Record

January 2006 Federal Election Commission Volume, 32

CANDIDATE GUIDE SUPPLEMENT

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Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to candidate committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of candidate committees. It should be used in conjunction with the FEC's June 2004 *Campaign Guide for Congressional Candidates and Committees*, which provides more comprehensive information on compliance for candidate committees.

Law & Regulations

Candidate Solicitation at State Party Fundraisers

On June 23, 2005, the Commission approved a revised Explanation and Justification for its rule at 11 CFR 300.64, regarding appearances by federal candidates and officeholders at state, district and local party fundraisers. The rule, which was not amended, contains an exemption permitting federal candidates and officeholders to speak at such events "without restriction or regulation."

Background

Under the Federal Election Campaign Act (the Act), federal candidates, officeholders and their agents may not solicit, receive, direct, transfer or spend nonfederal funds in connection with federal or nonfederal elections except under limited circumstances. See 2 U.S.C. §441i(e). However, the Act permits them to speak or be featured guests at state, district and local party fundraisers ("state party fundraisers"), where nonfederal funds may be raised. See 2 U.S.C. §441i(e)(3).

The Commission's regulation at 11 CFR 300.64 permits federal candidates and officeholders to speak without restriction or regulation at these fundraisers. In *Shays v. FEC* the court found that, although this exemption was a permissible interpretation of the statute, the Explanation and Justification for the rule did not satisfy the "reasoned analysis" requirement of the Administrative Procedure Act (APA). The court remanded the regulation to the Commission for further action consistent with its opinion.

Accordingly, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking comments both on proposed changes to the Explanation and Justification for the existing rule and on a proposal to amend the regulation to prohibit federal candidates and officeholders from soliciting or directing nonfederal funds when attending or speaking at state party fundraisers. The Commission held a public hearing on May 17 to receive testimony concerning this NPRM. See the June 2005 *Record*, page 6, and the April 2005 *Record*, page 4.

Revised E&J

After considering public comments and testimony, the Commission decided to retain the current exemption in 11 CFR 300.64 permitting federal candidates and officeholders to attend, speak or be featured guests at state party fundraisers without restriction or regulation. The Commission determined that the existing rule provides the "more natural" interpretation of the statute, is more consistent with legislative intent and provides federal candidates and officeholders with

Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
202/694-1100
202/501-3413 (FEC Faxline)
202/219-3336 (TDD for the hearing impaired)

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Robert J. Costa, Acting Staff Director
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Published by the Information Division
Greg J. Scott, Assistant Staff Director
Carlin E. Bunch, Editor

http://www.fec.gov

Congress Amends Law for Campaigns' Use of Funds and Contributions to Other Candidates

On December 8, 2004, President Bush signed legislation (the Consolidated Appropriations Act of 2005) that included amendments to the Federal Election Campaign Act (the Act) to:

- Return "any other lawful purpose" (as long as it does not constitute "personal use") to the list of permissible uses of campaign funds and explicitly allow donations to state and local candidates, consistent with state law; and
- Raise to $2,000 the amount that the authorized committee of one candidate can contribute to the authorized committee of another.

Permissible Uses of Campaign Funds

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended 2 U.S.C. §439a, which addresses the permissible uses of a candidate's campaign funds. In doing so, Congress removed "any other lawful purpose" (so long as funds are not converted to personal use) from the list of statutorily permissible uses. Thus, in post-BCRA rulemakings and advisory opinions, the Commission has interpreted the list of permissible uses in section 439a as being exhaustive.[1] Under the new amendments to the Act, permissible

[1] *These permissible uses include otherwise authorized expenditures in connection with the candidate's campaign for federal office, ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder, contributions to charitable organizations described in 26 U.S.C. §170(c) and unlimited transfers to national, state or local political party committees. 2 U.S.C. §439a(a). Campaign funds must not be converted to "personal use" by any person. 2 U.S.C. §439a(b)(1).*

uses of campaign funds now include, in addition to the previously listed uses:

- Donations to state and local candidates, subject to the limits and prohibitions of state law; and
- Any other lawful purpose that does not violate 2 U.S.C. §439a(b).

Visit the FEC's Redesigned Web Site

FEC staff recently completed a significant upgrade of the Commission's web site, www.fec.gov. The redesigned site offers a wealth of information in a simple, clearly-organized format. Features include cascading menus that improve navigation and interactive pages that allow users to tailor content to their specific needs.

Noteworthy among the new features is a search engine. This tool allows visitors to immediately access all pages on the site that contain a desired word or phrase. Another new feature, the Commission Calendar, helps users keep track of reporting deadlines, upcoming conferences and workshops, Commission meetings, comment deadlines and more.

The site also offers a robust new enforcement section that includes the Enforcement Query System, information on closed MURs, the Alternative Dispute Resolution and Administrative Fine programs and—for the first time—access to final audit reports issued by the Commission.

The Commission encourages the regulated community and the public to make use of this dynamic and interactive site by visiting www.fec.gov.

Contributions from One Authorized Committee to Another

Under the Act, with certain exceptions, no political committee that supports, or has supported, more than one candidate may be designated as an authorized committee. 2 U.S.C. §§432(e)(3)(A) and 432(e)(3)(B). Prior to the new amendment, "support" was defined to exclude a contribution of $1,000 or less.[2] This support limitation was not raised under the BCRA when the contribution limits for candidates and authorized committees increased to $2,000. The current amendment to the Act raises to $2,000 the amount that one authorized committee can contribute to another without that contribution being considered "support."

—*Amy Kort*

Final Rules on Contributions by Minors

On January 27, 2005, the Commission approved final rules regarding contributions and donations by minors to candidates and political committees. The rules, which will take effect on March 7, 2005, conform to the Supreme Court's decision in *McConnell v. FEC*. In that decision, the Court found unconstitutional a provision of the Bipartisan Campaign Reform Act (BCRA) that barred minors from making contributions to candidates or from making contributions or donations to political party committees.

The practical effect of the amended regulations is to return the rules to their pre-BCRA state. The final regulations provide that an individual under 18 years old may make contributions to candidates and party committees if:

- The decision to contribute is made knowingly and voluntarily by the minor;
- The funds, goods or services contributed are owned or controlled by the minor, such as income earned by the minor, proceeds from a trust for which he or she is a beneficiary, or funds withdrawn by the minor from a financial account opened and maintained in his or her name; and
- The contribution is not made from the proceeds of a gift given for the purpose of making the contribution and is not in any other way controlled by another individual. 11 CFR 110.19.

Note that the Commission has made one substantive change from the pre-BCRA regulations by removing the requirement that a minor "exclusively" own or control the funds, goods or services contributed. The Supreme Court reaffirmed in *McConnell v. FEC* that minors have a constitutional right to contribute to federal candidates and party committees. Maintaining the exclusivity requirement would have risked effectively precluding some minors from contributing their personal funds simply because they maintained their financial accounts in a place where an adult co-signatory was required for such accounts.

The final rules and their Explanation and Justification were published in the February 3, 2005, *Federal Register* (69 FR 5565) and are available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml.

—*Amy Kort*

[2] *Commission regulations have interpreted this to limit candidate-to-candidate contributions to $1,000 per election. 11 CFR 102.12(c)(2) and 102.13(c)(2).*

Contribution Limits for 2005-2006

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates	$2,100
Individuals/Non-multicandidate Committees to National Party Committees	$26,700
Biennial Limit for Individuals	$101,400[1]
National Party Committee to a Senate Candidate	$37,300[2]

[1]This amount is composed of a $40,000 limit for what may be contributed to all candidates and a $61,400 limit for what may be contributed to all PACs and party committees. Of the $61,400 portion that may contributed to PACs and parties, only $40,00 may be contributed to state and local party committees and PACs.

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

Contribution Limits for 2005-2006

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), certain contribution limits are indexed for inflation every two years, based on the change in the cost of living since 2001, which is the base year for adjusting these limits.[1] The new inflation-adjusted limits are:

- The limits on contributions made by persons to candidates and national party committees (2 U.S.C. §§441a(a)(1)(A) and (B));
- The biennial aggregate contribution limits for individuals (2 U.S.C. §441a(a)(3)); and
- The limit on contributions made to U.S. Senate candidates by certain political party committees (2 U.S.C. §441a(h)).
  (See the chart on page 3 for the contribution limits applicable for 2005-2006.)

The inflation adjustments to these limits are made only in odd-numbered years, and—except for the biennial limit—the limits are in effect for the two-year election cycle beginning on the day after the general election and ending on the date of the next general election. The biennial limit covers the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even numbered year.

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

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

—*Amy Kort*

[1] The applicable cost of living adjustment amount is 1.067.

Final Rules on Filing by Priority Mail, Express Mail and Overnight Delivery

On March 10, 2005, the Commission approved final rules regarding the timely filing of documents using Priority Mail, Express Mail and overnight delivery service. The rules implement amendments to the Federal Election Campaign Act (the Act) made as part of the Consolidated Appropriations Act, 2004. The statutory amendments permit filers to use these additional delivery options to satisfy the Commission's "timely filing" requirements for certain designations, reports and statements that are filed with either the FEC or the Secretary of the Senate. Prior to this amendment to the Act, filers could rely on a U.S. Postal Service postmark date only if the documents were sent by registered or certified mail. See 2 U.S.C. §§434(a)(2)(A)(i) and (4)(A)(ii) and (5).

Under the new rules, a designation, report or statement is generally considered to be filed on the date of the postmark[1] if it is sent by:

- Registered or certified mail;
- Priority or Express Mail with a delivery confirmation; or
- Overnight delivery service[2]—the document must be scheduled to be delivered the next business day after the date of deposit and must be recorded in the overnight delivery service's on-line tracking system.

[1] The rules define "postmark" to mean a U.S. Postal Service Postmark or the verifiable date of deposit with an overnight mailing service.

[2] An "overnight delivery service" is a private delivery service of established reliability that offers an overnight (i.e. next day) delivery option.

Twelve-day pre-election reports filed by any of these means must be postmarked no later than the 15th day before any election. The new rules do not apply to 48-hour reports of contributions, 24- and 48-hour reports of expenditures and 24-hour reports of electioneering communications. See 11 CFR 104.5(f), (g) and (j).

Designations, reports and statements filed by any other means, including first-class mail and courier, must be received by the Commission or the Secretary of the Senate, as appropriate, by the close of business on the filing deadline.

The final rules were published in the March 18, 2005, *Federal Register* (70 FR 13089), and are available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml. The new rules took effect on April 18, 2005.

—*Amy Kort*

Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1996 are available on the FEC web site as PDF files. Visit the FEC web site at http://www.fec.gov/pages/record.shtml to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1996. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

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Advisory Opinions

AO 2004-3 Conversion of Authorized Committee to Multicandidate Committee

Dooley for the Valley, a multicandidate committee that was formerly U.S. Representative Calvin M. Dooley's principal campaign committee, may keep its status as a multicandidate committee. However, funds the committee received while it was a principal campaign committee may only be spent for the four permissible uses of campaign funds provided for in the Federal Election Campaign Act (the Act).

The Act and Commission Regulations

The Act defines a "multicandidate committee" as a political committee that has been registered with the FEC for at least six months, has received contributions from more than 50 persons and, except for a state political party organization, has made contributions to at least five federal candidates. 2 U.S.C. §441a(a)(4). Nothing in the Act or Commission regulations explicitly addresses the conversion of a candidate's authorized committee into a multicandidate committee. However, in past advisory opinions, the Commission permitted a principal campaign committee to become a multicandidate committee. AOs 1994-31, 1993-22, 1988-41, 1987-11, 1985-30, 1985-13, 1983-14, 1982-32 and 1978-86. See also AO 2000-12.

The Act lists four permissible uses for contributions received by a federal candidate:

- Otherwise authorized expenditures in connection with the candidate's campaign for federal office;
- Ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder;
- Contributions to charitable organizations described in 26 U.S.C. §170(c); and
- Unlimited transfers to national, state or local political party committees.

2 U.S.C. §439a(a); 11 CFR 113.2(a), (b) and (c).[1]

In the Bipartisan Campaign Reform Act of 2002 (BCRA), which took effect on November 6, 2002, Congress deleted "any other lawful purpose" from the list of permissible uses of campaign funds, making this list of permissible uses exhaustive. See AOs 2003-30 and 2003-26.

Transition to Multicandidate Committee

On September 2, 2003, Representative Dooley announced his decision to retire from Congress as of January 2005. His principal campaign committee, Dooley for Congress, filed an FEC Form 1M, Notification of Multicandidate Status, on September 30, and subsequently filed an amended Statement of Organization reflecting the new status as a multicandidate committee and changing the committee's name to Dooley for the Valley (the Committee).

The BCRA's amendments to the Act do not *per se* bar an authorized committee from becoming a multicandidate committee. When the Committee was converted to an unauthorized committee after

[1] *Campaign funds must not be converted to "personal use" by any person. 2 U.S.C. §439a(b)(1). Commission regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); 2 U.S.C. §439a(b)(2).*

Representative Dooley ceased to be a federal candidate, it became a multicandidate committee because it had already met the requirements for multicandidate committee status. 2 U.S.C. §441a(a)(4). See AOs 1993-22, 1988-41 and 1985-30. Accordingly, the Committee may accept contributions of up to $5,000 per contributor per calendar year. 2 U.S.C. §441a(a)(1)(C).

However, when the Committee converted to a multicandidate committee it had a large amount of cash-on-hand—money that it had raised when it was a principal campaign committee. The Act's restrictions on the use of campaign funds apply expressly to "contribution[s] accepted by a candidate." 2 U.S.C. §439a(a). Thus, funds that the Committee received when it was a principal campaign committee must be spent only for the permissible uses listed above, and must not be converted to the personal use of any individual. 2 U.S.C. §439a(b).

In addition, the Committee must limit to $1,000 per election any contributions it makes to other federal candidates using funds it received while it was a principal campaign committee. 2 U.S.C. §432(e)(3)(B). The Act and regulations provide that, in general, a political committee that supports more than one candidate may not be designated as a principal campaign committee or authorized committee of a candidate. 2 U.S.C. §432(e)(3)(A); 11 CFR 102.12(c)(1) and 102.13(c)(1). A candidate's committee may contribute only up to $1,000 per election to another federal candidate's principal campaign committee or authorized committee without being considered to "support" another candidate. 2 U.S.C. §432(e)(3)(B); 11 CFR 102.12(c)(2) and 102.13(c)(2).

The Committee may, however, use its other funds—funds not from contributions received while it was a principal campaign committee—in a manner consistent with lawful uses by any other multicandidate committee. Therefore, contributions and other funds received after the Committee's September 30, 2003, conversion date may be spent for purposes other than the four uses listed above, as long as the Committee complies with the other provisions of the Act and Commission regulations.

Determining the Sources of Committee Funds

If the Committee makes disbursements that, in total, exceed the amount it received since it became a multicandidate committee, then it will be considered to be spending funds it received as a principal campaign committee. The spending of amounts exceeding its post-conversion receipts will be subject to 2 U.S.C. §§439a and 432(e)(3)(B).

When the Committee spends funds from its cash-on-hand as of September 30, 2003, that cash-on-hand figure will be reduced by the amount of the disbursements that are lawful under the Act's restrictions on principal campaign committees. As a practical matter, this means that, once a permissible disbursement of pre-conversion funds has been determined to have been made, that disbursement will not be included in total post-conversion disbursements for the purposes of determining the source (*i.e.*, pre-or post-conversion) of any subsequent disbursement.

Refunds

If the Committee made any contribution that would constitute an impermissible use of funds by a principal campaign committee using funds that it received while it was a principal campaign committee, then it must seek a refund.[2] The Committee cannot make donations to nonfederal candidates and other non-party committees for state and local elections from funds it received as a principal campaign committee, because these donations would not be a permissible use of a candidate's campaign funds. 2 U.S.C. §439a. Such donations are only permissible in the furtherance of a candidate's campaign.[3] Representative Dooley was no longer a candidate for re-election to federal office after the conversion date and the donations would not fit into any of the categories of permitted uses in 2 U.S.C. 439a(a).

Date Issued: March 11, 2004; Length: 5 pages.

—*Amy Kort*

Campaign Guides Available

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[2] *The amounts of any refunds received by the Committee will not count toward total post-conversion receipts in determining whether total post-conversion disbursements exceed post-conversion receipts. However, any permissible portion of a disbursement after the receipt of a refund (for example, $1,000 of a $5,000 contribution to a federal candidate after $4,000 has been refunded) will draw down the pre-conversion cash-on-hand.*

[3] *See the Explanation and Justification for the regulations at 11 CFR Part 113 (67 FR at 76975), where the Commission explained that such donations are permissible "[i]n furtherance of a Federal candidate's election."*

AO 2004-8
Severance Pay Awarded to Employee Who Resigns To Run for Congress

In keeping with its past practice, the American Sugar Cane League (ASCL) may provide severance pay and health insurance benefits to a former executive who is running for Congress without violating the Federal Election Campaign Act's (the Act) prohibition on contributions by corporations.

Background

ASCL, a nonprofit corporation representing Louisiana sugar cane growers and processors, plans to provide Charles Melancon, its former President and General Manager, a proposed severance package of full salary and full health insurance coverage for one year. Mr. Melancon, who held his position with ASCL for 11 years, resigned on February 20, 2004, in order to become a candidate for the U.S. House of Representatives.

ASCL has offered severance benefits to certain former employees since 1987. While there is no written policy for offering severance benefits and no formula for the calculation of those benefits, ASCL considers such factors as the position held, the length of time employed and the evaluation of job performance in determining whether to offer severance benefits and the size of those benefits. The content of severance packages granted to employees in the past varies. For example, a Vice President and General Manager with 15 years tenure received 3 months pay without continuation of health benefits; more recently, an employee with a total of 24 years of service, including 16 years as Vice President and Director of Research, received one year's full pay and health benefits coverage, his company-owned computer and the option to purchase his company owned car for its "Blue Book" value. In its request, ASCL noted that the severance package it is prepared to offer Mr. Melancon is identical to the package individual board members considered for him in 2001 when there was no prospect of his becoming a federal candidate.

Analysis

As an incorporated entity, ASCL is prohibited from making any "contribution or expenditure" in connection with a federal election 2 U.S.C. §441b(a); 11 C.F.R. 114.2(b)(1). The term "contribution" includes "any gift, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A). Thus, ASCL may only provide Mr. Melancon with the proposed severance package if it does not constitute a contribution under the Act or Commission regulations.

The Act also prohibits the conversion of campaign funds to any "personal use." If a third party pays a candidate's expenses that would otherwise be deemed "personal use" expenses, the payments are considered contributions unless the third party would have made the payments "irrespective of the candidacy." 11 CFR 113.1(g)(6). For example, compensation payments are considered contributions unless:

- The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- The compensation is exclusively in consideration of services provided by the employee as a part of this employment; and
- The compensation does not exceed the amount that would be paid to any other similarly qualified person for the same work over the same period of time.

Applying these criteria, ASCL's proposed severance package will not result in a prohibited corporate contribution. ASCL has a sufficient corporate record of providing severance packages to departing employees to demonstrate that the package for Mr. Melancon relates exclusively to services rendered in his *bona fide* employment with ASCL. Additionally, the proposed package appears to be proportionate to past severance packages offered by ASCL.

Mr. Melancon's proposed severance package differs from a proposal for partial paid leave considered in AO 2000-1, where the Commission determined that partial paid leave for a federal candidate would not be compensation "irrespective of the candidacy" because the decision to grant the request was solely at the discretion of the firm and based on factors not exclusively tied to services provided by the employee. In contrast, while the determination by ASCL was discretionary in part, it focused on factors related solely to Mr. Melancon's service, such as length of service, position and job performance. Moreover, the fact that a similar package was proposed for Mr. Melancon years before he considered running for office is additional evidence that ASCL's

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proposed package is compensation "irrespective of the candidacy."

Concurring Opinion

Commissioner McDonald issued a concurring opinion on May 6, 2004.

Date Issued: April 30, 2004; Length: 5 pages.

—*Amy Pike*

AO 2004-10 "Stand By Your Ad" Disclaimer Requirements for Radio Advertisements

A ten-second message sponsored by a federal candidate and read live on the air by a Metro Networks reporter must include the disclaimer statement required for candidate-sponsored radio ads; however, as an exception to the general rule, a Metro Networks reporter may read the required "stand by your ad" statement, rather than the federal candidate authorizing the sponsorship message.

Background

Under the Bipartisan Campaign Reform Act's so-called "stand by your ad" requirement, radio advertisements authorized by a federal candidate must include "an audio statement by the candidate" that identifies the candidate and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(i). The message need not be read live in real time by the candidate, but the candidate must speak the required authorization statement.

Metro Networks is a national company that provides more than 2,000 radio stations throughout the United States with live traffic, news, sports and weather reports. Metro Networks generates revenue by selling ten-second "live read" sponsorship messages that the company's reporters read at the end of their reports. An "opening mention" precedes the actual report and also identifies the person purchasing the sponsorship message.

Metro Networks intends to market the ten-second sponsorship messages to federal candidates. However, Metro Networks stated that the live nature of the reports and limitations of their broadcasting equipment make it "physically impossible" for them to include any statement spoken by a candidate himself or herself. The reports are produced live in Metro Networks studios and from mobile units and aircrafts with Metro Networks reporters interacting live in real time with radio station personnel. Therefore, Metro Networks asserted that its reporter would be able to read a statement for a sponsoring candidate, but Metro Networks would not be equipped to play a recorded voice of a candidate.

Analysis

The Commission has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement in the prescribed manner. For example, an exception in Commission regulations covers skywriting, water towers, wearing apparel or other means of displaying an advertisement when full application of the disclaimer requirement would be "impracticable." 11 CFR 110.11(f)(1)(ii)

In this case, the specific physical and technological limitations Metro Networks describes make it impracticable to require the approving candidate to speak the "stand by your ad" statement himself or herself. Thus, while the disclaimer is required, it is permissible for a Metro Networks reporter to speak for the candidate, or candidates, who authorized the advertisement.[1] This approach is practical and as faithful as possible to the "stand by your ad" statute, while avoiding unnecessary burdens on political speech that could result from a rigid application of all disclaimer provisions in all instances. See AO 2004-1.[2]

An appropriate disclaimer statement to be read by the Metro Networks reporter would be, "Paid for by the committee to re-elect candidate ABC. ABC approved this message."

—*Kathy Carothers*

AO 2004-14 Federal Candidate's Appearance in Public Service Announcements

U.S. Representative Tom Davis may appear in public service announcements (PSAs) to benefit the National Kidney Foundation (the Foundation) by promoting the Cadillac Invitational Golf Tournament. Because the funds raised through the tournament are solely for charitable purposes, Representative Davis's appearance in the PSAs will not be a solicitation of funds in connection with an election, subject to the requirements of the Federal Election Campaign Act (the Act). 2 U.S.C. §441i(e)(1). The PSAs will also not constitute a "coordinated communication," resulting in an in-kind contribution to Representative Davis, because his Congressional office will pay for the costs of taping the announcements. See 11 CFR 109.21.

Background

Representative Davis, who is seeking re-election in the November 2, 2004, general election, has appeared in PSAs promoting the Cadillac Invitational Golf Tournament for the past three years. The tournament is strictly a charitable fundraising event held annually to benefit the Foundation, which does

[1] *The Commission assumes for the purposes of this request that the federal candidate would not be physically present with the reporter, and thus would not be available to read the statement.*

[2] *AO 2004-1 addressed the "stand by your ad" requirement for a television communication authorized by two federal candidates. The Commission permitted one candidate to speak for both candidates so long as the approval statement conveyed that both candidates approved the advertisement.*

not engage in any activity in connection with an election, including voter registration, get-out-the-vote activity or generic campaign activity. The PSAs will not expressly advocate Representative Davis's election or make any reference to his candidacy. Representative Davis's Congressional office will pay for the taping of the announcements, and they will be cablecast without a fee.

Analysis

The two issues concerning the application of the Act to Representative Davis's appearance in the PSAs are whether:

- Funds raised through the announcements are in connection with a federal or nonfederal election; and
- The PSAs fall within the definition of a "coordinated communication" and, thus, trigger payment or reporting obligations for Representative Davis.

Solicitations. Under the Act, federal candidates are generally prohibited from soliciting funds in connection with a federal election that are not subject to the limits, prohibitions and reporting requirements of the Act. Federal candidates and officeholders are also prohibited from raising funds in connection with a nonfederal election unless those funds are subject to the Act's limits and source prohibitions. 2 U.S.C. §441i(e) and 11 CFR 300.61 and 300.62. However, if the funds raised are not in connection with a federal or nonfederal election, then the Act's prohibitions at section 441i(e) do not apply. See AO 2003-20. In this case, the funds raised through the tournament are solely for charitable uses and are not in connection with any federal or nonfederal election.

Coordinated communication. The Act defines as an in-kind contribution an expenditure made by any person "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate, his or her authorized committee or their agents. 2 U.S.C. §441a(a)(7)(B)(i). The Commission's coordinated communication regulation sets forth a three-pronged test to determine whether an expenditure for a communication becomes an in-kind contribution as a result of coordination between a person making an expenditure and a candidate. A payment for a communication that satisfies all three prongs will constitute an in-kind contribution. The first prong of the test is that the communication must be paid for by a "person" other than the federal candidate, the candidate's authorized committee or their agents, and the second two prongs set out a series of content and conduct standards.

The Davis PSAs do not meet the first prong of the coordinated communication test because Davis's Congressional office will pay for the taping of the announcements—the only costs identified in the request for the PSAs. The Act specifically exempts the federal government or any of its authorities from the definition of "person." 2 U.S.C. §432(11); see also 11 CFR 100.10. Because the use of federal government resources by Representative Davis's Congressional office does not qualify as a payment by a person for a communication, these PSAs fail the three-pronged test and do not qualify as coordinated communications.[1] Thus, no in-kind contribution results from the costs of the PSAs, and Representative Davis will not incur any obligations under the Act from his participation in the announcements.

Similarly, because neither Representative Davis nor the Foundation—nor any other person—will pay to cablecast the announcements, the PSAs do not qualify as electioneering communications, which are limited to communications "disseminated for a fee." 11 CFR 100.29(b)(3)(i). Thus, the PSA's are not coordinated electioneering communications, which are also considered in-kind contributions. 2 U.S.C. §441a(a)(7)(C).

[1] *Because all three prongs must be satisfied for a communication to constitute a "coordinated communication," the Commission did not examine the second and third prongs of the test.*

Dissenting Opinion

Commissioner Thomas issued a dissenting opinion on June 14, 2004.

Date Issued: June 10, 2004; Length: 4 pages.

—*Amy Kort*

AO 2004-15 Film Ads Showing Federal Candidates Are Electioneering Communications

Television and radio commercials featuring a Presidential candidate to promote a documentary film would constitute electioneering communications if they air within 60 days before the general election or within 30 days before a primary election or national nominating convention and could be received by more than 50,000 people. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. Ads that constitute electioneering communications may not be paid for by corporations or labor organizations and may trigger reporting obligations. 2 U.S.C. §§434(f) and 441b(b)(2); 11 CFR 104.20, 114.2(b)(2)(iii) and 114.14(b).

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an electioneering communication is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed for a fee within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. For Presidential and Vice Presidential candidates, "publicly distributed" means that the communication can be received:

- By 50,000 people or more in a state where a primary election or caucus is being held within 30 days;
- By 50,000 people or more anywhere in the U.S. from 30 days prior to the convention until the end of the convention; or
- Anywhere in the U.S. within 60 days before the general election. 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29(b)(3)(ii).

David T. Hardy, President of the Bill of Rights Educational Foundation (the Foundation), is producing a documentary film that focuses on the Bill of Rights. The request stated that the Foundation qualifies as a nonprofit corporation under Section 501(c)(4) of the Internal Revenue Code. The film will include some footage of federal officeholders who are also candidates, including President Bush. Mr. Hardy and the Foundation plan to air radio and television ads for a fee in order to promote the film's distribution. The ads will not be received in the districts of Congressional candidates who are clearly identified in the ads, but at least one Presidential candidate will be featured.

Analysis

Ads that refer to at least one Presidential candidate, are publicly distributed within the electioneering communication periods and can reach at least 50,000 people will meet all of the elements that define an electioneering communication. None of the statutory or regulatory exemptions for electioneering communications will apply to the ads in this opinion.[1] Moreover, Mr. Hardy did not assert that the Foundation was entitled to a media exemption under the Act, and, thus, the Commission made no finding with respect to the application of the media exemption in this opinion. 2 U.S.C. §434(f)(3)(B)(i). Thus, the ads will be subject to the prohibitions and reporting requirements for electioneering communications.

As a corporation, the Foundation may not finance ads that constitute electioneering communications.[2] However, Mr. Hardy may pay for the ads himself, and he must comply with the Act's reporting requirements for electioneering communications that aggregate in excess of $10,000 in a calendar year. 2 U.S.C. §§434(f) and 441b(b)(2) ; 11 CFR 104.20.

Date Issued: June 25, 2004; Length: 4 pages.

—*Amy Kort*

AO 2004-17 Federal Candidate's Compensation for Part-Time Employment

Payments that Becky A. Klein, a Congressional candidate, receives as compensation for part-time consulting services rendered to a law firm are not contributions to Ms. Klein's campaign. The payments from the law firm will be for services actually rendered, and they are excepted from the definition of "contribution" because they qualify as compensation made irrespective of her candidacy.

Background

Ms. Klein is a U.S. House candidate, and she intends to accept part-time employment providing consulting services, based on her experience as Chairman of the Texas Public Utility Commission, to a law firm. The law firm will pay her on an hourly basis for services actually rendered, and the rate of compensation will be comparable to that earned by similarly qualified consultants for similar services. Her work for the law firm will be independent of her campaign, and she will not use the firm's facilities—nor those of any of the firm's clients—for campaign-related activity.

Analysis

The Federal Election Campaign Act (the Act) prohibits the conversion of campaign funds to any "personal use." 2 U.S.C. 439a. Under Commission regulations, a third party's payment of a candidate's expenses that would otherwise be deemed "personal use" expenses is considered a contribution by the third party, unless the payment would have been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). See also 2 U.S.C. 439a(b)(2). The regulations state that employment-related compensation is considered a contribution unless the compensation:

- Results from *bona fide* employment that is genuinely independent of the candidacy;
- Is exclusively in consideration for services provided by the employee as part of his or her employment; and
- Does not exceed the amount of compensation that would be paid to any other similarly qualified person for the same work over the same time period. 11 CFR 113.1(g)(6)(iii)(A), (B) and (C).

Ms. Klein's proposal meets all three of these requirements. The consulting services arrangement is a *bona fide* employment, and it is genuinely independent of her candidacy. The proposed hourly rate of compensation is exclusively tied to services actually rendered and is not more than what is paid to similarly

[1] *Exceptions might apply if a communication was disseminated through means other than broadcast, cable or satellite communication, was a reportable expenditure or independent expenditure, was a candidate debate forum or a promotion of such an event, was a communication by local or state candidates or was made by a charitable organization under 26 U.S.C. 501(c)(3). 11 CFR 100.29(c).*

[2] *While qualified nonprofit corporations (QNC), as described in 11 CFR 114.10, are exempt from the prohibition on corporate payments for electioneering communications, the Foundation does not qualify as a QNC under Commission regulations.*

qualified consultants who perform similar services. Thus, the payments will be made "irrespective of candidacy" and will not be contributions to Ms. Klein's campaign under the Act or Commission regulations.[1]

Date Issued: June 24, 2004; Length: 4 pages.

—*Amy Kort*

AO 2004-18 Campaign Committee's Purchase of Candidate's Book at Discounted Price

The Friends of Joe Lieberman Committee (the Committee) may buy copies of Senator Joseph Lieberman's book at a discounted price that will be made available to other purchasers under a customary practice in the publishing industry. The books will be given to campaign supporters and contributors.

Background

Under Senator Lieberman's publishing contract, if the publisher determines that his book is no longer "readily saleable at regular prices within a reasonable time," it may designate its remaining stock of copies as "remainder copies" and sell them at a steep discount. The publisher recently made this determination and, pursuant to the publishing contract, offered the book to Senator Lieberman at a discounted price of $3.40 per copy before offering this price to other buyers. The Committee intends to purchase a few hundred of the thousands of remaining copies in order to distribute them as gifts to campaign supporters. The Committee will not otherwise promote or sell the book. Senator Lieberman will waive any potential royalties or royalty credits that might result from this purchase.

Analysis

In-kind contributions. Under the Federal Election Campaign Act (the Act), a contribution includes the provision of goods or services at less than the usual and normal charge—in other words, at less than the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 CFR 100.52(d)(1) and (2). In the past, the Commission has determined that the purchase of goods or services at a discount does not result in a contribution when the discounted items are made available in the ordinary course of business and on the same terms and conditions to the vendor's other customers that are not political committees. See AOs 2001-8, 1996-2, 1995-46 and 1994-10.

In this case, the practice of discounting books when they are no longer saleable at the regular price is standard in the publishing industry. In addition, the publisher set the price for the remainder copies of Senator Lieberman's book in the ordinary course of its business based on its estimation of the fair market value of the book as a remainder. Thus, the Committee will pay the usual and normal charge for this type of purchase, and no in-kind contribution will result.

Personal use of campaign funds. The Act provides for four categories of permissible uses of campaign funds, including otherwise authorized expenditures that are made in connection with the candidate's federal campaign. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(a), (b) and (c). In no case, however, may campaign funds be used for an expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder, and thus be converted to "personal use." 2 U.S.C. §439a(b)(1) and 11 CFR 113.1(g).

In this case, the funds will be used for an otherwise authorized expenditure made in connection with Senator Lieberman's campaign, and the expense would not exist irrespective of the campaign because:

- The books will only be used as gifts to campaign supporters and the Committee will not promote or sell the book; thus, the Committee will use them only for the purpose of influencing Senator Lieberman's re-election to federal office;
- The Committee will not buy more books than it needs for this purpose; and
- Senator Lieberman will not receive any royalties or royalty credits as a result of the Committee's purchase of the books, nor will the purchase increase his opportunity to receive future royalties.[1]

Thus, the Committee's purchase of the books is permissible under the Act and Commission regulations. The Committee should report funds it spends on the books as operating expenditures for the 2006 election cycle. 2 U.S.C. §§434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(2)(i) and (b)(4)(i).

Date Issued: July 15, 2005; Length: 7 pages.

—*Amy Kort*

[1] *The Commission noted that Ms. Klein's situation seemed virtually indistinguishable from that presented in AO 1979-74, which was the culmination of a series of advisory opinions reaffirming that "an individual may pursue gainful employment while a candidate for Federal office" and establishing and refining the criteria for when compensation received by a candidate would not be a contribution from the employer. The three part test in AO 1979-74 was subsequently codified in Commission regulations at 11 CFR 113.1(g)(6)(iii).*

[1] *Although the personal use regulations permit a candidate to rent space, equipment or other items to his principal campaign committee at the usual and normal charge, Senator Lieberman's waiver of royalties and royalty credits that would otherwise result from the sale of copies of his book to the Committee precludes the use of the sale as a device to use the Committee to benefit him financially. See 11 CFR 113.1(g)(1)(i)(E) and AOs 2001-8 and 1995-46.*

AO 2004-19
Earmarked Contributions to Candidates via a Web Site

An incorporated web site operator may receive and forward earmarked contributions to federal candidates because it satisfies both the "commercial vendor" exception to the ban on corporate facilitation of contributions at 11 CFR 114.2(f)(1), and the "commercial fundraising firm" exception to the definition of "conduit or intermediary" in 11 CFR 110.6(b)(2).

Background

DollarVote.org (DollarVote), a Virginia C corporation, proposed a two-part plan to accept and forward contributions from individuals to candidates in upcoming elections. Under the Plan, individuals are granted access to the DollarVote web site upon paying an annual subscription fee. The web site contains various position statements on political issues. The position statements are referred to as "DollarBills," and participating candidates may post "promises" on the site to support the statements of their choice. Individuals may then view the DollarBills and "vote" to contribute funds to the candidate(s) who have promised to support an issue. If no candidate has promised to support an issue at the time of an individual's vote, the contributed funds would go to the first future candidate who registers a promise in support of that DollarBill. The individual may stipulate additional criteria for the future recipient candidate, such as excluding particular candidates by name and including only candidates belonging to a certain political party, among other conditions. The contributor also selects a 501(c)(3) organization to be the recipient of the funds, should no candidate meet the individual's selected criteria. If multiple candidates promise on the same DollarBill, contributions will be distributed equally.

Along with the annual subscription fee, DollarVote will charge contributors a small processing fee for each transaction. Candidates will also be charged a fee for the ability to register promises on the site.[1] These monies will go into the corporation's general account, which will be separate from the merchant accounts established to hold earmarked contributions.

The Plan also contains screening and processing measures to prevent excessive contributions and contributions from prohibited sources under the Act.

Analysis

Commercial vendor exception. Corporations are prohibited from making any contribution or expenditure in connection with a federal election. 2 U.S.C. §441b(a). Corporations are further prohibited from facilitating the making of contributions to candidates or political committees. 11 CFR 114.2(f)(1). A corporation does not facilitate the making of a contribution to a candidate, however, if the corporation provides a service in the ordinary course of business as a commercial vendor. DollarVote would be operating permissibly as a commercial vendor under 11 CFR 114.2(f)(1), because:

1. Its services are rendered for the usual and normal charge paid by authorized candidate committees;
2. DollarVote forwards earmarked contributions to candidates through separate merchant accounts; and
3. DollarVote's web site incorporates adequate screening procedures to ensure it is not forwarding illegal contributions.

See also AO 2002-7.

[1] *The fee, terms and conditions will be the same for all participating candidates, and the fee will be set so that DollarVote will receive the usual and normal charge for its services. DollarVote will not deny participation to any candidate who meets the payment and eligibility requirements.*

Commercial fundraising firm exception. Commission regulations state that any person prohibited from making contributions or expenditures is also prohibited from acting as a conduit or intermediary for earmarked contributions. 11 CFR 110.6(b)(2)(ii). As a corporation, DollarVote must meet the regulatory exception to the definition of "conduit or intermediary" in order to conduct the activities in its Plan. Commission regulations at 11 CFR 110.6(b)(2)(i)(D) establish an exception for "a commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising." As a commercial vendor that is retained by candidates to assist in raising funds for their campaigns and exercises no discretion over the contributions, DollarVote meets this exception.

Date Issued: August 20, 2004; Length: 6 pages.

—*Meredith Trimble*

AO 2004-22
Unlimited Transfers to State Party Committee

U.S. Representative Doug Bereuter, a retiring member of Congress, may make unlimited transfers of campaign funds to the Nebraska State Republican Party (the Party). The Party, in turn, may use these funds to renovate its office building. Under the Federal Election Campaign Act (the Act), transfers to a state party committee are a permitted use of contributions received by a principal campaign committee. 2 U.S.C. §439a.

Background

Representative Bereuter resigned from the U.S. House of Representatives and will not run for re-election. His principal campaign committee, Bereuter for Congress, recently transferred $5,000 from its campaign account to the Party to defray the

costs of remodeling the Party's office building. Bereuter for Congress intends to transfer another $10,000 to $15,000 to fund further remodeling.

Analysis

The Act lists four permissible uses for campaign funds and provides that campaign funds must not be converted to the personal use of any individual. 2 U.S.C. §§439a and 439a(b). One permissible use of funds is for unlimited transfers to a state party committee. 2 U.S.C. §439a(a)(4); 11 CFR 113.2(c). These provisions of the Act do not limit the ways that the state party committee can use the funds, nor do they restrict the amount that may be transferred in any specific period of time.[1]

Thus, Bereuter for Congress may transfer $10,000 to $15,000 in campaign funds to the Party for the purpose of remodeling its party headquarters. Any or all of the funds may be transferred before August 31, 2004.

Date Issued: July 23, 2004; Length: 2 pages.

—*Amy Kort*

AO 2004-25 Senator May Donate Personal Funds to Voter Registration Organizations

U.S. Senator and Democratic Senatorial Campaign Committee (DSCC) Chairman Jon Corzine may donate his personal funds to organizations engaging in voter registration activity, as defined at 11 CFR 100.24(a)(2),[1] without triggering the Federal Election Campaign Act's (the Act) provisions regulating the raising and spending of funds by officers of national party committees and federal candidates or officeholders.[2] Senator Corzine will make the donations solely at his own discretion, without authority from, or on behalf of, the DSCC. He will not donate to organizations that he has directly or indirectly established, financed, maintained or controlled, and he will not exercise any control of how his funds are used by any organization to which he donates.

Status as National Party Committee Officer

The Act bars officers and agents of a national party committee from raising or spending any nonfederal funds (i.e., funds not subject to the limitations, prohibitions and reporting requirements of the Act). 2 U.S.C. §441i(a); 11 CFR 300.2(k) and 300.10. It also restricts national party committees, their officers and agents from raising and spending funds for nonprofit organizations under 26 U.S.C. §501(c) that make expenditures and disbursements in connection with an election for federal office (as well as restricting them from raising and spending funds for certain political organizations under 26 U.S.C. §527). 2 U.S.C. §441i(d); 11 CFR 300.11 and 300.50. The plain language of the Act and the Commission's regulations, however, specifically applies these restrictions to national party committee officers and agents only when such individuals are acting on behalf of the national party committee. See 2 U.S.C. §§441i(a) and (d); 11 CFR 300.10(c)(1), 300.11(b)(1) and 300.50(b)(1).[3]

Based on the request's representation that Senator Corzine's donation of personal funds[4] will be made solely at his own discretion, without express or implied authority from, or on behalf of, the DSCC, the Commission concluded that Senator Corzine would not be acting on behalf of the DSCC, and thus would not be restricted by the aforementioned provisions from donating unlimited personal funds to organizations that engage in voter registration activity, as defined in the federal election activity (FEA) provisions of Commission regulations. See 11 CFR 100.24(a)(2). If any of those organizations, however, qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

Status as Federal Candidate or Officeholder

The Act and Commission regulations similarly restrict federal candidates and officeholders in their ability to raise and spend funds in connection with an election for fed-

[1] *A transfer pursuant to 2 U.S.C. §439a(a)(4) and 11 CFR 113.2(c) is not subject to the contribution limitation in 2 U.S.C. §441a(a)(1)(D) or 11 CFR 110.1(c)(5). Such a transfer is also consistent with the regulations addressing office buildings of state or local party committees in 11 CFR 300.35.*

[1] *As defined at 11 CFR 100.24(a)(2), "voter registration activity" means contacting registered voters by phone, in person or by other individualized means to assist them in registering to vote. This activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms and helping them to fill out these forms.*

[2] *These rules generally provide that a national party committee and a federal candidate/officeholder may only solicit, receive, direct, transfer or spend funds in connection with an election for federal office—including funds for "federal election activity"—if those funds are federal funds that are subject to the limits, prohibitions and reporting requirements of the Act. See 2 U.S.C. §§441i(a) and (e)(1)(A). See also 11 CFR 100.24.*

[3] *In* McConnell v. Federal Election Commission, *540 U.S. __, 124 S.Ct. 619 at 658, 668, 679 (2003), the Supreme Court acknowledged that these provisions do not apply to officers acting in "their individual capacities."*

[4] *See 2 U.S.C. §431(26) and 11 CFR 300.33 for a definition of the term, "personal funds."*

eral office. Specifically, the law and regulations stipulate that no federal candidate or officeholder shall solicit, receive, direct, transfer, spend or disburse funds in connection with an election for federal office, including funds for any FEA,[5] unless the funds consist of federal funds that are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A); 11 CFR 300.61.

Unlike the restrictions regarding national party committees, the Act and regulations do not explicitly limit application of the restrictions to when such an individual is acting in his or her official capacity. The language of section 441i, however, is not clear as to whether the restrictions on the use of funds extend to the personal funds of federal candidates or officeholders, and there is no legislative history suggesting that Congress intended them to extend in such a way. Moreover, the underlying anti-corruption purposes of the section 441i restrictions, and their accompanying regulations, are not furthered by restricting such individuals from spending their personal funds solely at their own discretion, as opposed to funds that are solicited or received from others at the behest of the federal candidate or officeholder.

Because the funds Senator Corzine plans to donate would not be solicited or received from others, he would not incur an obligation toward any other person that would raise concerns regarding corruption or the appearance thereof. Thus, Senator Corzine may donate his personal funds in amounts exceeding the Act's limits to organizations that engage in FEA, irrespective of his status as a federal candidate or officeholder. In reaching this conclusion, the Commission assumes that Senator Corzine's donations to each organization will not be in amounts that are so large or comprise such a substantial percentage of the organization's receipts that the organization would be considered to be "financed" by Senator Corzine. See 2 U.S.C. §441i(e)(1); 11 CFR 300.61. Again, however, if any of those organizations qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

Date Issued: August 20, 2004; Length: 5 pages.

—Dorothy Yeager

[5] *Under the Act, the term "federal election activity" includes "voter registration activity" that occurs during the period beginning 120 days before the date of a regularly scheduled federal election and ending on the date of the election. 2 U.S.C. §431(20); See 11 CFR 100.24(a)(2) and(b)(1).*

AO 2004-26 Foreign National's Participation in Political Committee Activities

A foreign national may participate in campaign activities as an uncompensated volunteer, but may not participate in the decision-making process of political committees.

Background

Ms. Zury Rios Sosa, a foreign national and member of the Guatemalan legislature, is engaged to marry U.S. Representative Gerald C. Weller. Representative Weller maintains two affiliated campaign committees—Jerry Weller for Congress, Inc. and Gerald C. 'Jerry' Weller for Congress—and is the honorary chair of Reform PAC, a nonconnected, multicandidate committee (collectively, the Committees).

Given the ban on contributions by foreign nationals, Representative Weller and Ms. Rios Sosa asked whether she could participate in the following activities:

1. Attending Committee events;
2. Speaking or soliciting funds and support at Committee events;
3. Participating in event planning and strategy sessions with Representative Weller and Committee personnel; and
4. Accompanying Representative Weller to other committees' fundraising and campaign events.

Analysis

Foreign national volunteer activity. The Act and Commission regulations prohibit foreign nationals, directly or indirectly, from making a "contribution or donation of money or other thing of value…in connection with a Federal, State, or local election." 2 U.S.C. §441e(a)(1)(A) and 11 CFR 110.20(b). The term "contribution," however, does not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. 2 U.S.C. §431(8)(B)(i) and 11 CFR 100.74. In AO 1987-25, the Commission concluded that a foreign student's work for a campaign without compensation would not result in a prohibited contribution because the value of volunteer services was specifically exempt from the Act's definition of contribution.[1] Similarly, the volunteer activities proposed by Ms. Rios Sosa would not result in the making of a prohibited contribution.

Foreign national participation in decision-making. Commission regulations prohibit foreign nationals from participating in the decisions of any person involving election-related activities. 11 CFR 110.20(i). This prohibition encompasses participation in the decision-making process of any person or committee concerning the making of contributions, donations, expenditures or disbursements in connection with elections, as well as involvement in decisions concerning the manage-

[1] *Compare AO 1978-25 with AO 1981-51, which concluded that the Act prohibits an artist who is a foreign national from donating his uncompensated services to create an original art work for a political committee's use in fundraising.*

ment of any political committee. Therefore, Ms. Rios Sosa must not participate in Congressman Weller's decisions regarding his campaign activities. She must also refrain from managing, or participating in the decisions of, the Committees.

With regard to the four types of activities specified above, Ms. Rio Sosa may, as an uncompensated volunteer, attend Committee events, solicit funds from permissible sources under the Act and give speeches at the events as long as she does not participate in the Committees' decision-making processes. Ms. Rios Sosa may also attend meetings regarding Committee events and strategy, but may not be involved in the management of the Committees. Finally, Ms. Rios Sosa may attend fundraising and campaign events of other political committees, provided she does not make a contribution of her personal funds in order to attend. Participation in such events is subject to the same restrictions detailed above.

Date Issued: August 20, 2004; Length: 4 pages.

—Meredith Trimble

AO 2004-27
Use of Campaign Funds for Unpaid Salary of Former Employees

Quayle 2000 Inc. (the Committee) may not use its remaining campaign funds to pay salary to campaign employees who agreed to work without salaries in 1999. Because the Committee initially treated the unpaid service as volunteer work and has never reported the unpaid amounts as debt, it cannot now consider the funds to be a permissible use of campaign funds. 2 U.S.C. §439a(a).

Background

During the 2000 campaign, two Committee employees agreed to work without salaries from March 1 to March 31, 1999, when the Committee was low on funds. Each employee signed a "Statement of Volunteer Services." See 11 CFR 116.6. The Committee currently has funds with which to pay these former employees the salary they would have received during this period had they not agreed to forgo salary payments.[1]

Analysis

Treatment of unpaid employee services. Under Commission regulations, when a political committee does not pay an employee for services rendered to the committee, the unpaid amount may be treated as either a debt owed by the political committee to the employee, or as volunteer services if the employee signs a written statement agreeing to be considered a volunteer. 11 CFR 116.6(a). If the service is considered a debt, the Committee must initially disclose the debt in a timely manner, and must continuously report that debt until the debt is extinguished. 2 U.S.C. §434(b)(8); 11 CFR 104.3(d) and 104.11(a) and (b); see also AOs 1997-21, 1991-9 and 1977-58. In this case, the two employees agreed to treat their employment as volunteer services, and the Committee has never reported the amounts as debt.

Permissible uses of campaign funds. The Federal Election Campaign Act (the Act) provides four categories of permissible uses of a candidate's campaign funds:

1. Otherwise authorized expenditures in connection with the candidate's federal campaign;
2. Ordinary and necessary expenses incurred as a federal officeholder;
3. Contributions to charitable organizations described in 26 U.S.C. §170(c); and
4. Unlimited transfers to national, state or local political party committees.

2 U.S.C. §439a(a); 11 CFR 113.2.[2]

In no case may campaign funds be converted to "personal use" by any person. 2 U.S.C. §439a(b)(1); 11 CFR 113.2. Commission regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); 2 U.S.C. §439a(b)(2).

Because the Committee has never reported the unpaid amounts of these employees' salaries as debts, there are no debts or obligations that could give rise to an authorized expenditure under the first permissible use of funds listed above.[3] Any payment now for services that had been considered volunteer services since 1999 would not be an authorized expenditure of the Committee. 2 U.S.C. §439a(a)(1). The payment for volunteer services also does not fit with any of the other three permissible uses of campaign funds. Thus, the Committee may not use its cam-

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[1] *In 1999, the Committee received matching funds under the Primary Matching Payment Account Act. In 2002, the Commission approved an audit report finding that no repayment of federal matching funds was required. After the audit, the Committee had campaign funds remaining in its account. However, because the Committee's account no longer contains federal matching funds and the Committee does not owe a repayment, the analysis below focuses only on the Federal Election Campaign Act. See 11 CFR 9038.2.*

[2] *In the Bipartisan Campaign Reform Act of 2002, Congress removed "any other lawful purpose" from the list of permissible uses of campaign funds in section 439a.*

[3] *In addition, allowing the Committee to pay these amounts in 2004 would mean that, contrary to the volunteer services arrangements, unreported debts or obligations did exist. Because these amounts were neither initially disclosed nor continuously reported, permitting payment would result in reporting violations by the Committee.*

paign funds to make the payments to these former employees.

Date Issued: September 9, 2004; Length: 4 pages.

—*Amy Kort*

AO 2004-29 Federal Candidate's Support of Ballot Initiative Committees

Representative Todd Akin, a member of Congress and candidate for reelection, may support or oppose ballot initiatives using his campaign funds, and may reference the initiatives in solicitations for his principal campaign committee (PCC). Representative Akin may also appear in ads focusing on ballot initiatives if the ads are paid for by his PCC, by the initiative committees with permissible funds and within permissible contribution limits or by a combination thereof. Finally, Representative Akin may use contributions received by his PCC to make donations to state and local candidates who support his positions on specific ballot initiatives.

Background

In Missouri, citizens may use the ballot initiative process to change state laws and the state constitution. Representative Akin would like to support some ballot initiative committees. He was not involved in establishing any of the ballot initiative committees. None of the ballot initiative committees are political committees under the Federal Election Campaign Act and Commission regulations.

Analysis

Donations to ballot initiative committees from the PCC. Representative Akin may use contributions accepted by the PCC to make donations to a ballot initiative committee. The Act lists four categories of permissible uses of contributions received by a federal candidate:

1. Otherwise authorized expenditures in connection with the candidate's campaign;
2. Ordinary and necessary expenses incurred in connection with duties as a federal office holder;
3. Contributions to organizations described in 26 U.S.C. §170(c); and
4. Unlimited transfers to national, state or local party committees. 2 U.S.C. §439a and 11 CFR 113.2(a), (b) and (c).

Donations from the PCC to the ballot initiative committees are permissible because they will be in connection with his campaign for reelection.

Referencing ballot initiative donations in PCC solicitations. Representative Akin may note in a solicitation for his PCC that funds received may be donated to ballot initiative committees that support his positions. The contributions received in response to such solicitations must be treated like any other contributions to the PCC and thus must comply with the amount limitations, source prohibitions and reporting requirements of the Act.

Representative Akin's appearance in ads paid for by ballot initiative committees. Representative Akin may appear in newspaper, radio or television ads disseminated in his district before the November 2 election that focus on the ballot initiatives. Because the ads meet the three-pronged test defining a coordinated communication at 11 CFR 109.21 (the source of payment prong, the conduct standard and the content standard) and because the costs of the ads will likely exceed the contribution limits (and the ballot initiative committees' funds may be from prohibited sources) ,the PCC must reimburse the sponsor of the ad for the attributable portion of the cost of the communication to avoid receiving an in-kind contribution, or an excessive or prohibited contribution.[1] See 2 U.S.C. §441a(a). Amounts that the PCC donates to the sponsor organizations may be treated as payment for the ads if the PCC specifically indicates that purpose for the donation.

Representative Akin's appearance in advertisements paid for by the PCC. Payments made by the PCC for ballot initiative ads featuring Representative Akin (referenced as either a Member of Congress or a candidate) are permissible uses of campaign funds under 2 U.S.C. §439a(a), as discussed above. The ads must include all appropriate disclaimers. See 11 CFR 110.11.

Donations from the PCC to state and local candidates. Representative Akin may also use contributions received by his PCC to make donations to candidates for state and local office who support his positions on ballot initiatives. Such donations will be in connection with the Representative's reelection campaign and therefore are permissible as "otherwise authorized expenditures in connection with the campaign for Federal office." 2 U.S.C. §439a(a)(1).

Date Issued: September 30, 2004; Length: 8 pages.

—*Meredith Trimble*

AO 2004-35 Presidential Campaigns May Use GELAC Funds for Recount Expenses

Kerry-Edwards 2004, Inc. (Kerry-Edwards), the authorized committee of Presidential and Vice-Presidential candidates Senators John Kerry and John Edwards, may use its general election legal and compliance

[1] *See Advisory Opinion 2004-1, which discusses a permissible allocation and attribution formula under 11 CFR 106.1(a).*

(GELAC) fund to pay legal expenses, staff pay and office expenses that might result from a recount of the November 2, 2004, Presidential election.

Background

Publicly funded Presidential candidates may not raise or spend funds for their campaigns outside of the public funding grant, which is $74.62 million dollars for the 2004 election. However, the campaigns may accept contributions to a GELAC fund, which may only be used to pay for certain expenses. See 11 CFR 9003.3(a)(2). Contributions to a GELAC fund must comply with the amount limitations and source prohibitions of Federal Election Campaign Act. See 11 CFR 9003.3(a)(1)(i).

Analysis

Although Commission regulations governing GELAC funds do not specifically address recount expenses, the regulations do provide that GELAC funds may be used for certain legal and accounting compliance expenses and winding down expenses, which are described as expenses "associated with the termination of the candidate's general election campaign." See 11 CFR 9003.3(a)(2)(i)(A), 9003.3(a)(2)(i)(I) and 9004.11(a). Legal expenses and fees, fees for payment of staff and administrative overhead and office equipment expenses that result from a recount generally fit within these permissible GELAC fund uses. Thus, Kerry-Edwards may use GELAC funds to pay the expenses. See 11 CFR 9003.3(a)(2). All receipts and disbursements from the GELAC account, including those related to a recount, must be reported to the FEC in a separate report. 11 CFR 9003.3(a)(3)(ii) and 9006.1(b)(2).

Date Issued: September 30, 2004; Length: 3 pages.

—Amy Kort

AO 2004-36 Reporting In-Kind Contribution of Office Space

Risley for Congress (the Committee) must report as an in-kind contribution one-fifth of the normal rental value of donated office space that it shares with four other candidate committees.

Background

An individual contributor has donated office space to the Committee and four other candidates. The office space is shared equally by all five committees. However, the committees do not share telephone lines, staff, campaign resources or information, and they do not intermingle funds. The usual and normal charge for the rental property is $2,000 per month.

Analysis

The provision of goods or services to a federal campaign at no charge or at less than the usual and normal charge is considered an in-kind contribution. 11 CFR 100.52(d)(1). In this case, the donation of the free use of office space is an in-kind contribution to each of the five campaigns using the space. The value of the in-kind contribution to the Committee is its proportionate share of the usual and normal rental value of the property for each month that the Committee uses it. Consequently, the contributor is giving $400 to the Committee on each rental due date.[1]

For reporting purposes, it is as though the contributor is giving the Committee money to pay for the office space. As a result, the Committee must report the receipt of this in-kind contribution as both a "contribution" and an "expenditure." 11 CFR 100.111(e) and 104.13(a)(2). The Committee must also itemize all contributions from a single individual that aggregate in excess of $200 per election cycle. Thus, the Committee must report and itemize the in-kind contribution of office space in the report covering the dates on which the contribution was received (in other words, the rental due dates), along with the election-to-date totals for this contributor. In the same report, the Committee must also report the contribution amount as an expenditure for rental of the space. 11 CFR 104.13(a)(2).

Date Issued: October 7, 2004; Length: 4 pages.

—Amy Kort

[1] This contribution is subject to the Act's contribution limits of $2,000 per candidate, per election, and it must be aggregated with any other contributions that contributor has made for the same election. 2 U.S.C. §441a(a)(1)(A) and 11 CFR 110.1(a) and (b)(1).

AO 2004-37 Brochure Advocating Candidates Not a Contribution

Representative Maxine Waters intends, through her principal campaign committee (PCC) or leadership PAC, to produce a brochure that expressly advocates for various federal and nonfederal candidates. The proposed brochure would not constitute support of, or be an in-kind contribution to, the federal candidates listed, provided that the federal candidates or their authorized committees reimburse the PCC or leadership PAC in the appropriate amounts and in a timely manner. Those reimbursements would likewise not constitute support of, or be contributions to, the sponsoring committee. The requestors did not request the Commission's opinion regarding arrangements with or payments by nonfederal candidates or their committees.

Background

Representative Maxine Waters is a U.S. Representative from California who ran for re-election on November 2, 2004. She would like to produce a brochure, either

through the Citizens for Waters principal campaign committee (the Waters Committee) or People Helping People leadership PAC (PHP), that will expressly advocate the election of clearly identified federal and nonfederal candidates in the general election. The brochure, promoted as Representative Waters' "official sample ballot," will feature a prominent picture of Representative Waters and convey her opinions and endorsements of federal and nonfederal candidates who will be given space and prominence in proportion to their prominence on the Democratic ticket. Federal candidates will be included in the brochure only if their principal campaign committees reimburse for the full production and distribution costs attributable to them. Approximately 200,000 brochures will be distributed via U.S. Mail; different versions, each more than 500 pieces, will be created to accurately reflect the actual ballot within the recipient's voting precinct. The initial request and subsequent opinion speak only to the federal candidates involved.

Analysis

No in-kind contribution to federal candidates listed. Under Commission regulations at 11 CFR 109.21, a coordinated communication is considered an in-kind contribution to the candidate or party with whom it is coordinated. The first factor to consider in determining whether a communication is coordinated is whether someone other than the referenced candidate or party paid for the ad. In this case, because each federal candidate will be included in the brochure only if he or she reimburses the Waters Committee or PHP for the attributable costs, the brochure would not satisfy the payment prong of the coordinated communication test. Therefore, payments by either the Waters Committee or PHP for the brochure would not constitute support of, or in-kind contributions to, any federal candidate appearing in the brochure, so long as reimbursement is made within a reasonable period of time.[1] Because the brochure would not be an in-kind contribution to the federal candidates listed within, the production and distribution costs would not be subject to the limits of either 2 U.S.C. 432(e)(3) (support of a federal candidate from a principal or authorized campaign committee of another federal candidate) or 441a(a)(2)(A) (contribution from a PAC to a federal candidate).[2]

No support of or contributions to Waters Committee or PHP by listed candidates. Reimbursements by the authorized committees of the federal candidates listed in the brochure in amounts equal to the attributable costs associated with each candidate's listing would not constitute support of the Waters Committee or contributions to PHP because, in this situation, mere reimbursement within a reasonable period of time would not constitute "anything of value" to the Waters Committee or PHP. Note that excess reimbursements would constitute contributions and be subject to the appropriate limits of the Act.

Attribution of costs to listed candidates. Attribution to each federal candidate shall be determined by the proportion of space devoted to each candidate as compared to the total space devoted to all candidates, whether federal or nonfederal. 11 CFR 106.1(a) and 106.1(a)(1).

Reporting of initial payments and reimbursements. The Waters Committee (on FEC Form 3) or PHP (on FEC Form 3X) must report the brochure production and distribution costs as operating expenditures. Likewise, reimbursements by each authorized committee of the individual candidates listed in the brochure must be reported as offsets to operating expenditures. Assuming the costs attributable to each candidate will exceed $500, the Waters Committee or PHP must disclose the costs attributable to each candidate as a debt owed to it on Schedule D of the 30-Day Post-General Election Report and future reports, unless a candidate's complete reimbursement occurs on or before November 22, 2004, the closing date of the Post General Election Report. The Waters Committee or PHP should include notations with the above entries citing this advisory opinion.

Disclaimer Requirements. Because the brochure will be distributed by a mass mailing, it will constitute a public communication. Accordingly, the brochure must include a disclaimer stating that it was paid for by the authorized committees of each federal candidate appearing in it. As the Commission has previously allowed for some flexibility in listing candidate names in a disclaimer notice, in this instance the Waters Committee or PHP may mark each paying candidate with an asterisk and include a statement on the mailing declaring that the brochure was "paid for by the authorized committees of the candidates marked with an asterisk."

Date Issued: October, 21, 2004; Length: 6 Pages

—Meredith Trimble

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[1] See *Advisory Opinion 2004-1, which concludes that communications produced and distributed by one candidate's authorized committee and coordinated with a second candidate's authorized committee would not result in an in-kind contribution to the second authorized committee so long as the second committee reimbursed the first for the attributed portion of the communication costs*.

[2] *The Commission assumes that if PHP produces and distributes the sample ballot, the Waters Committee, like the authorized committees of all the other federal candidates listed, will reimburse PHP for the full costs attributable to Representative Waters*.

AO 2004-43
Sale of Ad Time Not a Contribution

A broadcaster's decision to offer Senator Christopher Bond the Lowest Unit Charge (LUC) for airing campaign ads did not result in an in-kind contribution under the Federal Election Campaign Act (FECA).

Background

The Communications Act generally requires broadcasters to charge a candidate the LUC for his or her political ads in the 45 days before a primary election and during the 60 days before a general election. However, a federal candidate is not entitled to the LUC if any of his or her ads make a direct reference to his or her opponent and fail to contain a statement identifying the candidate and stating that the candidate approved the communication.[1] 47 U.S.C. §315(b).

The Missouri Broadcasters Association (MBA), a voluntary association of broadcasters who are Federal Communications Commission (FCC) licensees, asked the FEC to assume that Senator Bond's broadcast ads did not satisfy this requirement and then asked whether a broadcaster's sale of ad time at the LUC would result in a contribution to Senator Bond. The FECA and Commission regulations provide that a contribution results from the provision of services, such as advertising services, at less than the usual and normal charge. See 11 CFR 100.53(d)(1).

Analysis

In this case, a broadcaster's provision of the LUC to Senator Bond did not result in an in-kind contribution. The Commission reviewed Senator Bond's ads as provided by MBA and concluded that there was no violation of any disclaimer requirement over which the Commission has jurisdiction. The Commission noted that the FECA's disclaimer requirements are substantially similar to those of the Communications Act, and that the Commission has substantial expertise in evaluating disclaimer issues. Moreover, the Commission noted that the FCC has not yet promulgated regulations implementing the stand-by-your-ad requirements in the Communications Act and has not put forth a different conclusion on the merits of this case. Thus, because the Commission found that there was no violation of the disclaimer requirements, in this instance, providing the LUC did not result in an in-kind contribution.

Concurring and Dissenting Opinions

Chairman Thomas issued a concurring opinion on February 16, and Commissioner Mason issued a concurring opinion on February 17, 2005. Vice Chairman Toner and Commissioner Smith issued a dissenting opinion on February 17, 2005.

Date Issued: February 14, 2005; Length: 3 pages.

—*Amy Kort*

AO 2004-45
Accounting Method for Determining Excess Contributions Under Millionaires' Amendment

Senator Ken Salazar and his principal campaign committee, Salazar for Senate (the Committee) may use a "last-in, first-out" (LIFO) accounting method to determine whether any contributions raised under the "Millionaires' Amendment" are "excess contributions" that must be returned to contributors. 2 U.S.C. §§441a-1 and 441a(i); 11 CFR Part 400.

Background

During the 2004 general election cycle, the Salazar Committee raised contributions under the Millionaires' Amendment, which allows a candidate to raise money in excess of the $2,000 per election individual contribution limit in certain circumstances where the candidate faces a self-financed opponent. Under the Federal Election Campaign Act (the Act) and Commission regulations, candidates receiving increased contributions under the Millionaires' Amendment must refund, within 50 days after the election, all "excess contributions" that were not spent in connection with that election. 2 U.S.C. §§441a(i)(3) and 441a-1(a)(4); 11 CFR 400.51 and 400.53. An "excess contribution" is the amount of each contribution raised over the usual $2,000 limit that is not otherwise spent "in connection with the election" to which it relates. 11 CFR 400.50.

Analysis

Neither the Act nor the Commission's regulations specify a particular accounting method that candidate committees must use to determine whether their remaining cash-on-hand after an election contains any "excess contributions." Because LIFO is a generally accepted accounting principle, the Salazar Committee may use this method to determine whether it has "excess contributions" under the Millionaires' Amendment.

Date Issued: January 27, 2005; Length: 3 pages.

—*Amy Kort*

[1] *Note that the stand-by-your-ad requirements in both the FECA and the Communications Act were added by the Bipartisan Campaign Reform Act of 2002. The FECA requires a similar, but not identical, statement in political ads. 2 U.S.C. §441d(d)(1). See also 11 CFR 110.11(c)(3).*

AO 2005-2
Fundraising by Federal Officeholder for Nonfederal Elections

As a federal officeholder, Senator Jon Corzine may not raise funds outside of the limitations and prohibitions of the Federal Election Campaign Act (the Act), other than for his own campaign for governor. Any funds the Senator and his agents raise for other state and local candidates or committees must comply with federal law.

Background

Senator Corzine is a U.S. Senator from New Jersey. He was elected in 2000, and he again became a federal candidate under the Act in early May 2001 as a result of his re-election efforts for the 2006 Senate race. However, on December 2, 2004, he announced his intention to run for Governor of New Jersey in the 2005 primary election, with Corzine for Governor, Inc., as his state campaign committee. Having announced his gubernatorial candidacy, Senator Corzine states that he is no longer seeking re-election to federal office.

New Jersey's June 7 primary and November 8 general elections do not involve the nomination or election of any federal candidates. Like "any other gubernatorial candidate," the Senator hopes to elicit support for his campaign by raising funds for other state and local candidates, for state PACs and for the nonfederal accounts of state and local party committees—all within the limits prescribed by New Jersey state law.[1] Senator Corzine states that the extent of cooperation and assistance he receives from state and local candidates and committees may depend upon his ability to offer them support He therefore contends that the aforementioned fundraising activities are exclusively in connection with his state campaign.

Analysis

Under provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), a federal candidate or officeholder may raise and spend funds in connection with a nonfederal election only in amounts and from sources that are consistent with state law *and* the limits and prohibitions of the Act. 2 U.S.C. §441(i)(e)(1)(B) and 11 CFR 300.62. As an exception, a federal candidate or officeholder may raise nonfederal funds "solely in connection" with his own state campaign, so long as the "solicitation, receipt, or spending" of those funds refers only to himself and/or to his nonfederal opponent. 2 U.S.C. §441i(e)(2).

Based on these restrictions, Senator Corzine and his agents may raise funds for the campaigns of other New Jersey state and local candidates, state PACs and the nonfederal accounts of state and local party committees only in amounts that are within the Act's limits and from sources that are permissible under the limitations and prohibitions of the Act. The limited exception for federal officeholders seeking election to a state office would not apply to solicitations on behalf of those groups.

Fundraising Restrictions

Joint candidates committee. New Jersey law permits two nonfederal candidates to conduct their activities together through a joint committee. Senator Corzine and his agents may raise up to $4,200 (twice the $2,100 federal limit) per election from an individual donor for a joint committee in which he is not involved, assuming he raises no other funds for the participating candidates from that individual.

State and local party committees. Commission regulations allow federal candidates and officeholders to speak without restriction at state or local party fundraising events. 11 CFR 300.64(b). As a result of this exemption, Senator Corzine may appear at such an event and solicit donations without regard to the amount limitations and source prohibitions of the Act.[2]

The Act and Commission regulations provide that an individual may contribute no more than $10,000 per calendar year to a political committee established and maintained by a state committee of a political party. 2 U.S.C. §441a(a)(1)(D); 11 CFR 110.1(c)(5). When soliciting for a party committee's nonfederal account, the Senator should be mindful that Commission regulations establish a rebuttable presumption that a state party committee and the local party committees of that state are affiliated and thus share one limit on contributions they receive. The amount Senator Corzine and his agents may solicit from an individual donor for the nonfederal accounts of a state party committee and affiliated local party committees is subject to a shared limit of $10,000 per calendar year. The Senator need not consider a prospective donor's previous contributions to a federally registered party committee's federal account when soliciting for its nonfederal account.

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[1] *Source restrictions and donation limits of New Jersey law differ significantly from those of federal law. Specifically, New Jersey law permits donations by labor organizations and most types of corporations, and New Jersey donation limits differ from the Act's limits at 2 U.S.C. §441a(a).*

[2] *The* Explanation and Justification *for this rule describes how the name of the federal candidate or officeholder may appear in pre-event publicity and explains the circumstances where solicitation restrictions would attach, notwithstanding this exception. See* Soft Money Final Rules, *67 FR at 49108. Note also that 11 CFR 300.64(b) is the subject of an ongoing rulemaking in response to* Shays v. FEC, *337 F. Supp. 2d 28 (D.D.C. 2004), appeal filed, No. 04-5352 (D.C. Cir. Sept. 28, 2004). The current regulation remains in full force and effect pending the outcome of this rulemaking proceeding.*

If a local party committee can demonstrate that it is not affiliated with the state or other local committees, the Senator may solicit up to $5,000 per year from an individual without regard to the amounts solicited for the other party committees. This $5,000 limit also applies to solicitations of an individual for donations to unregistered local party organizations.

The same principles of aggregation and non-aggregation for donations by individuals apply to donations by federal PACs made at the request of Senator Corzine to the party committees' nonfederal accounts. The donations must comply with 11 CFR 300.62 with respect to the amounts and sources used for the donations. However, the amount he may solicit will depend upon whether the federal PAC is a multicandidate committee. A non-multicandidate federal PAC may contribute $10,000 per year, in the aggregate, to any committees established and maintained by a state party committee, while the limit on yearly contributions by a multicandidate federal PAC to a state party committee is only $5,000. 2 U.S.C. §§441a(a)(1)(D) and (2)(C).

Nonfederal activities not involving solicitations. Senator Corzine and his agents may help state and local candidates, state PACs and state and local party committees plan their fundraising and spending activities, so long as he and his agents do not solicit, receive, direct, transfer, spend or disburse funds proscribed by 2 U.S.C. §441i(e)(1)(B). Such planning, electioneering activity and consulting activities, by themselves, do not constitute spending by Corzine for Governor. Similarly, the Senator may recommend individuals for employment to candidates, PACs and parties, even if those individuals' duties would involve soliciting, receiving, directing, transferring, spending or disbursing nonfederal funds, so long as the recommended individuals are not acting as agents for Senator Corzine or his state campaign.

Agents. When an individual is acting as an "agent" for Corzine for Governor, he is acting on behalf of an entity directly or indirectly established, financed, maintained or controlled by Senator Corzine, (as per the definition of "agent" at 11 CFR 300.2(b)(3)). Hence the individual's activities are governed by the restrictions on federal officeholders at 2 U.S.C. §§441i(e)(1) and (2).[3] It is possible, however, that an individual may be an agent of Corzine for Governor and yet perform other acts that are not on behalf of Corzine for Governor. Whether such individual would be an agent of Senator Corzine would be determined by a number of factors; it is a fact-based determination that will be based on what the Senator and the individual say and do.

Dissenting Opinion

Commissioner David Mason issued a dissenting opinion, filed on April 21, 2005.

Date Issued: April 22, 2005; Length: 10 pages.

—Meredith Trimble

AO 2005-4 Reporting Restitution Owed to Committee

The Friends of John Boehner Committee (the Committee) must continue to report as a debt the amount of a court-ordered restitution, and must report restitution payments as receipts, even if it redirects or assigns the payments to a charity. If, however, the court order is amended so that the restitution must be paid to the charity rather than to the Committee, then the Committee would no longer need to report the debt or receipt of the restitution payments.

Background

Russell E. Roberts, the former treasurer for the Committee, is required by the court to pay restitution of $617,562.88 to the Committee in as part of his sentence for embezzling funds from the campaign. Mr. Roberts is currently serving a prison sentence and will pay no more than $100 per calendar year in restitution. This payment schedule will increase modestly upon his release, but the Committee does not anticipate ever receiving full restitution from Mr. Roberts. The Committee wishes to direct or assign the restitution payments to a charitable foundation, and it does not wish to continue reporting the restitution amount as a debt and the payments it receives as receipts.

Analysis

Political committees must report all debts owed to them until the debt is extinguished, and they must deposit and report all receipts except for contributions that are returned. 2 U.S.C. 432(h), 434(b)(2) and 434(b)(8). Because Mr. Roberts is required by the court order to pay the entire restitution amount to the Committee, this amount is a debt to the Committee under the Federal Election Campaign Act and must be continuously reported. Although the Committee may donate the restitution payments to charity, it must deposit the payments in the Committee's bank account and disclose in its FEC reports both the receipt from Mr. Roberts and the subsequent disbursement to the charity. See A0 1991-38.

However, if the court were to amend the order so that Mr. Roberts was obligated to make restitution payments to the charity rather than to the Committee, then the Committee would report that the debt was extinguished and would no longer need to report the debt or the receipt of restitution payments.

Date Issued: May 4, 2005; Length: 5 pages.

—Amy Kort

[3] *The Commission's regulations defining "agent" are the subject of an ongoing rulemaking. The Commission's current regulations defining "agent" remain in full force and effect pending the outcome of the rulemaking proceeding.*

AO 2005-5
Federal Candidate/ Officeholder's Use of Funds from Nonfederal Exploratory Committee

U.S. Representative Ray LaHood, a federal candidate and officeholder who is also exploring a gubernatorial candidacy, may use funds remaining in his gubernatorial exploratory committee's account to make donations in connection with nonfederal elections because the funds in this account were raised in accordance with the Federal Election Campaign Act's (the Act) contribution limits and source prohibitions. See 11 CFR 300.62. Representative LaHood's exploratory committee funds may also be refunded to donors and donated to charitable organizations that do not engage in election activity.

Background

Under the Act, federal candidates and officeholders, their agents and any entities directly or indirectly established, financed, maintained or controlled by a federal candidate/officeholder can only solicit, receive, direct, transfer, spend or disburse funds in connection with a nonfederal election if those funds are consistent with the limits and prohibitions of the Act and also comply with state law. The Act provides a limited exception from this requirement for federal candidates and officeholders who are also state or local candidates and are raising and spending funds solely in connection with their own nonfederal campaigns. 2 U.S.C. §§441i(e)(1)(B) and 441i(e)(2); 11 CFR 300.62 and 300.63.

Analysis

Representative LaHood, who is considering a candidacy for Governor of Illinois, has established an exploratory campaign committee, Ray LaHood for Illinois (the Committee). Although not required under the Act, all funds raised by and for the Committee have been in amounts and from sources that are in compliance with the Act's limits and prohibitions.

If Representative LaHood decides not to announce a gubernatorial candidacy, he may use the funds remaining in the Committee's account for donations to state and local candidates and to the nonfederal accounts of party organizations, so long as the donations are consistent with state law. Because the Committee's funds are in compliance with the Act's limits and prohibitions, donations in connection with nonfederal elections would be permissible. For the same reason, Representative LaHood may also use those funds to make refunds to donors, provided that such refunds are consistent with state law.

Finally, Representative LaHood may use the Committee's funds to make donations to charitable groups organized under section 501(c)(3) of the Internal Revenue Code that do not conduct election activity, so long as the donations are consistent with state law. Donations to section 501(c)(3) organizations that conduct no election activity of any kind do not involve the transfer or spending of funds in connection with a federal or nonfederal election and, thus, are not subject to the restrictions on federal candidates/officeholders. See AO 2003-32.

Date Issued: June 10, 2005; Length: 5 pages.

—*Amy Kort*

AO 2005-6
Former Officeholder May Donate Campaign Funds to Charity

Former Representative Scott McInnis may donate campaign funds from Friends of Scott McInnis, Inc. (the Committee) to Friends of McInnis Canyons National Conservation Area (Friends of McInnis Canyons NCA), a not-for-profit charitable organization that will neither employ nor otherwise compensate the former Representative or his family.

Background

Friends of McInnis Canyons NCA is a not-for-profit organization that is incorporated in Colorado. The organization is in the process of applying for tax exempt status under section 501(c)(3) of the Internal Revenue Code (IRC). The organization's mission is to support the McInnis Canyons National Conservation Area in Colorado, which is named after former Congressman Scott McInnis, by providing funds and volunteers to do such things as trail maintenance, habitat improvement and educational activities. None of the organization's funds will be used to influence any federal election, and neither former Representative McInnis nor any member of his family will receive any income from the organization.

Analysis

The Federal Election Campaign Act (the Act) provides that campaign funds may be donated to any charitable organization described in 26 U.S.C. 170(c),[1] but may not be "converted by any person to any personal use." 2 U.S.C. §§439a(a)(3) and (b)(1); 11 CFR 113.2(b) and 113.1(g)(2). The regulations explain that campaign donations to charitable organizations are not personal use unless the candidate (former or current) receives compensation from the organization before that organization has expended, for purposes unrelated to the candidate's personal benefit, the entire amount donated to it. 11 CFR 113.1(g)(2).[2]

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[1] *Charities that qualify for tax exempt status under section 501(c)(3) of the Internal Revenue Code (IRC) are described in section 170(c) of the IRC.*

[2] *See Advisory Opinions 1997-1 and 1996-40, which consider the application of the Act and Commission regulations to situations similar to the circumstances presented in 2005-6.*

Although Friends of McInnis Canyons NCA bears former Representative McInnis' name, it will not employ, compensate or financially benefit Mr. McInnis or any member of his family. As a result—assuming the IRS approves Friends of McInnis Canyons NCA's application for 510(c)(3) status—the Committee may permissibly donate campaign funds to the organization.

The Committee must report its donations as "Other Disbursements" on its FEC reports.

Date Issued: June 23, 2005;
Length: 5 pages.

—*Meredith Trimble*

AO 2005-7
Certain Commentaries and Editorials Are Prohibited Corporate Contributions if Coordinated

Bona fide news stories concerning federal elections are exempt from the definition of "contribution" and "expenditure," even when published by a media corporation co-owned by a federal candidate. The media corporation may also publish opinion columns written by the federal candidate provided that those columns are not "coordinated communications." In addition, the federal candidate may purchase advertising space from the media corporation provided the candidate's committee is charged the same standard rate charged to other advertisers.

Background

Andy Mayberry, a candidate for the U.S. House of Representatives for Arkansas' 2nd District, co-owns Spirit Publications, Inc., an incorporated media company. Spirit Publications publishes and distributes *The East Ender*, a local newspaper that carries opinion columns and *bona fide* news stories, and the *Spirit Magazine*, a monthly publication. The circulation area of both periodicals is within Arkansas' 2nd Congressional District. Mr. Mayberry is a regular opinion columnist for both periodicals.

Press Exemption

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations from making any contribution or expenditure in connection with a federal election. 2 U.S.C. §441b(a); 11 CFR 114.1(a), 114.2(b)(1) and (b)(2). However, the rules exempt from the definitions of "contribution" and "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication." 11 CFR 100.73 and 100.132. This so-called press exemption applies to the costs of news stories that are *bona fide* news accounts, subject to certain conditions, even if the newspaper or magazine is owned or controlled by a candidate. Thus, the expenses of publishing and distributing editions of the *East Ender* containing *bona fide* news stories about federal elections and candidates are not contributions or expenditures because the news stories are part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation area. 11 CFR 100.73 and 100.132.

The press exemption does not apply, however, to commentaries and editorials that are distributed through facilities that are owned or controlled by a political party, political committee or candidate. 2 U.S.C. §431(9)(B)(i); 11 CFR 100.73 and 100.132. Therefore, any opinion columns written by Mr. Mayberry that are published and distributed through Spirit Publications are not exempt from the definitions of "contribution" or "expenditure" under the press or media exemption.

Coordinated Communications

Lacking an exemption, the Commission next considered whether publishing the columns would result in contributions from Spirit to the Mayberry campaign and thus be prohibited.

Under the Act and Commission regulations, a communication that is coordinated with a candidate or party is considered an in-kind contribution by the person paying for the communication. 2 U.S.C. §441a(a)(7)(B)(i); 11 CFR 109.21(b). Commission regulations provide for a three-prong test to determine whether a communication is a coordinated communication. The test considers whether the communication:

- Is paid for by a person other than a federal candidate, a candidate's authorized committee, a political party committee or an agent of any of these;
- Satisfies one or more of six conduct standards (11 CFR 109.21(d)); and
- Satisfies one or more of four content standards (11 CFR 109.21(c)). See 11 CFR 109.21(a) and (b)(1).

Opinion columns authored by Mr. Mayberry satisfy the payment prong of the test because, although Mr. Mayberry would write the columns, they would be paid for by Spirit Publications. Similarly, because Mr. Mayberry would be the author and editor of the opinion columns at the same time that he is a candidate for federal office, Spirit Publication's continued publication of Mr. Mayberry's opinion columns would satisfy the test's second prong—conduct. The conduct standards focus on issues such as whether the candidate or the candidate's agents "request or suggest" or are "materially involved" in the making and airing of a communication, or engage in "substantial discussion" about the communication. 11 CFR 109.21(a)(3) and (d)(1) through (3).

His opinion columns may also meet the test's third prong—content. Four types of communications satisfy the content standard: (1) a public communication that expressly

advocates the election or defeat of a clearly identified federal candidate; (2) a public communication that disseminates, distributes or republishes campaign materials; (3) electioneering communications; and (4) a public communication that refers to a political party or clearly identified federal candidate that is disseminated 120 days or fewer before an election and is directed to voters in the candidate's jurisdiction. 11 CFR 109.21(c).

Mr. Mayberry's opinion columns constitute public communications, so if any future opinion columns expressly advocate the election or defeat of a clearly identified federal candidate, those columns will satisfy the "express advocacy" content standard in 11 CFR 109.21(c)(3). Similarly, if future opinion columns disseminate, distribute or republish, in whole or in part, campaign materials prepared by Mr. Mayberry or any other federal candidate, or by an agent of either, those columns will satisfy the "republication" content standard in 11 CFR 109.21(c)(2).

Opinion columns that contain a byline with Mr. Mayberry's name and photograph would meet the "120 day public communication" content standard if they are publicly distributed or disseminated within 120 days of an election for federal office and are directed to voters within his jurisdiction. Conversely, opinion columns that do not bear a byline with Mr. Mayberry's name or photograph and do not contain any other reference to a clearly identified federal candidate or party would not meet this content standard, regardless of when such columns are publicly distributed or disseminated.

Any editorial or commentary in the periodicals—including the candidate's opinion column—that satisfies any of the content standards discussed above would be an impermissible in-kind contribution. As such, it would also be an impermissible corporate expenditure. See U.S.C. §441b(b)(2) and 11 CFR 100.111

Payments for Ad Space

Finally, Mr. Mayberry's committee may purchase advertising space in *the East Ender* at the same standard rates that Spirit Publications sells such space to other advertisers, so long as that rate is the usual and normal charge for such advertising, and normal practices for assigning advertising space are followed, and payment terms for the Committee follow normal billing practices. 11 CFR 100.111(e).

Date Issued: August 18, 2005; Length: 10 pages

—*Amy Pike*

AO 2005-9 Campaign May Pay Travel Expenses of a Federal Candidate's Minor Children

"Friends of Chris Dodd," the principal campaign committee of Senator Chris Dodd, may use campaign funds to pay for the travel expenses of Senator Dodd's minor children to accompany their parents between their home in Connecticut and Washington, DC, provided that the parents are traveling to participate in functions directly connected to the senator's *bona fide* official responsibilities.

Background

Senator Dodd, a United States Senator from Connecticut, travels regularly between his home in Connecticut and Washington, DC in connection with his official duties, and his travel expenses are paid for in accordance with Senate rules and Commission regulations. Senator Dodd's wife also travels to Washington, DC to participate in events relating to Senator Dodd's official duties. When both parents travel between Connecticut and Washington, DC, the senator's two young daughters accompany their parents.

Analysis

The Federal Election Campaign Act (the Act) identifies six categories of permissible uses of contributions accepted by a federal candidate, including "ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office." 2 U.S.C. §439a(a) and 11 CFR 113.2(a) In no case, however, may campaign funds be used for an expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder, and thus be converted to "personal use." 2 U.S.C. §439a(b)(1) and 11 CFR 113.1(g). The question of whether payment of travel expenses constitutes personal use is dealt with by the Commission on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).

Commission regulations specify that certain travel costs qualify as "ordinary and necessary expenses incurred in connection with" one's duties as a federal officeholder. These expenses specifically include the costs of travel for a federal officeholder and an accompanying spouse to participate in a function directly connected to *bona fide* official responsibilities, such as a fact-finding meeting or an event at which the officeholder's services are provided through a speech or appearance in an official capacity. 11 CFR 113.2(a)(1)

While the regulations do not specifically include the costs of travel for accompanying children, the facts in this case are similar to those in Advisory Opinion 1995-20. In that opinion, the Commission approved the use of campaign funds to pay for the travel expenses of a federal candidate's minor children finding that even though the children themselves participated only occasionally in campaign events, the expenditure was required only because of the candidate's campaign. Similarly, Senator Dodd and his wife travel between their home in Connecticut and Washington, DC, to participate in functions directly related to Senator Dodd's *bona fide* official responsibilities as a holder of federal office. When Senator Dodd's minor chil-

dren accompany him and his wife on these trips, the costs of the children's travel arise solely from the senator's duties as a federal officeholder. Such travel may be contrasted, for example, with family travel to vacation locales or other examples of personal uses of campaign funds. Therefore, payments for the travel expenses of minor children are a permissible use of campaign funds.

Date Issued: August 18, 2005; Length: 5 pages

—*Amy Pike*

AO 2005-10
Federal Candidates and Officeholders Fundraising for Ballot Initiative Committees

U.S. Representatives Howard L. Berman and John T. Doolittle are not subject to the restrictions on federal candidates and officeholders of the Federal Election Campaign Act (the Act) when they solicit funds for ballot measure committees formed solely to support or oppose ballot initiatives on the California special election ballot. These ballot measure committees are not directly or indirectly established, financed, maintained or controlled by Representative Berman or Representative Doolittle, by anyone acting on their behalf or by any political party committee.

Background

On November 8, 2005, California will hold a statewide special election. Neither Representative Berman nor Representative Doolittle, nor any other federal candidate, will appear on the ballot for this election. However, the election will present ballot initiatives that represent major issues facing the constituents of Representatives Berman and Doolittle and touch on matters frequently before Congress.

Representatives Berman and Doolittle plan to raise funds for ballot measure committees formed solely to support or oppose these initiatives. These committees are not directly or indirectly established, financed, maintained or controlled by either of the Representatives or by any national, state, district or local party committee. Representatives Berman and Doolittle will fundraise for these ballot measure committees in their individual capacities and not on behalf of any party committee. They will not raise funds for public communications that would refer to either of them and that would be distributed in their respective congressional districts.

Analysis

Under the Act, federal candidates and officeholders, such as Representatives Berman and Doolittle, may not raise or spend funds in connection with an election for federal office, unless the funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A) and 11 CFR 300.61. In addition, federal candidates and officeholders may not raise or spend funds in connection with an election other than an election for federal office, unless the funds are within the contribution limits to candidates and political committees and from permissible sources under the Act. 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62. See 2 U.S.C. §§441a(a)(1), (2), and (3). These restrictions on federal candidates and officeholders do not apply to the fundraising activities of Representatives Berman and Doolittle in the circumstances described above.

Concurring and Dissenting Opinions

Chairman Thomas issued a dissenting opinion on September 2. Vice-Chairman Toner and Commissioner Mason issued a concurring opinion on August 29. Commissioners Weintraub and McDonald issued a concurring opinion on September 2.

Date Issued: August 22; Length: 3 pages.

—*Amy Kort*

AO 2005-11
Use of Campaign Funds to Pay for Legal Expenses

Representative Randall "Duke" Cunningham may use campaign funds for expenses incurred in connection with a grand jury investigation related to his campaign activities and his duties as a federal officeholder.

Background

Representative Cunningham is the U.S. Representative from the 50th Congressional District of California and is a member of the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee. The U.S. Attorney for the Southern District of California convened a grand jury to investigate Representative Cunningham's conduct in office and his campaign fundraising activities. The investigation appears to be based upon two principal allegations:

- In November 2003, Mitchell Wade, founder and president of federal defense contractor MZM, Inc., purchased a house owned by Representative Cunningham allegedly at a price that was above market value, allegedly in order to support MZM's efforts to secure defense contracts; and
- Mr. Wade allegedly allowed Representative Cunningham to live rent-free on his yacht for 13 months.
- Representative Cunningham and his campaign committee intend to use campaign funds to pay for:
- Legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings arising from the investigation; and
- Legal fees and expenses involved in responding to the press regarding the matter.

Legal Analysis

The Act and Commission regulations generally prohibit the conversion of campaign funds to "personal use," which occurs when funds are

used for expenses that would exist "irrespective" of the candidate's campaign or duties as a federal officeholder. 11 CFR 113.1(g). Permissible uses of campaign funds include:

- Expenditures in connection with a candidate's campaign for federal office; and
- Ordinary and necessary expenses incurred in connection with a federal officeholder's duties.

The question of whether the payment of legal fees constitutes personal use is dealt with on a case-by-case basis. In previous advisory opinions, the Commission has concluded that legal fees and expenses incurred in legal proceedings involving allegations that relate to a candidate's campaign activities or duties as a federal officeholder pass the "irrespective" test and therefore may be paid with campaign funds. (See AOs 2003-17, 1998-1, 1997-12, 1996-24 and 1995-23).

Based on the representations in the request, the Commission concluded that legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham's campaign activities and federal officeholder duties. Accordingly, the Commission determined that he may use campaign funds to pay for the legal fees and expenses incurred in connection with the investigation and any legal proceedings stemming from the investigation. If at some point the grand jury investigation involves allegations not related to Representative Cunningham's campaign activities or officeholder duties, the use of campaign funds to pay for those legal expenses would constitute impermissible "personal use" of campaign funds.

Similarly, Representative Cunningham may use campaign funds to pay for legal fees and expenses incurred in responding to the press regarding allegations that relate to his campaign activities or officeholder duties because such fees and expenses would not exist irrespective of those activities and duties. (See AOs 1998-1 and 1997-12). However, in keeping with previous advisory opinions, the Commission cautioned that if the grand jury investigation involves allegations that are not related to Representative Cunningham's candidate or officeholder activities, then campaign funds can cover 100% of legal fees and expenses incurred in preparing press releases, press conferences or talking with reporters, and cover 50% of other press-related legal expenses. The campaign must maintain appropriate documentation of any disbursements made for legal fees in connection with the investigation, legal proceedings or press responses, and the committee must disclose these disbursements as "operating expenditures" on its regular reports filed with the FEC.

--- Gary Mullen

AO 2005-12

Fundraising and Spending by a Federal Candidate/ Officeholder for his Nonfederal Exploratory Committee

U.S. Representative Fattah may raise and spend funds for his potential mayoral campaign that exceed the Act's contribution limits. The funds must only be raised and spent for activities that refer to his candidacy for mayor of Philadelphia and/or others seeking that office and the amounts and sources of the funds must be consistent with state law.

Background

Generally, under the Act, federal candidates and officeholders, their agents and any entities directly or indirectly established, financed, maintained or controlled by a federal candidate/officeholder can only solicit, receive, direct, transfer, spend or disburse funds in connection with a nonfederal election if those funds are consistent with the limits and prohibitions of the Act and also comply with state law. However, the Act provides a limited exception from this requirement for federal candidates and officeholders who are also state or local candidates and are raising and spending funds solely in connection with their own nonfederal campaigns. 2 U.S.C. §§441i(e)(1)(B) and 441i(e)(2); 11 CFR 300.62 and 300.63.

Analysis

Representative Fattah is both a federal officeholder and a federal candidate seeking re-election to the House from the Second Congressional District of Pennsylvania in 2006. Although Representative Fattah does not plan to formally announce his candidacy for mayor until after the November 2006 Congressional election, he does intend to establish an exploratory committee for the mayoral election prior to that time. As part of that exploratory effort, he intends to raise and spend funds that are in excess of the amount limits contained in the Act. The funds would be raised and spent "exclusively in connection with his potential candidacy for mayor and would not, in any way, be used in connection with any candidacy for federal office" nor used "in any way to influence any election other than that of Representative Fattah's potential candidacy for mayor of Philadelphia."

Representative Fattah and his exploratory committee's fundraising are covered by the exception contained in 2 U.S.C. §441i(e)(2). Accordingly, once his mayoral exploratory committee is established, Representative Fattah and his exploratory committee may raise and spend funds in excess of the amount limits contained in the Act exclusively in connection with his candidacy for mayor of Philadelphia, so long as their activities refer only to Representative Fattah as a candidate for mayor of Philadelphia, to other candidates for that same office, or

both, and so long as the amounts and sources of the funds are consistent with state law. See AO 2003-32, 2005-2 and 2005-5.

Date issued: September 22, 2005; Length: 5 pages

----*Kathy Carothers*

AO 2005-18
Candidate May Host Radio Program

Congressman Silvestre Reyes may use campaign funds to finance a weekly radio program discussing Congressional, campaign and local issues. While the program must include a disclaimer indicating that it was paid for by the campaign, other Members of Congress who appear as guests on the program would not need to issue separate disclaimers, nor would their appearance constitute an in-kind contribution from the Reyes campaign.

Background

The Reyes Committee, Inc. ("the Committee") intends to purchase time on a radio station for a weekly 30-minute Spanish-language program hosted by Congressman Reyes. The program will air in the Congressman's district throughout the 2006 primary season. Other Members of Congress, who do not represent districts within the radio station's listening area, may participate in the program, but the program will not advocate those Members' reelection.

Analysis

Under the Federal Election Campaign Act (the Act) and FEC regulations, campaigns have wide discretion over how they spend their funds, so long as funds are not converted to personal use. 11 CFR 113.2. The regulations specifically identify campaign and officeholder expenses as permissible uses of committee funds. Since Congressman Reyes' radio program will address Congressional, campaign and local issues, the Committee's payments fall within both of those permissible expense categories.

The Committee will pay the radio station the prevailing commercially-reasonable rate for airtime. Were it to pay less than that, the amount of the discount would represent an in-kind contribution from the incorporated station, prohibited under 2 U.S.C. §441b.

A radio program paid for by a congressional candidate's committee on which other Members of Congress running for reelection appear as guests could constitute a coordinated communication, and therefore would be an in-kind contribution to those Members under 11 CFR 109.21. To determine whether a communication is coordinated, the Commission applies a three-part test that examines: 1) who paid for the communication; 2) the content of the communication; and 3) the conduct of those involved. Only communications that satisfy all three parts are considered coordinated. In this case, the communication does not satisfy the second part—the content test. To satisfy the content test a communication must be either an electioneering communication, a republication of campaign materials, an express advocacy message or a public communication disseminated to the relevant electorate within 120 days of the election.

The broadcasts would not qualify as electioneering communications because the Committee's payments would be reported as expenditures and, as such, would be exempt under 11 CFR 100.29(c)(3). The program also would not republish campaign materials or expressly advocate the election or defeat of a clearly identified candidate. Lastly, because the station's listening area is not in the jurisdiction of the other Members of Congress, it would not reach the relevant electorate. Therefore it does not satisfy the "120 public communication" content standard.

As a public communication paid for by the Committee and authorized by Mr. Reyes, each broadcast will require a disclaimer identifying the Committee as the sponsor. 11 CFR 110.11. Additionally, Congressman Reyes must voice a disclaimer that identifies him and the office he seeks, and indicates that he approved the communication. As noted above, other Members of Congress who may appear on the program are not required to make a disclaimer, because they are not paying for or authorizing the broadcast.

Concurring Opinion

Commissioners Scott Thomas, Michael Toner, David Mason, Danny McDonald and Ellen Weintraub issued a concurring opinion on December 2, 2005.

Date issued: November 18, 2005; Length: 6 pages.

—*Carlin E. Bunch*