

Record

August 2011

Federal Election Commission

Volume 37, Number 8

NONCONNECTED SUPPLEMENT

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Note: Portions of this publication may be affected by the Supreme Court's decision in *Citizens United v. FEC*. Essentially, the Court's ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications. For more information, see page 5.

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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 nonconnected committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulations and advisory opinions that affect the activities of nonconnected committees. It should be used in conjunction with the FEC's May 2008 *Campaign Guide for Nonconnected Committees*, which provides more comprehensive information on compliance for nonconnected committees.

Court Cases

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."

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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 appellate 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

EMILY’s List v. FEC

On September 18, 2009, the U.S. Court of Appeals for the District of Columbia found that three Commission regulations that implement how nonconnected federal political committees may allocate funds to finance certain activities that influence both federal and non-federal elections, and that clarify when funds obtained in response to solicitations are contributions under the Federal Election Campaign Act (the Act), violate the Constitution and are in excess of the Commission’s statutory authority. The court found these regulations to be invalid and ordered the district court to vacate the challenged regulations.

Background

EMILY’s List is a nonconnected political committee registered with the FEC. In January 2005, EMILY’s List filed suit in the U.S. District

Court for the District of Columbia, asserting a facial challenge to regulations promulgated by the FEC to implement provisions of the Act.

The regulations at issue established a new rule for when funds received in response to certain solicitations must be treated as “contributions” under the Act and thereby must be subject to federal limitations and prohibitions. The regulations also modified the Commission’s rules regarding how political committees may allocate funds between federal and nonfederal accounts.

Under current FEC rules, nonconnected political committees that maintain both federal and nonfederal accounts may allocate administrative expenses, costs of generic voter drives and costs of public communications that refer to a political party, but not to specific candidates, with a minimum of 50 percent federal funds. (The remainder may be allocated to the nonfederal account). 11 CFR 106.6(c). Public communications and voter drives that refer to one or more clearly identified federal candidates, but not to any nonfederal candidates, must be financed with 100 percent federal funds. 11 CFR 106.6(f)(1). Public communications and voter drives that refer to one or more clearly identified nonfederal candidates but do not refer to any federal candidates may be financed with 100 percent nonfederal funds. 11 CFR 106.6(f)(2).

With regard to solicitations, Commission regulations state that funds received in response to a solicitation must be considered “contributions” under the Act if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate. 11 CFR 100.57(a). Likewise, if a solicitation refers to a clearly identified federal candidate and a political party, but not to a clearly identified nonfederal candidate, all funds received in response are considered

contributions. 11 CFR 100.57(b)(1). In contrast, however, if the solicitation refers to one or more clearly identified nonfederal candidates, in addition to a clearly identified federal candidate, at least 50 percent of the funds received must be treated as contributions under the Act, regardless of whether the solicitation also refers to a political party. 11 CFR 100.57(b)(2).

EMILY's List sought to enjoin enforcement of the regulations, alleging that each was in excess of the Commission's authority, was arbitrary and capricious, was promulgated without adequate notice under the Administrative Procedure Act (APA) and violated the First Amendment to the Constitution.

Court Decision

The court held that Commission regulations at 11 CFR 106.6(c), 106.6(f) and 100.57 violate the First Amendment and exceed the FEC's authority under the Act.

In its discussion of the First Amendment, the court referred to *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), which found that campaign contributions and expenditures constitute "speech" and, therefore, fall under the protection of the First Amendment. The court noted that in *Davis v. FEC* 128 S. Ct. 2759, 2773 (2008), it was decided that limiting contributions and expenditures in an effort to equalize the political field is not a "legitimate government interest" and, therefore, cannot be the reasoning behind these types of regulations. The court went on to state that the only legitimate government interest that allows for the restriction of campaign finances is preventing corruption or the appearance of corruption. The appeals court stated that that government interest has only been applied to contributions to candidates and parties because those two groups pose the greatest risk of *quid pro quo* corruption. *Buckley*, 424 U.S. at 26-27; *see also*

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97 (1981).

The court stated that, since the regulations in question do not address candidates, parties or for-profit corporations, which the court said are the only entities the Supreme Court has allowed these types of limits to be placed on, the appeals court had to determine how to apply the above principles to non-profit entities. The court determined that "the central issue turns out to be whether independent non-profits are treated like individual citizens (who under *Buckley* have the right to spend unlimited money to support their preferred candidates) or like political parties (which under *McConnell* [v. *FEC*, 540 U.S. 93 (2003),] do not have the right to raise and spend unlimited soft money)." The court then made a distinction between three different types of non-profits and stated how their contributions and expenditures can be regulated.

First, the court stated, there are non-profits that make no contributions, but only expenditures for political activities such as advertisements and GOTV activities. In the decision, the court stated that "non-profit entities, like individual citizens, are constitutionally entitled to raise and spend unlimited money in support of candidates for elected office—with the narrow exception that, under *Austin*, the Government may restrict to some degree how non-profits spend donations received from the general treasuries of for-profit corporations or unions."

The court stated that a second category of non-profits are those that make contributions to candidates, but no expenditures. The court stated that these groups can be limited in the contributions they receive.

The court stated that a third category, which includes EMILY's List, consists of those non-profits that make both contributions and expenditures. According to the court, such groups "are entitled to make their

expenditures...out of a soft-money or general treasury account that is not subject to source and amount limits," as long as they make their contributions from a hard-money account. The court did not interpret *McConnell* as permitting the types of soft-money restrictions currently placed on political parties to be applied to non-profits like EMILY's List.

The court then held that sections 106.6(c), 106.6(f) and 100.57 are not closely drawn to meet an important government interest and would, therefore, be struck down. Among other things, the court stated that "non-profits are constitutionally entitled to pay 100 percent of the costs of...voter drive activities [and generic campaign activity] out of their soft-money accounts."¹ The court reached the same conclusion for ads that refer to a federal candidate.² It further stated that the solicitation regulation unconstitutionally prohibits a non-profit from stating that the money it is raising will be used to support its preferred candidate.³ The court also held that the regulations exceeded the Commission's

¹ 11 CFR 106.6(c) requires that nonconnected political committees maintaining both a federal and a nonfederal account allocate administrative expenses, costs of generic voter drives and costs of public communications that refer to a political party, but not to a specific candidate, with a minimum of 50 percent federal funds.

² 11 CFR 106.6(f)(1) requires that public communications and voter drives that refer to one or more clearly identified federal candidates, but not to any nonfederal candidates, must be financed with 100 percent federal funds.

³ 11 CFR 100.57 states that funds received in response to a solicitation must be considered federal "contributions" under the Act if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate.

statutory authority because, the court said, they required non-profits to use hard money for activities that were exclusively non-federal. The court found the regulations to be invalid and ordered the district court to vacate the challenged regulations.

Judge Brown concurred in the result reached by the two judges in the majority because she agreed that the regulations exceeded the Commission's authority under the Act. However, she disagreed with the majority's First Amendment analysis, and she stated that the court's decision to reach the constitutional questions was unnecessary.

U.S. Court of Appeals for the District of Columbia, 08-5422.

—Katherine Wurzbach

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 contribu-

tors. 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>.

SpeechNow.org v. FEC

On March 26, 2010, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *SpeechNow.org. v. FEC* that the contribution limits of 2 U.S.C. §441a are unconstitutional as applied to individuals' contributions to SpeechNow. The court also ruled that the reporting requirements of 2 U.S.C. §§432, 433 and 434(a) and the organizational requirements of 2 U.S.C. §431(4) and §431(8) can be constitutionally applied to SpeechNow.

Background

SpeechNow is an unincorporated nonprofit association registered as a "political organization" under §527 of the Internal Revenue Code. SpeechNow intends to raise funds solely through donations by individuals and intends to operate exclusively through independent expenditures, which are defined by the Federal Election Campaign Act (the Act) as expenditures that expressly advocate the election or defeat of a clearly identified federal candidate and are 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). SpeechNow intends to run ads for the 2010 election cycle if it is

not subject to the contribution limits of the Act.

In November 2007, SpeechNow filed an advisory opinion request with the Commission, asking whether it must register as a political committee under the Act and if donations to SpeechNow would qualify as "contributions," as defined by the Act, which are subject to the amount limitations of 2 U.S.C. §441a(a)(1)(C) and §441a(a)(3). At the time, the Commission did not have enough Commissioners to issue an opinion, but the Commission's Office of General Counsel did issue a draft advisory opinion which stated that SpeechNow would be a political committee and contributions to it would be subject to the political committee contribution limits. SpeechNow filed a complaint in the U.S. District Court for the District of Columbia, alleging that the restrictions applicable to political committees would be unconstitutional as applied to SpeechNow.

The Act defines a political committee as "any committee, club, association, or other group of persons" that receives contributions or makes expenditures in excess of \$1,000 in a calendar year. 2 U.S.C. §431(4). Once a group qualifies as a political committee, contributions to that committee are restricted to \$5,000 from an individual in a calendar year; additionally, an individual's total contributions to all political committees are limited, currently to \$69,900 biennially. 2 U.S.C. §441a(a)(1)(C) and §441a(a)(3). A political committee must also comply with all applicable recordkeeping and reporting requirements of the Act, which include, among other things, filing periodic campaign finance reports with the Commission. See 2 U.S.C. §434(a)(4) and §434(b).

Appellate Court Decision

Contribution Limits. The court of appeals held that when the government attempts to regulate the financing of political campaigns and

express advocacy through contribution limits, it must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights. In light of the Supreme Court's recent decision in *Citizens United v. FEC*, in which the Supreme Court held that the government has no anti-corruption interest in limiting independent expenditures, the appeals court ruled that "contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption." As a result, the court of appeals held that the government has no anti-corruption interest in limiting contributions to an independent group such as SpeechNow. Contributions limits as applied to SpeechNow "violate the First Amendment by preventing [individuals] from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits." The court noted that its holding does not affect direct contributions to candidates, but rather contributions to a group that makes only independent expenditures.

Disclosure and Reporting Requirements. The appeals court held that, while disclosure and reporting requirements do impose a burden on First Amendment interests, they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." Furthermore, the court held that the additional reporting requirements that the Commission would impose on SpeechNow if it were organized as a political committee are minimal, "given the relative simplicity with which SpeechNow intends to operate." Since SpeechNow already has a number of "planned contributions" from individuals, the court ruled that SpeechNow could not compare itself to "ad hoc groups that want to create themselves on the spur of the moment." Since the public has an interest in knowing who is speaking about a candidate and who is fund-

ing that speech, the court held that requiring such disclosure and organization as a political committee are sufficiently important governmental interests to justify the additional reporting and registration burdens on SpeechNow.

The court's decision is available at http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf.

United States Court of Appeals for the District of Columbia Circuit, Case Nos. 08-5223 and 09-5342.

—Myles Martin

Regulations

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 criteria, 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 PAC¹ 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.

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).

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-

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

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 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

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.

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. Contributions 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

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>.

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 PACs¹ 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 com-

mittee 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 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

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).

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 convey-

ances, 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 com-

mittee 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 Administrative 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, activi-

ties 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 for 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

2011 Conferences and Seminars

Seminar for House and Senate Campaigns

April 6, 2011
FEC Headquarters
Washington, DC

Seminar for Corporations and Their PACs

May 11, 2011
FEC Headquarters
Washington, DC

Seminar for Trade Associations, Labor Organizations, Membership Organizations and Their PACs

June 8, 2011
FEC Headquarters
Washington, DC

Regional Conference For Campaigns, Party Committees and Corporate/Labor/Trade PACs

September 7-8, 2011
Minneapolis, MN

Regional Conference For Campaigns, Party Committees and Corporate/Labor/Trade PACs

October 25-26, 2011
San Diego, CA

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

¹ The applicable cost of living adjustment amount is 1.23152.

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

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).

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.

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 be 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.

Advisory Opinions

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)(1)(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 2008-08 Earmarked Contribution Counts Against Current Spending Limits

An earmarked contribution sent by an individual through a nonconnected political action committee (PAC) is considered "made" when the contributor gives the money to the nonconnected PAC, not when the committee eventually forwards the contribution to the final recipient. Thus, a contribution earmarked through a nonconnected PAC in 2008 will be subject to the 2008 calendar-year contribution limit and count against the contributor's 2007-2008 biennial limit, even if the contribution is not forwarded to the intended recipient until a later election cycle.

Background

On June 25, 2008, Jonathan Zucker made an on-line credit card contribution through ActBlue, a nonconnected PAC. ActBlue solicits and accepts on-line credit card contributions for candidates and party committees and forwards them to the intended recipient via check. Mr. Zucker earmarked his contribution for the 2010 Democratic nominee for the U.S. Senate in Arizona or, in the event there is no such nominee, to the Democratic Senatorial Campaign Committee (DSCC).

Usually, a person who receives a contribution of any amount for an authorized political committee, or a contribution greater than \$50 for a political committee that is not an authorized committee, must forward the contribution to the intended recipient no later than 10 days after receipt. 11 CFR 102.8(a) and (b)(1), and 110.6(c)(1)(iii) and (iv).

However, in AO 2006-30, the Commission determined that ActBlue could solicit and receive contributions earmarked for a prospective candidate and delay forwarding those contributions until no later than 10 days after the candidate had registered a campaign committee,

rather than within 10 days after ActBlue's receipt of the contribution. The Commission also determined that ActBlue could forward the contribution to a named national party committee in the event the intended candidate did not register with the Commission. See also AO 2003-23.

Analysis

The Federal Election Campaign Act and Commission regulations place limits on the amount that any person can contribute to a national party committee, and this limit is indexed for inflation. For 2008, an individual can give no more than \$28,500 to a national party committee. 11 CFR 110.1(c)(1). Individuals are additionally subject to a "biennial limit," which limits the total amount of contributions that any individual may make to all federal candidates, PACs and party committees during a two-year cycle. For the 2008 cycle, the overall biennial limit is \$108,200, which is further broken down into separate limits for candidates and other committees. The biennial limit is also indexed for inflation every two years. 11 CFR 110.1(b)(1)(ii). Inflation adjustments beyond 2008 cannot be determined at this time.

The date a contribution is "made" determines the election limit it counts against, and a contribution is considered "made" when the contributor relinquishes control over it. 11 CFR 110.1(b)(6). A credit card contribution is "made" when the credit card or number is presented because, at that point, the contributor is strictly obligated to make the payment. AO 1990-14.

In this case, Mr. Zucker's credit card has been charged for the contribution, and he is obligated to pay that amount to the credit card company. Thus, his contribution has been "made." Moreover, under Commission regulations a contribution to a candidate or committee with respect to a particular election, *including an earmarked contribution*, counts against the contribution

limits in effect during the election cycle in which the contribution is actually made, regardless of the year in which the particular election is held. 11 CFR 110.5(c)(1). Accordingly, if his contribution is forwarded to a 2010 Senate nominee, it will still count against his 2007-2008 biennial limit. If there is no Democratic Senate nominee and his contribution is forwarded to the DSCC, the contribution will again count against his 2007-2008 biennial limit and against his calendar-year contribution limit to the DSCC for 2008.

The Commission further determined that, because Mr. Zucker may not know until 2010 whether his contribution was forwarded to a candidate or a political committee, the only way to ensure that he does not exceed any possible limit that may apply is to consider his contribution as if it were made to both the 2010 Democratic Senate nominee and the DSCC.

Date Issued: September 12, 2008;
Length: 4 pages.

—Isaac J. Baker

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 corporation'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

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.*

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 2008-17 PAC May Pay Expenses Incurred by Senator's Co- Author

Expenses incurred by a Senator's co-author while preparing a manuscript of a book the two are writing may be paid for with funds from the Senator's leadership PAC. The Senator's principal campaign committee, however, may not use its funds to reimburse the co-author for the expenses.

Background

For three years, Missouri Senator Christopher "Kit" Bond has worked on a book about terrorist threats from the Far East. In December of 2005, Senator Bond and his co-author signed an agreement concerning liability, delivery of the manuscript, confidentiality responsibilities, how the advance of royalties would be split and other matters. Also in December of 2005, the Senator and co-author signed a contract with a company to publish the book, for which they received an advance of \$60,000. The co-author received \$43,333 of the advance and Senator Bond received \$16,667. The Senator paid \$15,000 of his \$16,667 to the publishing agent who secured

the original contract and paid the remaining amount to the co-author.

The original agreement required repayment of the advance if the publisher declined to publish the book and the authors secured a second publisher. The original publisher *did* decline to publish the book and Senator Bond and his co-author found a second publisher, who also agreed to pay them an advance. That advance will be used to reimburse the original publisher's advance. Senator Bond will not receive any profits from the book.

However, the requestor said no funds from the second advance will remain to fully compensate Senator Bond's co-author for the expenses, time and effort spent in preparing the manuscript for the second publisher. The requestor placed the fair market value of these services at \$25,000.

Senator Bond asked the Commission whether Missourians for Kit Bond, the Senator's principal campaign committee (the Committee), or KITPAC, a nonconnected multicandidate committee associated with Senator Bond, could pay the book's co-author \$25,000 for the expenses, time and effort spent in preparing the manuscript for the second publisher's approval.

Analysis

Missourians for Kit Bond may not reimburse the co-author for the \$25,000, but KITPAC may pay these expenses.

Under the Federal Election Campaign Act (the Act) and Commission regulations, candidates and their committees have wide discretion in making expenditures to influence the candidate's election. 2 U.S.C. §439(a) and 11 CFR 113.2. However, a candidate or candidate committee may not convert contributions to personal use. Personal use occurs when a "contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of

Federal office." 2 U.S.C. §439a(b)(2). Using this "irrespective test," the Commission concluded that the Committee's proposed payment to the co-author would amount to personal use.

While third parties are limited in what they may pay for on behalf of federal candidates, the "irrespective test" contained in the third party payment provision at 11 CFR 113.1(g)(6) differs slightly from the "irrespective test" contained in the general personal use prohibition at 11 CFR 113.1(g). This provision asks whether the third party would pay the expense even if the candidate was not running for federal office. If the answer is yes, then the payment does not constitute a contribution.

The requestor stated that Senator Bond "seeks to publish the book purely to advance the ideas and philosophies important to his campaign and leadership PAC, and not to benefit himself personally." The requestor also stated that KITPAC's interest in the book would exist even in the absence of the Senator's reelection or his campaign.

Because the book promotes KITPAC's goals and the PAC would pay for the book and the co-author's expenses irrespective of the Senator's campaign, the payment would not constitute a contribution under 11 CFR 113.1(g)(6). The Commission concluded that KITPAC may therefore make the proposed \$25,000 payment to the book's co-author.

Date Issued: December 22, 2008;
Length: 5 pages.

—Isaac J. Baker

AO 2008-19 Campaign Committee Employee May Serve as Leadership PAC's Treasurer

An employee of a candidate's principal campaign committee may also serve as the treasurer of a leadership PAC sponsored by the same candidate.

Background

Ms. O'Lene Stone is a paid staff member of Texans for Lamar Smith (the Committee), which is the principal campaign committee for Representative Lamar Smith. In her position as the Committee's office manager, she collects mail, supervises volunteers, occasionally acts as a contact person for fundraising firms and performs other day-to-day administrative tasks for the Committee. She is not involved in any fundraising or in preparing or filing any Commission reports for the Committee.

Ms. Stone is also the treasurer of the Longhorn Political Action Committee (Longhorn PAC), a leadership PAC sponsored by Representative Smith. In this position, she signs Longhorn PAC's FEC reports and has final approval of all disbursements. She does not prepare FEC reports for the PAC and does not sign checks or make deposits.

Ms. Stone maintains separation between her two roles. She performs all of her duties for Longhorn PAC on her own time, outside of her paid hours for the Committee. No Longhorn PAC resources or funds are used in the performance of Ms. Stone's Committee duties, and no Committee resources or funds are used in the performance of her Longhorn PAC duties.

Analysis

Neither the Federal Election Campaign Act nor any Commission regulation bars a person from serving as an employee of a principal campaign committee and as the treasurer of a leadership PAC sponsored

by that candidate simultaneously. Therefore, Ms. Stone may continue to serve as the treasurer of Longhorn PAC while she is employed by the Committee.

Date Issued: January 16, 2009;
Length: 3 pages.

—Isaac J. Baker

AO 2009-32 Proposed Sale of Art on Behalf of Committees is Not a Contribution

An individual who conducts a web-based business as a sole proprietor may sell artwork as fundraising items for political committees and provide the political committees with solicitation e-mails. The sale of these fundraising items, and the provision of the solicitation e-mails, would not constitute contributions from the sole proprietor to the political committees as long as the fee received by the sole proprietor is the usual and normal charge.

Background

The requestor, Richard Jorgensen, operates a web-based business as a sole proprietor. Through this website, Dr. Jorgensen sells, among other things, prints of President Barack Obama and Secretary of State Hillary Clinton. Dr. Jorgensen sells these prints for \$49.95 plus \$5 for shipping and handling.

Dr. Jorgensen proposes to enter into agreements with political committees to sell these prints as fundraising items. Dr. Jorgensen plans to draft solicitation e-mails promoting the artwork and provide those solicitation e-mails to the committees he deals with. The political committees can request changes to the solicitation e-mails or customize them. Dr. Jorgensen will charge the political committees a fee for providing the solicitation e-mails, and the committees will disseminate the e-mails through their own distribution lists.

The e-mails will contain images of the products offered for sale and hyperlinks to purchase the products from Dr. Jorgensen's website. The hyperlinks will contain an embedded ID tag, unique to each political committee, so that purchases resulting from each committee's fundraising efforts can be appropriately credited to that committee and contributor information can be collected and forwarded to the political committee for reporting purposes. Dr. Jorgensen will request and provide to the committees information from contributors, including their names, addresses and the amount of their purchases and, for contributors whose purchases exceed \$200, their occupations and employers.

For sales made through the proposed arrangements with political committees, the price will be marked up by an amount that Dr. Jorgensen and the political committee agree upon, so that Dr. Jorgensen will receive the same dollar amount he would receive from any other sale. When purchases are made from the website, payment will be collected via PayPal Pro, and deposited on a weekly basis into a separate bank account for each political committee. From those accounts, funds will be sent to the artist for the prints and shipping costs, to PayPal Pro for transaction fees and to Dr. Jorgensen for his commissions. The political committees will retain the remaining amount.

Analysis

Dr. Jorgensen asked the Commission whether he could provide solicitation e-mails to the political committees without the provision of those e-mails constituting a contribution to the political committees. The Commission determined that Dr. Jorgensen could provide solicitation e-mails to the political committees, and that his provision of those e-mails would not constitute contributions to the political committees as long as Dr. Jorgensen receives the usual and normal charge for such

services. Under Commission regulations, 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). As long as the fee for drafting the solicitation e-mail is commercially reasonable at the time the service is provided, it will constitute the “usual and normal charge” and therefore not result in a contribution. The Commission also determined that Dr. Jorgensen could sell artwork on behalf of political committees as fundraising items, and that his provision of the artwork will not constitute a contribution to the purchasing committees because the commission Dr. Jorgensen proposes to receive is the usual and normal charge in a commercially reasonable transaction.

Dr. Jorgensen proposes to sell the artwork for \$49.95 in addition to a markup to be agreed upon with the political committees and a \$5 fee for shipping and handling. The Commission determined that Dr. Jorgensen will not be making contributions to the political committees because the amount he will receive on sales to the political committees would be the same amount he would receive on sales that are not made to political committees. 11 CFR 100.52(d). Because the political committees will receive funds from individual contributors and not from Dr. Jorgensen’s sole proprietorship, the transactions will not result in contributions from Dr. Jorgensen. See, e.g., AO 2008-18.

The Commission noted that the political committees participating in this proposed plan will authorize Dr. Jorgensen as their agent to receive contributions, and, therefore, Dr. Jorgensen will be subject to certain recordkeeping and reporting obligations. 11 CFR 102.9. Dr. Jorgensen will have to request and forward to the political committees the name and address of any person contribut-

ing more than \$50, and the date and full amount of the contribution, as well as the occupation and employer of anyone who contributes more than \$200 to a particular committee. 2 U.S.C. §432(c); 11 CFR 102.9(a). Also, Dr. Jorgensen will have to forward the contributions, along with the required contributor information, to the treasurer of the recipient committee within the required time period. 2 U.S.C. §432(b)(1); 11 CFR 102.8(a).

Date Issued: January 29, 2010;

Length: 5 pages.

—Isaac J. Baker

AO 2010-11 Contributions to an Independent Expenditure Committee

A nonconnected committee, established solely to make independent expenditures, may solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations.

Background

Commonsense Ten (the “Committee”) is a nonconnected political committee registered with the FEC. The Committee intends to make only independent expenditures and wants to solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations. It will screen for and refuse contributions from foreign nationals, federal contractors, national banks and corporations organized by act of Congress. The committee will not make any monetary or in-kind contributions (including coordinated communications) to any other political committee or organization and intends to disclose its activity on reports it files with the FEC.

Analysis

Recent court decisions have altered the landscape for financing independent expenditures. In *Citizens United v. FEC*, the U.S. Supreme Court overturned the ban on

corporate expenditures, holding that corporations may make unlimited independent expenditures from their general treasury funds. See *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 913 (2010). Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit held that individuals may make unlimited contributions to political committees that only make independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

Based on the holdings of *Citizens United* and *SpeechNow*, the Commission concluded that individuals, corporations, labor organizations and political committees may make unlimited contributions to independent expenditure-only committees, like Commonsense Ten.

The Commission noted that it may update its registration and reporting forms to facilitate disclosure by these committees. In the meantime, the Committee may include a letter with its Form 1 Statement of Organization clarifying that it intends to accept unlimited contributions for the purpose of making independent expenditures. 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: 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 contri-

butions 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 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 deter-

mines 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 2011-10 Partnerships May Deduct PAC Contributions from Sales Contracts

A family of partnerships may make preauthorized deductions from amounts due on sales contracts for contributions to a nonconnected committee.

Background

POET, LLC is a single-member, limited liability company that has elected not to be treated as a corporation for income tax purposes. POET PAC is registered with the Commission as a nonconnected, multicandidate committee.

The POET family of companies includes 27 POET plants that produce and refine ethanol. To produce ethanol, the POET plants purchase corn from corn farmers, the vast majority of whom are individuals, partnerships or limited liability companies electing partnership treatment for tax purposes. The sales are conducted pursuant to sales contracts between the corn farmers and the POET plants.

POET, LLC, POET PAC and Sioux River Ethanol, LLC d/b/a POET Biorefining-Hudson want to establish the POET PAC Cultivator Club (the “program”) to make it easier for corn farmers to contribute to POET PAC.¹ Under the program, the participating POET plants would solicit contributions to POET PAC from the corn farmers with whom

they do business. The corn farmers may opt to have the participating POET plants deduct a portion of the money owed to them for their corn, and the participating POET plants would transfer the deducted amounts to POET PAC each week. A corn farmer wishing to participate in the program would check a box on the farmer’s corn sales contract, thereby authorizing the participating POET plant to make deductions for contribution purposes. A farmer could modify or revoke the authorization at any time by notifying the participating POET plant in writing and via the POET companies’ website. The authorization would not carry over from contract to contract, but a farmer wishing to continue to participate in the program after his or her contract expires would have to affirmatively elect to do so on the new sales contract.

Under the proposal, the POET PAC solicitation and check-off box would be preprinted on each corn sales contract, while the necessary disclaimers, statement of political purpose and best efforts statement would appear with the Terms and Conditions. The Terms and Conditions would also state that contributions from foreign nationals, federal government contractors and corporations are prohibited. POET, LLC, POET PAC and Sioux River Ethanol, LLC would implement compliance safeguards to ensure that POET PAC does not accept any excessive contributions or contributions from prohibited sources, and POET PAC would retain all necessary records and would report all contributions received on its reports filed with the Commission. All required disclaimers and “best efforts” information would be placed on a single double-sided document that includes the contract on one side and the Terms and Conditions on the other side. Finally, POET PAC proposes to compensate the participating POET plants for the services that they provide in solic-

iting, deducting and transmitting contributions by paying the usual and normal charge for these services to the participating POET plants in advance every month. The payments would be based on estimates of staff compensation and the time involved in administering the fundraising program.

Analysis

The Commission determined that the planned Cultivator Club program is permissible and similar to other programs previously approved by the Commission. See AOs 1982-63 and 2005-20. In this case, the solicitation, deduction and transmittal of contributions to POET PAC would constitute the provision of services and could be considered in-kind contributions by the participating POET plants to POET PAC. 2 U.S.C. §431(8)(A)(i) and 11 CFR 100.52(a) and (d)(1) and (2). However, the participating POET plants are all either partnerships or LLCs that have elected treatment as partnerships for tax purposes and are, thus, treated as partnerships under the Act and Commission regulations as well. See 11 CFR 110.1(g)(2). As such, they may make contributions of up to \$5,000 per calendar year to nonconnected multicandidate political committees. 2 U.S.C. §441a(a)(1)(C); 11 CFR 110.1(d).

In this case, however, POET PAC indicates it will pay in advance for the services furnished by the participating POET plants. Thus, the Commission concluded that no contribution would result if POET PAC pays in advance the usual and normal charge for the participating POET plants’ services in soliciting and processing contributions made by corn farmers. See AO 2005-20.

The Commission also determined that POET PAC may include required disclaimers on a separate Terms and Conditions page rather than on the page with the actual check-off box for the POET PAC Cultivator Club. See 2 U.S.C. §441d(a); 11 CFR 110.11(a)(3); 11

¹ Under the program, only corn farmers that are individuals, partnerships, or limited liability companies electing to be treated as partnerships for tax purposes could make contributions to POET PAC. Only the 24 POET plants that are limited liability companies treated as partnerships and the single POET plant that is a limited liability partnership will participate in the Cultivator Club. The remaining two POET plants, one of which is a corporation and the other of which is treated as such for tax purposes, will not participate.

CFR 100.26; 11 CFR 100.27. Under Commission regulations, every disclaimer “must be presented in a clear and conspicuous manner.” 11 CFR 110.11(c)(1). Disclaimers on printed communications must be of sufficient type size to be clearly readable, must have a reasonable degree of color contrast between text and background and must be contained in a box set apart from the rest of the communication. 2 U.S.C. §441d(c); 11 CFR 110.11(c)(2)(i)-(iii). A communication that would require a disclaimer if distributed separately must contain the required disclaimers if it is included in a package. 11 CFR 110.11(c)(2)(v). However, a disclaimer need not appear on the front cover of a communication with multiple pages. 11 CFR 110.11(c)(2)(iv). Political committees are also required to make their “best efforts” to gather information about contributors and to include in solicitations “a clear request” for the required identifying information from the contributor. 11 CFR 104.7(b)(1)(i).

Here, POET PAC proposes to place all required disclaimers and “best efforts” information on a single double-sided document that includes the contract on one side and the Terms and Conditions on the other side. The disclaimer would be set apart in a box and it would be printed in the same font size as other material on the rest of the page. The Commission concluded that this proposal would satisfy the disclaimer requirement because the disclaimers and the solicitation and check-off will be distributed as a single document.

Finally, the Commission allowed POET PAC to perform a quarterly reconciliation of the actual staff time spent administering the POET PAC Cultivator Club by participating POET plants and POET, LLC employees to the amounts paid in advance by POET PAC. POET PAC plans to provide advance payment to the participating POET plants based on an initial estimate of plant

employee time to be spent soliciting and processing contributions in connection with the POET PAC Cultivator Club. It would then adjust these payments each calendar quarter to reflect the actual time spent.

If POET PAC’s initial advance payment to the participating POET plant underestimates the amount due to the participating POET plant for the staff time actually expended, the resulting difference would be considered an advance or an extension of credit by the participating POET plant to POET PAC, and therefore a contribution, until it is repaid. 2 U.S.C. §431(8)(A)(i), 11 CFR 100.52(a). As such, it would be subject to contribution limits. See 11 CFR 110.1(e). The Commission instructed POET PAC to report each advance payment to a participating POET plant on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the expense is an advance payment for solicitation and contribution processing services to be provided by the participating POET plant. If POET PAC later determines that its advance payment to a participating POET plant was less than the amount actually due for services rendered, then POET PAC must report the difference between the two amounts as a debt owed to the participating POET plant on Schedule D until the difference is paid in full. See 11 CFR 104.11. When POET PAC pays the amount owed to a participating POET plant for services rendered, it must report the payment on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the amount is an additional payment for services rendered and the date(s) that the services were rendered, and identifying the report in which the advance payment was reported.

Date: June 16, 2011;

Length: 9 pages.

—Zainab Smith

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, federal 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).

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 *Readers' 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.

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.

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 con-

tributions 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.

—*Stephanie Caccomo*