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## NONCONNECTED SUPPLEMENT

### Table of Contents

#### Court Cases

- 1 *Shays v. FEC (III)*
- 3 *EMILY's List v. FEC*

#### Regulations

- 5 Final Rules on Reporting Contributions Bundled by Lobbyists, Registrants and Their PACs
- 7 Notice of Proposed Rulemaking on Coordinated Communications
- 9 Final Rules on Campaign Travel

#### Contribution Limits

- 12 Contribution Limits for 2009-2010

#### Advisory Opinions

- 13 "Stand-by-Your-Ad" Disclaimer Required for Brief Television Advertisements, AO 2007-33
- 14 Organization's Status as a Partnership, AO 2008-5
- 14 Earmarked Contribution Counts Against Current Spending Limits, AO 2008-8
- 15 Online Advertising Vendor May Sell Political Advertising Services, AO 2008-10
- 17 PAC May Pay Expenses Incurred by Senator's Co-Author, AO 2008-17
- 18 Campaign Committee Employee May Serve as Leadership PAC's Treasurer, AO 2008-19

### 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." The appeals court reversed the district court's decision to uphold the provision allowing federal candidates to solicit funds without restriction at state and local party events. These regulations were remanded to the FEC to issue "regulations consistent with the Act's text and purpose." The court did not vacate the regulations, so they remain in effect, pending further action. The appeals court upheld the FEC's regulations regarding the firewall safe harbor for coordination by former employees and vendors, which the district court had found deficient.

#### Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a

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

the FEC did not adequately explain and justify its actions.

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

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

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

### Appeals Court Decision

The appellate court upheld the majority of the district court's decision, including the remand of the content standard for coordination, the 120-day common vendor coordination time period and the definitions of GOTV activity and voter registration activity. While the district court had held the firewall safe harbor for coordination by former employees and vendors invalid, the court of appeals reversed the district court and upheld the safe harbor provision. The court of appeals reversed the district court's

decision to uphold the provision permitting federal candidates to solicit funds without restriction at state or local party events.

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

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

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

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

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

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

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

—Meredith Metzler

## 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 adver-

tisements 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.”<sup>1</sup> The court

<sup>1</sup> 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.

reached the same conclusion for ads that refer to a federal candidate.<sup>2</sup> 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.<sup>3</sup> The court also held that the regulations exceeded the Commission’s 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

<sup>2</sup> 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.

<sup>3</sup> 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.

## 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 politi-

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

*Semi-annual Covered Period.* All reporting committees with bundled contributions to disclose must file a report covering the semi-annual periods of January 1 through June 30 and July 1 through December 31. 11 CFR 104.22(a)(5)(i). Totals for the first six months of the year will appear on quarterly filers’ July 15 report and on monthly filers’ July

<sup>1</sup> 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).

20 report.<sup>2</sup> All reporting committees will disclose totals for the second half of the year on their January 31 Year-End Report.

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

**Monthly Covered Period.** For reporting committees that file campaign reports on a monthly basis, the covered period includes the semi-annual periods above and each month in the calendar year, except that in election years they file for the pre- and post-general election reporting periods in lieu of the November and December reports. 11 CFR 104.22(a)(5)(iii). As noted above, reporting committees that file campaign finance reports monthly may elect to file their lobbyist bundling disclosure on a quarterly basis. 11 CFR 104.22(a)(5)(iv). Reporting committees wishing to change their lobbyist

bundling disclosure from monthly to quarterly must first notify the Commission in writing. Electronic filers must file this request electronically. A reporting committee may change its filing frequency only once in a 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.<sup>3</sup> 11 CFR 104.22(a)(6)(i).

Bundled contributions also include those received from the original contributor when the contributions are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC through records, designations or other means of recognizing that a certain amount

of money has been raised by that lobbyist/registrant or lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(ii). The final rules outline ways that a reporting committee may be considered to “credit” a lobbyist/registrant or lobbyist/registrant PAC for raising contributions.

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

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

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

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

### Disclosure Requirements

As noted above, the Commission has created new FEC Form 3L, Report of Contributions Bundled by Lobbyists/Registrants and Lobbyist/

<sup>3</sup> *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.*

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

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](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-03.pdf).

—Elizabeth Kurland

## Notice of Proposed Rulemaking on Coordinated Communications

On October 8, 2009, the Commission approved a Notice of Proposed Rulemaking (NPRM) proposing amendments to portions of its three-part regulatory test for coordinated communications. 11 CFR 109.21. The NPRM also proposes adding a safe harbor to address certain public communications in which federal candidates endorse or solicit support for non-profit entities, as well as a safe harbor for certain commercial and business communications. Proposed 11 CFR 109.21(i) and (j). The Commission is undertaking this rulemaking to comply with the ruling in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*), that invalidated aspects of the rules defining coordinated communications.

### Background

As part of its rulemaking to implement the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission devised a three-prong test for determining whether a communication has been coordinated with a candidate or party, and thus

results in an in-kind contribution. The test considers:

- The source of payment;
- The content of communication; and
- The conduct of those involved.

To be considered coordinated, the communication must satisfy all three prongs of the coordinated communication test.

In *Shays III Appeal*, the court invalidated a portion of the content prong of the test. To satisfy the content prong a communication must be:

- An electioneering communication;
- A public communication that republishes campaign materials;
- A public communication that expressly advocates; or
- A public communication that refers to a political party or clearly identified federal candidate and is publicly distributed within 90 or 120 days of the primary or general election.<sup>1</sup>

The appeals court concluded that the Commission’s decision to apply “express advocacy” as the only content standard outside the 90-day and 120-day windows does not “rationally separate election-related advocacy from other activity falling outside FECA’s expenditure definition.” *Shays III Appeal*, 528 F.3d at 926.

In *Shays III Appeal*, the Court of Appeals also invalidated a portion of the conduct prong of the test. To fulfill the conduct prong, the communication must be created, produced, or distributed:

- At the request or suggestion of;
- After material involvement by; or
- After substantial discussion with, a candidate, a candidate’s authorized committee, or a political party committee;

<sup>1</sup> These are the revised time periods the Commission promulgated in 2006 in response to *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

or

- The person paying for the communication contracts with, or employs, a “commercial vendor” to create, produce, or distribute the communication; and
- The commercial vendor provided services to the clearly identified candidate, that candidate’s authorized committee, the candidate’s opponent or his or her authorized committee or a political party committee referred to in the communication within the previous 120 days; and
- The commercial vendor conveys material information about the campaign or needs of the candidate to the person paying for the communication;

or

- The communication is paid for by a person or the employer of a person, who has previously been an employee or an independent contractor of a candidate or the candidate’s authorized committee, the opponent or the opponent’s authorized committee, or a political party committee during the 120 days before the purchase or distribution of the communication; and
- The person must convey material information about the campaign or needs of the candidate to the person paying for the communication.

The first three elements were not at issue in *Shays III Appeal*. The *Shays III Appeal* court invalidated the 120-day period of time during which a common vendor’s or former campaign employee’s relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR 109.21(d)(4) and (d)(5). *Shays III Appeal*, 528 F.3d at 928-29.

### Proposals

In response to the court’s decision, the Commission has proposed four possible modifications to the existing content standards in 11 CFR 109.21:

- 1) Adopt a content standard to cover public communications that promote, attack, support or oppose (PASO) a political party or a clearly identified federal candidate. This alternative would amend 11 CFR 109.21(c) by replacing the express advocacy standard with the PASO standard. As part of its consideration of a PASO content standard, the Commission is also considering whether it should adopt a definition of PASO. The NPRM sets forth two possible approaches to defining PASO. Alternative A provides a specific definition for each of the component terms that would apply when any of those terms is used in conjunction with one or more of the other terms. Alternative B applies a multi-prong test to determine whether a given communication PASOs. See Alternatives A & B at Proposed 11 CFR 100.23.
- 2) Adopt a content standard to cover public communications that are the “functional equivalent of express advocacy.” The proposed standard specifies that 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. See *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007).
- 3) Clarify the existing express advocacy content standard by providing a cross-reference to the express advocacy definition at 11 CFR 100.22.
- 4) Adopt a standard that pairs a public communication standard with a new conduct standard (the “Explicit Agreement” standard). This would require a formal or informal agreement between a candidate, candidate’s committee or political party committee and the person paying for the public communication. Either the agreement or the communication must be made for the purpose of influencing a federal election.

In response to the court’s decision regarding the conduct prong, the Commission has proposed three alternatives for the time periods specified in the common vendor and former employee conduct standards:

- 1) Retain the current 120-day period with the Commission providing additional justification for that time period. The *Shays III Appeal* court did not hold that the 120-day period was inherently improper, but rather that the Commission “must support its decision with reasoning and evidence...” *Shays III Appeal*, 528 F.3d at 929.
- 2) Amend 11 CFR 109.21(4) and (5) by deleting the phrase “the previous 120 days” and replacing it with “the two-year period ending on the date of the general election for the office or seat the candidate seeks.” The two-year period corresponds with the election cycle for the House of Representatives, the most common election cycle of those regulated by the Commission.
- 3) Replace the existing 120-day period with a “current election cycle” period. “Current election cycle” is defined in current Commission regulations as beginning “on the first day following the date of the previous general election for the office or seat which the candidate seeks...The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held.” 11 CFR 100.3(b).

*Other issues.* Although not included in the *Shays III Appeal* ruling, the Commission is also considering adding a safe harbor to 11 CFR 109.21(i) to address certain public communications in which federal candidates endorse or solicit support for non-profit entities organized under 501(c)(3) of the Internal Revenue Code, or for public policies or legislative proposals espoused by those organizations. This proposed additional safe harbor would, under

certain circumstances, enable a federal candidate to participate in such a public communication, without the communication being treated as an in-kind contribution to the candidate.

The Commission is also considering adding a new safe harbor at 11 CFR 109.21(j) for certain commercial and business communications. This proposed safe harbor would apply to 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 PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made prior to the candidacy in terms of the medium, timing, content and geographic distribution.

The Commission also seeks comment on whether it should issue an NPRM on the party coordinated communication regulation at 11 CFR 109.37, since that provision has a content prong that is substantially similar to the one for “coordinated communications” in 11 CFR 109.21(c). Also, the common vendor and former employee conduct standards of 11 CFR 109.21(d) that were struck down in *Shays III Appeal* are incorporated by reference in the party coordinated communication regulations. See 11 CFR 109.37(a) (3).

### Comments

The NRPM was published in the October 21, 2009, *Federal Register* and is available on the FEC web site at [http://www.fec.gov/pdf/nprm/coord\\_commun/2009/notice\\_2009-23.pdf](http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf). The Commission strongly encourages comments, especially those that include empirical data.

All comments must be received on or before January 19, 2010. Comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, fax

or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to [CoordinationShays3@fec.gov](mailto:CoordinationShays3@fec.gov). If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E St. NW, Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends.

A public hearing on the proposed rules will be held at a later date in the Commission’s ninth floor hearing room, 999 E St., NW, Washington, DC.

—Katherine Wurzbach

## Final Rules on Campaign Travel

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

### General Rule

HLOGA amended the Federal Election Campaign Act (the Act) to prohibit candidates for the U.S. House of Representatives, their authorized committees and their leadership PACs<sup>1</sup> 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

<sup>1</sup> 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).

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.<sup>2</sup>

The pro rata share is calculated based on the number of candidates represented on a flight, regardless of whether the individual candidate is actually present on the flight. A candidate is represented on a flight if a person is traveling on behalf of that candidate or the candidate's authorized committee. Accordingly, when an individual is traveling on behalf of another political committee (such as a political party committee or a Senate leadership PAC), rather than on behalf of the candidate's own authorized committee, the reimbursement for that travel is the responsibility of the political committee on whose behalf the travel

occurs. The reimbursement must be made to the service provider within seven calendar days after the date the flight began to avoid the receipt of an in-kind contribution.

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

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

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

To avoid the receipt of an in-kind contribution, the committee must reimburse the service provider no later than seven calendar days after the date the flight began. 11 CFR 100.93(c)(3).

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

New 11 CFR 100.93(c)(2) generally prohibits House candidates and individuals traveling on behalf of House candidates, their authorized committees or the leadership PACs

of House candidates from engaging in non-commercial campaign travel on aircraft. This prohibition cannot be avoided by payments to the service provider, even by payments from the personal funds of a House candidate.

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

### **Non-Commercial Air Travel on Behalf of Other Committees**

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

### **Other Means of Transportation**

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

### **Government Conveyances**

Candidates and representatives of political committees may make campaign travel via government conveyances, such as government aircraft,

<sup>2</sup>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)

subject to specific reimbursement requirements. HLOGA provides an exception to the prohibition on non-commercial air travel by House candidates and their authorized committees and leadership PACs, but does not specify any particular reimbursement rate for travel aboard government aircraft.

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

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

For campaign travelers who are traveling on government aircraft but are not traveling with or on behalf of a candidate or candidate’s committee (for example, a person traveling on behalf of a political party committee or an SSF), the Commission

is retaining its previous reimbursement rate, which provides that the reimbursement be equal either to the lowest unrestricted and non-discounted first class airfare to or from the city with regularly scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used, or, for all other travel, the applicable rate from among the rates specified in 100.93(c)(3). 11 CFR 100.93(e)(2).

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

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

#### **Aircraft Owned or Leased by Candidate or Immediate Family**

The Commission is also amending its regulations to conform with HLOGA’s exception from the payment and reimbursement requirements for travel aboard aircraft that are “owned or leased” by a candidate or a candidate’s immediate family, including an aircraft owned or leased by any entity in which the candidate or a member of the candidate’s immediate family “has an ownership interest,” provided that 1) the entity is not a public corporation, and 2) the use of the aircraft is not

“more than the candidate’s or immediate family member’s proportionate share of ownership allows.”

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

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

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

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

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

### Recordkeeping Requirements

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

### Additional Information

The final rules and Explanation and Justification were published in the December 7, 2009, issue of the *Federal Register* (74 FR 63951). They are available on the Commission's website at [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-27.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-27.pdf). The rules took effect on January 6, 2010.

—Myles Martin

## Contribution Limits

### Contribution Limits for 2009-2010

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), 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.<sup>1</sup> 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 on the next page for the contribution amount limits applicable for 2009-2010. The inflation adjustments to these limits are made only in odd-numbered years, and—except for the biennial limit—the limits are in effect for the two-year election cycle beginning on the day after the general election and ending on the date of the next general election. The biennial limit covers the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even-numbered year. Please note, however, that these limits do not apply to contributions raised to retire debts from past elections. Contributions may not exceed the contribution limits in effect on the date of the election for which those debts were incurred. 11 CFR 110.1(b)(3)(iii).

<sup>1</sup> The applicable cost of living adjustment amount is 1.216.

The BCRA also introduced a rounding provision for all of the amounts that are increased by the indexing for inflation.<sup>2</sup> 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

<sup>2</sup> 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).

### FEC Web Site Offers Podcasts

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

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

## New Formats for Downloading Data Files, Disclosure Data Blog

At [data.fec.gov](http://data.fec.gov), the Commission is building files that will allow for more sophisticated use of campaign finance data. Each of the files can be downloaded in either .csv or .xml formats. Each also has a metadata page that describes the information included and the structure of the file itself. There is a .pdf version of each file for printing.

On the [Disclosure Data Blog](#), the Commission will post information about the files and future plans, and solicit questions, ideas and suggestions from users.

## 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 excep-

## Contribution Limits for 2009-2010

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates	\$2,400
Individuals/Non-multicandidate Committees to National Party Committees	\$30,400
Biennial Limit for Individuals	\$115,500 <sup>1</sup>
National Party Committee to a Senate Candidate	\$42,600 <sup>2</sup>

<sup>1</sup> This amount is composed of a \$45,600 limit for what may be contributed to all candidates and a \$69,900 limit for what may be contributed to all PACs and party committees. Of the \$69,900 portion that may be contributed to PACs and parties, only \$45,600 may be contributed to state and local party committees and PACs.

<sup>2</sup> This limit is shared by the national committee and the Senate campaign committee.

tion, 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 2008-5 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 exemp-

tions 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).

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Length: 5 pages.

—Myles Martin

### **AO 2008-8 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 li-

censing 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 with-

out 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.<sup>1</sup>

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

This activity would not by itself be sufficient to cause the purchasers to be considered "a group of persons," and thus a political committee. The Commission did not address whether any agreements or collaboration between a creator and a purchaser not involving the corporation would result in the formation of a "group of persons" that would be considered a political committee.

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

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

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—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.

<sup>1</sup> *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.

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.

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—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.

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—Isaac J. Baker