

# Record

October 2010

Federal Election Commission

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For reporting dates for the NY-29 Special General Election on November 2, 2010, see the FEC's reporting page at [http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml).

## Reports

### October Reporting Reminder

The following reports are due in October:

- All principal campaign committees of House and Senate candidates must file a quarterly report by October 15, 2010. The report covers financial activity from July 1 (or the day after the closing date of the last report) through September 30;
- Principal campaign committees of Presidential candidates must file a report by October 15, if they are quarterly filers (the report covers financial activity from July 1 through September 30), or by October 20, if they are monthly filers (the report covers activity for the month of September);
- National party committees, political action committees (PACs) following a monthly filing schedule and state, district and local party committees that engage in reportable "federal election activity" (see "State, District and Local Party Committees, on page 6) must file a monthly report by October 20. This report covers activity for the month of September. 11 CFR 104.5; and

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## Regulations

### Final Rules on Coordinated Communications

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

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

### Background

Commission regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) established a three-prong test for determining whether a communication is coordinated with a candidate, a candidate's authorized committee, a political party committee or the agents of any of these. Coordinated communications generally result

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in an in-kind contribution. The test includes a payment prong, a content prong and a conduct prong. The content and conduct prong each include several standards, and satisfying any one of the standards within a prong satisfies that prong of the test. 11 CFR 109.21(a)(1)-(3).

Various aspects of the coordinated communications test were challenged in court. The new regulations respond to the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Shays III Appeal*. In that decision, the court held that the Commission's decision to

have an "express advocacy" standard as the only content standard that applies outside of 90-day and 120-day windows before an election runs counter to the purpose of BCRA and the Administrative Procedure Act. The court noted that the FEC "must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside [the Act's] expenditure definition.'" In addition, the court invalidated the 120-day period used in the existing conduct prong to determine whether a common vendor or former campaign employee's relationship with a candidate committee or party committee would satisfy the prong. 11 CFR 109.21(d)(4) and (d)(5). The court found that the Commission failed to justify its decision to apply a 120-day window.

### New Content Standard

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

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

The new content standard is an objective, well-established standard. The functional equivalent of express advocacy test has been developed by the Supreme Court to apply to a wide range of speakers as a stand-alone test for separating election-

related speech that is not express advocacy from non-election related speech. The new content standard applies to all speakers subject to the coordinated communications rules at 11 CFR 109.21, including individuals and advocacy organizations, without regard to when a communication is made or its intended audience. As required by *Shays III Appeal*, the new content standard also captures more communications than the express advocacy content standard outside of the 90-day and 120-day time windows.

### Conduct Standards

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

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

The former employee/independent contractor conduct standard is satisfied if the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's

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authorized committee or a political party committee during the previous 120 days. Additionally, the former employee or independent contractor must use, or convey to the person paying for the communication, information about the plans, projects, activities or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. 109.21(d)(5).

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

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

There is no information in the rulemaking record showing that use or conveyance by common vendors and former employees of information material to public communications outside of the 120-day period

has become problematic in the time the 120-day period has been in effect. The Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

### Safe Harbor for Certain Business and Commercial Communications

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

### Additional Information

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

—Myles Martin

## Final Rules for Definition of Federal Election Activity

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

### Scope

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

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

### Definition of “Voter Registration Activity”

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

- Encouraging or urging potential voters to register to vote, whether by mail, e-mail, in person, by telephone or by any other means;

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

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

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

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

### Definition of "GOTV Activity"

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

identifies the following activities as GOTV activity:

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

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

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

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

### Brief, Incidental Exhortation

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

to ensure that communications that would not otherwise be voter registration activity or GOTV activity do not become so merely because they include a brief, incidental exhortation to register to vote or to vote.

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

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## Legal History of the Presidential Election Campaign Fund Act Available from the FEC

The FEC's Law Library is making available case-bound copies of the *Legal History of the Presidential Election Campaign Fund Act* in two volumes. Compiled and printed by agency staff in 1984, these editions provide an exhaustive historical record of the bills, accompanying reports and floor debates from which the present law originated. The material is presented in chronological fashion, starting with the 1957 Gore Report, which examined the campaign contributions and expenditures during the 1956 federal elections. These volumes are available to the public free of charge. They can be obtained at the Federal Election Commission's headquarters at 999 E Street NW, Washington, DC, 20463. To obtain a copy, please contact Leta Holley at [lholley@fec.gov](mailto:lholley@fec.gov) or (202) 694-1516.

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incidental and would not qualify for the exception from the definition of GOTV activity. Additional examples of exhortations that would qualify for the exception are provided in the final rules.

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

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

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

### Activities Involving De Minimis Costs

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

ing activities from the FEA funding restrictions:

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

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

### Additional Information

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

—Zainab Smith

## Reports

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- Pre-General reports are due on October 21 (close of books, October 13). Candidate committees must file this report if their candidate is running in the general election. PACs and party committees that file quarterly must file this report if they make contributions or expenditures in connection with the general election during the October 1-13 reporting period. PACs and party committees that file on a monthly schedule **must** file the Pre-General report in lieu of the regular November 20 monthly report.

### Notification of Filing Deadlines

In addition to publishing this article, the Commission notifies committees of filing deadlines on its website, via its automated Faxline and through reporting reminders called prior notices. Prior notices are distributed exclusively by electronic mail. For that reason, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address. To amend Form 1, electronic filers must submit Form 1 filled out in its entirety. Paper filers should include only the committee's name, address, FEC identification number and the updated or changed portions of the form.

### Treasurer's Responsibilities

The Commission provides reminders of upcoming filing dates as a courtesy to help committees comply with the filing deadlines set forth in the Federal Election Campaign Act (the Act) and Commission regulations. Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline. Accordingly, reports filed by methods

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other than electronically, or other than Registered, Certified or Overnight Mail must be received by the Commission's (or the Secretary of the Senate Public Records Office's) close of business on the last business day before the deadline.

### Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures, in excess of \$50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC elec-

tronically.<sup>1</sup> Reports filed electronically must be received and validated by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the applicable filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines. 11 CFR 104.18(e).

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial copy of their reports with the Commission in order to speed disclosure. The Commission's electronic filing software, FECFile, is free and can be downloaded from the FEC's website. New FECFile Version 6.4.2.0 is available for download from the FEC website at <http://www.fec.gov/electfil/updatelist.html>. All reports filed after June 1, 2010, must be filed in Format Version 6.4.2.0 (the new version). Reports filed in previous formats will not be accepted. Filers may also use commercial or privately developed software as long as the software meets the Commission's format specifications, which are available on the Commission's website. Committees using commercial software should contact their vendors for more information about the Commission's latest software release.

### Timely Filing for Paper Filers

*Registered and Certified Mail.* Reports sent by registered or certi-

fied mail must be postmarked on or before the mailing deadline to be considered timely filed. A committee sending its reports by certified or registered mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

*Overnight Mail.* Reports filed via overnight mail<sup>2</sup> will be considered timely filed if the report is received by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

*Other Means of Filing.* Reports sent by other means—including first class mail and courier—must be received by the FEC (or the Secretary of the Senate Public Records Office) before close of business on the filing deadline. See 11 CFR 100.19 and 104.5(e).

Paper forms are available for downloading at the FEC's website (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413). The 2010 Reporting Schedule is also available on the FEC's website ([http://www.fec.gov/info/report\\_dates\\_2010.shtml](http://www.fec.gov/info/report_dates_2010.shtml)), and from Faxline. For more information on reporting, call the FEC at 800/424-9530 or 202/694-1100.

### State, District and Local Party Committees

State, district and local party committees that engage in certain

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## FEC Offices Open Extended Hours for October 15 Reports

The FEC's Reports Analysis Division (RAD) and Electronic Filing Office will be open until 8:00 p.m. (EDT) on Friday, October 15, to help committees complete and file their quarterly reports. RAD analysts will be available to answer committees' questions on reporting specific transactions, and E-Filing staff will be on hand to address any technical issues filers may encounter. To reach these offices, call 800-424-9530 and press 4 for the E-Filing Office or press 5 for RAD. Locally, call RAD at (202) 694-1130 and the E-Filing Office at (202) 694-1307.



<sup>1</sup>The regulation covers individuals and organizations required to file reports of contributions and/or expenditures with the Commission, including any person making an independent expenditure. Disbursements for "electioneering communications" do not count toward the \$50,000 threshold for mandatory electronic filing. 11 CFR 104.18(a).

<sup>2</sup>"Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system.

## Reports

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levels of “federal election activity” must file on a monthly schedule. See 11 CFR 300.36(b) and (c)(1). Committees that do not engage in reportable “federal election activity” may file on a quarterly basis in 2010. See 11 CFR 104.5(c)(1)(i).

### National Party Committees

National committees of political parties must file on a monthly schedule in all years. 2 U.S.C. §434(a)(4)(B) and 11 CFR 104.5(c)(4).

### Political Action Committees

PACs (separate segregated funds and nonconnected committees) that filed on a semi-annual basis in 2009 file on a quarterly basis in 2010. Monthly filers continue on the monthly schedule. PACs may change their filing schedule, but must first notify the Commission in writing. Electronic filers must file this request electronically. A committee may change its filing frequency only once a year, after giving notice of change in filing frequency to the Commission. The committee will receive a letter indicating the Commission’s acknowledgment of the request. All future reports must follow the new filing frequency. 11 CFR 104.5(c).

### Additional Information

For more information on 2010 reporting dates:

- See the reporting tables in the January 2010 *Record*;
- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Fax the reporting tables to yourself using the FEC’s Faxline (202/501-3413, document 586); or
- Visit the FEC’s web page at [http://www.fec.gov/info/report\\_dates\\_2010.shtml](http://www.fec.gov/info/report_dates_2010.shtml) to view the reporting tables online.

—Elizabeth Kurland

## Advisory Opinions

### AO 2010-14

### Using Recount Funds to Pay Recount Expenses Before Election Day

The Democratic Senatorial Campaign Committee (DSCC) may use its recount funds before the general election to pay expenses incurred preparing for possible general election recounts. Additionally, the DSCC may allocate the cost of certain expenses that are attributable to both recount and campaign activities between its principal campaign account and its recount fund.

#### Background

The DSCC asks if it may make disbursements from its recount fund before the date of the general election to prepare for potential recounts and election contests that may occur in connection with the results of the general election. Such planned expenses include retaining the services of attorneys and staff to research state laws on recounts and election contests, developing plans and budgets for anticipated recounts and recruiting volunteers to help with the recount process. All of these disbursements, and the activities funded with these disbursements, will be dedicated solely to post-election recounts and contests, and will not be usable for any pre-election campaign activities, such as get-out-the-vote activity, voter registration and polling. The DSCC also asks if it may use recount funds to defray the costs of soliciting donations to its recount fund.

Additionally, the DSCC asks if it may allocate the cost of certain expenses that are attributable to both recount activities and campaign activities between its principal campaign account and its recount fund. These expenses consist of: (1) the payment of salaries and benefits

to staff who will divide their time between working on campaign activities and preparing for possible recounts or contests, and (2) the expenses of fundraising attributable to the solicitation of both recount funds and campaign funds. The DSCC asks whether it may allocate the fundraising expenses on a “funds received” basis. See, e.g. 11 CFR 106.1(a) and 106.7(d)(4).

#### Analysis

The DSCC may use recount funds before the date of the general election to retain attorneys and staff for possible recounts and election contests, to pay for legal and other research in preparation for a recount or election contest and to defray the costs of soliciting contributions to the recount fund. Additionally, the DSCC may allocate expenses attributable to the solicitation of recount funds and campaign funds based on the “funds received” formula in 11 CFR 106.1(a), and may also allocate the salary and benefits of staff who work on both recount and campaign activities. However, none of these activities, or their results, may be used for campaign activity before Election Day, and the DSCC must account for and report the use of these funds according to the procedures set forth below.

In 2009, the Commission concluded that the DSCC could create a recount fund and use that fund to pay for expenses incurred in connection with recounts and election contests of federal elections. Neither the Federal Election Campaign Act (the Act) nor Commission regulations and advisory opinions address when recount funds may be raised or spent. On its face, the exclusion of donations and disbursements “made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election” from the definitions of “contribution” and “expenditure”

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is not limited to the post-election period. 11 CFR 100.91, 100.151.

In contrast, Commission regulations do speak to the time frame during which other types of funds may be spent, such as the requirement that general election contributions be refunded if a candidate does not become a candidate in the general election. 11 CFR 102.9(e)(3). However, the Commission has, in limited circumstances, approved disbursements similar to those at issue here. In 1986, the Commission concluded that a candidate may spend general election funds prior to the date of his or her primary election in cases where it was “necessary to make advance payments to vendors for services that [would] be rendered . . . with respect to the [potential] general election” and that would not “influence the primary election or nominating process or . . . [be] for goods or services to be used in both the primary and general elections.” AO 1986-17.<sup>1</sup> Likewise, the DSCC proposes to retain the services of attorneys and staff to conduct research and make preparations for a potential recount or contest that will take place (if at all) after the general election. Accordingly, the DSCC may use recount funds to pay recount-related expenses incurred before Election Day.

Commission regulations generally permit—and occasionally require—the proceeds of fundraising activities be used to defray the costs of those activities. For example, a joint fundraising committee is required to deduct the participants’ allocable share of expenses before distributing proceeds from the event. 11 CFR 102.17(c)(7)(i)(A). The DSCC

may therefore use recount funds to defray the costs of soliciting donations to the recount fund. However, when holding fundraising events at which the DSCC will raise contributions and recount funds, the recount solicitations must clearly state the purpose of the fund and note that no donations to the fund will be used to influence any federal election. See, e.g. 11 CFR 9003.3(a)(1)(A).

Neither the Act nor Commission regulations and advisory opinions address the allocation of expenses incurred for both recount and campaign activities. However, Commission regulations do generally permit (and in some cases require) the allocation of expenses attributable to more than one purpose. 11 CFR 102.5(a), Part 106, Part 300, and 9003.3(a)(2)(ii). Although these regulations do not apply here, they generally stand for the proposition that allocation is appropriate when funding activities with multiple purposes.

The DSCC’s proposal to allocate its fundraising costs based on the ratio of funds received for its principal campaign account to its total receipts from each fundraising program or event is appropriate. See, e.g. 11 CFR 106.7(d)(4). The DSCC may make an initial payment for all of the fundraising expenses, both campaign-related and recount-related, from its principal campaign account, and then reimburse its principal campaign account from the recount fund for the proportion of the total fundraising expenses attributable to recount activities. The reimbursement must be made within sixty days after payment is made from the principal campaign account.

The allocation of salaries and wages between federal and nonfederal accounts of state and local party committees is determined by the percentage of time each employee spends in connection with a federal election, as shown in monthly logs. The DSCC’s proposal

to allocate staff salary and benefits between the recount fund and principal campaign account based upon a monthly log is permissible, so long as the DSCC keeps records indicating which duties are considered recount activities and which are considered election contest activities and a monthly log recording the percentage of time each employee spends on campaign activities as opposed to recount activities. See 11 CFR 106.7(d)(1) and 9003.3(a)(2)(ii)(C).

### Reporting

The DSCC must report all disbursements from its recount fund in accordance with 2 U.S.C. §434(a) and (e) and 11 CFR 104.3 and 300.13(a). When reporting allocated activities, the DSCC must disclose the entire amount paid by the principal campaign account for the cost of fundraising and the salaries and benefits of employees who spend some of their time on recount activities and some of their time on campaign activities, as well as the reimbursement from the recount account.

Date Issued: August 26, 2010;

Length: 8 pages.

—Christopher Berg

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### Need FEC Material in a Hurry?

Use FEC Faxline to obtain FEC material fast. It operates 24 hours a day, 7 days a week. Hundreds of FEC documents—reporting forms, brochures, FEC regulations—can be faxed almost immediately.

Use a touch tone phone to dial **202/501-3413** and follow the instructions. To order a complete menu of Faxline documents, enter document number 411 at the prompt.

<sup>1</sup> Such advance payments are limited to goods or services that are provided or rendered after a candidate has established his or her candidacy for the general election. AO 1986-17.

## Advisory Opinions

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### AO 2010-15

#### Candidate May Receive Refund from His Committee

A candidate who made undesignated contributions to his authorized campaign committee and is not a candidate in the general election may receive refunds, even though the contributions were reported as primary election contributions.

#### Background

Douglas Pike was a first-time Democratic candidate for the House of Representatives in the May 18, 2010, primary in Pennsylvania's Sixth District. In December of 2009 Mr. Pike gave \$340,000 in personal funds to Pike for Congress, his principal campaign committee (the Committee). In March he made another contribution of \$100,000. Neither of these contributions was designated for a particular election, although the candidate maintained they were intended for the general election.

In its year-end 2009 report and its April 2010 quarterly report, the Committee reported these two of Mr. Pike's contributions as primary election contributions. Mr. Pike made other contributions to the Committee, totaling more than \$600,000, which Mr. Pike maintains were meant for the primary election, and were reported as such.

After losing the primary, Mr. Pike was no longer a candidate. Therefore, the committee refunded all the contributions it received for the general election from other contributors. After doing so, the Committee had no outstanding debts and almost \$550,000 leftover in its account. The Committee asked if it could refund contributions totaling \$440,000 to Mr. Pike.

#### Analysis

Despite the fact that the candidate's undesignated contributions made on December 31, 2009, and

March 31, 2010, were treated as primary election contributions and therefore are not required to be refunded as excessive contributions, they may be refunded to the candidate.

The Federal Election Campaign Act (the Act) provides that candidates may contribute an unlimited amount of their personal funds to their campaign committees. 11 CFR 110.10; AOs 1985-33 and 1984-60. Contributions that are not specifically designated by the contributor for use in a particular election are considered to be for the next election for that federal office. 11 CFR 110.1(b)(2)(ii). In Mr. Pike's case, his contributions were undesignated and made before the primary election. As the next election was the May 2010 primary election, the Committee correctly reported Mr. Pike's contributions as having been made for the primary election.

Under Commission regulations, a contributor, including a candidate, may request a refund for a primary election contribution, and the candidate committee is free to make such a refund. In its advisory opinion, the Commission noted that the Committee had no outstanding debts, had already refunded the contributions it received for the general election from other contributors and had enough cash on hand to make the refund.

While the Act contains a restriction on converting campaign funds to personal use, the proposed refund would not violate this personal use ban. 11 CFR 113.2(e). The Committee may therefore refund Mr. Pike's contributions and must report the refund in accordance with the Act and Commission regulations.

Date Issued: August 26, 2010;

Length: 4 pages.

—Isaac J. Baker

## Advisory Opinion Requests

### AOR 2010-22

Recognition of CT Working Families Federal PAC d/b/a Take Back Congress CT as the state committee of a political party (Working Families Party of Connecticut, September 7, 2010)

### AOR 2010-23

Use of cellular phone text messaging for anonymous contributions to candidates and political committees (CTIA-The Wireless Association, September 10, 2010)

### AOR 2010-24

Oversight of voter registration activity (Republican Party of San Diego County, September 15, 2010)

### AOR 2010-25

Application of press exemption and commercial activity exception to documentary film; candidate appearances and licensing activities in conjunction with film (RG Entertainment, Ltd., September 9, 2010)

## Federal Register

*Federal Register* notices are available from the FEC's Public Records Office, on the website at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml) and from the FEC faxline, 202/501-3413.

### Notice 2010-17

Coordinated Communications (75 FR 55947, September 15, 2010)

### Notice 2010-18

Definition of Federal Election Activity (75 FR 55257, September 10, 2010)

## Court Cases

### Cao v. FEC

On September 10, 2010, the U.S. Court of Appeals for the Fifth Circuit upheld several provisions of the Federal Election Campaign Act (the Act) relating to political parties' contribution limits to federal candidates and coordinated expenditure limits. The court held that these provisions of the Act did not violate the First Amendment, and that in light of previous Supreme Court rulings, each of the challenged provisions was a constitutionally permissible regulation of a political party committee's campaign contributions and coordinated party expenditures.

#### Background

Congressman Anh "Joseph" Cao is the U.S. Representative for the 2<sup>nd</sup> Congressional District of Louisiana and the RNC is the national political party committee of the Republican Party (together, plaintiffs). On November 13, 2008, the plaintiffs filed a suit for declaratory judgment challenging various provisions of the Act as unconstitutional in the U.S. District Court for the Eastern District of Louisiana.

Pursuant to 2 U.S.C. §437h, the district court ultimately certified four constitutional challenges to the *en banc* Court of Appeals, while dismissing four additional challenges as frivolous. The certified challenges involved the plaintiffs' standing to bring suit under Article III of the Constitution, the Act's \$5,000 contribution limitation for a political party's in-kind and direct contributions to federal candidates, the fact that the \$5,000 contribution limit is not indexed for inflation and the Act's "coordinated party expenditure" limitations at 2 U.S.C. §441a(d). See the March 2010 *Record*.

#### Court of Appeals Decision

*Standing of plaintiffs.* The court of appeals held that the plaintiffs

had met their burden of establishing standing under Article III of the Constitution, since they had a personal stake in the outcome of the controversy and therefore had standing to bring constitutional claims. The FEC had not contested the plaintiffs' standing in the case.

*\$5,000 Contribution Limit.* The Act provides that contributions from multicandidate political committees (including political party committees) to federal candidates are limited to \$5,000 per candidate, per election. 2 U.S.C. §441a(2)(A). The plaintiffs had challenged this provision as a violation of their First Amendment rights since it imposes the same contribution limits on political parties as on other multicandidate political committees. The plaintiffs argued that the speech of political parties deserves a higher degree of protection than that of other multicandidate political committees.

The court instead held that, while Supreme Court precedent acknowledged the important historic role that political parties have played, the Court has also acknowledged that it is precisely this role that political parties fill that gives rise to the government's compelling interest in regulating their coordinated expenditures and contributions. The Supreme Court in *FEC v. Colorado Republican Fed. Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*) recognized a political party's unique susceptibility to corruption.

In the present case, the Court of Appeals further held that the Act affords a "reasonable limitation" of \$5,000, and as such does not seriously impair political parties' ability to effectively participate in the political process, as had been the issue in the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230 (2006) (*Randall*). Also, the court found that the Supreme Court's decision in *Citizens United v. FEC* did not affect the validity of contribution

limits on political party committees and other political committees.

*Inflation Adjustment.* The plaintiffs also argued that the \$5,000 contribution limitation from political party committees to candidates is unconstitutional because it is not adjusted for inflation. The plaintiffs relied on the Supreme Court's decision in *Randall*, in which the Court invalidated contribution limits to candidates in Vermont, holding that "[a] failure to index limits means that limits which are already suspiciously low...will almost inevitably become too low over time." However, the Court of Appeals held that the Supreme Court's statement "does not, in turn, mean that all contribution limits not indexed for inflation are automatically 'suspiciously low' and unconstitutional." The court stated that, in the present case, the Act's \$5,000 limit is not comparable to Vermont's \$200-\$400 limit at issue in *Randall*.

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### 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 website ([www.fec.gov](http://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.

## Court Cases

(continued from page 10)

*Coordinated Party Expenditure Limits.* The plaintiffs' challenge to the coordinated party expenditure limits of 2 U.S.C. §441a(d) arose out of the RNC's desire to spend in excess of the amount allowed for Congressman Cao (which was \$42,100 in 2008 for House candidates in Louisiana). Specifically, the RNC wanted to air a radio ad and to coordinate with the Cao campaign as to the "best timing" for the ad.

The RNC stated that its involvement with the Cao campaign amounted to coordination under FEC regulations, and that if they had aired the ad, it would have violated the amount limitations of the party expenditure provision because the RNC had already spent its limit under the Act. The RNC asserted that this provision of the Act violates its First Amendment rights because the provisions regulate the RNC's "own speech," and that its own speech may not be regulated, regardless of whether the speech is coordinated. "Own speech" is defined by the RNC as speech that is attributable to the RNC, even when candidate writes the speech and decides how it is to be disseminated.

The Court of Appeals held that the Supreme Court's holding in *Colorado II* expressly recognized that Congress has the power to regulate coordinated expenditures in order to prevent circumvention of the contribution limits and political corruption, provided that the restriction is "closely drawn" to match a sufficiently important government interest in combating political corruption. *Colorado II* at 456. The Court of Appeals stated that if it was to accept the plaintiffs' arguments, it would "effectively eviscerate the Supreme Court's holding in *Colorado II*," in which the Supreme Court held that coordinated expenditures may be restricted because contribution limits could be eroded if "inducement to circumvent them were

enhanced by declaring parties' coordinated spending wide open." Id. at 457. The Court of Appeals also held that *Citizens United v. FEC* (2010) did not undermine *Colorado II*'s holding that Congress may regulate a party's coordinated expenditures, since *Citizens United* dealt with restrictions on independent expenditures by corporations.

### Remand

The court remanded the case to the district court for entry of judgment consistent with this opinion.

U.S. Court of Appeals for the Fifth Circuit; No. 10-30080, No. 10-30146.

—Myles Martin

## 800 Line

### FEC Rules Governing Public Debates

FEC regulations provide an exemption that allows certain nonprofit organizations and the news media to stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates. This exception is consistent with the traditional role these organizations have played in the political process. This article describes the guidelines for nonprofits and news media-sponsored debates.

Other entities, such as individuals or unincorporated organizations, may sponsor debates; however, their costs are not exempted under FEC regulations and thus are considered contributions and/or expenditures. See the FEC's explanation and justification for 11 CFR 110.13 at 60 Fed. Reg. 64261 (December 14, 1995).<sup>1</sup>

<sup>1</sup> Available online at [http://www.fec.gov/law/cfr/ej\\_compilation/1995/1995-23\\_Express\\_Advocacy\\_Indep\\_Exp\\_and\\_Coordination.pdf#page=3](http://www.fec.gov/law/cfr/ej_compilation/1995/1995-23_Express_Advocacy_Indep_Exp_and_Coordination.pdf#page=3).

### Who May Sponsor Debates Under the FEC's Exemption?

Candidate debates may be paid for by: (1) a broadcaster, a *bona fide* newspaper or a magazine or other periodical publication, so long as they are neither owned nor controlled by a political party, political committee or candidate; or (2), a nonprofit organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code (Title 26, U.S. Code) that does not endorse, support or oppose any candidate or party. 110.13(a) and 114.4(f)(1)-(2).

### Corporate/Labor Donations Permitted

A corporation or labor organization may donate funds to a nonprofit organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code (Title 26, U.S. Code) that does not endorse, support or oppose any candidate or party to defray the cost of staging a candidate debate. 114.4(f)(1) and (3).

### Debate Structure

The debates must be structured such that they do not promote or advance one candidate over another, and they must include at least two candidates. 110.13(b).

### Candidate Selection

The organization staging the debate must select the candidates based on pre-established objective criteria.<sup>2</sup> For primary elections, the organization may restrict candidates to those

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<sup>2</sup> In its *Explanation and Justification for these regulations*, the FEC stated that the choice of which objective criteria to use is largely left to the discretion of the staging organization and advised such organizations to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate. See 60 Fed. Reg. 64262 (December 14, 1995).

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seeking the nomination of one party. For general elections, the staging organization may not use nomination by a particular party as the sole objective criterion. 110.13(c).

—Dorothy Yeager

## Disclosing Independent Expenditures on FEC Form 5

An independent expenditure is an expenditure for a communication, such as a website, newspaper, television or direct mail ad that:

- Expressly advocates the election or defeat of a clearly identified federal candidate; and
- Is not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, a party committee or the agents of either. 100.16(a).

Such expenditures have special filing requirements. This article focuses on the requirements for filers who are not registered with the FEC.<sup>1</sup>

### Who Must File Form 5?

Any entity not registered with the FEC (including a corporation,<sup>2</sup> a labor organization, an individual or a group of people) (hereafter in this article referred to as "Form 5 filers") must file a report with the FEC on Form 5 at the end of the first reporting period in which independent

expenditures with respect to a given election aggregate more than \$250 and must continue to file reports in any succeeding reporting period during the same year in which additional independent expenditures of any amount are made. 109.10(b). Also, all Form 5 filers whose independent expenditures exceed, or are expected to exceed, \$50,000 in any calendar year, must electronically file FEC Form 5. 104.18. Visit <http://www.fec.gov/electfil/FECFileIntroPage.shtml> to access the Commission's FECFile filing software for this purpose.

### 24-Hour Pre-Election Reports

Independent expenditures of \$1,000 or more (when aggregated with respect to a given election) that are made after the 20th day, but more than 24 hours, before the day of an election must be reported on FEC Form 5 within 24 hours after the communication is publicly disseminated. Another 24-Hour Notice is required each time additional independent expenditures during the period aggregate \$1,000 or more. The 24-Hour reports must be received by the end of the day following the date that the communication is publicly disseminated. All Form 5 filers, even those supporting or opposing Senate candidates, must file 24-Hour reports of independent expenditures with the Commission. Electronic filers must file these reports electronically, and paper filers may file by fax or email. Additionally, paper filers may file 24-Hour reports using the FEC website's online program. 100.19(d)(3) and 109.10(d).

The Form 5 filer must then disclose the last-minute independent expenditure a second time on

a Schedule 5-E filed with the next scheduled report. 109.10(b). For example, if a Form 5 filer files a 24-Hour report before a general election, it must also disclose that independent expenditure on a Year-End report covering the last quarter of the year. (See "Quarterly Reports" below)

The 24-Hour Report period for the general election of 2010 begins October 13 and runs through October 31. See [http://www.fec.gov/info/charts\\_ie\\_dates\\_2010.shtml](http://www.fec.gov/info/charts_ie_dates_2010.shtml).

### 48-Hour Reports

Once independent expenditures reach or exceed \$10,000 in the aggregate with respect to a given election at any time during a calendar year—up to and including the 20th day before an election—the Form 5 filer must disclose this activity within 48 hours of the date that the communication is publicly disseminated. Another 48-Hour Notice is required each time additional independent expenditures during the period aggregate \$10,000 or more. All 48-Hour reports must be filed with and received by the Commission by 11:59 p.m. (Eastern time) on the second day after the communication is publicly disseminated. Electronic filers must file these reports electronically, and paper filers may file by fax or email. 100.19(d)(3) and 109.10(c).

The Form 5 filer must then disclose the independent expenditures a second time on a Schedule 5-E filed with the next scheduled report. 109.10(b). For example, if a Form 5 filer files a 48-Hour report in February, it must also disclose those independent expenditures on an April Quarterly report.

### Quarterly Reports

Form 5 filers must disclose independent expenditures aggregating

<sup>1</sup> Filers registered with the FEC, such as PACs and party committees, should consult their Campaign Guide and 11 CFR 104.4 for filing requirements specific to them.

<sup>2</sup> See the Supreme Court's opinion in *Citizens United v. FEC (2010)*, available at [http://www.fec.gov/law/litigation/cu\\_sc08\\_opinion.pdf](http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf).

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in excess of \$250 with respect to a given election during the calendar year on a quarterly basis; however, such filers need only file reports for any quarterly period during which independent expenditures aggregating in excess of \$250 are made and in any period thereafter in which additional expenditures are made. The report must be filed by the filing deadline of the next report under the quarterly filing schedule. 109.10(b).

### Aggregating Independent Expenditures for Reporting Purposes

Independent expenditures are aggregated toward the various reporting thresholds on a per-election, per-race basis within the calendar year. For example, all independent expenditures made in support of or in opposition to candidates in a particular Senate general election during a calendar year would be aggregated together for purposes of applying the reporting thresholds.

The date that a communication is publicly disseminated serves as the date that the filer must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts of \$1,000 or \$10,000. The calculation of the aggregate amount of the independent expenditures must include both disbursements for independent expenditures and all contracts obliging funds for disbursements of independent expenditures. 104.4(f).

—Dorothy Yeager

## Nonfilers

### Committees Fail to File Pre-Election Reports

The Commission cited four campaign committees for failing to file the 12-Day Pre-Primary Election Report required by the Federal Election Campaign Act for the Maryland, Massachusetts and New York primary elections held on September 14, 2010.

As of September 10, 2010, the required disclosure report had not been received from:

- Committee to Elect Daniel McAndrew (MD Senate);
- Wilhelm for Congress (MD-3);
- Keith Lepor for Congress (MA-9); and
- People for Gail Goode (NY Senate).

The reports were due on September 2, 2010, and should have included financial activity for the period July 1, 2010, through August 25, 2010. If sent by certified or registered mail, the reports should have been postmarked by August 30, 2010.

The FEC notified committees involved in the September 14 primary elections of their potential filing requirements on August 10, 2010. Those committees that did not file on the due date were sent notification on September 3, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

—Myles Martin

## Outreach

### FEC to Host Reporting and E-Filing Workshops

On October 6, 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 financial 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 (press 6), or locally at 202/694-1100.

—Kathy Carothers

### Winding Down the Campaign Reporting Roundtable

On November 17, 2010, the Commission will hold a roundtable workshop to help candidate committees prepare to file their 30 Day Post-General (30G) Report and wind down their campaigns. The workshop will include information on raising funds to retire campaign debt, settling debts for less than the full amount owed, filing the Post Election Detailed Summary Page and terminating a committee. Attendance is limited to 50 people and the registration fee is \$25. The registration form is available on the FEC's

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## Outreach

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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

### Roundtable Schedule

#### Reporting Workshops

October 6-7, 2010  
FEC Headquarters

*Reporting for Candidate Committees (Oct. 6)*  
9:30 a.m.-11:00 a.m.

*FECFile and E-Filing for PACs and Party Committees (Oct. 6)* **Sold Out!**  
9:30 a.m.-11:00 a.m.

*Reporting for PACs and Party Committees (Oct. 6)*  
1:00 p.m.-2:00 p.m.

*FECFile and E-Filing for Candidate Committees (Oct. 6)*  
1:00 p.m.-2:00 p.m.

*FECFile and E-Filing for PACs and Party Committees (Oct. 7)* **Just Added!**  
9:30 a.m.-11:00 a.m.

#### Winding Down the Campaign Reporting Roundtable

November 17, 2010  
FEC Headquarters  
9:30 a.m.-11:00 a.m.

## Outreach Initiatives for 2011-12

During the 2011-12 election cycle, the FEC plans to modify and expand its outreach efforts to offer more opportunities for training on the campaign finance laws at less cost to attendees.

The biggest change involves the agency's annual series of conferences in Washington, DC. Beginning next year, these conferences will be replaced by smaller, more targeted roundtable workshops and day-long seminars held at FEC headquarters. By hosting the workshops in its own meeting rooms, the Commission can offer more frequent training sessions, provide separate sessions for beginners and more advanced practitioners and dramatically reduce registration fees. Additionally, the agency will be able to capture the workshops for use on-line as part of its e-learning library and, eventually, as live webinars to offer individuals in remote locations inexpensive access to interactive training.

Those who prefer the FEC's traditional, more formal conference program will still have an opportunity to attend the agency's regional conferences. In the fall of 2011, the agency plans to conduct two-day conferences in the Midwest and West, and intends to visit the South and Northeast during the first half of 2012.

Additional information concerning the agency's 2011-12 outreach programs will appear in future issues of the *Record* and on-line at <http://www.fec.gov/info/outreach.shtml>.

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