation factors. In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J). These ten circumstantial factors do not constitute an exhaustive list, and other factors may be considered. Three of these factors are relevant in this case.

The first factor considers whether a sponsoring organization has the authority or ability to direct or participate in the governance of another sponsoring organization through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 11 CFR 100.5(g)(4)(ii)(B). The AKC and the voting clubs exercise reciprocal rights of participation in each other's governance. The voting clubs participate in the AKC's governance through the delegates they appoint to represent them, and the AKC participates in the governance of the voting clubs by reviewing and approving the voting club's organizational documents. Moreover, the AKC can discipline voting clubs and their individual members, and the AKC Board can approve or disapprove a voting club's designation of a delegate. Finally, through the dog show rules, the AKC governs all aspects of voting clubs' dog shows.

Although the accredited clubs are not "members" of the AKC under the Commission's regulations, individuals who are members of the accredited club need not have rights and obligations with respect to the AKC in order for the accredited club to be affiliated with the AKC. AO 1999-40. Moreover, the AKC participates in the governance and operations of the accredited clubs because it can discipline them and governs all aspects of their dog shows.

Further, the AKC furnishes both voting and accredited clubs with prototype constitutions and bylaws that the clubs follow substantially. Finally, the voting club must submit its organizational documents and its membership list to the AKC before it is accepted for membership. The AKC reviews and approves the organizational documents and membership lists of both voting and accredited clubs to determine whether the clubs are eligible for membership or accreditation. Once a club's organizational documents are approved, the AKC has effective veto power over any proposed amendments. Together, these facts suggest affiliation between the AKC and the voting and accredited clubs.

The second relevant factor addresses whether a sponsoring organization has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decision-making employees or members of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(C). The AKC and the voting clubs each exercise some authority over each other's officers or other decision-making employees. The voting clubs' delegates appoint members of the AKC Board of Directors from their own ranks. The Board then appoints the AKC's officers. Furthermore, the AKC reviews the membership lists submitted by clubs applying for membership. The AKC has the authority to strip any person of the privileges of association with the AKC. Thus, this factor also suggests affiliation between the AKC and the voting and accredited clubs.

The third factor considers whether a sponsoring organization or its agent had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I). The AKC takes an active role in the formation of voting and accredited clubs by establishing the requirements a club must satisfy to attain club status. Both voting and accredited clubs substantially follow prototype constitutions and bylaws provided by the AKC. In addition, the AKC reviews the organizational documents and membership lists of both voting and accredited clubs to determine whether the clubs are eligible for membership or accreditation.

Intent of individual members of voting and accredited clubs to join the AKC. In determining affiliation, the Commission also considers the intent of the people who join an organization.[2] Groups become voting or accredited clubs of the AKC because this allows them to conduct AKC-approved dog shows. Without AKC sponsorship, they would lose substantial revenue from exhibitors. Thus, clubs are motivated to subordinate practically all aspects of their dog shows to the direction of the AKC. In this sense, the individual's primary purpose in joining voting or accredited clubs is to be associated with the AKC as a whole.

Conclusion

The AKC and the voting clubs are affiliated because they exercise reciprocal rights of participation in each other's governance. The AKC also assumes a significant role in the formation of the voting clubs, and an individual's primary purpose in joining a voting club is to be associated with the AKC. With regard to the accredited clubs, the fact that the AKC participates in the governance of the accredited clubs and has a significant role in their formation, coupled with

[2] *The Commission noted in its Explanation and Justification for its final rules regarding the Definition of "Member" of a Membership Organization that "a person who joins one tier of a multi-tiered organization clearly demonstrates an intention to associate with the entire organization." 64 FR 41266, 41271 (July 30, 1999).*

the fact that the individual's primary purpose in joining an accredited club is to be associated with AKC, outweighs the absence of influence or control over the AKC through voting rights. AO 1995-12. Thus, because the voting and accredited clubs are affiliates of the AKC, the AKC or any SSF it forms may solicit all of the individual members of its voting and accredited clubs for contributions to its SSF.

Date issued: October 12, 2007;
Length: 10 pages.

—*Amy Kort*

AO 2007-19
Renaissance Health Service Corporation

A non-profit 501(c)(4) corporation qualifies as a membership organization and individuals selected to be members of that organization qualify as "members" for purposes of the Federal Election Campaign Act (the Act). Accordingly, the organization may solicit those individuals for contributions to a separate segregated fund (SSF) established by the organization.

Background

Renaissance Health Service Corporation is a non-profit corporation that is exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Renaissance primarily serves as a holding company for Delta Dental Plan of Michigan (DDPMI) and Delta Dental of Tennessee (DDTN) and other companies it directly or indirectly owns or controls. It also supports programs to promote dental science and access to dental care. Currently, Renaissance has 75 members, all of whom are individuals.

Renaissance is the sole corporate member of both DDPMI and DDTN and therefore "controls" them. Renaissance has entered into an "Affiliation Agreement" with both companies, whereby DDPMI would select no more than 68 of the 75 members of Renaissance and DDTN would select no fewer than seven members. The members serve three-year terms and may be re-appointed to further terms. Under the Bylaws of Renaissance, these 75 individuals elect the organization's board of directors at the annual membership meetings. The board of directors exercises Renaissance's corporate powers. The term of a director is three years, and directors may be re-elected twice. Individuals who were not Renaissance members become members of Renaissance upon their election to the board.

The Bylaws permit a member to be removed during his or her membership appointment if the member refuses to comply with the conditions of the voting agreement, which requires members to vote so that no more than 17 of the 19 directors represent DDPMI and no fewer than two represent DDTN.[1]

Legal Analysis

As an exception to the prohibition on corporate contributions and expenditures, the Act and Commission regulations provide that an incorporated membership organization, cooperative or corporation without capital stock, or an SSF established by such an entity, may solicit at any time voluntary contributions to that SSF from the entity's members and their families, as well as the entity's executive and administrative personnel and their families. 11 CFR 114.1(a)(2)(iii) and 114.7(a).

Application of Criteria for Membership Organization. Under the Act and Commission regulations, a "membership organization" is defined as a trade association, cooperative or corporation without capital stock that meets the criteria listed below. To be considered a membership organization, an entity must satisfy all six of the criteria. A membership organization:

- Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization;
- Expressly states the qualifications and requirements for membership in its articles, bylaws or constitution;
- Makes its articles, bylaws or constitution available to its members upon request;
- Expressly solicits persons to become members;
- Expressly acknowledges the acceptance of membership; and
- Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to federal office. 11 CFR 114.1(e)(1)(i)-(vi) and 100.134(e)(1)-(6).

As to the first criterion, the 75 members elect the board of directors and the directors are a subset of the Renaissance members. Thus it can be argued that at least some of the individual members are vested with the power and authority to operate or administer Renaissance through their board membership, or all 75 members of Renaissance are vested with such authority by their ability to elect members of the board. The fact that a member can be removed during his or her membership appointment for refusing to comply with the voting agreement, and that DDPMI and DDTN can decide not to re-appoint members to additional terms, indicates some limits on the discretion exercised by directors and other members. However, the directors exercise Renaissance's corporate powers, and even if DDPMI and DDTN do not want to re-select a director as a Renaissance director, the member can serve out his or her term. Hence, at least some of the members are vested

[1] *A nominating committee composed of directors selects the potential directors to be voted on by the members, and, although two of the nominees must be acceptable to DDTN, a member may comply with the voting agreement by voting for individuals who are among the DDTN-appointed members of Renaissance for the board seats associated with DDTN.*

with the power and authority to operate or administer Renaissance during their three-year terms as director.

Renaissance also meets each of the second through fifth criteria listed above. Renaissance's Articles of Incorporation and Bylaws are made available to any member upon request, Renaissance expressly invites individuals to be members upon their selection by DDPMI or DDTN, and Renaissance expressly acknowledges the acceptance of membership.

Additionally, Renaissance was not organized for the purpose of influencing any nomination for election, or election, of any individual for federal office, and has not changed its purpose. The membership consists of retired employees of DDPMI, dentists participating in DDPMI and DDTN networks, subscribers to those plans, retired dentists and others. Thus, the membership is made up of a small group of individuals intended to represent constituencies of providers and users of dental services and has historically served Renaissance's purposes of promoting access to dental care and the advancement of dentistry, and not the purpose of influencing federal elections.

Application of Criteria for "Member." Commission regulations provide that the term "member" includes all persons who 1) currently satisfy the requirements for membership, 2) affirmatively accept the membership organization's invitation to become a member and 3) have a significant financial attachment to the organization, pay membership dues at least annually or have a significant organizational attachment to the membership organization which includes affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. 11 CFR 114.1(e)(2)(i)-(iii) and 100.134(f)(1)-(3).

The 75 individuals satisfy the requirements for membership as described by Renaissance's Bylaws, affirmatively accept Renaissance's invitation to be a member and affirm membership on an annual basis. With respect to the exercise of participatory rights, the members vote in the election of board members and have other voting powers that are not subject to the voting agreement. Despite the voting agreement and the selection powers exercised by DDPMI and DDTN, the 75 individuals have some limited discretion in the important function of electing directors and greater discretion in voting on other specific matters. Thus the directors have sufficient direct participatory rights during their three-year member terms to meet Commission regulations' definition of member.

Date Issued: November 16, 2007
Length: 7 pages

—Myles Martin

AO 2007-27 Nonconnected Committee Solicitations for SSF Contributions

ActBlue, a registered nonconnected committee, may not independently solicit contributions from the general public on behalf of separate segregated funds (SSFs). However, ActBlue may work directly with SSFs to solicit the restricted class of those SSFs' connected organizations for contributions designated for the SSFs.

Background

ActBlue is a nonconnected political committee registered with the Commission that primarily serves as a conduit for contributions earmarked for Democratic candidates and political party committees. ActBlue wishes to expand its fundraising activities by providing contributors the choice to contribute to political committees (including SSFs) that support political principles similar to those promoted by Democratic candidates and party committees.

ActBlue proposes two different fundraising programs to solicit and receive contributions designated for a number of different SSFs. Under Program 1, ActBlue would solicit the general public for contributions designated for SSFs via its web site (including its blog and fundraising pages) and through e-mail to its own list. ActBlue would not have any contact with the SSFs or their connected organizations regarding the solicitations, and ActBlue would not be paid for its fundraising. Solicitations would inform potential contributors of applicable contribution limitations.

Under Program 2, ActBlue would solicit only the restricted classes of the SSFs' connected organizations, and would work directly with the SSFs in making the solicitations. (A connected organization's restricted class generally includes its executive and administrative personnel, stockholders and the families of both groups.) Solicitations made under Program 2 would be through a password-protected webpage of ActBlue's web site. Each SSF would choose the password for that password-protected page and distribute the password to members of its connected organization's restricted class only.

ActBlue would pay all costs associated with the solicitations in both Programs 1 and 2. Within ten days of receipt of a contribution designated for an SSF, ActBlue would forward each contribution to the intended SSF recipient along with a report containing all required information, which would include the contributor's name and the amount of the contribution.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations allow an SSF and its connected organization to solicit at any time contributions to the SSF from the connected organization's "restricted class," which includes the connected organization's executive and administrative personnel, its stockholders and the families of both groups. 11

CFR 114.1(c) and 114.5(g). Solicitations by an SSF or its connected organization beyond the restricted class are generally prohibited.[1] An entity acting on behalf of an SSF or its connected organization is bound by the same restrictions as the SSF.

Under Program 1, ActBlue would be acting on behalf of the recipient SSFs and their connected organizations when soliciting contributions designated for the SSFs. ActBlue would represent to the public that contributing to an SSF through ActBlue is the functional equivalent of contributing directly to the SSF. An SSF that continually accepts earmarked contributions and contributor information from ActBlue would not be able to claim that it was unaware that ActBlue is soliciting contributions on its behalf. Thus ActBlue is not permitted to solicit contributions from beyond the restricted classes of the SSFs' connected organizations under Program 1.

ActBlue may, however, work directly with the recipient SSFs and their connected organizations under Program 2 to solicit contributions from members of the restricted class only. Any costs associated with soliciting the restricted class that are paid by ActBlue must be treated as in-kind contributions to the recipient SSFs. 11 CFR 100.52(a) and (d). Such costs include a portion of staff salaries and expenses for web site development and maintenance. If ActBlue receives a contribution designated for an SSF, ActBlue must forward the name, address and receipt date to the treasurer of the SSF no later than ten days after receipt if that contribution is in excess of $50. If the contribution exceeds $200, ActBlue must also forward information about the contributor's employer and occupation. 11 CFR 102.8(b)(2). Contributions of $50 or less must be forwarded within 30 days. 11 CFR 102.8(b)(1).

Date Issued: December 17, 2007; Length: 7 pages.

—Myles Martin

[1] *A connected organization or its SSF may, however, make two written solicitations per year to non-executive employees, subject to certain restrictions. 11 CFR 114.6.*

AO 2007-33 "Stand-By-Your-Ad" Disclaimer Required for Brief Television Advertisements

A series of 10- and 15-second independent expenditure television ads Club for Growth Political Action Committee (Club for Growth PAC) plans to air in support of a federal candidate must contain the full, spoken "stand-by-your-ad" disclaimer in addition to meeting other disclaimer requirements.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, when express advocacy ads are paid for by a political committee, such as Club for Growth PAC, and are not authorized by any candidate, the disclaimer must clearly state the full name, permanent address, telephone number or web address of the person who paid for the communication and indicate that the communication is not authorized by any candidate or candidate's committee. 11 CFR 110.11(b)(3). For televised ads, this disclaimer must appear in writing equal to or greater than four percent of the vertical picture height for at least four seconds. 11 CFR 110.11 (c)(3)(iii). Radio and television ads must also include an audio statement identifying the political committee or other person responsible for the content of the ad. 11 CFR 110.11(c)(4)(i).

In this case, Club for Growth PAC intends to pay for 10- and 15-second television ads that expressly advocate the election of a federal candidate. It plans to include the required written disclaimer indicating that it is responsible for the content and that the ads are not authorized by any candidate or candidate's committee.

However, Club for Growth PAC requested it be allowed to omit or truncate the required spoken disclaimer. Since the ads are shorter than most other political ads, which run for 30 to 60 seconds, Club for Growth PAC argued the spoken disclaimer would limit the ad's ability to get its message to viewers.

Analysis

In previous advisory opinions, the Commission has recognized that in certain types of communications it is impracticable to include a full disclaimer as required by the Act and Commission regulations. For example, in AO 2004-10, the Commission found that the specific physical and technological limitations of ads read during live reports broadcast from a helicopter made it impracticable for a candidate to read the required disclaimer himself or herself.

Likewise, in AO 2002-09, the Commission determined that certain candidate-sponsored text messages were eligible for the "small items" exception from the disclaimer requirements. Under this exception, bumper stickers, pins and other small items are not required to carry a printed disclaimer because their size would make doing so impracticable. 11 CFR 110.11(f)(l)(i).

However, Club for Growth PAC's plan presents facts that are materially different from those presented in these advisory opinions. AO 2004-10 did not dispense with the spoken disclaimer, but rather allowed the broadcaster, rather than the candidate, to read it. Moreover, the 10- and 15-second ads proposed by Club for Growth PAC do not present the same physical or technological limitations as those described in previous advisory opinions.

Likewise, the "small items" exception does not apply to the spoken disclaimer requirements for televised ads. Under Commission regulations, the "small items" exception applies

only to "bumper stickers, pins, buttons, pens and other similar items upon which the disclaimer cannot be conveniently printed." 11 CFR 110.11(f)(1)(i). Thus, it does not apply to the *spoken* disclaimer for the television ads that Club for Growth PAC plans to sponsor. Additionally, the Commission noted that the Act provides no exemptions from the spoken disclaimer requirement simply because the ads are only 10 or 15 seconds long. Thus, Club for Growth PAC must include the full spoken disclaimer in its 10- and 15-second television ads.

Date Issued: July 29, 2008;
Length: 4 pages.

—Isaac J. Baker

AO 2008-05 Organization's Status as a Partnership

An entity organized under state law as a limited liability partnership, but classified as a corporation for federal tax purposes, is treated as a partnership under the Federal Election Campaign Act (the Act). Accordingly, the partnership's federal political action committee (PAC) is not a separate segregated fund (SSF), but rather a nonconnected PAC. As such, all administrative support provided to the PAC by the partnership would constitute contributions, subject to the limitations and prohibitions of the Act.

Background

Holland & Knight LLP (the Firm) is a law firm that is classified as a limited liability partnership (LLP) under the laws of Florida. However, for purposes of federal taxation, the Firm is classified as a corporation. The Firm is taxed as a partnership in Massachusetts and Florida, but is taxed as a corporation in other states in which it operates.

The Firm administers the Holland & Knight Committee for Effective Government (the Committee), a nonconnected PAC.

Analysis

The Act's legislative history and Commission regulations rely on state law to determine if an organization is a partnership or a corporation. Since the Firm is organized as a limited liability partnership under Florida law, the Firm is treated as a partnership under the Act and Commission regulations.

The Act generally prohibits corporations from making contributions or expenditures in connection with a federal election. However, the Act exempts from the definition of "contribution or expenditure" a corporation's costs for establishing, administering or soliciting contributions to its SSF. 11 CFR 114.1(a)(2)(iii) and 114.2(b). These exemptions are generally not extended to partnerships. Since the Firm is a partnership and not a corporation, the contribution and expenditure exemptions do not apply, and the Firm may not treat the Committee as its SSF, nor may the Firm treat disbursements for the costs of administering the Committee or for soliciting contributions for the Committee as exempt from the definition of "contribution or expenditure" under the Act and Commission regulations.

Administrative and solicitation costs paid by the Firm on behalf of the Committee are contributions. Partnerships are treated as persons under the Act and Commission regulations and may contribute up to $5,000 per calendar year to a nonconnected committee. 11 CFR 100.10 and 110.1(d). Any contributions made to the Committee by the Firm are attributable both to the Firm and to its partners. 110.1(e)(1) and (2).

Date Issued: July 29, 2008;
Length: 5 pages.

—Myles Martin

AO 2008-10 Online Advertising Vendor May Sell Political Advertising Services

A corporation that provides an Internet service that permits individuals and nonconnected political committees to post their own online political advertising content and permits individuals to purchase airtime for these ads or ads created by the corporation is considered to be a commercial vendor engaging in *bona fide* commercial activity. As a result, the corporation does not make prohibited contributions or expenditures under the Federal Election Campaign Act (the Act) by offering its service.

Background

WideOrbit, Inc. (the corporation) sells software packages to manage advertising. As part of its business, it has developed and operates an Internet service named VoterVoter.com (the web site) that allows individuals to purchase television airtime for ads posted on the web site that expressly advocate the election or defeat of federal candidates. Neither WideOrbit, Inc. nor VoterVoter.com is owned or controlled by a candidate, political party or political committee.

Specifically, the web site allows individuals to view ads created by the corporation and by individuals and nonconnected political committees (creators). Then, through the corporation, individuals may purchase TV airtime for the ads that they have either chosen or created. The corporation receives revenue by charging the airtime purchaser a licensing fee for the use of ads created by the company and by obtaining a commission from the TV stations on the airtime bought by each purchaser through the corporation.

If an individual purchases ads created by the corporation, then the corporation will charge that purchaser a licensing fee related to the cor-

PACronyms, Other PAC Publications Available

The Commission annually publishes an alphabetical listing of acronyms, abbreviations and common names of political action committees (PACs).

For each PAC listed, the index provides the full name of the PAC, its city, state, FEC identification number and, if not identifiable from the full name, its connected, sponsoring or affiliated organization.

This index is helpful in identifying PACs that are not readily identified in their reports and statements on file with the FEC.

To order a free copy of PACronyms, call the FEC's Disclosure Division at 800/424-9530 or 202/694-1120.

PACronyms is also available on diskette for $1 and can be accessed free on the FEC web site at www.fec.gov.

Other PAC indexes, described below, may be ordered from the Disclosure Division. Prepayment is required.

- An alphabetical list of all registered PACs showing each PAC's identification number, address, treasurer and connected organization ($13.25).
- A list of registered PACs arranged by state providing the same information as above ($13.25).
- An alphabetical list of organizations sponsoring PACs showing the name of the PAC and its identification number ($7.50).

The Disclosure Division can also conduct database research to locate federal political committees when only part of the committee name is known. Call the telephone numbers above for assistance or visit the Public Records Office in Washington at 999 E St. NW.

poration's production costs and will receive an airtime commission in an amount sufficient to make a profit on each transaction. When an individual chooses an ad created by a creator, the corporation charges no licensing fee because it incurs no expense to create the ad, and the corporation will be compensated by the commission on the airtime purchased by the individual.

Where purchasers desire a new, customized advertisement, the corporation will arrange with a media creation company for the creation of the ad, with the full costs passed on to the purchaser. As a result of these payment arrangements, the purchaser will pay the corporation the usual and normal charge.

Ads that are posted on the VoterVoter.com web site will not be posted for a fee. The corporation does not charge a fee for uploading or hosting videos when individuals or committees create their own videos to post on the web site, and it requires the creators to affirm that they were not paid by anyone else to create or post their content. The ads created and posted on the web site by the creators and by the corporation expressly advocate the election of clearly identified federal candidates. The business model of the corporation and the web site involves ads that constitute independent expenditures, not coordinated communications. The VoterVoter.com web site will not display the creators' names. No contact between candidates and creators or purchasers is established or facilitated by the corporation. In addition (with the exception of informing a purchaser of the content of the disclaimer on a political committee-created ad that is being aired), the corporation will not provide any information to actual or prospective purchasers regarding the creator of a given ad, whether other purchasers have also bought airtime for the ad or the scheduling or airing of ads. Similarly, the corporation will not give an ad's creators any information about the ad's purchasers or the scheduling or airing of ads. Services are provided on a strictly nonpartisan basis and without regard to political affiliation.

Once a purchaser chooses an ad to run, the corporation advises the purchaser of the Act's prohibitions and also that the ad will include all required disclaimers. The corporation also offers assistance to purchasers in filling out and filing FEC Form 5 (the form used by individuals and groups to report independent expenditures), but the ultimate reporting responsibility lies with the purchasers.

Analysis

Corporation as commercial vendor engaging in bona fide *commercial activity.* Under the proposed business model, the ads created by the corporation and by the creators will be viewable by the general public. Although the Act prohibits contributions or expenditures by corporations under 2 U.S.C. §441b, the Commission has determined that the distribution of express advocacy messages to the general public is permissible as "*bona fide* commercial activity," and is not a contribution or expenditure, when undertaken by a corporation organized and maintained for commercial purposes only and the activities themselves are for purely commercial purposes. For example, in the context of the sale of political paraphernalia, the Commission looked at factors including whether:

- The activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election;
- The sales of any merchandise involve fundraising activity for candidates or solicitation of political contributions;
- The items are sold at the vendor's usual and normal charge; and
- The purchases are made by individuals for their personal use. AOs 1994-30 and 1989-21.

The Commission has also considered other factors, including whether the entity is owned, controlled or affiliated with a candidate or political committee; is "in the business" of conducting the type of activity involved; and follows industry standards and usual and normal business practices. Matters Under Review (MURs) 5474 and 5539.

The facts in this case indicate that the corporation will be acting as a commercial vendor for genuinely commercial purposes and not for the purpose of influencing any federal election. Moreover, the corporation is not owned or controlled by a party, candidate or political committee, and its business model does not involve fundraising for any political committee or candidate. The corporation sells airtime at the usual and normal charge and purchasers pay in advance of the corporation's purchase of the media time requested, and hence in advance of the airing of the ad. These practices are consistent with usual and normal industry practices. In the context of this request, it is also significant that the corporation accepts and posts ads on a nonpartisan basis and seeks to attract creators without regard to the candidates their ads support or oppose.

Costs incurred by creators. Costs incurred by an individual in creating an ad are exempt from the definition of "expenditure," as long as the creator is not also purchasing TV airtime for the ad he or she created. Under 11 CFR 100.94 and 100.155, an individual, or group of individuals, may engage in uncompensated Internet activities for the purpose of influencing a federal election without a contribution or expenditure resulting. Thus, the posting by uncompensated individuals of ads they create on the web site, where such ads are not posted for a fee, would not be a contribution or expenditure at the time of posting. See 11 CFR 100.94, 100.155 and 100.26. If an individual then pays to have the ad broadcast on television, the costs for creating the ad are no longer covered by the Internet volunteer activity exemption, and thus become part of the expenses for an independent expenditure. See 11 CFR 109.10.

In contrast, if a political committee posts an ad it creates, its costs constitute expenditures and are reportable as such (even if the ad is never televised), because the exemptions at 11 CFR 100.94 and 100.155 do not apply to political committees. If that ad is then aired on TV, the ad's disclaimers must contain the required information about both the ad's purchasers and the ad's creators. 11 CFR 110.11(b)(3) and (c) (4). See AO 2007-20.[1]

Political committee status not triggered. The Act defines a political committee as any group of persons that makes expenditures aggregating over $1,000 in a calendar year. This definition does not apply to the individuals who create and purchase ads from the corporation because there is no communication or pre-arrangement between the creator and purchaser, and the corporation has not conveyed any information between them. See 11 CFR 100.5(a). Moreover, purchasers may obtain airtime for an ad that was already purchased and aired by other purchasers, even after reviewing FEC filings by those purchasers. This activity would not by itself be sufficient to cause the purchasers to be considered "a group of persons," and thus a political committee. The Commission did not address whether any agreements or collaboration between a creator and a purchaser not involving the corporation would result in the formation of a "group of persons" that would be considered a political committee.

In-kind contributions not triggered. Here, given that there is no collaboration between purchasers and creators, the purchase of airtime to run an ad created by a nonconnected committee does not result in an in-kind contribution from the purchaser to the committee. See 11 CFR 100.52(d)(1).

The republication of a candidate's campaign materials does result in a contribution. However, if an individual independently creates and uses his or her own footage of a candidate's public appearance in a web site posting and the campaign does not have any ownership rights to the footage, then the footage does not constitute a candidate's campaign materials and use of it would not represent an in-kind contribution by either the creator or a subsequent purchaser of airtime for the ad. 11 CFR 109.23. The footage may include images of campaign materials (e.g., tee-shirts, buttons and signs customarily displayed at campaign events) without becoming a republication of campaign materials, unless the creator arranged for such materials to be held up, displayed or worn during the event.

Date Issued: October 24, 2008; Length: 12 pages.

—Dorothy Yeager

AO 2008-14 Internet Campaign TV Station Qualifies for Press Exemption

Various news stories, discussions, commentaries and other web programming proposed by a corporation operating an Internet campaign-TV station would not result in a contribution or expenditure under the Federal Election Campaign Act (the Act). Instead, those activities would fit into the Act's "press exemption," including certain solicitations on behalf of featured candidates under limited circumstances.

[1] *Disclaimers need not appear on ads created by political committees and only posted on the web site, because ads posted on VoterVoter.com are not placed for a fee and, thus, are not a "public communication." 11 CFR 100.26.*

Background

Melothe, Inc. (the corporation), a for-profit corporation engaged in developing technology and providing technical capabilities for Internet web sites, plans to launch and operate an Internet TV station that would cover the campaign(s) of one or more federal candidates. The corporation would produce and transmit live and pre-recorded programming daily from the campaign's headquarters. This programming would be viewable for free by the general public through an interactive multi-channel Internet TV Web site. The content of the corporation's web site likely would feature and support Democratic candidates. The corporation is neither owned nor controlled by any political party, political committee or candidate. It hopes to commercialize the web site by generating ad revenues and selling merchandise. The corporation also envisions that program hosts, interviewers and news anchors would solicit contributions during programming. Hyperlinks to campaign fundraising pages would appear on the web site. However, the corporation would not act as a conduit or intermediary for those contributions.

Analysis

Press Exemption. Under section 431(9)(B)(i) of the Act, known as the "press exemption," the term "expenditure" does not include any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication. The press exemption does not apply if the facilities are owned or controlled by any political party, political committee or candidate. Under FEC regulations implementing the press exemption, the costs of news stories, commentary or editorials by broadcasting stations, web sites, newspapers, magazines or other periodicals, including Internet and electronic publications, are exempt from the definitions of "contribution" and "expenditure," provided that the facilities are not owned or controlled by any party, political committee or candidate. See 11 CFR 100.73 and 100.132.

To determine whether the press exemption applies to a particular situation, the Commission first asks whether the entity engaging in the activity is a press or media entity. Second, it applies a two-part analysis to determine that the entity is:

- Not owned or controlled by a party, political committee or candidate; and
- Acting as a press entity when conducting the activity at issue. See *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

In order to determine whether an entity is a press or media entity, the Commission focuses on whether the entity is in the business of producing on a regular basis a program that disseminates news stories, commentaries and/or editorials, including doing so through a web site. Because the corporation's proposed web site will provide daily news reports, interviews and commentary related to particular political campaigns, the Commission concluded that the proposed Internet content, for the most part, falls within the normal business of news coverage. Although its content is calculated to appeal to supporters of a particular party, the Commission does not investigate an entity's viewpoints in determining its status as a press entity. See AOs 2007-20, 2005-19 and 2005-16.

The Commission accepted the corporation's representations that it was neither owned nor controlled by any party, candidate or political committee, and that it would exercise control over all content displayed on its web site. The Commission then considered whether the proposed activities would include news stories, commentary and editorials, and whether the materials would be available to the general public and in a form that is similar to materials ordinarily issued by the entity. The corporation was able to satisfy on its face the public availability of the materials on its web site and represented that it would not deviate in any form from its ordinary planned news media activities to delve into more traditional forms of campaigning. Accordingly, the Commission determined that the corporation's Internet media content were legitimate press functions.

Volunteer Briefing. The Commission declined to render an opinion regarding the corporation's proposed daily live segment briefing campaign volunteers because it was unclear whether the program envisioned coverage of campaigns themselves briefing the volunteers or whether the corporation would prepare and provide the briefings. The Commission noted that, if the corporation were to prepare and provide the briefings, it would be tantamount to a corporation providing personnel to a campaign, a prohibited activity outside the press exemption.

Solicitations. The corporation also proposed including solicitations on behalf of candidates in its programming. Although the corporation would not serve as a conduit, it would enable links to the fundraising web pages of a campaign, and its commentators would make the solicitations. Without additional information provided, the Commission declined to render a definitive opinion on this aspect of the proposal. It did note, however, that under its previous interpretations of the press exemption, nothing prohibited commentators and program guests from suggesting that viewers make contributions to specific candidates. It also noted that the intermittent provision of a hyperlink would not be prohibited. However, because providing a mechanism for raising funds is not a typical press function, adding a contribution page or providing a permanent hyperlink to a fundraising web page does not fit into the press exemption. Moreover, if unpaid solicitations for particular

candidates became a regular feature on the corporation's web content, it would go beyond the scope of previous rulings and be tantamount to a prohibited expenditure.

Date Issued: November 13, 2008; Length: 7 pages.

—*Dorothy Yeager*

AO 2008-15 Nonprofit Corporation May Use General Treasury Funds to Broadcast Radio Advertisement

The National Right to Life Committee, Inc. (the NRLC), may use its general treasury funds to finance the broadcast of a radio ad entitled "Waiting for Obama's Apology #1." With regard to a second proposed radio ad, "Waiting for Obama's Apology #2," the Commission could not approve a response by the required four affirmative votes.

Background

The NRLC is a non-stock, not-for-profit corporation that is exempt from federal taxes, but is not a "qualified non-profit corporation." The NRLC has produced two radio ads that it intends to broadcast and maintains that the broadcast of such ads will be independent of any candidate or candidate's agents, or any political party committee or its agents. The full text of both proposed ads is printed in AO 2008-15, which is available on the FEC web site at http://saos.nictusa.com/saos/searchao.

Analysis

The Commission concluded that the NRLC may finance the broadcast of Waiting for Obama's Apology #1 with general treasury funds. The Commission could not approve a response by the required four affirmative votes regarding Waiting for Obama's Apology #2.

Date Issued: November 24, 2008; Length: 4 pages.

—*Myles Martin*

AO 2008-18 Drug Discount Card Program Would Result in Prohibited Corporate Contributions

A proposed affinity program involving payments to political party committees for the provision of prescription drug discount cards to their supporters (or other interested persons) would result in prohibited corporate contributions being made to national political party committees or to the federal accounts of state or local party committees.

Background

Mid-Atlantic Benefits (MAB) is a limited liability company (LLC) that elects to be treated as a partnership, rather than a corporation, for income tax purposes. MAB takes part in a program that involves recruitment of entities such as banks, religious organizations, unions, charities and local government sponsors to create, promote and distribute prescription drug discount cards. MAB partners with Agelity, Inc., a Delaware-based corporation that maintains the program and has contractual relationships with pharmacy networks that honor the cards. MAB wished to make Agelity, Inc.'s prescription drug discount program available to Democratic and Republican political party committee sponsors. The party committee sponsors would, in turn, offer the program to supporters or other interested persons without charge.

Under the planned program, the party committee sponsor would agree to manufacture the cards and pay for their promotion and distribution. The party committee sponsor would develop its own promotion materials, which would be approved by Agelity, Inc. and MAB before the party committee sponsor could disseminate them. MAB and Agelity, Inc. would scrutinize the proposed materials to make sure they focused on promoting the drug cards themselves and that the materials did not solicit political contributions or otherwise promote the party committee sponsor.

Cardholders would use the cards they received from the party committee sponsors to obtain discounts on drugs at participating pharmacies. The participating pharmacy networks would pay Agelity, Inc. a negotiated fee for each purchase of a single medication with the card. For each purchase, Agelity, Inc. would pay a transaction fee of $.70 to MAB, a fee that is derived from the fee that the pharmacy networks would pay to Agelity, Inc. MAB, in turn, would pay a transaction fee, out of what it received from Agelity, Inc., of $.25 to the party committee sponsor. Thus, the payments to the party committee sponsor would flow from Agelity, Inc.'s revenues. MAB's profit would be the difference between the fee it receives and the fee it disburses, while the party committee sponsors would receive a $.25 fee per transaction.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations from making contributions in connection with a federal election. U.S.C. §441b(a) and 11 CFR 114.2(b)(1). A contribution includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A)(i) and 11 CFR 100.52(a). "Anything of value" includes in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the normal charge. 11 CFR 100.52(d)(1).

The Commission concluded that MAB's proposal would amount to prohibited corporate contributions from Agelity, Inc. to the federal account of the participating political party committee sponsor. The proposed program is impermissible

because the transaction fees the political committees would receive are from Agility, Inc.'s corporate funds, and not from individual funds. While MAB is not a corporation, all the funds it would provide to the party committee sponsors would consist of Agility, Inc.'s general treasury funds. Therefore, the political party committees participating in the program would receive corporate contributions.

MAB's proposal is almost identical to a plan from Leading Edge Communications, which the Commission found impermissible in AO 1992-40. In that case, the corporation planned to recruit political party committees to market and distribute long-distance telephone discount cards to party members. In exchange for these services, the corporation proposed to pay the parties a percentage of the revenue it collected from long-distance telephone charges. The plan, therefore, involved a corporation's use of a political committee's assets to generate income through an ongoing business venture.

In this situation, MAB and Agility, Inc. furnish access to Agility, Inc.'s discount card program by recruiting sponsors to perform marketing and distribution services on Agility, Inc.'s behalf in exchange for a portion of the revenues Agility, Inc. generates from the participating pharmacy networks. As was the case in AO 1992-40, in this proposal party committee sponsors would lend their resources in promoting and distributing the cards. That distribution would, in turn, generate revenue for Agility, Inc., for MAB and the party committee sponsors. Thus, MAB and Agility, Inc.'s program, by contracting with national committees of political parties, or with state or local committees of political parties using their federal accounts, would result in prohibited corporate contributions.

The Commission noted that nothing would preclude MAB and Agility, Inc. from implementing their proposal with respect to the nonfederal accounts of state or local committees provided that the transaction fees received by state or local committees are placed into nonfederal accounts and that the party committees' participation in the program is permitted under state and local law.

Date Issued: January 16, 2009; Length: 6 pages.

—Isaac J. Baker

AO 2008-20 Non-Profit Corporation May Reimburse its PAC for Advertising Expenses

The National Right to Life Committee, Inc. (NRLC) may reimburse its separate segregated fund for expenses the separate segregated fund incurred in broadcasting a radio advertisement. NRLC's separate segregated fund paid for the ad as a legal precaution while NRLC awaited an advisory opinion from the Commission. Because the Commission has since issued an advisory opinion that stated NRLC could have paid for the ad with its general treasury funds, NRLC may reimburse its separate segregated fund for those advertising costs.

Background

NRLC is a non-stock, not-for-profit corporation. The National Right to Life Political Action Committee (NRLCPAC) is NRLC's separate segregated fund.

In AO 2008-15, issued November 24, 2008, the Commission determined that NRLC could use general treasury money to finance the broadcast of one of two ads, titled "Waiting for Obama's Apology #1" (Apology #1). The Commission could not approve a response regarding the second ad, titled "Waiting for Obama's Apology #2." See the January, 2009, *Record*, page 8.

On October 28, 2008, NRLCPAC began broadcasting the Apology #1 ad. While awaiting the Commission's decision in AO 2008-15, NRLCPAC paid for the broadcast out of legal precaution. NRLCPAC paid a total of $69,271.56 to broadcast the ad between October 28 and November 24, the date the Commission issued AO 2008-15. NRLC then asked the Commission whether it could reimburse NRLCPAC for the money the separate segregated fund spent broadcasting the Apology #1 ad during that time period.

Analysis

In the unique circumstances presented by this situation, NRLC may reimburse NRLCPAC for the cost of this ad, which NRLC was allowed to pay for under the Federal Election Campaign Act (the Act).

NRLC used funds from NRLCPAC, its separate segregated fund, to pay for the advertisements as a precaution against legal liability while NRLC awaited the Commission's advisory opinion. Thus, NRLC should not be penalized for taking these precautionary measures to comply with the law.

The Commission has previously allowed a reimbursement in a similar situation. In AO 1979-33, a labor organization's separate segregated fund paid for a banquet that the labor organization mistakenly believed to constitute political campaign activity. The money, instead, was to be used for non-partisan get-out-the-vote activities, and thus was exempt from the Act's definition of "contribution or expenditure" in 2 U.S.C. §441b(a). The Commission allowed the labor organization to reimburse the SSF because the labor organization could have financed the dinner directly without violating the Act. Although the SSF initially paid for the dinner, the Commission concluded that it did not change the characterization of the money as a payment for an exempt activity under section 441b. In this situation, NRLC, like the labor organization in AO 1979-33, could have financed the activity

with general treasury funds without violating the Act.

Therefore, the Commission concluded that NRLC may reimburse NRLCPAC for the costs involved in broadcasting the Apology #1 radio advertisement between October 28 and November 24, 2008.

Date Issued: January 30, 2009; Length: 4 pages.

—*Isaac J. Baker*

AO 2008-21 Solicitation of Members of Corporation's Wholly Owned Mercantile Exchanges for PAC Contributions

CME Group, Inc. may solicit voluntary contributions to its separate segregated fund from certain categories of individual members of two of its wholly owned subsidiaries, the Chicago Board of Trade (CBOT) and New York Mercantile Exchange (NYMEX), regardless of whether such members own shares of stock in the parent corporation. CME Group, Inc. may also solicit individual members of its third wholly owned mercantile exchange, the Chicago Mercantile Exchange (CME), but only in their capacity as stockholders in CME Group, Inc.

Background

As a result of recent mergers, CME, CBOT and NYMEX are now wholly owned subsidiaries of CME Group, Inc. Some, but not all, of the members of each of the three exchanges own stock in CME Group, Inc., the parent corporation. CME Group, Inc. plans to solicit the members of the exchanges who qualify as CME Group, Inc. stockholders for voluntary contributions to its separate segregated fund, CME Group, Inc. PAC (the PAC). CME Group, Inc. also wishes to solicit certain categories of members of the exchanges who are not CME Group, Inc. stockholders for contributions to its PAC.

The Federal Election Campaign Act (the Act) and Commission regulations detail the types of persons who may be solicited for contributions to separate segregated funds such as the PAC. 2 U.S.C. §441b(b)(4); 11 CFR 114.1(j). This solicitable class includes a corporation's stockholders, executive and administrative personnel, and their family members. 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.1(j). A membership organization is membership-based rather than stockholder-based. The solicitable class of an incorporated membership organization includes its members—as defined by the Act and Commission regulations—and its executive and administrative personnel and their families. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.1(e)(1), (2) and (3). Commission regulations also define any corporation's solicitable class to include the executive and administrative personnel, and their families, of its subsidiaries or other affiliates. 11 CFR 114.5(g)(1).

Analysis

Based on these legal principles, CME Group, Inc.'s situation can be broken down into four questions, discussed below.

Do CME, CBOT and/or NYMEX qualify as membership organizations that have "members" under the Act and Commission regulations? Commission regulations define a membership organization as a "trade association, cooperative, [or] corporation without capital stock" that:

- Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;
- Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
- Makes its articles, bylaws, constitution or other formal organizational documents available to its members upon request;
- Expressly solicits persons to become members;
- Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
- Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to federal office. 11 CFR 114.1(e)(1) and 100.134(e).

CME has issued capital stock and, as a result, is not a membership organization under Commission regulations. CBOT and NYMEX, however, are both corporations without capital stock and also meet the six criteria for being a membership organization.

CBOT and NYMEX meet the first criterion because they are made up of members, at least some of whom are vested with the power and authority to govern the organizations. Both organizations are governed by CME Group, Inc.'s 33-member Board of Directors, and each is entitled to designate members to serve as voting members on the Board. The Board serves as the highest governing body for each exchange and is empowered to make policy for both.

CBOT and NYMEX meet the second and third criteria because they have rulebooks that expressly state the qualifications for membership, CBOT posts these rules on its web site, and NYMEX makes them available on its web site and upon request. They meet the fourth requirement because both expressly solicit membership by advertising the benefits of membership on their respective web sites and inviting applications, and they meet the fifth requirement because they formally acknowledge an individual's membership through detailed procedures for applying for and approving membership. In addition, both exchanges provide jackets or badges to

new members that permit access to the trading floor. Finally, CBOT and NYMEX were organized to operate as trading organizations and not primarily for the purpose of influencing federal elections, thus meeting the sixth criterion.

Having determined that CBOT and NYMEX are membership organizations, the next issue is to determine which persons within those organizations are members under the Act and, thus, may be solicited for contributions to the PAC. Under Commission regulations the term "members" includes all persons who currently satisfy the membership requirements of a membership organization, affirmatively accept the membership organization's invitation to become a member **and**:

- Have a significant financial attachment to the organization, such as a significant investment or ownership stake; or
- Pay membership dues at least annually of a specific, predetermined amount; or
- Have a significant organizational attachment that includes affirmation of membership on at least an annual basis and direct participatory rights in the organization's governance.

On a case-by-case basis, the Commission may also determine that individuals who do not precisely satisfy the above requirements nevertheless qualify as members, provided that such individuals demonstrate a "relatively enduring and independently significant financial or organizational attachment to the organization." 11 CFR 114.1(e)(3) and 100.134(g).

CME Group, Inc. asked whether the following categories of individuals qualify as members of the exchanges:

- Outright owners of seats, including owners who lease their seats to others (lessors);
- Owners of seats who temporarily transfer their memberships to others (temporary transferors); and
- Certain individuals who do not own seats, but who hold them and exercise membership rights associated with them on behalf of others (temporary transferees).

The value of a seat on CBOT or NYMEX has typically ranged between $500,000 and $1.5 million. Thus, outright owners of a seat, who currently satisfy the membership requirements of an exchange and have affirmatively accepted that membership, have either paid a substantial amount for the seat or have been given a seat having substantial value. The Commission has specifically recognized such an ownership stake in a stock or commodity exchange as a significant "investment or ownership stake," and hence a significant financial attachment. Therefore, outright owners of a seat are members.

Seat owners who lease their seats are also members. CBOT and NYMEX lessors retain beneficial ownership of the seat because they can unilaterally decide to terminate the lease and sell the seat. The retention of beneficial ownership and exclusive rights of alienation in the seats indicates that lessors retain their significant financial attachments to their respective exchanges during the lease period.

CBOT and NYMEX also allow individuals who own seats to temporarily transfer their memberships to other individuals, subject to certain conditions. These temporary transferors are members of their respective exchanges for the purposes of the Act and Commission regulations, even if the exchanges do not consider the transferors to be members during the transfer period. While they cannot exercise most of the prerogatives of membership associated with seat ownership during the transfer period, they may regain those prerogatives at any time by revoking the transfer. Thus, they are in effect "temporarily retired" or "temporarily inactive" members. Accordingly, they demonstrate "relatively enduring and independently significant financial" ties to the exchanges sufficient to qualify them as members.

Finally, the request asks about two types of temporary transferees. CBOT has members, known as member-firm transferees, who are not lessees but rather hold seats through transfer from a member firm. In NYMEX, there are individuals, known as conferring members, who qualify for membership in the exchange, but who essentially hold their memberships on behalf of member firms. Although these classes of transferees do not own their seats, they must apply for membership in the exchanges through the same processes that member-owners undergo. In affirmatively accepting such membership, member-firm transferees and conferring members agree to abide by, and are bound by, the rules of their respective exchanges and are subject to significant penalties from the exchange. Penalties range from warning letters and reprimands to substantial monetary penalties and suspension or expulsion from the exchange. Although member-firm transferees and conferring members do not own their seats, the exchanges' rulebooks show that they are current, fully-functioning trading members, having significant privileges in the trading of options contracts, futures contracts and/or commodities contracts and earn their livelihoods, at least in part, through such trading privileges. The fact that they are personally liable for violations of the membership rules and that their livelihoods, in terms of trading privileges, are dependent upon their continued status in the exchange suffices as a significant financial attachment despite the absence of an ownership interest. See AOs 1997-5 and 1995-2. Thus, both types of temporary transferees are members of their respective

exchanges under the Act and Commission regulations.

Are the individual members of CME stockholders and therefore solicitable? Under the Act and Commission regulations the individual members of CME are stockholders. A stockholder is defined as someone who has:

- A vested beneficial interest in stock;
- The power to direct how that stock shall be voted, if it is voting stock; and
- The right to receive dividends.

Individuals acquiring seats in CME automatically own one share of Class B stock in CME Group, Inc.[1] Therefore, the first condition of qualification as a stockholder under the regulation is met. Individuals holding seats in CME have regular and special voting rights associated with their shares of stock, and they have the right to receive dividends. They also have the right to receive value for the share in the event of CME Group, Inc.'s liquidation. Therefore, the second and third criteria of stockholder status are also satisfied.

Are the three exchanges affiliated with CME Group, Inc.? Committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person or group of persons, including any parent, subsidiary, branch, department or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(l)(ii). As wholly owned subsidiaries, CME, CBOT and NYMEX are affiliated with CME Group, Inc.

Are the members or stockholders of the three exchanges part of CME Group, Inc.'s solicitable class? As holders of Class B stock in CME Group, Inc., the individual members of CME are solicitable by CME Group, Inc. 2 U.S.C. §441b(b)(4)(A)(i) and 11 CFR 114.1(j). With respect to the categories of members of CBOT and NYMEX, the Commission has concluded in previous advisory opinions that a corporation may solicit all individuals within the solicitable classes of its subsidiaries or other affiliates. See AOs 2005-17, 2003-28 and 2001-18. Although CME Group, Inc. is a corporation and CBOT and NYMEX are membership organizations, the Commission has previously affirmed that this difference is not an obstacle to permissible solicitation. See AO 2005-17.

Because CBOT and NYMEX are affiliated with CME Group, Inc., and are incorporated membership organizations with solicitable members, any SSF established by either of the exchanges could transfer without limit its federally permissible contributions, received from its own members, to CME Group, Inc. PAC. It follows that CME Group, Inc. may solicit the solicitable members of CBOT and NYMEX for contributions to CME Group, Inc. PAC. AO 2005-17

Conclusion

CME Group, Inc. may solicit voluntary contributions to the PAC from the following categories of members of CBOT and NYMEX regardless of whether such members hold stock in CME Group, Inc.:

- Outright owners of seats on the exchanges, including owners who lease their seats to others;
- Owners of seats who temporarily transfer their memberships to others; and
- Certain individuals who do not own seats, but who hold them and exercise membership rights associated with them on behalf of others.

Because individual members of CME qualify as stockholders of CME Group, Inc., CME Group, Inc. may also solicit contributions to the PAC from those individuals.

Date Issued: February 13, 2009; Length: 12 pages.

—Isaac J. Baker

AO 2009-02 Independent Expenditures by Single Member LLC

The True Patriot Network, LLC (TPN), a single natural person member limited liability company (LLC), may make independent expenditures subject to the limitations and disclosure requirements that apply to individuals.

Background

TPN is a limited liability company organized under the laws of the State of Washington. Nicolas Hanauer is the sole member and manager of TPN. As TPN's manager, he has the "sole and exclusive right" to manage TPN's affairs.

TPN plans to expand its activities to include communications that influence federal elections. Such communications would endorse and urge support for specific federal candidates and officeholders who share TPN's principles and ideals. In undertaking these activities, TPN states that it will not coordinate with federal candidates or party committees.

Analysis

TPN may make independent expenditures, subject to the limitations and disclosure requirements that apply to individuals. An LLC is treated as a person under the Federal Election Campaign Act (the Act). 2 U.S.C. §431(11). As such, LLCs are subject to the Act's provisions regarding contributions and expenditures made by persons. 2 U.S.C. §§431(8) and (9).

Commission regulations address LLCs in the context of the Act's contribution limitations and prohibitions. The Commission generally

[1] *CME Group, Inc. issues two types of stock. Class A stock is publicly traded. Class B stock is owned exclusively by CME seat holders and is not publicly traded.*

treats contributions by LLCs consistent with the tax treatment that the entities elect under the Internal Revenue Code. An LLC that is treated as a partnership under the Internal Revenue Code is subject to the contribution limits that apply to partnerships. Similarly, an LLC that elects to be treated as a corporation by the Internal Revenue Service (IRS) is subject to the Act's rules on corporate activity. 11 CFR 110.1(g)(3). For federal income tax purposes, a single member LLC cannot elect to be classified as a partnership. It may either choose to be treated as a corporation or to be disregarded as an entity separate from its owner. 26 CFR 301.7701-3(a). Commission regulations provide that contributions by an LLC with only a single natural person member that does not elect to be treated as a corporation for federal income tax purposes "shall be attributable only to that single member." 11 CFR 110.1(g)(4).

Since TPN is a single natural person member LLC that has not elected corporate tax treatment, TPN is subject to the contribution limitations of Mr. Hanauer, its sole member. The Commission has not previously determined whether or not expenditures by a single member LLC, like contributions, are attributable solely to the LLC's single member. Under the circumstances presented here, the Commission concludes that they are.

As a result of the unity between Mr. Hanauer and TPN, any independent expenditures made by TPN shall be treated as if they were made by Mr. Hanauer. However, if circumstances change such that TPN could be construed as a "group of persons," TPN may need to consider whether it may also be a "political committee" under the Act and Commission regulations. 2 U.S.C. §431(4)(A) and 11 CFR 100.5(a).

Date Issued: April 17, 2009;
Length: 4 pages.

—Myles Martin

AO 2009-13
Political Committee Status of Consultants Serving LLCs Who Make Independent Expenditures

A communications consulting company established as a Limited Liability Company (LLC) may serve as a commercial vendor to a single-member, natural-person LLC that makes independent expenditures concerning federal elections or candidates without triggering political committee status. This consulting company may also serve as a commercial vendor to two or more of these LLCs without triggering political status assuming that it does not facilitate communications between the LLCs and does not convey information from one LLC to another.

Background

Black Rock Group (BRG) is an LLC that assists its clients, including CEOs, elected officials and Fortune 500 companies, in building public policy campaigns through communication, "earned media" and grassroots messaging. BRG intends to extend these strategic communication and general consulting services to single-member, natural-person LLCs established for the sole purpose of making independent expenditures that expressly advocate the election or defeat of one or more federal candidates.

The LLCs that BRG plans to work with will all be established for the sole purpose of making independent expenditures supporting or opposing federal candidates. BRG will only work with an LLC if it consists of a sole member and manager, is treated as a disregarded entity (not as a corporation) for federal income tax purposes, receives all capital contributions solely from the personal funds of its only member, accepts no donations from any other individual or entity and engages in no for-profit business activities.

Each single-member, natural-person LLC will spend more than $1,000 per calendar year on independent expenditures expressly advocating the election or defeat of one or more federal candidates via television, radio, direct mail, phone banks and print ads. In no case will any communication be funded by more than one LLC. However, in some cases more than one LLC may make independent expenditures for or against the same federal candidate. Neither BRG nor its LLC clients nor any other vendor providing services to each LLC will coordinate any communications with any federal candidate or political party committee. The same BRG personnel will service all of the LLCs, and BRG will manage other consultants such as pollsters, media production and placement companies and other communication vendors who will provide services to each LLC. BRG will not have firewalls preventing BRG personnel advising one LLC from discussing that client's private plans and activities with staff advising another LLC. BRG anticipates facilitating certain communications between LLCs by, for example, scheduling meetings or conveying messages between them.

Analysis

Treatment of LLC as an Individual. Under the Federal Election Campaign Act (the Act) and Commission regulations, contributions and independent expenditures made by a single-member, natural-person LLC are treated as if they were made by an individual. 2 U.S.C. §431(8) and (9); 11 CFR 110.1(g). In AO 2009-02, the Commission determined that independent expenditures made by an LLC with a sole natural person member should be treated as if they were made by that member. Because the LLC is a third party and is not the requestor of this advisory opinion, the Commission could not state in advance that the LLC at issue would have the same kind of unity with the sole member of the LLC demonstrated in AO 2009-02. However, for purposes of

this advisory opinion, the Commission assumed that the LLC to which BRG is providing its services will be similar in all material respects to the single-member LLC addressed in AO 2009-02. Therefore, the single-member, natural-person LLCs addressed by this opinion are treated as individuals, not as "political committees" under the Act.

Political Committee Status of BRG. This advisory opinion addresses two "political committee" status issues: first, the possible status of BRG as a political committee and, second, the status of BRG and one single-member, natural-person LLC as a "group of persons" constituting a "political committee." The Act and Commission regulations define "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)(A); 11 CFR 100.5(a). The Supreme Court limited the scope of the term to organizations that are controlled by a federal candidate or whose major purpose is the nomination or election of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The request, as well as the information available on BRG's website, indicates that BRG is organized and operated for commercial purposes, and not for purposes of nominating or electing a candidate. BRG is a vendor of communication consulting services to a range of clients. BRG indicates that it has not in the past advocated the election of any federal candidate, supported any political party or stated any political purpose, and does not plan to do so in the future. BRG is neither owned nor controlled by any federal candidate. Therefore, the Commission concludes that BRG is not itself a political committee.

BRG and one single-member, natural-person LLC as a Group of Persons. Although BRG will advise its LLC client on message development and the communication of its views on federal candidates, it offers similar consulting services to its non-political clients by advising them on media strategy, message campaigning and building public policy campaigns. The LLC will retain ultimate control over the timing, content, method and candidate referenced in each communication constituting an independent expenditure, and BRG itself will not pay for any communications. The relationship between BRG and its LLC client is consistent with that of a commercial vendor, defined by Commission regulations as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 CFR 116.1(c). The consulting services BRG will provide to its LLC client are consistent with its usual and normal business practice; thus, BRG and its LLC client will not constitute a "group of persons."

Political Committee Status of BRG and Multiple LLCs. Assuming that none of the LLCs directly communicate with one another and that BRG does not facilitate communication between them, the Commission agreed that there was nothing to suggest that either the LLCs or the LLCs together with BRG would be a political committee. The Commission has previously concluded that individuals using a common commercial vendor did not constitute a "group of persons" and thus were not a political committee. See AO 2008-10. In that advisory opinion, the requestor represented that it did not facilitate communications or arrangements among its clients. If BRG does not facilitate communication between any of its LLC clients or otherwise convey any information about one LLC to any other LLC, BRG will simply be establishing a separate commercial relationship with each individual LLC, and the LLCs or the LLC together with BRG will not become a political committee. The Commission did not address whether any agreements or collaboration between the LLCs that does not involve BRG would result in the creation of a political committee.[1]

Date issued: September 28, 2009;
Length: 7 pages.

—*Christopher B. Berg*

AO 2009-14
LLC Affiliated with Domestic Subsidiary of a Foreign Corporation May Administer an SSF

A domestic subsidiary of a foreign corporation may serve as the connected organization of a separate segregated fund (SSF). An affiliated limited liability company (LLC) that is treated as a partnership but owned entirely by corporations, and which shares the same foreign parent as the domestic subsidiary, may administer and pay the associated costs of running the SSF. The abbreviated name of that SSF may reflect the foreign parent's name.

Background

Mercedes-Benz USA LLC (MBUSA LLC) is a LLC organized under the laws of the State of Delaware and headquartered in New Jersey; its sole member is Daimler North America Corpora-

[1] *The Commission could not approve a response by the required four affirmative votes as to whether BRG and its clients would become a "group of persons" if it served as a common vendor among various LLCs sponsoring independent expenditures concerning (1) the same federal candidates or elections or (2) different federal candidates or elections where BRG did not represent that it would not pass messages between various LLCs and that the LLCs would not communicate directly among themselves.*

tion (DNAC). DNAC is the wholly owned subsidiary of Daimler AG, a German company that is the ultimate parent of the Daimler-related companies. Sterling Truck Corporation (Sterling Corp.) is a Delaware corporation that is headquartered in Oregon; it is the wholly owned subsidiary of Daimler Trucks North America LLC (DTNA LLC), the sole member of which is DNAC.

Sterling Corp. intends to establish an SSF and MBUSA LLC would like to use its personnel and resources to administer that SSF, including paying the administrative and solicitation expenses of the SSF out of its External Affairs and Public Policy-Americas (EAPP) cost center. EAPP expenses are paid from MBUSA LLC's general treasury, which consists of U.S.-generated funds, or using its short-term credit line with Daimler North America Finance Corporation, which MBUSA LLC repays from domestic revenues.

MBUSA LLC would invoice Daimler AG for EAPP expenses per the terms of an agreement between MBUSA and Daimler AG for the provision of and payment for such services (the "Service Level Agreement"). Rather than reimburse MBUSA LLC directly for EAPP expenses, Daimler AG permits MBUSA LLC to credit those expenses against the amount it owes Daimler AG for vehicles and products.

Under the Service Level Agreement, Daimler AG authorizes annual spending levels for the EAPP cost center and "approve[s] the [EAPP] services to be provided by [MBUSA LLC] via the Budgeting and Planning procedures of the Daimler Group." Daimler AG does not otherwise guide or prioritize how MBUSA LLC must spend EAPP funds. All decision-making regarding the proposed SSF would be made exclusively by executive or administrative personnel of MBUSA LLC or Sterling Corp. who are U.S. citizens or legal permanent residents. Contributions to the SSF would not be solicited or accepted from persons who are foreign nationals.

Additionally, MBUSA LLC and Sterling Corp. propose a number of potential official names for the SSF, but would like to abbreviate the name of the SSF to "Daimler PAC."

Analysis

Connected Organization. The Federal Election Campaign Act (the Act) defines a connected organization as any organization that is not a political committee and that directly or indirectly establishes, administers or financially supports a political committee. 2 U.S.C. §431(7) and 11 CFR 100.6(a). Corporations, labor organizations, membership organizations, cooperatives and trade associations may serve as connected organizations of their SSFs. Payments by a connected organization for the establishment, administration or solicitation of contributions to its SSF are exempt from the definition of contribution and expenditure. 2 U.S.C. §441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii).

The Commission has held previously that foreign nationals[1] may not serve as an SSF's connected organization. See AOs 1977-53 and 1982-34. However, domestic subsidiaries of foreign corporations may establish and administer SSFs if they are discrete entities whose principal place of business is the United States, and if those exercising decision-making authority over the SSF are not foreign nationals. See AOs 1980-100 and 1980-111.

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Act to expand the prohibition on campaign contributions and donations by foreign nationals. The BCRA extended the ban to prohibit foreign national contributions that were made "directly or indirectly." See 2 U.S.C. §441e.

In this situation, Sterling Corp.'s ultimate parent is Daimler AG, a German company. However, Sterling Corp. is a U.S. corporation that is organized under the laws of Delaware and is headquartered in Oregon. As such, and given that foreign nationals will not have decision-making authority regarding the proposed SSF, Sterling Corp. may serve as the SSF's connected organization.

Personnel and Resources. The Commission has interpreted the Act and Commission regulations to permit a partnership (or an LLC electing partnership status) to pay the administrative and solicitation costs of an SSF established by the partnership's (or LLC's) corporate owner, but only when the partnership is wholly owned by corporations and affiliated with at least one of the corporations. In that case, the administrative and solicitation support provided by a partnership may be construed as coming from the affiliated corporation(s). See, for example, AOs 2004-42, 2001-18 and 1992-17.

MBUSA is treated as a partnership under Commission regulations because it is a non-publicly traded LLC that has not affirmatively elected treatment as a corporation for tax purposes. In addition, since MBUSA is wholly owned by DNAC, MBUSA would be able to perform the functions of a connected organization for an SSF connected to DNAC, including paying the SSF's administrative and solicitation costs. For internal business reasons, however, DNAC has chosen not to serve as the connected organization for the proposed SSF; Sterling Corp. will instead serve as the connected organization.

Through DNAC, MBUSA is also affiliated with Sterling Corp.,

[1] *The Act and Commission regulations define "foreign national" to include "foreign principals," as defined at 22 U.S.C. §611(b). 2 U.S.C. §441e(b) and 11 CFR 110.20(a)(3). Under 22 U.S.C. §611(b), "foreign principal" includes corporations organized under the laws of or having their principal place of business in a foreign country.*

which is DNAC's wholly owned subsidiary. Although previous Commission advisory opinions have not addressed an arrangement whereby an LLC that is wholly owned by and affiliated with one corporation pays the administrative and solicitation costs of another affiliated corporation's SSF, the Commission finds no material differences in the proposed arrangement that would affect the ability of MBUSA LLC to use its resources and personnel to administer Sterling Corp.'s SSF. As a result of this affiliation, MBUSA may pay the administrative and solicitation costs of Sterling Corp.'s SSF. The SSF must identify Sterling Corp. as its connected organization on its Statement of Organization (FEC Form 1). 2. U.S.C. §433b(2) and 11 CFR 102.2(a)(1)(ii).

Administrative Costs. The Commission considered the question of whether the payment of administrative costs of the proposed SSF could come from MBUSA LLC's EAPP cost center, but could not approve a response by the required four votes.

Name of SSF. The Act and Commission regulations require the name of an SSF to include the full name of its connected organization. 2 U.S.C. §432(e)(5) and 11 CFR 102.14(c). An SSF established by a subsidiary may, but need not, include in its name the name of the subsidiary's parent or another subsidiary of its parent. In limited circumstances, however, the Commission has allowed an SSF to be named after an LLC that is wholly owned a corporation that serves as the SSF's connected organization. See AOs 2004-42, 2003-28, and 1997-13.

In this proposal, Sterling Corp. will serve as the connected organization for the proposed SSF and the funding for the administration of and solicitation for the SSF will come from MBUSA LLC. The SSF may not be named after MBUSA LLC, though, because MBUSA LLC is not in virtually the same position as a corporate subsidiary as was the case with other SSFs named after LLCs. Accordingly, the name of the SSF must include Sterling Corp. and may, but need not, include the names of Sterling Corp.'s parent—DNAC—and a subsidiary of its parent, including MBUSA.

Commission regulations permit an SSF to use a "clearly recognized abbreviation or acronym by which the connected organization is commonly known." 11 CFR 102.14(c). In determining whether specific terms or names meet this requirement, the Commission has examined whether they give the public adequate notice to the public as to the identity and sponsorship of the SSF.

The Commission concludes that the proposal to abbreviate the name of the SSF as "Daimler PAC" would be sufficient to provide the public with adequate notice as to the identity and sponsorship of the SSF and is therefore permissible. Although the SSF will be connected to Sterling Corp. and funded by MBUSA LLC, it will operate on behalf of all the Daimler-related companies.

The SSF must use both the abbreviation and the full name on the Statement of Organization (FEC Form 1), on all reports filed with the Commission and on all disclaimer notices required by Commission regulations. In addition, Sterling Corp. will be disclosed as the SSF's connected organization on the Statement of Organization with the Commission.

Date Issued: August 28, 2009;
Length: 7 pages.

— *Myles Martin*

AO 2009-18

Disaffiliation of SSFs After Restated Agreement

Penske Truck Leasing Co., L.P. Political Action Committee (Penske PAC), the separate segregated fund (SSF) of Penske Truck Leasing Co., L.P. (Joint Venture) may disaffiliate from the General Electric Company PAC (GEPAC), the SSF of the General Electric Company (GE) principally because the GE limited partners have divested themselves of majority ownership status and relinquished majority control of the Joint Venture's Advisory Committee to the Penske affiliates.

Background

In 1988, Penske Truck Leasing Corporation ("Penske") formed a limited partnership in which affiliates of General Electric Capital Corporation (GE Capital Corporation) became limited partners one month later. At that time, affiliates of Penske owned 69 percent of the Joint Venture and affiliates of GE Capital Corporation owned 31 percent. In 2002, the GE companies' ownership increased to 79 percent of the Joint Venture. Since then, the ownership level of the GE companies has steadily decreased, though remaining above 50 percent, until the execution of the Joint Venture's Third Amended and Restated Agreement of Limited Partnership of Penske Truck Leasing Co., L.P. (Third Restated Agreement) on March 26, 2009. Following the Third Restated Agreement, GE companies' ownership level of the Joint Venture fell to 49.90 percent bringing the combined ownership of Penske companies to 50.10 percent.

Additional changes under the Third Restated Agreement charged Penske, the general partner, with performing all management and operational functions relating to the business of the Joint Venture. Furthermore, the limited partners, such as GE companies, will not participate in the control of the business of

the Joint Venture and have no power to act or bind the Joint Venture. However, the limited partners do retain the right to approve certain actions, as well as certain voting rights.

The Joint Venture has an Advisory Committee which consists of five members, three appointed by Penske and two appointed by GE companies. Under the Third Restated Agreement, the Advisory Committee cannot possess or apply any power that could amount to participation in the control of the business. The financing of the Joint Venture also changed under the Third Restated Agreement. Even though the Joint Venture has received financing from a line of credit from GE Capital Corporation in previous years and continues to do so, now the nature of the contractual agreement is closer to agreements with third party lenders, with affirmative and negative covenants, events of default and reporting obligations.

In 2002, the Joint Venture's SSF, Penske PAC, was formed. Since 2002, Penske PAC has identified GE Credit Corporation of Tennessee as a connected organization on its FEC Form 1, due to the ownership level of the GE companies to the Joint Venture, and has identified GEPAC as an affiliated committee.

Penske asked the Commission if, after the Third Restated Agreement, Penske PAC and GEPAC are no longer affiliated with each other under the Federal Election Campaign Act (the Act) and Commission regulations.

Legal Analysis and Conclusions

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In the absence of *per se* affiliation, Commission regulations provide for an examination of various circumstantial, non-exhaustive factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee, and hence, whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii); and 110.3(a)(3)(i) and (ii); See AOs 2007-13 and 2004-41. The Commission considered a number of circumstantial factors in determining that Penske PAC and GEPAC are no longer affiliated.

Organization owns a controlling interest in the voting stock or securities. One affiliation factor considers whether a sponsoring organization owns a controlling interest in the voting stock or securities of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A). Prior to the Third Restated Agreement, GE companies owned a 79 percent interest in the Joint Venture; however, after the Third Restated Agreement, GE companies now have a minority interest of 49.90 percent in the Joint Venture. In addition, no GE company owns any voting interest in Penske Corporation or any Penske affiliate. Under the facts presented, the GE companies no longer have a majority interest in the Joint Venture. Thus, the Commission noted the application of this factor to these facts does not suggest that the entities are affiliated.

Authority or ability to direct or participate in governance or to control officers. Other factors which indicate the affiliation of organizations include the authority or ability of one corporate sponsor to participate in the governance of another corporate sponsor or to hire, appoint, demote or otherwise control the officers, or other decision-making employees, of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(B); 110.3(a)(3)(ii)(B); 11 CFR 100.5(g)(4)(ii)(C) and 110.3(a)(3)(ii)(C).

The general partner, Penske, has broad management control of the affairs of the Joint Venture including, among others, paying expenses, debts and obligations to the Joint Venture and entering into and terminating contracts with third parties. The general partner is fully in charge of all affairs of the Joint Venture, and the management and control of the Joint Venture's business rests exclusively with the general partner. The Third Restated Agreement does include the requirement for a supermajority of four out of the five members of the Advisory Committee to approve certain actions, such as changing business conduct policies, making acquisitions in excess of $10 million or changing the character of the Joint Venture which was established in the Third Restated Agreement. However, even with the requirement of a supermajority in these matters, the GE companies do not control the day-to-day affairs of the Joint Venture. Furthermore, the Commission noted that it has in the past concluded that limited partners in a joint venture were not affiliated with the joint venture, despite the existence of supermajority voting rights. See AO 2001-07.

In regards to the ability to control officers, the general partner has the authority to appoint officers to the Joint Venture with the approval of only three members of the Advisory Committee. Since the GE companies appoint only two members to the Advisory Committee, they do not have the ability to veto the appointment of officers. Thus, the Commission concluded the application of these factors to these facts does not suggest that the entities are affiliated.

Common or overlapping officers or employees indicating a formal or ongoing relationship or the creation of a successor entity.[1] The law also considers whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization indicating a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(E) and 110.3 (a)(3)(ii)(E). An additional factor asks whether a sponsoring organization or committee has any members, officers, or employees who were members officers or employees of another sponsoring organization or committee indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g) (4)(ii)(F) and 110.3(a)(3)(ii)(F). The Joint Venture and the GE companies have one official overlapping decision-maker, namely Mr. Penske. Mr. Penske serves as chairman of the general partner, Penske, and sits on the Board of Directors of GE. Besides Mr. Penske there are the two appointed GE members to the Advisory Committee, and the CEO of the Joint Venture who holds an "honorific title" with GE Capital Corporation only as a holdover from when the Joint Venture was majority owned by GE entities. Currently there are no other overlapping officers, directors or employees between the Joint Venture and the GE companies. There are also no former officers or employees of GE companies who may work for the Joint Venture or Penske companies other than what "might be expected in the normal employment market" as described by the requestors. Furthermore, there is no agreement for Penske companies or GE companies to hire former employees of the other entity. The Commission remarked that in past advisory opinions, previously affiliated SSFs were deemed no longer affiliated despite the fact that there was an overlap in officers in the parent organizations. See AOs 2007-13 and 1996-23. Thus, the Commission noted that the overlap of officers between the Joint Venture and GE companies is not by itself a strong indication of affiliation.

Providing funds or goods in a significant amount or on an ongoing basis. The affiliation factors also include whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4) (ii)(G) and (H) and 110.3(a)(3)(ii) (G) and (H). The Joint Venture's primary source of financing is a revolving line of credit held by GE Capital Corporation which was established prior to the execution of the Third Restated Agreement. However, following the Third Restated Agreement, the terms of the line of credit were renegotiated to give GE Capital Corporation the right to reset the rates to market rates and to make the Joint Venture refinance the debt with third party lenders. These current terms are similar to agreements with third-party lenders. The Commission has concluded in prior advisory opinions that disaffiliated companies may maintain some consumer-supplier relationships and that those transactions can be seen as part of the process to establish the independence and separation of an entity from its organizational parent. See AOs 2000-28, 2003-21, 2004-41, 2007-13 and 1996-41; see also AOs 2007-13 and 2008-28. Thus, the newly renegotiated line of credit between GE companies and the Joint Venture can be viewed as part of the process of separating the two and does not suggest that the entities are affiliated.

Having an active or significant role in the formation of another sponsoring organization or committee. The affiliation factors also include whether a sponsoring organization or committee had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I). In this case, the GE companies were not involved in the actual formation of the Joint Venture, but rather became involved shortly after its formation in 1988. Penske PAC was established in 2002 by the Joint Venture and its employees who administer it without the involvement of the GE companies. Additionally, there is no indication that the Joint Venture was involved in the formation of GEPAC. Therefore, the application of this factor to these facts does not suggest the entities are affiliated.

Having similar patterns of contributions or contributors indicating a formal or ongoing relationship. An additional affiliation factor includes whether the sponsoring organizations or committees have similar patterns of contributions or contributors indicating a formal or ongoing relationship between the sponsoring organizations or committees. 11 CFR 100.5(g)(4)(ii)(J) and 110.3(a)(3)(ii)(J). Penske PAC and GEPAC do not coordinate contributions except to the extent necessary to comply with the shared contribution limits applicable to affiliated committees. The two SSFs have no transfers between the two of them and the Joint Venture knows of no overlap between contributors to the two SSFs. Thus, this factor does not indicate the entities are affiliated.

[1] *The Commission noted that the affiliation factor involving whether a sponsoring organization has common or overlapping membership with another sponsoring organization indicating a formal or ongoing relationship between the sponsoring organizations did not apply to this particular case because neither the Joint Venture nor the GE companies is a labor organization, membership organization, a cooperative or a trade association. 11 CFR 100.5(g) (4) (ii)(D) and 110.3(a)(3)(ii)(D).*

Conclusion

Based on the above analysis of affiliation factors the Commission concluded that the Joint Venture and the GE companies are no longer affiliated for purposes of the Act. Consequently, Penske PAC and GEPAC may disaffiliate.

Date Issued: July 29, 2009;
Length: 11 pages.

—*Katherine Wurzbach*

AO 2009-19
PAC May Use Contributor Information for Limited Communication

A separate segregated fund may use contributor information obtained from reports filed with the Federal Election Commission to notify contributors to Senator Arlen Specter's 2010 Senate reelection campaign that the Senator has switched his party affiliation and has publicly offered to refund contributions upon request.

Background

On April 28, 2009, Pennsylvania Senator Arlen Specter announced he had decided to switch his party affiliation and to run as a Democrat for the 2010 Senate election. Senator Specter stated that he would return campaign contributions made during the 2010 election cycle upon request.

Club for Growth (Club) is an incorporated nonprofit membership organization, and Club for Growth PAC (Club PAC) is the separate segregated fund of the Club.

The Club and Club PAC wish to communicate with individual contributors to the Specter Committee to inform them of Senator Specter's decision to run as a Democrat in the 2010 election. The Club and Club PAC propose to compile a list of contributors from information contained in campaign finance reports that the Specter Committee has filed with the Commission. The communication would notify contributors about Senator Specter's stated policy of providing refunds upon request to those who contributed to his campaign while he was running as a Republican. Club PAC indicated that the communication would not contain any express advocacy or mention any other candidate.

Either the Club or Club PAC would send a one-time letter to Specter's contributors or, alternatively, for those contributors with published phone numbers, the Club or Club PAC may make one telephone call.

The communications would not contain any solicitation of any kind for the Club, Club PAC, any candidate or any other entity. No follow up mailings or telephone calls would be made unless, during the initial telephone call, the contributor requests further information from the Club or Club PAC on how to request a refund. The communications would be made independently of any candidate or political party.

The Club and Club PAC would not use the list for any purpose other than the communication proposed in the advisory opinion request, and would not retain the list for any other purpose. The Club and Club PAC would not put any of the contact information obtained from the Specter Committee's Commission filings into either the Club or the Club PAC's general membership database. The Club and Club PAC would not make the list of contributors to the Specter Committee available to any other entity.

Analysis

Under the Federal Election Campaign Act (the Act) and Commission regulations, political committees are required to file reports with the Commission identifying the names and mailing addresses of their contributors. 2 U.S.C. §§434(b)(2)(A) and (b)(3)(A); 11 CFR 104.8(a). The Act provides that the Commission shall make reports and statements filed with it available for public inspection and copying within 48 hours of receipt. Any information copied from such reports or statements, however, "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes," other than using the name and address of a political committee to solicit contributions from that political committee. 11 CFR 104.15(a). Under Commission regulations, "soliciting contributions" includes soliciting any type of contribution or donation, such as political or charitable contributions. 11 CFR 104.15(b).

In AO 1981-05, the Commission concluded that a candidate could use information obtained from disclosure reports to mail letters to contributors to his opponent's campaign to correct allegedly defamatory charges made by his opponent. In Advisory Opinion 1984-02, a nonconnected political committee calling itself "Americans for Phil Gramm in 84" solicited contributions without the permission of Phil Gramm or his authorized campaign committee. The Commission concluded that Representative Gramm and his authorized campaign committee could use contributor information contained in Americans for Phil Gramm in 84's disclosure reports to inform contributors that the nonconnected committee was not Phil Gramm's authorized committee.

In these AOs, the Commission pointed out that the purpose of the sale and use prohibition is to prevent contributor information from being used for commercial purposes or for making solicitations. The prohibition does not, "foreclose the use of this information for other, albeit political, purposes, such as correcting contributor misperceptions." (AO 1984-02.)

In this advisory opinion the Commission noted that the Club and Club PAC will not solicit contributions for any reason and will not use the contributor information for any commercial purpose. The Club and Club PAC will use contributor information obtained from the Specter

Committee's disclosure reports only for the limited purpose of notifying contributors that Senator Specter has switched parties and of his refund policy. Each donor will only be contacted once. Also, the Club and Club PAC indicated that they will safeguard the contributor information obtained from the reports to avoid using the contributor information for any purpose not presented in the advisory opinion request.

Therefore, in this limited situation, the Commission concludes that the use of contributor information obtained from the Specter Committee's disclosure reports does not violate the solicitation and commercial use prohibition at 2 U.S.C. §438(a)(4).

Date Issued: August 28, 2009;
Length: 5 pages.

—*Isaac J. Baker*

AO 2009-23

Nonfederal PAC Need Not Allocate its Expenses

Given the requestor's representation that they are not "political committees" under the Federal Election Campaign Act (the Act) or Commission regulations, FEC allocation rules do not apply to the Virginia Chapter of the Sierra Club's ("VA Chapter") proposed use of its state-registered political action committee ("State PAC") and funds from the Sierra Club Voter Education Fund ("SC-VEF") to finance certain activities relating to upcoming elections in Virginia.

Background

VA Chapter is a state chapter of the Sierra Club, which is a nonprofit corporation pursuant to section 501(c)(4) of the Internal Revenue Code. VA Chapter formed the State PAC in 1985 for the exclusive purpose of engaging in state and local political campaign activities, and registered it with Virginia's State Board of Elections. VA Chapter raises funds in accordance with Virginia law for the State PAC's account, which may include funds from its members, corporations, labor organizations and other individuals. The State PAC has made contributions to state and local candidates, but has not used its account to make any contributions or expenditures in connection with federal elections. Since July 31, 2000, the State PAC has been organized under section 527 of the Internal Revenue Code. 26 U.S.C. §527.

SC-VEF is also organized under section 527 of the Internal Revenue Code. The Sierra Club established SC-VEF as a nonfederal political organization in order "to educate people about public official's environmental records, voting records and position of candidates for election to Congress, the Presidency, and state or local offices…" Both VA Chapter and SC-VEF maintain that neither the State PAC nor SC-VEF is a "political committee" under FEC regulations.

Proposed Activities. The State PAC intends to conduct three categories of activities in connection with the 2009 Virginia elections and the 2010 federal general elections. SC-VEF intends to assist by providing partial funding for these activities. First, the State PAC intends to conduct voter drives, including voter identification efforts asking potential voters for their views on environmental matters and how those views may affect their voting behavior in the upcoming elections. The voter drive activities will also involve voter registration and GOTV activity urging the public to register to vote and to elect candidates who support government actions to protect the environment. None of these voter drive activities will refer to any clearly identified federal, state or local candidates, or political parties.

Second, the State PAC intends to make public communications expressly advocating the election or defeat of clearly identified state and local (but not federal) candidates in connection with the 2009 Virginia general election. Some of these public communications will feature federal officeholders who are candidates for re-election in the 2010 federal elections endorsing state and local candidates, but the communications will neither reference the 2010 election, nor the fact that the officeholders are federal candidates.

Third, the State PAC will distribute "issue advertisements" in connection with the above-mentioned 2009 and 2010 elections that will refer to positions on issues of public policy held by clearly identified federal officeholders from Virginia, some or all of whom will also be candidates for re-election in 2010. These communications will not expressly advocate the election or defeat of any federal candidates, nor will they contain the functional equivalent of express advocacy. Additionally, the public communications will not be coordinated with any federal candidates.

Analysis

Under the Act and Commission regulations, the term "political committee," includes any committee, club, association or other group of person which receives contributions or makes expenditures in excess of $1,000 during any calendar year. 2 U.S.C. §431(4) and 11 CFR 100.5(a)-(c). The Supreme Court has held that only organizations under the control of a candidate or whose major purpose is federal campaign activity (i.e., the nomination or election of federal candidates) can be considered political committees under the Act. See *Buckley v. Valeo*, 4242 U.S. 1, 79 (1976).

Commission regulations provide that various types of political committees that make disbursements in connection with both federal and nonfederal elections must allocate certain expenses between federal funds (i.e., funds that are subject to the limitations and prohibitions of

the Act) and nonfederal funds (i.e., those funds not subject to the limitations or prohibitions of the Act). 11 CFR Part 106. More specifically, section 106.6 requires separate segregated funds and nonconnected committees that make disbursements in connection with both federal and nonfederal elections to allocate expenses in certain ways depending upon the nature of the activity involved. Under those rules, these entities may make such disbursements in one of two ways: 1) they may pay the activities using 100 percent federal funds; or 2) if they have established separate federal and nonfederal accounts pursuant to 11 CFR 102.5, they may allocate the expenses between these accounts. 106.6(a).

The Commission has consistently applied these allocation rules only to PACs that qualify as "political committees" under the Act and Commission regulations. Accordingly, given the representation that the State PAC and SC-VEF are not "political committees" under the Act and given the nature of their proposed activities, the allocation rules at 11 CFR 106.6 do not apply. This conclusion assumes that neither entity will engage in any activity that would cause it to become a political committee under the Act.

Date Issued: October 9, 2009;
Length: 5 pages.

—Myles Martin

AO 2009-29 Membership Organization May Establish SSF Without Vote of Its Membership

The Federal Election Campaign Act (the Act) does not require a non-profit 501(c)(4) incorporated membership organization to submit a proposal to its membership in order to form a separate segregated fund (SSF).

Background

The Retiree Support Group of Contra Costa County ("Contra Costa Retirees") is a non-profit membership organization established under California law and organized under section 501(c)(4) of the Internal Revenue Code. Its members include retired employees of the Contra Costa County government, including the county's special districts, and surviving spouses of certain retired employees.

Contra Costa Retirees has a Board of Directors (Board) which manages the organization. The Board is elected by the membership, and members may approve or disapprove of certain actions undertaken by the Board. Contra Costa Retirees is considering whether to establish an SSF to make political contributions in connection with state and federal elections.

Analysis

An incorporated membership organization may establish an SSF under the Act and Commission regulations for the purpose of making contributions or expenditures in connection with federal elections. 2 U.S.C. §441b(b)(2)(C) and 11 CFR 114.5. Commission regulations do not specifically address how a membership organization may form an SSF. However, Commission regulations do provide a non-exhaustive list of examples of events that may suffice to form an SSF. These examples include: "[a] vote by the board of directors or comparable governing body of an organization to create a[n SSF] to be used wholly or in part for federal elections; selection of initial officers to administer such a fund; or payment of the initial operating expenses of such a fund." 11 CFR 102.1(c).

Once an SSF is established by an organization, the SSF must file a Statement of Organization (FEC Form 1) with the Commission within 10 days after the establishment of the SSF. 11 CFR 102.2.

Since neither the Act nor Commission regulations specifically address how to determine whether or not to establish an SSF, the Commission concludes that Contra Costa Retirees is not required to submit the question to its members for a vote in order to establish an SSF.

Date Issued: January 19, 2010;
Length: 4 pages.

—Myles Martin

AO 2009-30 Trade Association Corporate Members May Use Treasury Funds to Assist Their SSFs

A trade association's corporate members may use their general treasury funds to pay for fundraising services to assist the members' separate segregated funds (SSFs). The trade association would not be making contributions to the SSFs as long as it charges its corporate members the fair market value for the services.

Background

TechNet is an incorporated trade association whose members include corporations and executives in the technology industry. TechNet currently provides government relations services, issues briefings and provides continuing education to its members. The costs for these services are included in the corporate members' annual membership dues. TechNet would like to offer additional fundraising assistance services to its member corporations for their SSFs. The services would include an assessment of the SSF's recent fundraising activities and recommendations for future efforts, a periodic newsletter, fundraising and marketing materials and assistance with planning and executing fundraising events. The corporate members would pay for the fundraising assistance services as an additional assessment in their annual membership dues. The amount charged would be set at a level that ensures that TechNet receives the fair market value of its services.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from using general treasury funds to make any contribution in connection with a federal election. 2 U.S.C. §441b; 11 CFR 114.2. However, the Act and Commission regulations permit a corporation, including an incorporated trade association, to pay for the establishment, solicitation and administrative costs of a separate segregated fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). Establishment, solicitation and administrative costs include the costs of fundraising and other expenses incurred in setting up and running a separate segregated fund. 11 CFR 114.1(b). In previous advisory opinions, the Commission concluded that payments by corporations to help their SSFs increase their fundraising are permissible "establishment, administration and solicitation" costs. AOs 2006-33 and 1980-50. Here, TechNet's corporate members would pay for the proposed services in order to help their SSFs with fundraising activities. The payments for the fundraising services would constitute fundraising expenses under 11 CFR 114.1(b). Therefore, TechNet's corporate members may use their general treasury funds to pay for TechNet's fundraising services for the members' SSFs.

The Commission also analyzed whether TechNet would be making a prohibited contribution to its members' SSFs by providing the fundraising services. As an incorporated trade association, TechNet would be prohibited from making contributions in connection with a federal election. 2 U.S.C. §441b; 11 CFR 114.2. A contribution includes the provision of goods and services without charge or at a charge that is less than the usual and normal charge for such goods or services. 11 CFR 100.52(d)(1). The "usual and normal charge" for goods means "the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution." The "usual and normal charge" for services means "the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered." 11 CFR 100.52(d)(2). In this case, since TechNet's proposal would charge its corporate members the fair market value for the fundraising services, TechNet would not make prohibited contributions to its member corporations' SSFs.

Date Issued: January 29, 2010;
Length: 4 pages.

—Zainab Smith

AO 2009-31 Employees May Use Credits to Make Contributions to SSF

MAXIMUS, a corporation whose employees earn "credits" redeemable for cash value as part of their regular compensation, may expand this credit program to allow restricted class employees to redeem these credits and use them to make contributions to its separate segregated fund, MAXPAC.

Background

MAXIMUS is a corporation whose employees earn "credits" as part of their regular compensation in addition to their salaries. These credits hold a cash value based on a *pro rata* share of the employee's salary, and may be redeemed for the following purposes:

- To receive pay while on personal leave;
- To receive pay during times of financial or personal hardship; and
- To receive a lump sum payment upon permanently leaving employment at MAXIMUS.

MAXIMUS wishes to revise its compensation plan to allow its restricted class employees to redeem credits for cash value for two additional purposes: to contribute it to MAXIMUS's charitable foundation, or to allow restricted class employees to make a contribution to MAXPAC, MAXIMUS's separate segregated fund (SSF). MAXIMUS would permit restricted class employees to voluntarily complete and submit a form authorizing MAXIMUS to redeem an employee-specified number of credits, the cash value of which would be contributed to MAXPAC. The form would be distributed only to restricted class employees and would contain all notifications required under the Federal Election Campaign Act (the Act) and Commission regulations for solicitations to an SSF's restricted class.

Analysis

The Act and Commission regulations permit a corporation to solicit its restricted class for contributions to the corporation's SSF. 2 U.S.C. §§441b(b)(2)(C) and (4)(A)(i); 11 CFR 114.1(a)(2)(iii), (c), (f) and (j); 114.2(f)(1) and (4)(i); 114.5(g)(1). Solicitations of the restricted class for contributions to the corporation's SSF must inform the employee of the political purpose of the SSF and of the employee's right to refuse to contribute without reprisal. 11 CFR 114.5(a). Among possible methods of solicitation for the SSF are payroll deduction, checkoff systems, periodic payment plans or return envelopes enclosed in a solicitation request. 11 CFR 114.1(f), 114.2(f)(4)(i), 114.5(g)(1) and (k); AO 1999-3. Corporations may not use treasury funds to pay any contributor for his or her contribution through a bonus or any other form of direct or indirect compensation. 11 CFR 114.5(b)(1).

Because MAXIMUS's existing credit system is part of a regular compensation plan provided to each employee, earned in the normal course of employment at a regular, predetermined rate, and because employees control the use of any credits earned and may redeem them in a variety of situations, the pro-

posal is materially distinguishable from the proposal presented in AO 1986-41, in which the Commission concluded that providing additional compensation to some employees in recognition of their political contributions would be contrary to the Act and Commission regulations.

MAXIMUS's proposal does not augment employee compensation to effect a contribution. The proposed expansion of MAXIMUS's credit program is analogous to a corporate payroll deduction plan, which the Commission has found to be an acceptable method of facilitating contributions to a corporation's SSF. 11 CFR 114.1(c) and (f), 114.5(k)(1); AOs 1999-3 and 1996-42. As a result, the Commission concludes that the proposal by MAXIMUS would not constitute such a prohibited use of treasury funds to compensate employees for contributions to MAXPAC.

Date Issued: January 29, 2010; Length: 4 pages.

—*Christopher Berg*

AO 2010-04 Determining Composition of Corporation's Restricted Class

Five managers working at Wawa Inc.'s (Wawa) corporate headquarters may be considered members of Wawa's "executive or administrative personnel," even though two of them directly supervise only hourly employees, and one of them directly supervises one hourly employee. The five managers are salaried managerial employees who have policymaking, managerial or supervisory responsibilities, such that they exercise discretion and independent judgment on matters of significance in the performance of their duties. Therefore, the fact that three of the managers supervise hourly employees does not preclude them from qualifying as "executive and administrative personnel." Further, the hourly employees whom these three managers supervise are similar in many respects to salaried employees.

Background

Among the salaried managerial employees working at Wawa's corporate headquarters are the Loss Prevention Manager, the Payroll Manager, the Retail Accounting Manager, the Retail Accounting Assistant Manager and the Inventory Accounting Manager. All five individuals are division or section managers who run the corporation's business and manage Wawa units that have a permanent status and function within Wawa's corporate hierarchy. However, the Retail Accounting Manager directly supervises five salaried employees and one hourly employee, and the Payroll Manager and the Retail Accounting Assistant Manager directly supervise only hourly employees. These hourly employees are full-time "at will" employees who are eligible for Wawa benefits, and there is an expectation of their continued employment.

Wawa's separate segregated fund (SSF) is the Wawa Political Action Committee. Wawa asked if the five managers qualify as "executive and administrative personnel" under the Federal Election Campaign Act (the Act) and Commission regulations.

Analysis

A corporation's restricted class includes its executive and administrative personnel, the corporate stockholders and the families of each. 11 CFR 114.1(j). The corporation's "executive and administrative personnel" are: (1) employees of the corporation, who (2) are paid on a salary rather than hourly basis and (3) who have policymaking, managerial, professional or supervisory responsibilities. 11 CFR 114.1(c). Employees considered "executive and administrative personnel" include the individuals who run the corporation's business, such as officers, other executives and plant, division and section managers, and also include recognized professionals, such as lawyers and engineers, provided they are not represented by a labor organization. 11 CFR 114.1(c)(1) and (2). Salaried foremen and other salaried lower level supervisors having direct supervision over hourly employees are not considered "executive and administrative personnel" under 11 CFR 114.1(c)(2)(ii).

Questions of whether managers who supervise hourly employees meet the definition of "executive and administrative personnel" depend on whether the managers meet the three criteria of the definition in 11 CFR 114.1(c), summarized above. Because the managers are salaried employees of the corporation, the question turns on whether the managers have policymaking, managerial, professional or supervisory responsibilities under 11 CFR 114.1(c). The Fair Labor Standards Act (FLSA) and its regulations may serve as a guideline regarding whether individuals have such responsibilities.

In this case, the Commission determined that the five employees qualify as "executive and administrative personnel" because they are salaried employees who have policymaking, managerial or supervisory responsibilities. The Commission concluded that the employees perform duties typical of those performed by managers: they supervise and direct the work of other employees, including other managers and supervisors; they manage staffing, including recruiting, hiring and training employees; and they plan and control the day-to-day activities of their departments and sections. The Commission also found that, under FLSA regulations, the employees run the corporation's business by working at corporate headquarters, and by managing departments or sections that affect Wawa's general business operations. The employees also manage

departments that are "customarily recognized" as typically managed by salaried executive employees. Therefore, the managers qualify as "executive and administrative personnel" under 11 CFR 114.1(c).

Next, the Commission considered whether the managers who supervise one or more hourly employees could be deemed salaried foremen or other lower level supervisors. Under the Act, "salaried foremen and other salaried lower level supervisors having direct supervision over hourly employees" are specifically excluded from the definition of "executive or administrative personnel." 114.1(c)(2)(ii).

The Commission concluded that the Wawa managers did not become foremen or other lower level supervisors simply because they supervised hourly employees. In fact, the managers exercise discretion and independent judgment on significant Wawa business matters; carry out major assignments; provide expert advice to senior management; interpret or implement corporate policies or operating practices; and investigate and resolve matters of significance to Wawa business. In addition, the Commission noted that the hourly employees that the managers supervise are similar to salaried employees in that they are eligible for Wawa benefits and manage or supervise other employees themselves. Finally, the legislative history shows that, although Congress intended to exclude foremen and other lower level supervisors from the definition of "executive and administrative personnel," it did not intend to exclude all supervisors who oversee hourly employees from the definition. Therefore, the fact that the Wawa managers supervise hourly employees does not negate their status as executive or administrative personnel.

Date Issued: April 30, 2010;
Length: 6 pages.

—Zainab Smith

AO 2010-05

Sale of Ad Time on a Foreign-Owned Television Station

Starchannel Communications, Inc. (Starchannel), the domestic representative of Televisa, a Mexican broadcasting corporation, may sell advertising time on Televisa television stations to federal candidates. A prohibited contribution would not result from offering federal candidates the "Lowest Unit Charge" (LUC) for time slots on Televisa since it is the usual and normal charge for similar federal candidate advertisements in the market in which the advertisements will be aired.

Background

Starchannel is a Delaware corporation that sells advertising time slots on television broadcast stations in Mexico that are owned by Televisa. The broadcast stations that carry these ads broadcast into markets in areas of Texas that are located on the border between the United States and Mexico ("U.S. border market"). Through a contractual agreement, Starchannel acts as the exclusive representative of Televisa in the sale of advertising time in the U.S. border market. The contract states that Starchannel may not negotiate a price with a buyer for an advertising time slot that is lower than the Televisa-established minimum price, but it may negotiate higher prices. The two corporations are independent of each other and Televisa does not exercise any ownership or control over Starchannel.

Starchannel wishes to expand its business by selling advertising time slots on Televisa's broadcasting stations to federal candidates. Starchannel plans to offer federal candidates the LUC for time slots on Televisa. Starchannel does not believe it is required to offer federal candidates the LUC because Televisa is a Mexican corporation.[1] Nevertheless, Starchannel plans to offer the LUC because, in its business judgment, it could not otherwise compete with American television stations that offer advertising time to federal candidates at the LUC. Starchannel plans to require federal candidates to comply with all paperwork, disclaimer and other requirements of the Communications Act and Federal Communications Commission regulations, just as if the ads were being run on a U.S. station.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit foreign nationals, including foreign principals such as partnerships, associations, corporations, organizations or other combination of persons, from making a contribution or donation of money or other things in connection with a federal, state or local election. 2 U.S.C. §441e(a)(1)(A) and 22 U.S.C §611(b)(3); see also 11 CFR 110.20(b). The Act also prohibits corporations from making contributions in connection with any federal election. 2 U.S.C. §441b(a).

Any gift, subscription, loan, advance or deposit of money or "anything of value" made by any person for the purpose of influencing a federal election is a "contribution." 2 U.S.C. §431(8)(A)(i) and 11 CFR 100.52(a); see also 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(1). "Anything of value" includes goods or services provided without charge or at less than the "usual and normal charge." 11 CFR 100.52(d)(1). "Usual and normal charge" means the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing

[1] *The Communications Act sets certain requirements for U.S. broadcasters providing advertising time to federal candidates. See 47 U.S.C. §315 and 47 CFR 73.1942.*

at the time the services were rendered. 11 CFR 100.52(d)(2).

Based on the information provided by Starchannel, the Commission concluded that it does not appear that Televisa would be providing any goods or services at less than the usual and normal charge. Under Televisa's contract with Starchannel, Televisa establishes a minimum price for advertising time that does not depend upon the identity of the buyer. Because Televisa's role in the sale of advertising time remains the same and conforms to its usual and normal business practices regardless of the buyer's identity, Televisa would not be making a contribution under the plan.

With respect to Starchannel, the Commission noted that Starchannel plans to offer advertising time to federal candidates using the same business practices in which it customarily engages when offering advertising time to other customers, except that it plans to offer federal candidates the LUC even if it is not required to do so under 47 U.S.C. §315(b) and 47 CFR 73.1942.

The Commission concluded that Starchannel may sell advertising time on Televisa stations to federal candidates at the LUC, consistent with the Act and Commission regulations, under the specific facts present here. Because Starchannel plans to offer the LUC only to federal candidates who comply with all relevant requirements of the Communications Act, these federal candidates would be entitled to receive the LUC from a U.S. broadcaster for advertisements airing in the U.S. border market, even if Starchannel is not required to offer them the LUC. Thus, the LUC reflects the usual and normal charge for Communications Act-compliant candidate advertising in the U.S. border market. 11 CFR 100.52(d). Further, the LUC represents the commercially reasonable rate prevailing for ads complying with the Communications Act at the time the ads are broadcast. 11 CFR 100.52(d)(2). Thus, Starchannel also would not be making a contribution under the plan by charging the LUC.

Accordingly, the Commission ruled that no contribution would result from the sale of advertising time to federal candidates on behalf of Televisa at the LUC rate for ads that comply with the Communications Act.

Date issued: May 27, 2010;
Length: 6 pages.

—*Stephanie Caccomo*

AO 2010-06

Political Affinity Accounts for Revenue-Generating Web Platform

Famos LLC, a for-profit limited liability company marketing a web-based platform (Famos Platform) that allows users to receive compensation from personal endorsements of products and services, may allow political committees to obtain a political affinity account and receive contributions from other individual platform users without making a prohibited corporate contribution.

Background

The Famos Platform will allow users to receive compensation from personal endorsements of products. For example, if a Famos account holder sends an e-mail to a friend recommending a movie, the Famos Platform may direct the friend to a website selling tickets for that movie. When Famos receives a commission from that website for directing the account holder's friend to purchase a movie ticket, Famos will share some of that revenue with the account holder.

The Famos Platform, like nearly all contemporary web-based marketing platforms, will be offered free of charge to prospective account holders. Famos and its account holders may earn and share revenue from three types of transactions: web searches, web shopping and online referrals. Famos plans to keep twenty percent of any revenue generated in the three types of transactions, with the remaining eighty percent shared by the rest of the "referral path."

Famos plans to offer the Famos Platform to political committees, including authorized committees, nonconnected committees and party committees, but excluding separate segregated funds. Famos will offer its platform to political affinity account holders on much the same terms as to other account holders: free of charge, with a $200 per hour customization rate for non-standard customizations to their Famos Platform. Political affinity account holders will need to make certain non-standard customizations to comply with the Federal Election Campaign Act (the Act).

Famos account holders will be able to keep their share of revenue or direct it (or any portion of it) to a charity or non-profit organization that also holds a Famos account. Famos will not distribute revenue shares to account holders or designated non-profit entities until their account balance is above ten dollars. Political affinity account holders will be removed from the revenue generating chain, with any revenue generated being passed down to the next account holder or entity in the referral path.

Famos account holders may have their share directed to political affinity account holders, just as they can to other non-profit or charity account holders.

Famos account holders will have to make the following certifications as described in AO 1995-09: that they are making the contribution from their own funds and not those of another; that the contributions are not from the general treasury funds of a corporation, labor organization or national bank; and that contributors are not federal government contractors or foreign nationals who lack permanent resident status in the United States.

Famos account holders will be informed that federal law requires the political affinity account holders to use their best efforts to collect and report the name, mailing address, occupation and name of employer of each individual whose contributions exceed $200 in a calendar year.

Analysis

Famos may enter into the proposed program because it would not violate the prohibition against corporate contributions. In prior advisory opinions, the Commission has examined a number of business arrangements between political committees and service providers that were either affinity programs or similar to affinity programs. In these advisory opinions, the Commission indicated that the Act permits corporations to offer affinity programs and enter into affinity-type business arrangements so long as the corporation and political committee enter into a commercially reasonable transaction in which the political committee pays the usual and normal charge for any services provided, and the amounts contributed to political committees via rebates or rewards are from individual customers' funds and not corporate funds. AOs 2006-34, 2003-16 and 2002-07.

Famos asks if it may enter into the proposed program with political committees without making prohibited corporate contributions.

Because nearly all web-based platforms now offered in the marketplace are made available free of charge, Famos may provide its basic platform free of charge to political affinity account holders as part of its standard practice. In exchange, Famos would receive the value of the political affinity account holders' marketing services. Because each additional user of the Famos Platform may potentially produce revenue for Famos as well as generate possible future contributions for the political affinity account holder, the provision of the Famos Platform in exchange for the political affinity account holder's promotion of the Famos Platform would represent a commercially reasonable transaction made in the ordinary course of business. AOs 2007-04, 2004-19, 1995-34 and 1994-33.

Political affinity account holders would be required to pay the usual and normal charge for any customization of the platform, an "industry rate" charged to other Famos account holders of $200 per hour for customization beyond the basic options provided as part of the political affinity account holders' setup and administrative page. Because Famos will not provide necessary customizations for free or at a reduced rate, the provision of those services will not result in a prohibited in-kind contribution. 11 CFR 100.52(d)(1).

The Commission has concluded in previous advisory opinions that any contributions from rebates or rewards must be made by individuals from their own funds and not by the corporate service provider. In general, the Commission has concluded that affinity programs in which a corporation transfers to a political committee a portion of the revenue collected result in a prohibited corporate contribution. AOs 2008-18 and 2003-16. However, the Commission has concluded that it is permissible for affinity programs to generate revenue in the form of rebates or rewards to individuals, who may then choose to pass their earned revenue to political committees who are affinity partners. AOs 2006-34 and 2003-16. Because the revenue in these programs was offered to individuals in the ordinary course of business, the revenue was the property of the customer or individual who controlled the direction of the revenue.

The remittances at issue in this instance would be offered in the ordinary course of business, with individual Famos account holders directing the disposition of their revenue shares. Famos will inform account holders of the appropriate requirements of the Act, requiring the certifications described in AO 1995-09. Additionally, Famos's plan to credit account holder-confirmed contributions to political committees through an automated clearinghouse transaction on the last day of each month in which the remittance is earned complies with the requirement that any person who receives a contribution of $50 or less for a political committee must forward the contribution to the political committee within thirty days of receipt. 2 U.S.C. §432(b)(2)(A); 11 CFR 102.8(b)(1). Because the account holder does not make a contribution until Famos sends a separate confirmation note to the account holder that Famos intends to distribute to the political affinity account holder, the plan complies with the requirement that contributions to authorized political committees be forwarded, along with any required information, no later than ten days after receiving the contribution. 2 U.S.C. §432(b)(1); 11 CFR 102.8(a). Finally, Famos's proposal to transmit the contributor's name, address, occupation and employer to the receiving political committee within ten days of the transfer of funds conforms with 11 CFR 102.8(b)(2). Thus, the proposed program does not violate the Act's prohibition against corporate contributions under the conditions set forth in this opinion.

Date Issued: May 27, 2010;
Length: 9 pages.
—*Christopher Berg*

AO 2010-08

Film Production, Distribution Costs Qualify for Press Exemption

The funds a non-stock corporation spends to produce and distribute documentary films that mention federal candidates are covered by the press exemption from the Federal Election Campaign Act's (the Act's) definitions of expenditure and electioneering communication.

Background

Citizens United is a Virginia-based non-stock corporation that describes its principal purpose as promoting "social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society." Its activities include issue advocacy, direct e-mail communications, disseminating publications and advertising and litigation. It also conducts political activities, such as making contributions, through a separate segregated fund. Citizens United is not owned or controlled by any political party, political committee or candidate.

This organization also produces and distributes films, which frequently deal with political issues and mention political candidates, through its in-house production arm, Citizens United Productions, and sometimes through affiliated agencies. Citizens United distributes these films as DVDs and theatrical releases, and on broadcast, cable and satellite television.

Citizens United asked whether the costs of producing and distributing its films, and related marketing activities, are covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication."

Analysis

The Act contains an exemption from the term expenditure for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431(9)(B)(i). The Act and Commission regulations also include a similar exemption from the definition of electioneering communication for a communication that appears in a news story, commentary or editorial distributed through the facilities of any broadcast, cable or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee or candidate. 2 U.S.C. §434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are commonly referred to as the "press exemption" or "media exemption."

In past advisory opinions, the Commission has applied the press exemption to a wide array of media, including cable television, the Internet, satellite broadcasts and other communications. The Commission conducts a two-step analysis to determine whether the media exemption applies. First, the entity engaging in the activity in question must be a press or media entity. AOs 2005-16, 1996-16, 1980-90. Second, the Commission must establish that the entity is not owned or controlled by a political party, a political committee or a candidate and that the entity is acting in its legitimate press function. *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

While the Act and Commission regulations do not define the term "press entity," the Commission has examined whether the entity in question regularly produces news stories, commentary and/or editorials. In the Explanation and Justification for the Final Rules on Electioneering Communications, the Commission stated that it will interpret "news story, commentary, or editorial" to include documentaries and educational programming within the context of the media exemption to the "electioneering communication" definition in 11 CFR 100.29(c)(2). Citizens United has made 14 films since 2004, and is currently producing several more. The organization also devotes a substantial amount of its budget to producing and distributing its documentary films. Based on these facts, the Commission determined that Citizens United is a press entity for the purposes of this opinion.

Citizens United and its production affiliates are not controlled by any candidate, political party or political committee.

When considering whether an entity is serving a legitimate press function, the Commission examines whether the communication materials in question are available to the general public and whether they are comparable to those ordinarily issued by the entity. In *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986), the Supreme Court held that a "Special Edition" newsletter did not qualify for the media exemption because the communication was not published through the same facilities as the regular newsletter, and it was distributed to a much larger group than the regular newsletter. The Commission found that the films discussed in Citizens United's AO request are available to the general public and comparable in form to those previously produced. In addition, Citizens United receives monetary compensation from broadcasters that air its documentaries.

Based on these factors, the Commission determined that Citizens United's documentary films are eligible for the media exemption.

Courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that product. *See FEC v. Phillips Publ'g*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) (citing *Reader's Digest*, 509 F. Supp. at 1215). Thus, Citizens United's ads

would fall under the media exemption to the extent that they promote activities that are part of the organization's legitimate press function. Ads that promote activities that are not part of Citizens United's legitimate press function would not be covered by the media exemption.[1]

Date Issued: June 11, 2010;
Length: 12 pages.

—*Isaac J. Baker*

AO 2010-09

Corporate Sponsored IE-Only Committee May Solicit and Accept Unlimited Individual Contributions

A nonprofit corporation may establish and administer a political committee that plans to make only independent expenditures. The committee may solicit and accept unlimited contributions from individuals in the general public, including contributions given for specific independent expenditures.

Background

The Club for Growth (the Club), an incorporated 501(c)(4) organization, plans to establish, administer and pay the solicitation costs of a political committee (the Committee) that intends to solicit unlimited contributions from individuals in the general public and to use those funds to finance independent expenditures. The Committee will comply with all disclaimer and notice requirements of the Federal Election Campaign Act (the Act) and Commission regulations, and will file regular reports to disclose its activity.

The Committee does not plan to accept contributions from any political committee, candidate, labor organization, foreign national, government contractor or corporation, nor will it make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act. The Committee will also not make any coordinated communications or coordinate any expenditures with any candidate, authorized committee, political party committee or agent of such persons.

In addition to the Committee, the Club maintains a separate segregated fund (SSF), Club for Growth PAC (Club PAC). The President of the Club serves as its treasurer and will also serve in that capacity for the Committee. However, the two committees will not make any contributions or transfers of funds to one another.

Analysis

Recent court decisions have altered the landscape for financing independent expenditures. In *Citizens United*, the Supreme Court found the ban on corporate independent expenditures unconstitutional. *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 913 (2010). In *SpeechNow*, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Act's contribution limits are unconstitutional as applied to individuals' contributions to independent expenditure groups. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010). Consistent with these decisions, and based upon the facts presented, the Commission determined that the Committee may solicit and accept unlimited contributions from individuals.

That conclusion applies equally to contributions the Committee solicits specifically for independent expenditures advocating a particular candidate. Under certain circumstances, contributions given to a PAC for the benefit of a specific candidate count against the contributor's limit to the candidate, in order to avoid circumvention of the limits. 11 CFR 110.1(h). In this case, however, the Committee will not use the funds it receives to make contributions, so there is no possibility of circumventing any contribution limits.

The Commission further determined that the Club's proposed payment of the Committee's establishment, administrative and solicitation expenses is not exempt from the definition of "contribution" or "expenditure" because the Committee is not an SSF. Therefore, any establishment, administrative or solicitation expenses paid by the Club must be reported by the Committee, which exclusively makes independent expenditures, as contributions from the Club. Alternatively, the proposed political committee may pay its own establishment, administrative and solicitation expenses.

The Commission noted that many of the issues addressed in this opinion implicate forthcoming rulemakings and that the agency may need to update its registration and reporting forms to facilitate disclosure. In the meantime, a committee that intends to accept unlimited contributions for the purpose of making independent expenditures may send a letter with its Form 1 Statement of Organization to identify itself as such. A sample letter was included as an attachment to the AO, and is available on the Commission's website at http://www.fec.gov/pdf/forms/ie_only_letter.pdf. Electronic filers may include this information in a Form 99.

Date Issued: July 22, 2010;
Length: 6 pages.

—*Katherine Wurzbach*

[1] *Having found that Citizens United's films qualify for the press exemption, the Commission determined that the question of whether the production and distribution of its films and related marketing activity constitute* bona fide *commercial activity by a commercial entity was moot.*

AO 2010-10

Attribution of Independent Expenditures

A separate segregated fund (SSF) making independent expenditures for various ads that expressly advocate the election or defeat of one or more federal candidates, and that sometimes identify their opponents, may attribute its expenditures to candidates as described below.

Background

The requestor, National Right to Life Political Action Committee (NRL PAC), is an SSF of the National Right to Life Committee, Inc. NRL PAC intends to make independent expenditures for communications that expressly advocate the election or defeat of one or more federal candidates in one or more elections, some of which also identify the opponents of those candidates.

Analysis

Under the Federal Election Campaign Act (the Act), political committees must report their independent expenditures, including a statement of whether each independent expenditure is made "in support of or opposition to" a particular candidate. 2 U.S.C §434(b)(H)(4)(iii), §434(b)(6)(B)(iii), §434(g)(1) and (2); 11 CFR 104.3(b)(1)(vii), 104.3(b)(3)(vii)(B) and 104.4(b) and (c). SSFs making independent expenditures on behalf of more than one clearly identified federal candidate must allocate the expenditure among candidates "according to the benefit reasonably expected to be derived." 11 CFR 106.1(a)(1). The expenditure for a publication or broadcast communication shall be attributed to each candidate according to the "proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates." 11 CFR 106.1(a).

NRL PAC presented five scenarios to the Commission and asked how each scenario should be reported on Form 3X, Schedule E.

Ads expressly advocating the election of one clearly identified candidate that do not identify any other candidate. The Commission concluded that no allocation is necessary for ads that expressly advocate the election of one clearly identified federal candidate and do not identify another candidate. Commission rules indicate that allocation is only necessary if more than one candidate is clearly identified. 11 CFR 104.10(a) and 106.1(a)(1). Thus, the entire independent expenditure may be reported as having been made in support of the candidate identified in the communication.

Ads expressly advocating the election of one clearly identified candidate and identifying, and comparing the positions of, that candidate's opponent. In the case of an ad that expressly advocates the election of one federal candidate and identifies and compares the position of his or her opponent, no allocation is necessary. The independent expenditure is made on behalf of only one candidate, so the entire expenditure may be reported as having been made in support of that candidate. 11 CFR 106.1(a)(1) and 104.10(a).

Ads expressly advocating the election of several candidates in different elections and identifying, and comparing the positions of, those candidates' respective opponents. For ads that expressly advocate the election of several federal candidates in different races and identify and compare the positions of those candidates' opponents in those races, NRL PAC should allocate the independent expenditures among the different races, based on the time or space analysis set out in 11 CFR 106.1(a)(1). Thus, the proportion of the expenditure attributed to each race may be reported as having been made in support of the candidate advocated. 104.3(b)(3)(vii)(B).

Ads expressly advocating the defeat of one clearly identified candidate that do not identify any other candidate. No allocation is necessary for ads that expressly advocate the defeat of one clearly identified federal candidate and do not identify another candidate. The entire expenditure may be reported as having been made in opposition to that candidate. 11 CFR 104.10(a).

Ads expressly advocating the election of a Presidential-Vice Presidential ticket and expressly advocating the defeat of a Senatorial candidate. Independent expenditures for ads expressly advocating the election of a Presidential ticket and expressly advocating the defeat of a Senate candidate are allocated between the two races based on a time or space analysis. The proportion of the expenditure attributed to the Presidential race may be reported accordingly in support of the Presidential-Vice Presidential ticket. 11 CFR 104.3(b)(3)(vii)(B). The proportion of the expenditure attributed to the Senate race may be reported accordingly in opposition to the Senatorial candidate. 11 CFR 104.3(b)(3)(vii)(B).

Date Issued: July 15, 2010;
Length: 7 pages
—*Stephanie Caccomo*

AO 2010-12

Payroll Deduction from Directors' Compensation for Voluntary SSF Contributions

Because Procter & Gamble Company (P&G) directors are compensated on a salary rather than hourly basis, they are considered part of P&G's restricted class, and thus eligible to be solicited by the corporation's separate segregated fund (SSF). P&G may extend its payroll deduction program to include the deduction of pre-authorized SSF contributions from board members' quarterly retainer payments.

Background

P&G operates a corporate payroll deduction system for its SSF, the Procter & Gamble Company Good Government Committee (P&G PAC). Employees in P&G's restricted class may elect to contribute to P&G PAC by pre-authorizing periodic deductions from their salary payments. P&G would like to extend the payroll deduction program to the members of its board of directors who are not full-time P&G employees, but who receive a salary of quarterly retainer payments from P&G as compensation for their board service. Under P&G's plan, P&G PAC would send a written solicitation to the director informing him or her of the choice to have P&G automatically deduct a portion of each quarterly retainer payment as a contribution to P&G PAC. Directors wishing to participate would return a signed authorization form.

Analysis

The basic question asked was whether P&G, with prior authorization from a P&G board member, may deduct a contribution to P&G PAC from the board member's quarterly retainer payments. Under the Federal Election Campaign Act (the Act) and Commission regulations, corporations are prohibited from making contributions in connection with federal elections and are generally prohibited from facilitating the making of contributions. 11 CFR 114.2(b)(1) and 114.2(f)(1). However, a corporation's use of general treasury funds to establish and administer its SSF and to solicit contributions to the SSF from the corporation's restricted class is not a contribution and does not facilitate the making of a contribution. 11 CFR 114.1(a)(2)(ii); 114.5(b)(1). The restricted class includes the corporation's executive and administrative personnel, stockholders and the family members of each. 11 CFR 114.5(g)(1). The "executive and administrative personnel" are employees who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional or supervisory responsibilities. 11 CFR 114.1(c). Members of a corporation's board of directors are not automatically considered members of the corporation's restricted class. 11 CFR 114.5(g)(1) and 114.1(c)(1)-(3); AO 2000-10. "[A] director must be paid a salary or stipend in order to be solicited (assuming the director is not otherwise solicitable as a stockholder or as an executive employee of the corporation)." AO 2000-10.

In this case, the Commission concluded that since P&G pays the directors quarterly retainers on a salary rather than hourly basis, the directors are members of P&G's restricted class and may be solicited by P&G PAC.

Commission regulations provide that facilitating the making of contributions does not include "[e]nrolling members of a corporation's . . . restricted class in a payroll deduction or check-off system which deducts contributions from dividend or payroll checks to make contributions" to the corporation's SSF. See 11 CFR 114.2(f)(4)(i). The Commission has issued a number of advisory opinions approving corporate payroll deduction or checkoff plans. See, e.g., AOs 2001-04 and 1999-03. It has also approved other similar arrangements. See AOs 2009-31 and 1999-06.

The Commission determined that P&G's proposal to provide for pre-authorized deductions from board members' quarterly retainer payments is analogous to such previous proposals and is thus permissible under the Act and Commission regulations. The Commission conditioned its approval upon P&G's compliance with the voluntariness requirements of 11 CFR 114.5(a), including the right of contributors to revoke their authorizations or to modify their contribution amounts at any time. In addition, P&G may not forward any contributions to P&G PAC until the quarterly retainer payments are paid to the contributors. This is to avoid advancing corporate funds, which is prohibited by 2 U.S.C. §441b(a). 11 CFR 114.1(a)(1).

Date Issued: August 13, 2010;
Length: 4 pages.

—*Zainab Smith*

AO 2010-16
SSF of Corporate-Owned LLC

EmblemHealth LLC, a limited liability company that is treated as a partnership for tax purposes and is wholly owned by corporations, may pay the administrative and solicitation costs of its affiliated corporation's separate segregated fund (SSF), but it may not be named as the SSF's connected organization. Nevertheless, the name of the SSF may be changed and abbreviated to EmblemHealth PAC, and EmblemHealth LLC and its owner corporations may solicit contributions to the SSF from the restricted class of EmblemHealth LLC and its corporate owners.

Background

EmblemHealth LLC is a limited liability company, treated as a partnership under the Internal Revenue Code,[1] that is wholly owned by two not-for-profit health services corporations: Health Insurance Plan of Greater New York (HIP) and Group Health Incorporated (GHI). Another corporation, EmblemHealth Inc., is the sole owner of both HIP and GHI. HIP and GHI established EmblemHealth LLC to integrate management and administration, and to set direction for the joint operations of GHI and HIP.

[1] *An LLC that elects to be treated as a partnership by the Internal Revenue Service under 26 CFR 301.7701-3 is treated as a partnership under Commission regulations. 11 CFR 110.1(g)(2).*

EmblemHealth LLC asks if an SSF currently operated by HIP may be renamed "EmblemHealth Services Company LLC Federal Political Action Committee," abbreviated as "EmblemHealth PAC," and further asks if it may act as the connected organization for the SSF. Furthermore, EmblemHealth LLC asks if it, GHI and HIP may each use personnel and resources to pay the administrative and solicitation expenses for the SSF, and solicit the restricted classes of EmblemHealth LLC, GHI and HIP for contributions to the SSF.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations do not include partnerships or LLCs in the definition of "connected organization" (11 CFR 100.6(a)), instead permitting them to contribute directly to candidates. However, partnerships that are owned entirely by corporations may not make contributions because of the dual attribution principle. Contributions by partnerships are attributed not only to the partnership but also to the partners which, in this case, are corporations prohibited from making contributions. 11 CFR 110.1(e). In order to avoid prohibiting these types of partnerships from both making contributions and establishing and administering an SSF, the Commission has interpreted the Act and Commission regulations as permitting such partnerships to pay the administrative or solicitation costs of an SSF established by the partnership's corporate owner, but only when the partnership is wholly owned by corporations and is affiliated with at least one of the corporations. AOs 2009-14 and 1992-17.

EmblemHealth LLC is wholly owned by GHI and HIP, both of which are corporations wholly owned by EmblemHealth, Inc. GHI and HIP are therefore subsidiaries of EmblemHealth Inc., and are thus affiliated. EmblemHealth LLC and its corporate owners may all act as the connected organization for the SSF, paying for its administrative expenses and solicitation costs. However, because EmblemHealth LLC itself does not satisfy the definition of "connected organization" as discussed above, it may not be listed as the SSF's connected organization on FEC Form 1. Instead, the SSF must list one of EmblemHealth LLC's corporate affiliates as the connected organization. AOs 2009-14, 2004-42 and 2003-28.

The SSF may be renamed "EmblemHealth Services Company LLC Federal Political Action Committee," abbreviated as "EmblemHealth PAC." In past advisory opinions, the Commission has permitted an SSF's name to include only the name of a joint venture LLC that was treated as a partnership under Commission regulations, where the LLC was performing the functions of the SSF's connected organization. AOs 2004-42 and 2003-28. Under that circumstance, the SSF may omit the names of the LLC's affiliated corporate owners from its name "because the LLC was in virtually the same position as a corporate subsidiary of the owner corporation." AO 2004-42.

An SSF and its connected organization may solicit contributions from the restricted class – the executive and administrative personnel and stockholders, and their families – of its subsidiaries, branches, and other affiliates. 2 U.S.C. §§441b(b)(2)(A) and (4)(A)(i); 11 CFR 114.3(a)(1) and 114.5(g)(1). Once the Commission has concluded that entities are affiliated, any one affiliate may solicit the restricted class of any other affiliated entities. AOs 2004-32 and 2001-18. Therefore, HIP, GHI and EmblemHealth LLC may solicit the restricted class of the SSF's connected organization (HIP) and the restricted class of its affiliated corporation (GHI) for contributions to the SSF. Although EmblemHealth LLC is not a corporate affiliate of HIP or GHI, the Commission has, in previous advisory opinions, determined that the executive and administrative personnel of partnerships that were affiliated with corporations could be solicited for contributions to the corporation's separate segregated fund. AOs 1989-08 and 1983-48. Therefore, because EmblemHealth LLC is affiliated with HIP, GHI and EmblemHealth Inc., and is treated as a partnership under Commission regulations, HIP, GHI and EmblemHealth LLC may solicit contributions from EmblemHealth LLC's executive and administrative personnel for contributions to the SSF.

Date Issued: September 23, 2010; Length: 6 pages.

—*Christopher Berg*

AO 2010-19

Disclaimers on Internet Text Ads

Candidates, their authorized committees and other political committees need not display disclaimers on text ads they sponsor that are generated through Google, Inc.'s AdWords program. The full disclaimer would instead appear on a "landing page" that appears when a user clicks through a text ad.

Background

Google, Inc. is a corporation that creates programs and applications that allow persons to search for and collect information on the Internet. Google's AdWords program generates text ads in conjunction with keywords that are chosen by the advertiser. Text ads have a headline which can consist of up to 25 characters and two lines of text that display a Uniform Resource Locater ("URL"), which can consist of up to 70 characters. This general format applies to all advertisers, regardless of whether they are political committees. Google has partnered with other websites to participate in Google's AdWords program. Using chosen keywords, Google can match an advertiser's ads to websites in Google's partner network that are

most relevant to the advertiser's message.

The primary purpose of a text ad is to attract customers to an advertiser's "landing page" so that customers may learn more about what the advertiser has to offer. Advertisers pay Google for a text ad based upon the number of times a user clicks on the ad and is taken to the advertiser's website. Google wishes to sell such text ads to candidates, their authorized committees and other political committees. The text ads would not display a disclaimer indicating who authorized or paid for the ad. A full disclaimer would instead appear on the landing page that appears when a user clicks through a text ad.

Analysis

The Commission could not reach an agreement by the required four affirmative votes in response to the questions presented by Google. 2 U.S.C. §437c(c) and 11 CFR 112.4(a). However, the Commission concluded that, under the circumstances described in the request, the proposed conduct is not in violation of the Federal Election Campaign Act or Commission regulations. Further explanation will be provided in the Commissioners' concurring opinions.

Date Issued: October 8, 2010; Length: 3 pages.

—Myles Martin

AO 2010-21

Corporate Affinity Program for Purchase of Used Mobile Phones

ReCellular, Inc., a for-profit corporation that recycles and resells used mobile phones and accessories, may offer an affinity program to transmit to political committees contributions that result from its purchase of consumers' used phones.

Background

ReCellular collects used cell phones in several ways, including purchasing phones directly from consumers via its website. A consumer visiting the website may enter the brand and model number of his or her phone and receive a purchase quote from ReCellular. If the consumer accepts the offer, ReCellular provides them a shipping label–a common industry practice that improves consumer follow through. Upon receipt, ReCellular assesses the phone to ensure that it meets certain sales criteria, and then sends the consumer a check for the agreed purchase price.

ReCellular allows each consumer the option of donating the sale proceeds from his or her phone to one of several 501(c)(3) charitable organizations listed on the company's website. If the consumer elects this option, ReCellular sends a check in his or her name for the full purchase price of the phone as a donation to the selected charity.

Now, ReCellular plans to allow consumers to choose to contribute their sale proceeds to federal candidates' authorized committees, national political party committees, and nonconnected committees. Committees will pay to be listed on the website, and ReCellular will post a statement that it does not endorse any of the committees. Consumers choosing to contribute sale proceeds to political committees will be asked to confirm that their contribution complies with the source and amount restrictions of the Act. Finally, ReCellular plans to collect the recordkeeping and reporting information committees need and use that information to generate two emails: the first to each consumer, will confirm completion of the sale and the amount of the contribution; the second to each recipient political committee, will list the contribution amount and contributor information provided by the consumer. ReCellular will not forward any proceeds from the sale of a phone to a political committee until it has ensured that the phone meets ReCellular's criteria.

ReCellular asks if its plan to allow consumers to direct the company to send proceeds from the sale of their used cell phones to a political committee chosen by the individual complies with the Act and Commission regulations. ReCellular also asks if it must charge the recipient political committee for the company's costs for shipping the phone, processing the transaction, confirming the sale, and transmitting the payment, even though that cost is already reflected in the price that ReCellular pays each consumer. Finally, ReCellular asks if recipient political committees must each pay ReCellular the incremental cost of sending a notification email to the committee with the contributor's name, address, occupation and employer, and date of contribution, if that cost is not already paid by the consumer.

Analysis

In prior advisory opinions, the Commission has allowed corporations to offer affinity programs and enter into affinity-type business arrangements so long as the corporation and political committee enter into a commercially reasonable transaction in which the committee pays the usual and normal charge for any services provided, and the amounts contributed to political committees via rebates or rewards are from individual customers' funds and not corporate funds. AOs 2010-06, 2008-18 and 2003-16.

The Commission concluded that ReCellular proposal represents a commercially reasonable transaction. ReCellular is not required to charge political committees for costs that are already reflected in the purchase price offered to the consumer, such as the cost of shipping phones and processing payments. However, committees must pay to be listed on the ReCellular website and must cover the cost of the notification emails, unless the cost is borne by the consumers. The Commission stated ReCellular could bill commit-

tees for these services monthly, so long as doing so would be "commercially reasonable." See AO 2006-34; 11 CFR 114.2(f)(1) and 116.4.

The Commission also determined that the proceeds of each phone sale are the property of the consumer. ReCellular does not disburse the proceeds of a phone sale until it confirms that the phone meets its purchase criteria. Additionally, the consumer has ultimate control over the disposition of the funds: upon agreeing to sell a phone to ReCellular, the consumer decides whether the company sends the proceeds to the consumer, a charity, or a political committee. Under ReCellular's proposal, each consumer must confirm that his or her contribution complies with the limitations and prohibitions of the Act: that it is not made by a corporation, national bank, labor organization, Federal contractor, or a foreign national. This is consistent with the conditions approved by the Commission in previous advisory opinions. AOs 2010-06, 2006-35 and 1995-09.

Finally, the Commission concluded that ReCellular's plan to forward sale proceeds to recipient committees within ten days of confirming that "the consumer's phone was worth the quoted price" complies with the Act and Commission regulations. 2 U.S.C. §432(a) and (b); 11 CFR 102.8.

Date Issued: October 8, 2010;
Length: 9 pages.

—Christopher Berg

AO 2010-30
Rental of E-Mail List to Committees at Fair Market Value Is Not Coordinated Expenditure or Coordinated Communication

Citizens United's rental of its e-mail list to federal candidates and political committees at fair market value will not result in a prohibited coordinated expenditure or "coordinated communication."

The Commission considered, but could not decide by the required four affirmative votes, whether or not Citizens United's proposed activities violate the prohibition against corporate facilitation of contributions to candidates or political committees. See 11 CFR 114.2(f).

Background

Citizens United is a 501(c)(4) incorporated nonprofit membership organization which has developed a list of e-mail subscribers over a period of several years. The e-mail list includes members of Citizens United and non-members, such as individuals who have purchased DVDs from the organization. Citizens United regularly rents its e-mail list to other entities at fair market value through a commercial list brokerage firm.

Citizens United wants to rent its e-mail list to federal candidates, authorized committees of federal candidates, political party committees and other political committees using the same procedures it currently uses to rent its list to others. Under the brokerage firm's standard practices, all communications on behalf of the renter of the list would appear to be from Citizens United, as Citizens United would be listed in the "from" line of the communication. However, the subject heading would indicate that the message and its content is from the e-mail list renter.

The political committee or federal candidate renting the list would pay the brokerage firm, which would deduct its fee then forward the remainder to Citizens United. While committees must promise to pay before any e-mail messages are sent, the actual payments may occur afterward.

Analysis

The Federal Election Campaign Act (the Act) defines an "expenditure" as any "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person" for the purpose of influencing a federal election. 2 U.S.C. §431(9)(A); 11 CFR 100.111(a). As an incorporated entity, Citizens United may use its treasury funds to make certain types of expenditures, but cannot coordinate its expenditures with a federal candidate or committee.[1] Doing so would result in a corporate contribution, which is prohibited under the Act. 2 U.S.C. §441b.

Commission regulations state that unless specifically exempted, "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services is an expenditure." 11 CFR 100.111(e)(1). "Usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.52(d)(2).

Since Citizens United currently rents its e-mail list to other organizations at fair market prices, it may rent the list to federal candidates and political committees on the same terms without making an expenditure.

Citizens United's rental of its e-mail list will also not constitute a "coordinated communication,"

[1] *Prior to last year's Supreme Court decision in* Citizens United v. FEC, *corporations were prohibited from making expenditures. 558 U.S. __, 130 S. Ct. 876 (2010).*

which is prohibited by corporations. To determine if a communication constitutes a "coordinated communication," Commission regulations apply a three-prong test. First, the communication must be paid for, in whole or in part, by a person other than the candidate, the candidate's authorized committee, or the political party committee with whom it was coordinated (the "payment prong"). 11 CFR 109.21(a)(1). Commission regulations also apply a "content prong" and a "conduct prong." 11 CFR 109.21(a)(2) and (c); 11 CFR 109.21(a)(3) and (d)(1)-(5). All three prongs must be met in order for a communication to be considered "coordinated."

Under the Commission's coordination test, the payment prong would not be met since Citizens United will charge any federal candidate or political committee the usual and normal charge for the rental of the e-mail list.

Date Issued: December 23, 2010;
Length: 5 pages.

—Myles Martin

AO 2011-04
Candidate Position Papers Posted on Members-Only Section of Website

A nonprofit corporation may post candidate position papers on the members-only section of its website.

Background

The American Israel Public Affairs Committee (AIPAC) is a nonprofit 501(c)(4) corporation dedicated to maintaining and improving the bonds between the United States and Israel that the Commission has previously determined qualifies as a membership organization under 11 CFR 114.1(e). Although primarily a lobbying organization, AIPAC also encourages its members to be involved in campaign activities, such as volunteering for campaigns and making contributions. AIPAC compiles information on candidates and races for federal office, including the political history of the district or state, information about money raised by the candidates, public polling data, recent news about the race and a list of announced candidates for the office. AIPAC also compiles voting records of incumbents and encourages its members to review those records, but the organization does not itself rate or endorse candidates.

AIPAC would like to encourage all federal candidates to prepare position papers on the United States-Israel relationship, and asks the Commission if it can post the position papers unedited and in their entirety on a portion of its website that is accessible only to AIPAC members. The position papers would set forth the candidates' views on issues affecting the United States-Israel relationship and would not contain any express advocacy.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations, including incorporated membership organizations, from making contributions in connection with a federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). However, communications by a membership organization to its restricted class are exempt from the definition of contribution and expenditure, and an incorporated membership organization may communicate with its restricted class on any subject, including by making express advocacy statements. 2 U.S.C. §431(9)(B)(iii) and (8)(B)(vi); 11 CFR 114.1(a)(2)(x) and 114.3(a)(2).

The Commission concluded that AIPAC may post candidate-prepared position papers on a section of its website accessible only by its members. Because posting the position papers constitutes a permissible communication between AIPAC and its membership, the Commission concluded that any costs associated with posting the papers would not be contributions or expenditures.

The Commission pointed out that, although a membership organization must report the costs incurred that are directly attributable to an express advocacy communication to its membership if those costs exceed $2,000 for any election,[1] the member communications at issue do not contain express advocacy. Therefore AIPAC need not report any costs associated with the communications to the Commission. See 2 U.S.C. §431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a) and 104.6(a).

Date: April 7, 2011;
Length: 4 pages.

—Zainab Smith

AO 2011-06
Vendor May Collect and Forward Contributions Without Making Impermissible Contribution

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

Background

Democracy Engine, LLC (the vendor) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. is the connected organization of the separate segregated fund (SSF) Democracy Engine, Inc., PAC (the PAC). Mr. Jonathan Zucker and Mr. Erik Pennebaker are United States citizens who qualify as part of the restricted class of Democracy

[1] *Communications containing express advocacy but that are "primarily devoted to subjects other than the express advocacy" need not be reported. 2 U.S.C. §431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a) and 104.6(a).*

Engine, Inc., and therefore may be solicited by and contribute to the PAC. The vendor is a for-profit limited liability company offering a web-based payment service that provides "subscribers" with the opportunity to make contributions to federal political committees and donations to non-political entities. Mr. Zucker and Mr. Pennebaker plan to become subscribers and use the vendor's services.

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

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

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

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

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

Analysis

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

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

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

Date Issued: May 26, 2011;
Length: 7 pages.

—Isaac J. Baker

AO 2011-08

Trade Association Members May Be Solicited for PAC Contributions

The American Society of Anesthesiologists (ASA), an incorporated nonprofit medical society, qualifies as a "membership organization" and may solicit certain categories of its members for contributions to its separate segregated fund (SSF).

Background

ASA serves as the connected organization for the American Society of Anesthesiologists Political Action Committee (ASAPAC). ASA's membership consists of some 45,000 physicians and other professionals who engage in or are interested in the medical practice of anesthesiology.

ASA has eight categories of membership, and its bylaws expressly lay out qualifications and requirements for each type of membership. When an individual accepts ASA's request for membership,

ASA responds by sending written confirmation of membership and a membership card and lists the new member on the "members only" section of ASA's website.

ASA seeks to solicit contributions from two classes of members, Life Members and Retired Members, for contributions to ASAPAC. Life Members are past presidents of ASA. They have the right to vote for ASA's delegates and directors and serve as members of the House of Delegates, ASA's highest governing body. Retired Members consist of several classes: individuals who have been active or affiliate members of ASA for 20 years or more and who have retired from practice; individuals who have been active or affiliate members for 20 years or more and have reached the age of 70; or individuals who are active members and who are disabled and therefore unable to practice for one year or more. Unlike Life Members, Retired Members do not have a vote in ASA.

Neither Life Members nor Retired Members are required to pay dues, but they must confirm their ASA membership annually. All members are subject to the same sanctions and disciplinary procedures.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations define a restricted class of persons who can be solicited by SSFs such as ASAPAC. 2 U.S.C. §441b(b)(4). The solicitable class of an incorporated membership organization includes its "members," its executive and administrative personnel and their families.

In determining whether Life Members and Retired Members qualify as "members" for solicitation purposes, the Commission first determined that ASA qualifies as a "membership organization." The Commission defines a "membership organization" as a trade association, cooperative or corporation without capital stock that:

- Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws or other formal organization documents;
- Expressly states in these organizational documents the qualifications and requirements for membership;
- Makes these formal organizational documents available to its members upon request;
- Expressly solicits persons to become members;
- Expressly acknowledges acceptance of membership; and
- Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual for federal office.

ASA meets all of these criteria, and therefore qualifies as a membership organization within the meaning of 11 CFR 100.134 and 114.1(e).

The Commission also determined that both Life Members and Retired Members meet the Commission's definition of "members" and may, therefore, be solicited by ASA for contributions to ASAPAC.

Commission regulations define a member as a person who satisfies the requirements for membership in a membership organization, affirmatively accepts the membership's invitation to become a member and has significant financial attachment to the membership organization, pays membership dues or has significant organizational attachment to the membership organization. Factors indicating significant organizational attachment include affirmation of membership on at least an annual basis, direct participatory rights in the governance of the organization, the right to vote on policy questions and the right to approve the organization's budget.

Life Members have the right to vote in ASA's elections for the House of Delegates, the ASA's highest governing body. Life Members qualify as members under Commission regulations because they currently satisfy the requirements for membership, affirmatively accept membership in ASA and have a significant organizational attachment to ASA.

Retired Members satisfy ASA's membership requirements and annually accept the invitation to maintain membership. But, unlike Life Members, they do not have the right to vote in elections for the ASA House of Delegates. As such, Retired Members do not have the same type of organizational attachment as do Life Members. However, the Commission may determine on a case-by-case basis whether persons qualify as members on the basis that they have a relatively enduring and independently significant financial or organization attachment to the organization. 11 CFR 100.134(g) and 114.1(e)(3).

Two types of Retired Members have similar requirements: a person must have paid dues for at least 20 years and must either be retired from anesthesiology or have reached the age of 70. Because these types of members are long-term dues-paying members, the Commission determined they qualify as "members" and may be solicited for contributions to ASAPAC. The third type of Retired Members consists of active members who are disabled and therefore are unable to engage in the practice of anesthesiology for one year or more. Once they become Retired Members they no longer pay dues and no longer have the right to vote in ASA elections as Active Members. In AO 2008-21 (CME Group, Inc.) the Commission determined that when a member of the Chicago Board of Trade (CBOT) temporarily transferred a seat on CBOT, that individual still remained a solicitable "member" under Commission regulations. The Commission stated that, "while they do not exercise most of the prerogatives of membership… they have reversionary interests in the membership and

may reacquire those prerogatives," and that this demonstrated a relatively enduring and independently significant financial attachment. Also, these third types of Retired Members maintain the same member benefit resources as active members and are also subject to sanction by the ASA, even while they are retired. Taking these factors into consideration, the Commission determined that these Retired Members also have an enduring and independently significant organization attachment to ASA. Therefore, Retired Members also qualify as "members" and may be solicited for contributions to ASAPAC.

Date Issued: June 15, 2011;
Length: 7 pages.

—Isaac J. Baker

AO 2011-11

Costs of Independent Expenditures Fall Within Press Exemption When Aired During TV Show

Stephen Colbert, host of *The Colbert Report* (the Show), may establish and operate an independent expenditure-only committee (the Committee) which may solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations (but not foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress). Costs incurred by Viacom (the Show's owner, producer and distributor) to cover the Committee on the Show and to produce and air independent expenditure advertisements during that coverage fall under the "press exemption" of the Federal Election Campaign Act (the Act) and do not need to be reported by the Committee as in-kind contributions. However, if independent expenditure ads were provided to the Committee to be distributed outside of the Show, the associated costs would not be covered under the press exemption and would thus constitute reportable in-kind contributions from Viacom to the Committee. Similarly, if Viacom were to pay administrative costs associated with running the Committee, these costs would also be considered in-kind contributions from Viacom to the Committee.

Background

Mr. Colbert hosts *The Colbert Report*, which is a half-hour program that is owned, distributed and produced by Viacom. Viacom is neither owned nor controlled by any political party, political committee or candidate. Mr. Colbert has discussed on the Show the idea of creating his own political committee. The idea of this Committee had been a vehicle for Mr. Colbert to discuss campaign finance rules and new developments in politics. Now, Mr. Colbert plans to establish the Committee, the activities of which will be covered on the Show and used by Mr. Colbert as an on-air premise for discussing campaign finance rules and other aspects of American politics.

Mr. Colbert states that the proposed committee will file with the Commission as a nonconnected committee, will make only independent expenditures,[1] and will not make monetary or in-kind contributions to any candidate or political committee, and will not coordinate its efforts with any candidate or political party. The Committee plans to solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations. It will also comply with all disclaimer and reporting requirements.

The Committee will pay for its own website, as well as the Committee's solicitation costs and some of its other expenses, including the cost of Mr. Colbert's Committee-related travel. However, Viacom would like to incur much of the cost of operating the Committee—including costs to produce some of its independent expenditure ads and prepare and file the Committee's FEC reports—either directly or indirectly, through payments to its vendors.

During the Show, Mr. Colbert plans to refer to the Committee's website and air independent expenditure ads, which will be part of the Show's coverage of the Committee. Some of the independent expenditure ads may be provided to the Committee to air as paid ads on other shows and other networks. The Show's production resources and staff may also prepare and file the Committee's reports with the Commission.

Analysis

Establishing the Committee. Political committees that make only independent expenditures may solicit and accept unlimited contributions from individuals, corporations, labor organizations and other political committees (but not foreign nationals, ederal contractors, national banks or corporations organized by authority of any law of Congress). See AO 2010-11 (Commonsense Ten). Such committees must register with the Commission and comply with all applicable reporting requirements of the Act. See also *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) and *SpeechNow.org v. FEC*, 599 F. 3d 686 (D.C. Cir. 2010).

Mr. Colbert may establish the Committee, which may accept unlimited contributions from individuals, corporations and labor organizations (but not foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress).

[1] *The Act and Commission regulations define an "independent expenditure" as an expenditure by any person for a communication expressly advocating the election or defeat of a clearly identified federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized committee, or their agents, or a political party committee or its agents. 2 U.S.C. §431(17) and 11 CFR 100.16.*

Press Exemption. The Act and Commission regulations exempt from the terms "contribution" and "expenditure" any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431(9)(B)(i); 11 CFR 100.73 and 100.132. These exclusions are known as the "press exemption."

In determining whether the press exemption applies to an entity, the Commission has conducted a two-step analysis. First, the Commission asks whether the entity engaging in the activity is a press entity. See, e.g., AOs 2005-16 (Fired Up) and 1996-16 (Bloomberg). Second, the Commission applies the two-part analysis in R*eaders' Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y., 1981), which requires it to determine: 1) Whether the entity is owned or controlled by a political party, political committee or candidate, and 2) whether the entity is acting as a press entity in conducting the activity at issue (i.e., whether the press entity is acting in its "legitimate press function").

The Commission has previously determined through the advisory opinion process that Viacom is a press entity and that Viacom is not owned or controlled by a political party, political committee or candidate. See AO 2004-07 (MTV).

To determine whether a press entity is acting in its legitimate press function, the Commission considers two factors: 1) whether the press entity's materials are available to the general public, and 2) whether the materials are comparable in form to those ordinarily issued by the press entity. See AOs 2005-16 (Fired UP) and 2000-13 (OPHTHPAC). In examining these two factors, the Commission is mindful that a press entity's press function is "distinguishable from active participation in core campaign or electioneering functions." AO 2008-14 (Melothe, Inc.).

Costs to Cover the Committee on the Show. The Commission concluded that Viacom's coverage of the Committee on the Show, which includes producing and airing segments of the Show that discuss the Committee's operations, the Committee's support for or opposition to federal candidates, the Committee's website, audience participation opportunities and the Committee's independent expenditure ads, would be part of Viacom's legitimate press function. Segments of the Show featuring discussions of the Committee and the Committee's independent expenditure ads are comparable in form to previously produced segments appearing on the Show. Furthermore, the staff that produces these segments will be the same staff that produces other segments of the Show, and the segments will be distributed on the same cable television channel, Comedy Central. Since Viacom will be acting within its legitimate press function, the press exemption applies to costs of covering the Committee on the Show and such costs incurred by Viacom will not be in-kind contributions from Viacom to the Committee.

Costs to Distribute Independent Expenditures Outside of the Show. The Commission concluded that Viacom would not be acting within its legitimate press function by providing independent expenditure ads to the Show and also providing the independent expenditure ads to the Committee, or providing independent expenditure ads produced directly for the Committee to distribute outside of the Show (including airing as paid ads on other shows and networks or as content for its website). Thus, costs incurred by Viacom for this activity would need to be reported by the Committee as in-kind contributions from Viacom to the Committee.

Committee's Administration Costs. The Commission concluded that the administration of the Committee by Viacom would similarly constitute "active participation [by Viacom] in core campaign or electioneering functions," which would fall outside of the scope of the press exemption. Accordingly, any costs incurred by Viacom associated with administering the Committee would need to be reported by the Committee as in-kind contributions by Viacom.

Contributions from the general public. The Commission concluded that even if the Committee were to receive in-kind contributions from Viacom, it could also solicit and accept contributions in unlimited amounts from individuals, political committees, corporations and labor organizations. It cannot solicit contributions from foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress.

Date Issued: June 30, 2011;
Length: 10 pages.

—*Myles Martin*

AO 2011-12

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

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

Background

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

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

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

Analysis

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

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

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

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

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

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

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

Date Issued: June 30, 2011;
Length: 5 pages.
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