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Regulations

Final Rules on Participation by Federal Candidates and Officeholders at Nonfederal Fundraising Events

On April 29, 2010, the Commission approved final rules addressing participation by federal candidates and officeholders at nonfederal fundraising events. These rules were promulgated in response to the decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III*), which invalidated the portion of the old regulations that permitted federal candidates and officeholders to speak at state, district or local party committee fundraising events “without restriction or regulation.” 11 CFR 300.64(b).

Scope

The final rule covers participation by federal candidates and officeholders at nonfederal fundraising events, which are those fundraising events that are in connection with an election for federal office or any nonfederal election where funds outside the amount limitations and source prohibitions of the Federal Election Campaign Act (the Act) are solicited. The rule addresses participation at the fundraising event and in publicizing the event. It does not cover fundraising events at which

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Advisory Opinions

AO 2010-03

Members of Congress May Solicit Nonfederal Funds for Redistricting Trust

The activities of a trust established to raise funds for pre-litigation and litigation costs arising from the next redistricting process are not considered to be in connection with an election. Therefore, Members of Congress may solicit funds on behalf of the trust outside the limitations and source prohibitions of federal law.

Background

The National Democratic Redistricting Trust (the Trust) was established by individuals, not Members of Congress, to raise funds to pay for the pre-litigation and litigation costs of the next legislative redistricting process. The Trust is run by a trustee and an executive director, neither of whom are Members of Congress. The Trust is not directly or indirectly established, financed, maintained or controlled by any Member of Congress, any authorized candidate committee or any national, state, district or local party committee.

The Trust does not seek to fund attempts to directly influence elec-

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tions. No funds raised will be used to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office. The solicitations of funds will not expressly advocate the election or defeat of any clearly identified candidate.

The Trust asked if Members of Congress could solicit funds on its behalf. These solicitations would request funds that do not comply with the amount limitations or source prohibitions of the Federal Election Campaign Act (the Act). Solicitations by Members of Congress

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would not advocate the election or defeat of any candidate for office.

Analysis

The Bipartisan Campaign Reform Act of 2002 (BCRA) and Commission regulations prohibit federal candidates and officeholders from soliciting, receiving, directing, transferring or spending any funds in connection with an election for federal office unless such funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A); 11 CFR 300.61. BCRA and the Commission's regulations also prohibit federal candidates and officeholders from soliciting, receiving, directing, transferring or spending any funds in connection with an election other than an election for federal office unless the funds are consistent with the Act's amount limitations and source prohibitions. 2 U.S.C. §441i(e)(1)(B); 11 CFR 300.62.

To determine whether Members of Congress can solicit nonfederal funds on behalf of the Trust, the key question is whether the federal candidate or officeholder is soliciting funds in connection with an election, be it a federal or nonfederal election. If the funds being solicited are not raised or spent in connection with an election, they do not fall under the scope of 2 U.S.C. §441i(e).

Since the passage of BCRA, the Commission has addressed the issue of whether certain activities are considered to be in connection with an election. The Commission cited AO 2005-10, in which the Commission found that federal candidates and officeholders were not prohibited from raising funds for committees formed solely to support or oppose ballot measures, including a ballot measure specifically related to redistricting. The committees, as described by the

AO requester, were not established, financed, maintained or controlled by a federal candidate, officeholder or anyone acting on their behalf, or by any party committee. No federal candidates appeared on the same ballot as the ballot measure.

The Commission also cited AO 2003-15, in which the Commission found that a federal candidate's costs for defending against a lawsuit seeking a special general election were not in connection with any election.

In this case, the Trust seeks to engage in litigation over the redistricting process that will govern how the electoral process is conducted in the future. BCRA does not directly address whether redistricting activities are considered to be activities "in connection with" elections. The Commission determined that, although the outcome of redistricting can have political consequences, funds raised and spent on the litigation process surrounding redistricting are not "in connection with" the actual elections.

The Commission concluded that donations to the Trust for the sole purpose of paying the pre-litigation and litigation costs associated with reapportionment and redistricting legal matters are not in connection with any election under 2 U.S.C. §441i(e)(1)(A) and (B). Therefore, the funds are not subject to the limitations and prohibitions of the Act and, accordingly, a Member of Congress may solicit unlimited funds on behalf of the Trust for the purposes of paying the legal expenses associated with the Trust's redistricting efforts.

Date Issued: May 7, 2010;
 Length: 5 pages.

—Isaac J. Baker

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FEC Record to Become a News Site

In an effort to provide more timely and user-friendly information, the *FEC Record* will transition this summer from a print-based online publication to a wholly web-based format that better utilizes the medium. We're excited to improve this already useful resource in a way that will help our readers keep up with FEC-related news even better than before.

Converting the *Record* into a continuously updated news site will allow us to provide campaign finance information in a more timely and responsive manner, adding stories as regulations are approved, advisory opinions are issued and court cases are decided. We will be able to add links within articles that point to related resources, including audio of Commission meetings, advisory opinion documents, *Federal Register* notices and helpful web-based training materials devoted to new or complex areas of the law.

The new *Record* will be more searchable than the old PDF version, with a custom search bar for the site providing more useful results. The categories and tags we've added will make browsing and navigating the *Record* faster and more convenient than before, and you will be able to subscribe to the RSS feed to receive automatic updates as stories are posted. We look forward to our transition this summer and hope you'll let us know how we can continue to improve and better serve our readers.

Advisory Opinions

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AO 2010-04

Determining Composition of Corporation's Restricted Class

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

Background

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

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eligible for Wawa benefits, and there is an expectation of their continued employment.

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

Analysis

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

Questions of whether managers who supervise hourly employees meet the definition of "executive and administrative personnel" depend on whether the managers meet the three criteria of the definition in 11 CFR 114.1(c), summarized

above. Because the managers are salaried employees of the corporation, the question turns on whether the managers have policymaking, managerial, professional or supervisory responsibilities under 11 CFR 114.1(c). The Fair Labor Standards Act (FLSA) and its regulations may serve as a guideline regarding whether individuals have such responsibilities.

In this case, the Commission determined that the five employees qualify as "executive and administrative personnel" because they are salaried employees who have policymaking, managerial or supervisory responsibilities. The Commission concluded that the employees perform duties typical of those performed by managers: they supervise and direct the work of other employees, including other managers and supervisors; they manage staffing, including recruiting, hiring and training employees; and they plan and control the day-to-day activities of their departments and sections. The Commission also found that, under FLSA regulations, the employees run the corporation's business by working at corporate headquarters, and by managing departments or sections that affect Wawa's general business operations. The employees also manage departments that are "customarily recognized" as typically managed by salaried executive employees. Therefore, the managers qualify as "executive and administrative personnel" under 11 CFR 114.1(c).

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

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

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Screen-Fillable Forms 1 and 2 Available on the FEC Website

FEC Form 1 (Statement of Organization) and FEC Form 2 (Statement of Candidacy) are now available in screen-fillable format on the FEC website. This will allow those committees who are registering for the first time or those committees who are filing amendments to these forms to fill them out by typing the required information on their computer rather than handwriting them. Screen-fillable Form 1 is available at <http://www.fec.gov/info/forms.shtml> and screen-fillable Form 2 is available at <http://www.fec.gov/pdf/forms/fecfrm2cand.pdf>.

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and other lower level supervisors from the definition of “executive and administrative personnel,” it did not intend to exclude all supervisors who oversee hourly employees from the definition. Therefore, the fact that the Wawa managers supervise hourly employees does not negate their status as executive or administrative personnel.

Date Issued: April 30, 2010;

Length: 6 pages.

—Zainab Smith

Advisory Opinion Requests

AOR 2010-08

Application of the media exemption and the commercial transaction exemption to documentary films discussing federal candidates (Citizens United, April 27, 2010)

FEC Accepts Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Via and MasterCard. While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment.

Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since prepayment is required, using a credit card or funds placed on deposit can speed the process and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 or 202/694-1120.

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only funds within the limitations and prohibitions of the Act are solicited or those in which funds outside the limitations and prohibitions of the Act are not solicited but are, nevertheless, received. 11 CFR 300.64(a).

Participation at Nonfederal Fundraising Events

A federal candidate or officeholder may attend, speak at and be a featured guest at a nonfederal fundraiser. 11 CFR 300.64(b)(1). He or she is also free to solicit funds at the fundraising event, provided that the solicitation is for funds that are within the limitations and prohibitions of the Act and are consistent with state law.

When the federal candidate or officeholder makes such a solicitation, he or she may limit the solicitation by displaying at the fundraiser a clear and conspicuous written notice, or by making a clear and conspicuous oral statement, that the solicitation is not for Levin funds (when applicable) and does not seek funds in excess of federally permissible amounts or from corporations, labor organizations, national banks, federal government contractors and foreign nationals. 11 CFR 300.62(b)(2). If the federal candidate or officeholder chooses to make an oral statement, it need only be made once.

Publicity for Nonfederal Fundraising Events

New 11 CFR 300.64(c) addresses the publicity for nonfederal fundraisers including, but not limited to, ads, announcements or pre-event invitation materials, regardless of format or medium of the communication.

If the publicity does not contain a solicitation or solicits only federally permissible funds, then the federal candidate or officeholder (or agent of either) is free to consent to the use of his or her name or likeness in the

publicity for the nonfederal fundraiser. 11 CFR 300.64(c)(1)-(2).

If the publicity contains a solicitation for funds outside the limitations or prohibitions of the Act or Levin funds, the federal candidate or officeholder (or agent of either) may consent to the use of his or her name or likeness in the publicity, only if:

- The federal candidate or officeholder is identified in any other manner not specifically related to fundraising, such as a featured guest, honored guest, special guest, featured speaker or honored speaker; and
- The publicity includes a clear and conspicuous oral or written disclaimer that the solicitation is not being made by the federal candidate or officeholder. 11 CFR 300.64(c)(3)(i). Examples of disclaimers are provided in the regulation at 11 CFR 300.64(c)(iv).

However, a federal candidate or officeholder (or agent of either) may not agree to the consent of his or her name or likeness in publicity that contains a solicitation of funds outside the limitations and prohibitions of the Act or of Levin funds if:

- The federal candidate or officeholder is identified as serving in a manner specifically related to fundraising, such as honorary chairperson or member of a host committee; or is identified in the publicity as extending the invitation to the event; or
- The federal candidate or officeholder signs the communication.

These restrictions apply even if the publicity contains a disclaimer. 11 CFR 300.64(c)(v).

In addition, the federal candidate or officeholder is prohibited from disseminating publicity for nonfederal fundraisers that contains a solicitation of funds outside the limitations or prohibitions of the Act

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or of Levin funds. 11 CFR 300.64(c) (iv).

Additional Information

The final rules and Explanation and Justification were published in the May 5, 2010, *Federal Register* (75 FR 24375). They are available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-11.pdf.

The rules are effective June 4, 2010.

—Katherine Wurzbach

Notice of Proposed Rulemaking on Standards of Conduct

On May 17, 2010, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* seeking public comment on proposed revisions to the FEC's "Standards of Conduct," rules that govern the conduct of the Commissioners and employees of the Commission. The Commission plans to update current regulations to reflect statutory changes enacted after the Standards of Conduct were promulgated in 1986, and to bring the regulations in line with those issued by the Office of Government Ethics (OGE) and the Office of Personnel Management (OPM). OGE rules establish a government-wide standard of ethical conduct for the Executive Branch and independent agencies and address issues such as gifts from outside sources, gifts between employees, conflicting financial interests, outside employment activities and others. In addition to the proposed revisions of the Standards of Conduct, the FEC is also proposing new rules that would supplement the OGE's ethical standards.

Proposed Supplemental Regulations in 5 CFR 4701

The FEC and OGE have determined, in view of the FEC's programs and operations, that sup-

plemental regulations are necessary. These supplemental regulations will be issued in a new chapter XXXVII of Title 5 of the Code of Federal Regulations (CFR).

Proposed 5 CFR 4701.101 indicates that regulations of 5 CFR part 4701 apply to Commissioners and employees of the Commission.

The Commission, in concurrence with OGE, proposes moving its requirement for prior approval of some outside employment and activities from 11 CFR part 7 of the Commission's regulations to new chapter XXXVII, with certain modifications. Proposed 5 CFR 4701.102 requires prior approval from the Designated Agency Ethics Official (DAEO) for outside activities that are related to the employee's official duties or involved the same specialized skill set or educational background used in the employee's duties at the FEC. The proposed rules would require an FEC employee to submit approval requests through all the employee's supervisors before submission of approval to the DAEO. Proposed 5 CFR 4701.102(d) would lay out a standard for approval of an employee's request. Approval would depend on whether the outside employment or activity would create conflicting financial interests, a lack of impartiality in performing official duties, the misuse of a government position and whether the activity complies with other federal regulations. The prior approval requirement would no longer apply to special Government employees hired by the Commission. The Commission seeks comment on these proposed rules and asks the public if there is an alternative system of seeking approval and, if so, how the alternative should be structured.

Proposed Revisions to the Commission's Standards of Conduct in 11 CFR Part 7

Many Commission regulations at 11 CFR Part 7 have been supplanted by OGE regulations. The Commission proposes to remove those regulations and to retain some provisions that are informational and procedural in nature.

Proposed regulations at 11 CFR 7.1(a) state that the regulations in 11 CFR part 7 apply to Commissioners and all employees of the FEC. Proposed 11 CFR 7.1(b) would detail the regulations in Title 5 of the CFR and proposed 5 CFR part 4701 that would relate to ethical conduct of Commission employees.

Revised 11 CFR 7.2 would continue to lay out definitions of terms such as "employee" and "Designated Agency Ethics Officer" used in 11 CFR Part 7.

The NPRM also proposes 11 CFR 7.3, which would revise the regulations related to interpretation and advisory service. The proposed regulations clarify that an FEC employee may request interpretations of 5 CFR from the Director of OGE.

Proposed 11 CFR 7.4 would require the reporting of suspected violations of the FEC's Standards of Conduct and OGE's Standards of Ethical Conduct.

Proposed 11 CFR 7.5 would inform FEC employees that violating FEC and OGE ethics rules may result in corrective, disciplinary or adverse action, in addition to any other penalties prescribed by law.

Other proposed revisions focus on the prohibition of making complaints and investigations public, Commissioners and Commission employees conducting activity with political organization and other associations and post-employment conflicts of interests.

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Comments

The NRPM was published in the May 17, 2010, *Federal Register*. The full NPRM is available on the FEC website at http://www.fec.gov/pdf/nprm/standards_of_conduct/notice_2010-05.pdf.

All comments must be received by June 16, 2010, and must be made in writing, be addressed to Robert M. Knop, Assistant General Counsel, and submitted via e-mail, fax or paper copy. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Email comments must be sent to ethics-rules@fec.gov. Faxed comments must be sent to (202) 219-3923, with a paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, 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.

—Isaac J. Baker

Hearings on Coordinated Communications Rules

On March 2 and 3, 2010, the Commission held public hearings on proposed changes to the coordinated communications regulations in response to the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) (*Shays III*). At issue in the rulemaking are the content and the conduct standards of the coordinated communications regulations, at 11 CFR 109.21. The Commission also proposes adding a safe harbor for certain public communications in support of 501(c)(3) organizations and a safe harbor for certain

business and commercial communications. Eleven witnesses,¹ representing party committees, non-profit organizations, business associations and election law practitioners, testified before the Commission on the proposed changes.

Background

When a person pays for a public communication that is coordinated with a candidate, authorized committee or party committee, the communication is an in-kind contribution to that candidate or committee.² The current regulations provide for a three-part test to determine whether a communication is coordinated. The three prongs consider the source of the payment (payment prong); the subject matter of the communication (content prong); and the interaction between the person paying for the communication and the candidate,

¹The witnesses who testified before the Commission were Paul Ryan, representing the Campaign Legal Center; Craig Holman, with Public Citizen; Steve Hoersting from the Center for Competitive Politics; Michael Trister, representing Alliance for Justice; Laurence Gold, representing the AFL-CIO; Jan Witold Baran, representing the Chamber of Commerce of the United States of America; Clea Mitchell from Foley & Lardner LLP; Sean Cairncross, representing the National Republican Senatorial Committee; Jessica Furst, representing the National Republican Congressional Committee; William McGinley from Patton Boggs LLP; and Marc Elias, representing the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee.

²Separate rules regulate communications paid for by political party committees and coordinated with candidates or their authorized committees; however, the Commission did not propose revisions to those rules since they were not addressed by the Court of Appeals in *Shays III*.

authorized committee or party committee (conduct prong).

The Content Prong

Under the current regulations, the content prong of the coordinated communication test contains four standards: express advocacy; electioneering communications; republication of campaign materials; and references to a candidate or party committee distributed in certain jurisdictions within either 90 days or 120 days before an election.

The Court of Appeals in *Shays III* found that the Commission's application of the express advocacy standard as the only content standard outside of the 90/120 day window was contrary to the Bipartisan Campaign Reform Act's (BCRA) purpose and does not rationally separate election-related speech from other advocacy. In response to the appellate court's decision, the Commission issued a Notice of Proposed Rulemaking (NPRM) that sought comments on proposed revisions to the coordinated com-

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FEC Updates Electronic Format and FECFile Filing Software

Beginning June 1, 2010, FECFile Version 6.4.2.0 will be available from the Commission's website at <http://www.fec.gov/electfil/updatelist.html>. Installation of the updated software is mandatory. The new version of FECFile is compatible with Microsoft Windows 7, has an auto-update feature and has an overall new look. A list of the changes to the software is available at that link as well.

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munications rules.³ Specifically, the Commission proposed retaining the existing content standards at 11 CFR 109.21(c) and:

- Adopting a content standard to cover public communications that promote, support, attack or oppose (PASO) a political party or clearly identified federal candidate (the PASO standard);
- Adopting a content standard to cover public communications that are the “functional equivalent of express advocacy,” as articulated in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (the Modified *WRTL* standard);
- Clarifying that the existing content standard includes express advocacy as defined under both 11 CFR 100.22(a) and (b); and/or
- Adopting a standard that pairs a public communication standard with a new conduct standard (the Explicit Agreement standard).

Witness testimony at the hearing focused on the proposed PASO and Modified *WRTL* standards. A summary of the testimony concerning each is provided below.⁴

The PASO Standard

The PASO standard would be satisfied if a public communication promoted, supported, attacked or opposed a political party or a

³ The Commission issued a Supplemental Notice of Proposed Rulemaking on February 10, 2010, seeking comment on the effect of the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. ____ (2010), on the Commission’s proposals in the NPRM.

⁴ To read the Commission’s Proposed Rules on Coordinated Communications go to: http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf. Written comments and a transcript of the hearing are at http://www.fec.gov/law/law_rulemakings.shtml#coordinationshays3.

clearly identified federal candidate. It would replace, but also incorporate, the express advocacy standard. The Commission also is considering whether to define PASO and offered two possible approaches: Alternative A would provide a specific definition for each of the component PASO terms, which would apply when any one of those terms is used in conjunction with one or more of the other terms. Alternative B would utilize a multi-prong test to determine whether a given communication PASOs a federal candidate.

Paul Ryan and Craig Holman testified in support of the Commission’s adoption of the PASO standard. Both witnesses felt that the PASO standard best addressed the appellate court’s concerns in *Shays III*, and was a clear standard that has withstood Supreme Court scrutiny. Mr. Ryan testified that the PASO standard would effectively capture any election-related communications taking place outside of the 90/120 day windows and noted that the Supreme Court wrote that persons of ordinary intelligence understand what PASO means. Mr. Holman noted the importance of effective coordination rules to prevent circumvention of contribution limits, especially since the dynamics of communications post-*Citizens United* are still unclear. Mr. Holman felt that the PASO standard would effectively guard against communications that circumvent the limits, without regulating lobbying or grassroots activity.

Sean Cairncross, on the other hand, testified that it is difficult to identify what is and is not PASO, which could chill speech. Michael Trister expressed concern that a PASO standard was overly broad and could sweep up legislative advocacy and grassroots lobbying.

The Modified *WRTL* Standard

The Modified *WRTL* Standard would apply to any public communication that is the “functional equivalent of express advocacy,” that is,

if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate. This standard would apply without regard to the timing of the communication or the targeted audience.

Seven witnesses⁵ testified in support of the Modified *WRTL* Standard. Jan Baran, for example, testified that this standard is an extension of Supreme Court precedent and was a familiar standard that had been used effectively by different types of speakers. In supporting the Modified *WRTL* Standard, Ms. Furst and Mr. Cairncross testified that the Modified *WRTL* Standard was clear and well-defined. Laurence Gold also expressed a need for unions and other groups to have reasonable regulations to follow in conducting their policy and election-related activities and that, although the Modified *WRTL* Standard was not perfect, it provided clear guidance for committees to follow. Mr. Trister felt that the appeal to vote standard would distinguish electoral from non-electoral activity and would avoid “endless” litigation on the subject.

Mr. Ryan and Mr. Holman, on the other hand, testified that the *WRTL* appeal to vote test was inapplicable to communications coordinated with candidates. Mr. Holman testified that the standard was very narrow and would not satisfy the appellate court’s concerns in *Shays III*.

The Conduct Prong

The *Shays III* appellate court also found that the Commission failed to justify the change in the coordinated communication’s common vendor/former employee conduct standards from the “current election cycle” to

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⁵ Steve Hoersting, Michael Trister, Jan Witold Baran, Sean Cairncross, Jessica Furst, William McGinley and Laurence Gold testified in support of the *WRTL* Standard.

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a 120-day period. The current regulations regarding common vendors provide that the conduct prong is satisfied if:

- The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor to create, produce or distribute the communication; and
- The commercial vendor has provided certain enumerated services to the candidate who is 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, and the commercial vendor uses or conveys to the person paying for the communication information about the plans, projects, activities or needs of the candidate, the candidate's opponent or political party committee that is material to the creation, production or distribution of the communication, or information used previously by the commercial vendor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or the political party committee that also is material to the creation, production or distribution of the communication. 109.21(d)(4).

Similarly, the regulations regarding former campaign employees provide that the conduct prong 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 who is 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; and

- The former employee or independent contractor uses or conveys to the person paying for the communication information about the campaign plans, projects, activities or needs of the clearly identified candidate, the candidate's opponent or a political party committee, and that information is material to the creation, production or distribution of the communication; or conveys to the person paying for the communication information used by the former employee or independent contractor in providing services to the candidate who is 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, and that information is material to the creation, production or distribution of the communication. 109.21(d)(5).

The Commission proposed the following alternative revisions to the common vendor and former employee conduct standards:

- Retain the 120-day temporal limit and provide additional justification for the period;
- Delete the phrase "the previous 120 days" from 11 CFR 109.21(d)(4)(ii) and (d)(5)(i) and replace it with "the two-year period ending on the date of the general election for the office or seat that the candidate seeks"; or
- Amend 109.21(d)(4)(ii) and (d)(5)(i) by replacing the existing 120-day period with a "current election cycle" period.

William McGinley encouraged the Commission to adopt the first alternative and to provide additional justification for the current regulation. Mr. Cairncross and Ms. Furst also encouraged the Commission to retain the current limit. They felt that there was a short "shelf-life" to campaign-related information and that the regulations should not further restrict a committee's ability to hire vendors and employ individuals that have no material information. Mr. Baran encouraged the Commission to retain the current limit because he said it is a familiar standard that seems to work for the regulated community. He also encouraged the Commission to look to the polling regulations as an example when considering the time periods and stated that polls lose value after 180 days. He stated that this may be relevant to whether an employee's knowledge is valuable after leaving the campaign. Ms. Mitchell added that the polling regulations are outdated, and that polls no longer retain their value for even 180 days.

Mr. Ryan instead supported a two-year or "current election cycle" period as appropriate for approximating the length of time that a vendor or campaign employee is likely to possess information useful to the campaign. Mr. Trister encouraged the Commission to eliminate the common vendor/former employee standards. He felt that the general conduct standards in 109.21(d)(1)-(3) should apply regardless of when a vendor or employee worked on a campaign. He also testified that, should the Commission retain the common vendor and former employee conduct standards, he supported shortening the time periods.

Proposed Safe Harbors

Finally, the Commission proposed adding new safe harbors for certain communications in support

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Regulations

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of 501(c)(3) organizations and for certain business and commercial communications. The first proposed safe harbor would address public communications in which federal candidates endorse or solicit support for 501(c)(3) non-profit entities, or for public policies or legislative proposals espoused by those organizations. Mr. Ryan opposed a safe harbor for such solicitations during the 90/120 day pre-election window, on the ground that it would open the door for candidates to coordinate with such groups in ways intended to influence elections, but he endorsed a PASO standard outside of those timeframes. Mr. Gold and Mr. Hoersting stated that because 501(c)(3) organizations are already wary of dealing with candidates and are hesitant to engage in the type of political activity that would threaten their tax-exempt status, no such danger is posed by a safe harbor.

The second proposed safe harbor, which Mr. Ryan supported, would address certain communications made for commercial or business purposes.

Additional Information

The Notice of Proposed Rulemaking, Supplemental Notice of Proposed Rulemaking, public comments submitted in response to these proposals and a transcript of the hearing are available on the FEC's website at http://www.fec.gov/law/law_rulemakings.shtml#coordinationshays3.

—Zainab Smith

Website

Candidate Disbursements Search Feature Available on Website

The Commission has introduced a new Candidate Disbursements feature on its website, which provides downloads of itemized disbursements reported by U.S. House and Senate candidate committees for the 2010 election cycle. Although disbursement data for House candidates had been previously downloadable from the FEC's website, this new feature provides the public with an easy-to-use, one-step tool for accessing data that up to now had taken several steps to put in searchable form. This also marks the first time that the public has had the ability to download Senate candidate data electronically.

"The FEC's Candidate Disbursements tool is part of an ongoing effort to make the FEC website more comprehensive, user-friendly and intuitive, and is another step the agency is taking to make the electoral process more transparent to the American people," said Commission Chairman Matthew S. Petersen.

The new feature allows users to download itemized disbursements data for a candidate by selecting the appropriate state for Senate candidates and the appropriate state and Congressional district for House candidates. Bulk downloads for all House and Senate candidate committees are accessible as well. Files are available in XML and CSV formats and can be found in the Disclosure Database Catalog under the Campaign Finance Reports and Data section of the agency's homepage, www.fec.gov.

—Myles Martin

Nonfilers

Committees Fail to File Pre-Election Reports

The Commission cited several campaign committees for failing to file the 12-Day Pre-Election Reports required by the Federal Election Campaign Act (the Act).

North Carolina Pre-Primary Report

The Commission cited two campaign committees for failing to file the 12-Day Pre-Primary Election Report required by the Act for the North Carolina primary election held on May 4, 2010.

As of April 30, 2010, the required disclosure report had not been received from:

- George Hutchins for U.S. Congress (NC-4); and
- Dr. Dan 4 Congress (NC-11).

The reports were due on April 22, 2010, and should have included financial activity for the period April 1, 2010, through April 14, 2010. If sent by certified or registered mail, the report should have been post-marked by April 19, 2010.

The Commission notified committees involved in the May 4 North Carolina primary election of their potential filing requirements on March 29, 2010. Those committees that did not file on the due date were notified on April 23, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Ohio Pre-Primary Report

The Commission cited a campaign committee for failing to file the 12-Day Pre-Primary Election Report required by the Act for the Ohio primary election held on May 4, 2010.

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Nonfilers

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As of April 30, 2010, the required disclosure report had not been received from:

- Citizens for MacNealy (OH-3).

The report was due on April 22, 2010, and should have included financial activity for the period April 1, 2010, through April 14, 2010. If sent by certified or registered mail, the report should have been post-marked by April 19, 2010.

The Commission notified committees involved in the May 4 Ohio primary election of their potential filing requirements on March 29, 2010. Those committees that did not file on the due date were notified on April 23, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Utah Pre-Convention Report

The Commission cited a campaign committee for failing to file the 12-Day Pre-Convention report required by the Act for Utah's Convention held on May 8, 2010.

As of May 5, 2010, the required disclosure report had not been received from:

- Committee to Elect Christopher Stout.

The report was due on April 26, 2010, and should have included financial activity for the period April 1, 2010, through April 18, 2010. If sent by certified or registered mail, the report should have been post-marked by April 23, 2010.

The Commission notified committees involved in the Utah Convention of their potential filing requirements on April 2, 2010.

Those committees that did not file on the due date were sent notification on April 27, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Oregon Pre-Primary Report

The Commission cited a campaign committee for failing to file the 12-Day Pre-Primary Election Report required by the Act for Oregon's primary election held on May 18, 2010.

As of May 14, 2010, the required disclosure report had not been received from:

- Germond for Congress (OR-4).

The report was due on May 6, 2010, and should have included financial activity for the period April 1, 2010, through April 28, 2010. If sent by certified or registered mail, the report should have been post-marked by May 3, 2010.

The FEC notified committees involved in the Oregon primary election of their potential filing requirements on April 12, 2010. Those committees that did not file on the due date were sent notification on May 7, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Additional Information

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000

or less, he or she is not considered a "candidate" subject to reporting under the Act.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the Commission broad authority to initiate enforcement actions, and the Commission has implemented an Administrative Fine program with provisions for assessing monetary penalties.

—Myles Martin

Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site (www.fec.gov).

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

Outreach

Washington, DC, Conference for Trade Associations, Membership Organizations and Labor Organizations

The Commission will hold its annual conference for trade associations, membership organizations and labor organizations and their PACs in Arlington, VA, on June 8-9, 2010. Commissioners and staff will conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. For additional information, to view the conference agenda or to register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2010/tradememberlabor10.shtml>.

Hotel Information. The conference will be held at the DoubleTree Crystal City Hotel in Arlington, VA (near the Pentagon). A room rate of \$226 single/\$246 double is available to conference attendees who make reservations on or before May 7, 2010. To make your hotel reservations and reserve this group rate, call 1-800-HHONORS and identify yourself as attending the Federal Election Commission conference. The hotel is walking distance (10 minutes) from the Pentagon City Metro subway station. The FEC recommends waiting to make hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

Registration Information. The registration fee is \$550 per attendee, which includes a \$25 non-refundable transaction fee. For additional information, or to register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2010/tradememberlabor10.shtml>.

FEC Conference Questions

Please direct all questions about the June conference registration and fees to Sylvester Management Corporation at 1-800/246-7277 or by e-mail to toni@sylvestermanagement.com. For all questions about the conference program, or to receive e-mail notification of upcoming conferences and workshops, call the FEC's Information Division at 1-800/424-9530 (press 6) or locally at 202/694-1100, or send an e-mail to Conferences@fec.gov.

—Dorothy Yeager

FEC to Host Reporting and E-Filing Workshops June 30

On June 30, 2010, the Commission will host roundtable workshops on reporting and electronic filing. The reporting sessions will address common filing problems and provide answers to questions committees may have as they prepare to file their July Quarterly and Monthly reports. The electronic filing sessions will provide hands-on instruction for committees that use the Commission's FECFile software and will address questions filers may have concerning electronic filing. Attendance is limited to 50 people per reporting workshop and 16 people per electronic filing workshop; the registration fee is \$25 per workshop. The registration form is available on the FEC's website at <http://www.fec.gov/info/outreach.shtml#roundtables> and from Faxline, the FEC's automated fax system (202/501-3413, request document 590). For more information, please call the Information Division at 800/424-9530, or locally at 202/694-1100.

—Kathy Carothers

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- 2009-31: Employees may use credits to make contributions to SSF, 3:10
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FEC Headquarters
Washington, DC
June 30, 2010

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FECFile and E-Filing for Candidate Committees, 9:30 a.m.-11:00 a.m.

Reporting for Candidate Committees, 1:00 p.m.-2:30 p.m.

FECFile and E-Filing for PACs and Party Committees, 1:00 p.m.-2:30 p.m.

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 Hawaii Special Election Reporting: 1st District, 4:7
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 PAC activity remains steady in 2009, 5:7
 Party committees report slight increase in 2009 receipts, 4:13

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- Candidate Disbursements search feature available on website, 6:10

PACronyms, Other PAC Publications Available

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

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

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

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

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

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

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

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