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Advisory Opinions

AO 2003-30
Retiring Campaign Debt and Repaying Candidate Loans

The Fitzgerald for Senate Committee (the Committee) may use its remaining cash-on-hand for any of the permissible uses of campaign funds listed in FEC regulations, including the repayment of personal loans made by the candidate during the 1998 elections. Recently enacted regulations that limit campaigns’ ability to repay certain candidate loans do not apply to these repayments.

Background

The Committee is the principal campaign committee of Senator Peter Fitzgerald, who announced on April 15, 2003, that he would not seek re-election in 2004. The Committee wishes to use some of its remaining cash-on-hand to repay debts owed to:

- A bank, for loans incurred in the 1998 primary and general elections;
- Senator Fitzgerald, for loans he made to the Committee with

(continued on page 2)

Compliance

MUR 5357: Corporation’s Reimbursement of Contributions

The Commission has entered into a conciliation agreement with Centex Construction Group, Inc. (CCG), Centex-Rooney Construction Co., Inc. (Rooney), headquartered near Ft. Lauderdale, FL, former CCG and Rooney CEO Bob Moss and various current and former CCG and Rooney officers, resulting in total civil penalties of $168,000. The conciliation agreement settles violations of the Federal Election Campaign Act (the Act) stemming from the company officers’ reimbursement of $56,125 in contributions with corporate funds. The reimbursed contributions went to seven federal candidates, two political party committees and one political action committee between 1998 and 2002. The FEC’s investigation stemmed from a sua sponte submission and complaint filed with the FEC by Centex Corporation, headquartered in Dallas, TX.

Background

The Act prohibits corporations from making contributions or expenditures from their general

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respect to the 1998 primary and general elections;
• Non-bank, non-candidate creditors, for obligations incurred in the 1998 primary and general elections, and for which the amount of debt is disputed; and
• Non-bank, non-candidate creditors, for obligations incurred for the 2004 primary.

Analysis
Commission regulations prohibit personal use of campaign funds, but otherwise permit campaigns to spend funds for any expense that would not exist absent the candidate’s campaign or duties as a federal officeholder. In addition to paying expenses in connection with the campaign for federal office, campaign funds may be used only for non-campaign purposes included in an exhaustive list found at 11 CFR 113.2 (a), (b) and (c):¹
• Ordinary and necessary expenses incurred in connection with the duties of a federal officeholder;
• Donations to a charitable organization; and
• Transfers to a national, state or local committee of a political party.

Such uses are permitted provided that they do not result in campaign funds being converted to personal use by any person. 2 U.S.C. §439a(b)(1).

Repayment of the debts listed above is a permissible use of the Committee’s campaign funds. The committee’s cash-on-hand consists of contributions lawfully made for the 2004 primary election for which Senator Fitzgerald was a candidate, and debt repayment is an authorized expenditure in connection with Senator Fitzgerald’s campaign for federal office.²

In implementing the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission promulgated regulations at 11 CFR 116.11 that limit repayment of certain personal loans from the candidate. These regulations do not apply to the retirement of the Committee’s debt owed to Senator Fitzgerald, since it was incurred in connection with a pre-BCRA election. Specifically, the Committee’s 1998 primary and general election debt to Senator Fitzgerald was incurred May 12, 1997, and April 16, 1998, well before the BCRA’s November 6, 2002, effective date. Therefore, the Committee is not limited in the amount of its debt owed to Senator Fitzgerald that it may repay with 2004 primary contributions, even those contributions received after November 6, 2002.

Date Issued: December 19, 2003;
Length: 5 pages.

—Jim Wilson

AO 2003-31
Candidate’s Loans to Campaign Apply to Millionaires’ Amendment Threshold

Senator Mark Dayton’s personal expenditures for campaign expenses will permanently constitute expenditures from personal funds under the Millionaires’ Amendment—even if his campaign reimburses him—unless the payments are otherwise exempted from the definitions of “contribution” and “expenditure.” A candidate’s payment for committee expenses is an “expenditure from personal funds” that counts toward the threshold amount for determining whether a candidate’s personal spending has triggered increased contribution limits for his or her opponents. See 2 U.S.C. §434(a)(6)(B)(i).

Background
Under the Federal Election Campaign Act (the Act) and Commission regulations, a candidate may make unlimited contributions from his or her personal funds, including unlimited contributions to his or her campaign. 11 CFR 110.10(a). See AO 1997-10. However, under the Bipartisan Campaign Reform Act’s so-called “Millionaires’ Amendment,” a candidate
opposing a self-financed candidate may under certain circumstances accept contributions from individuals under increased contribution limits, and, for Senate candidates, the coordinated party expenditure limits for national and state party committees may be suspended. 2 U.S.C. §§441a(i) and 441a-1; 11 CFR 400.40 and 400.41. Increased contribution limits and/or suspended expenditure limits are triggered based on a candidate’s “oppositional personal funds amount,” (OPFA) which is based in part on the difference between the aggregate amount of expenditures from personal funds that a candidate and an opposing candidate each make in the same election. See 2 U.S.C. §441a(i)(1)(D) and 11 CFR 400.10. An expenditure from personal funds is “an expenditure made by a candidate using personal funds; and a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate’s authorized committee.” 2 U.S.C. §434(a)(6)(B)(i).

The Act and Commission regulations also contain exceptions from the definitions of “contribution” and “expenditure.” Any campaign-related transportation or subsistence expense paid for by an individual, including a candidate, that does not aggregate in excess of $1,000 for a single election and is not reimbursed by the campaign is not a contribution or expenditure. 2 U.S.C. §431(8)(b)(iv); 11 CFR 100.79 and 100.39. Also, any reimbursed campaign-related travel or subsistence expense paid for by an individual, including a candidate, is not a contribution if it is reimbursed by the campaign within 30 days after the expense is incurred or, in the case of a credit card payment, within 60 days after the closing date of the billing statement on which the expense first appears. 11 CFR 116.5(b).

Application to Proposal

Senator Dayton, a candidate for U.S. Senate in 2006, expects personally to make payments for:

- Campaign-related travel expenses in excess of $1,000 that are reimbursed by his campaign committee more than 30 days after the date on which the expense was incurred;
- Campaign-related travel expenses in excess of $1,000 that are charged to his personal credit card and reimbursed by his committee more than 60 days after the closing date of the credit card billing statement on which the expense first appears; and
- Other campaign expenses that are not travel related.

All of these payments will be both expenditures and contributions under the Act because they are a payment made, and a loan or something of value given, for the purpose of influencing an election for federal office. 11 CFR 100.111 and 100.52. Moreover, Senator Dayton’s payments for the travel expenses do not fall into the exceptions to the definitions of “contribution” and “expenditure” because they will not be reimbursed within the appropriate timeframes. As a result, any of the payments described above would constitute an expenditure from personal funds within the meaning of the Millionaires’ Amendment. 2 U.S.C. §434(a)(6)(B)(i); 11 CFR 400.4(a)(1) and (2).

The fact that Senator Dayton may subsequently be reimbursed does not change the expenses’ character as expenditures from personal funds. Neither the Millionaires’ Amendment nor the Commission’s implementing rules and forms contemplate reductions in expenditures from personal funds. Rather, the OPFA is calculated using the “aggregate amount[s]” of expenditures from personal funds that a candidate and an opposing candidate each make in the same election. See 2 U.S.C. §441a(i)(1)(D) and 11 CFR 400.10. An expenditure from personal funds is “an expenditure made by a candidate using personal funds; and a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate’s authorized committee.” 2 U.S.C. §434(a)(6)(B)(i).

The Act and Commission regulations also contain exceptions from the definitions of “contribution” and “expenditure.” Any campaign-related transportation or subsistence expense paid for by an individual, including a candidate, that does not aggregate in excess of $1,000 for a single election and is not reimbursed by the campaign is not a contribution or expenditure. 2 U.S.C. §431(8)(b)(iv); 11 CFR 100.79 and 100.39. Also, any reimbursed campaign-related travel or subsistence expense paid for by an individual, including a candidate, is not a contribution if it is reimbursed by the campaign within 30 days after the expense is incurred or, in the case of a credit card payment, within 60 days after the closing date of the billing statement on which the expense first appears. 11 CFR 116.5(b).

Application to Proposal

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- Other campaign expenses that are not travel related.

All of these payments will be both expenditures and contributions under the Act because they are a
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tures from personal funds from the
candidate and his or her opponents.
2 U.S.C. §441a(i)(1)(D). The
reporting provisions of the Act and
Commission regulations use the
 terms “aggregate” and “total”
 interchangeably, and do not con-
sider “aggregate” to mean “net”—in
other words, what remains after
deductions. Moreover, Congress
provided for the subtraction of
candidate contributions from
personal funds in one of the vari-
bles used for OPFA calculation,
but did not make a similar provision
for the subtraction of any amounts
in the variables for the “[greatest
aggregate amount of expenditures
from personal funds” made by the
candidate or opposing candidate. 2
U.S.C. §§441a(i)(1)(D)(i) and (ii);
11 CFR 400.10(b). Finally, the
Commission does not require a
candidate to file a new FEC Form
10 when a committee repays a
candidate’s loan to the committee. If
repayment of such loans decreased
the total amount of expenditures
from personal funds, the candidate
would need to file a new Form 10
with the corrected, decreased
expenditure from personal funds
amount.

Since any of the expenses listed
above paid for by Senator Dayton
are permanently expenditures from
personal funds for the purposes of
the Millionaires’ Amendment, the
committee must report on Form 10
when they aggregate in excess of
twice the threshold amount. 11 CFR
400.21(a) and 400.24 (a).

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Length: 6 pages.♣

AO 2003-32
Federal Candidate’s Use of
Surplus Funds from
Nonfederal Campaign
Account

Inez Tenenbaum, a candidate for
U.S. Senate, may donate surplus
nonfederal funds in her state cam-
paign account to 501(c)(3) charita-
table organizations that do not
conduct any election activity. She
may not, however, donate these
funds to 501(c)(3) charitable
organizations that conduct election
activity, including types of federal
election activity, as their principal
purpose, nor may she donate these
funds to the South Carolina Demo-
cratic party or a state legislative
caucus committee.

Background

As a candidate for South Carolina
state office in 2002, Ms.
Tenenbaum’s campaign maintained
a state campaign account into which
she placed funds raised for her
 candidacy. The state campaign
account has paid all of its expenses
from the 2002 election and is
prepared to terminate. The account
contains surplus funds that, while
compliant with South Carolina law,
were not raised in accordance with
the contribution limits and source
prohibitions of the Federal Election
Campaign Act (the Act).

Ms. Tenenbaum would like to
donate these funds to several
organizations including those
organized under section 501(c)(3) of
the Internal Revenue Code (26
U.S.C. 501(c)(3)), the South Caro-
lina Democratic Party and a state
legislative caucus committee. Ms.
Tenenbaum does not directly or
indirectly establish, finance, main-
tain or control any of the 501(c)(3)
organizations that might receive
the funds, and the proposed uses are
consistent with South Carolina law.
Some of the 501(c)(3) organizations
to which she would like to donate
funds conduct activities in connec-
tion with elections, including the
federal election activities enumera-
ted at 11 CFR 300.65(c) (e.g., voter
registration, voter identification,
get-out-the-vote activity and generic
campaign activity). Some of these
organizations conduct some federal
election activity that is not their
principal purpose, while others
conduct such activity as their
principal purpose or would spend
the donation specifically on those
activities.

Analysis

Donations to 501(c)(3) organiza-
tions that do not conduct any
election activity. Ms. Tenenbaum
may donate the nonfederal funds in
her state campaign account to
501(c)(3) organizations that do not
conduct any election activity. As
amended by the Bipartisan Cam-
paign Reform Act of 2002 (BCRA),
the Act limits the ability of federal
candidates and officeholders, their
agents and entities directly or
indirectly established, financed,
maintained or controlled by them to
raise or spend funds in connection
with either federal or nonfederal
elections. 2 U.S.C. §441(i)(e)(1). As a
candidate for election to the U.S.
Senate, Ms. Tenenbaum is prohib-
ited from soliciting, receiving,
directing, transferring or spending
any funds in connection with a
federal or nonfederal election unless
such funds are subject to the limita-
tions and prohibitions of the Act. 2
U.S.C. §§441(i)(e)(1)(A) and (B); 11
CFR 300.61 and 300.62. Donations
to 501(c)(3) organizations that
conduct no election activity of any
kind would not be in connection
with a federal or nonfederal elec-
tion. Therefore, such donations do
not fall within the restrictions and
prohibitions of 2 U.S.C. §441(i)(e)(1)
and are permissible. These dona-
tions cannot be earmarked or
designated for any election activity,
including federal election activity,
or debts arising from any election
activity.

—Amy Kort
PACronyms, Other PAC Publications Available

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

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

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

To order a free copy of PACronyms, call the FEC’s Disclosure Division at 800/424-9530 (press 3) or 202/694-1120. PACronyms also is available on diskette for $1 and can be accessed free at www.fec.gov/pages/pacronym.htm.

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

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

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

Donations to 501(c)(3) organizations that conduct election activity as their principal purpose. Ms. Tenenbaum may not donate the nonfederal funds in her state campaign account to 501(c)(3) organizations that conduct election activity, including federal election activity as described in 11 CFR 300.65(c), as their principal purpose. Given the strong likelihood that these organizations would use the donations to fund election activity either directly or indirectly, such donations would be subject to the restrictions and prohibitions of 2 U.S.C. §441i(e)(1), unless one of the exceptions to this section applies.

Under 2 U.S.C. §441i(e)(2), the prohibition above does not apply to the solicitation, receipt or spending of funds by an individual who is or was a candidate for state or local office solely in connection with such election for state or local office, if such activity is permitted by state law. While Ms. Tenenbaum falls within the scope of §441i(e)(2) because she is a former state candidate, the donations must also meet the other elements of this section. Section 441i(e)(2) applies to funds spent “solely in connection with election for State or local office.” Donations to 501(c)(3) organizations that conduct federal election activity would not constitute the spending of funds solely in connection with her election for state office, and are therefore not permissible.

Ms. Tenenbaum’s request also proposed that the donations should nonetheless be permitted by the exception at §441i(e)(4)(B). This section, however, pertains only to solicitations and does not extend to donations; thus, it does not apply.

Donations to the South Carolina Democratic Party or state legislative caucus committee. Similarly, the Commission concluded that Ms. Tenenbaum’s nonfederal campaign funds may not be donated to the South Carolina Democratic Party or a state legislative caucus committee in South Carolina. Since Ms. Tenenbaum is not a candidate in 2004 or 2006 for state or local office, 2 U.S.C. §441(e)(2) does not apply because the donated funds could not be used “solely in connection with [her] election for State or local office.” The exception in §441(e)(4)(A) also does not apply because neither the South Carolina Democratic party committee nor a state legislative caucus committee is a 501(c) organization.

Donations to 501(c)(3) organizations that conduct election activity, but not as their principal purpose. Ms. Tenenbaum also asked if she could donate the funds in her state campaign account to 501(c)(3) organizations that conduct election activity, including federal election activity, but whose principal purpose is not to conduct election activity. The Commission considered this question but could not approve a response by the required four votes.

Date Issued: December 19, 2003; Length: 5 pages.

—Meredith Trimble

AO 2003-33
Charitable Matching Plan with Prizes for Donors

Anheuser-Busch Companies, Inc. may count donations it makes to the United Way through its PAC’s Charitable Matching Program toward a contributor’s eligibility to receive prizes under the company’s United Way program.

Background

Anheuser-Busch currently administers both a Charitable Matching Program to encourage contributions to its PAC and a United Way Program to encourage employees to donate to charity. Under the first, when an individual contributes to the Anheuser-Busch...
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Companies, Inc. Political Action Committee (AB-PAC), Anheuser-Busch matches that contribution with a donation to a charity designated by the contributing employee. Under the second, Anheuser-Busch gives prizes such as beer, steins or plaques to employees who donate directly to the United Way.

Prior to 2002, these programs were separate. If an individual participated in the Charitable Matching Program and designated the United Way as his or her charity, then the donation did not count toward the prize thresholds under the United Way Program. In 2002, Anheuser-Busch began to aggregate donations so that these individuals could receive prizes under the United Way Program.

Analysis
Although corporations are prohibited from making contributions or expenditures in connection with any federal election, they are allowed to use their treasury funds to pay establishment, administration and solicitation expenses for their separate segregated fund (i.e., PAC). However, a corporation may not use this process as a means to exchange treasury funds for voluntary contributions. A contributor may not be rewarded for their contribution through a bonus, expense account or any other direct or indirect compensation. 11 CFR 114.5(b).

The Commission has allowed charitable matching programs similar to those offered by Anheuser-Busch. Under the Charitable Matching Program, all treasury funds go to a designated charity, not the individual. The contributor does not receive any tangible benefit and there is no exchange of treasury funds for contributions to AB-PAC. See, for example, AOs 2003-4, 1990-6, and 1989-9.

The Commission has also allowed contributors to be rewarded with prizes or tokens of appreciation. See AO 1981-40. These prizes are permitted so long as they are not disproportionately valuable compared to the contributions raised. The cost of the prizes may not exceed one-third of the money raised. 11 CFR 114.5(b)(2).

Anheuser-Bush’s plan combines these two permissible fundraising methods, offering contributors both a charitable match and a token of appreciation. Since the value of the prizes awarded under the United Way Program do not exceed one-third of the amount raised under the Charitable Matching Program, and the prizes are not so valuable as to constitute a tangible benefit to the employee who contributes through the Charitable Matching Program, the plan is permissible.

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—Phillip Deen

AO 2003-34
Reality TV Show to Simulate Presidential Campaign

Three incorporated media companies may fund, produce, air and distribute a reality television series depicting a fictional Presidential campaign without making a prohibited corporate contribution or expenditure because the proposed show falls within the Federal Election Campaign Act’s (the Act) press or media exemption.

Background
Showtime Networks, a wholly-owned subsidiary of Viacom, has contracted with TMD Productions (collectively, “the requesters”) to produce American Candidate, a “reality documentary series” that will simulate a Presidential campaign. In the show, American citizens will compete in a series of events designed to test their political skills. The competition will include fundraising for charitable organizations, which will be the sole benefici-
tion or media exemption,” that exempts 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, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. §431(9)(B)(i); 11 CFR 100.73 and 100.132. The Act and regulations also include a similar exemption with respect to the definition of an “electioneering communication.” 2 U.S.C. §434(f)(3)(B)(i); 11 CFR 100.29(c)(2).

In this case, the Commission concluded that the requesters meet the criteria within the Act and regulations to qualify for the “press or media exemption.” First, the requesters qualify as press entities and are not owned or controlled by a political party, political committee or candidate.1 Second, the series as political party, political committee and are not owned or controlled by any political party, political committee, or candidate.1 The Act and regulations to qualify for the “press or media exemption.” First, the requesters meet the criteria within the Act and concluded that the requesters meet the criteria within the Act and

1 Congressman Gephardt accepted $3,131,788.10 in matching fund payments on January 2, 2004. See related article on page 13. Mr. Gephardt has since withdrawn his candidacy.

AO 2003-35
Presidential Candidate May Withdraw from Matching Payment Program

Congressman Richard A. Gephardt, a Presidential candidate in 2004, could choose to withdraw from the Presidential Primary Matching Payment Account Act’s (the Matching Payment Act) public funding program even though the Commission has already certified his eligibility to receive funds under the program, so long as he withdraws before the payment date for receiving funds.1 Withdrawing from the program would not require him to refund any contributions or obtain the contributors’ authorization to retain the contributions. Moreover, if he withdrew from the program, Congressman Gephardt would not be bound by the legal requirements imposed as a result of participating in the public funding program.

Background

On November 4, 2003, Congressman Gephardt and Gephardt for President, Inc., (the Committee) filed their threshold submissions to the Commission to qualify for primary matching funds under the Matching Payment Act, along with the necessary Candidate and Committee Agreements and Certifications under 26 U.S.C. §9033 and 11 CFR 90033.1. The Commission subsequently certified to the Secretary of the U.S. Treasury that Congressman Gephardt was eligible to receive matching funds, which were scheduled to be paid on January 2, 2004.

Analysis

Withdrawal from the program.
Neither the Matching Payment Act nor its legislative history addresses a candidate whom the Commission has certified as eligible to receive payments but who no longer wished to participate in the program. However, the legislative history does expressly recognize that a Presidential primary candidate’s participation in the program is voluntary. See H.R. Conf. Rep. No. 93-1438, at 116 (1974). Moreover, the Matching Payment Act’s dependence on a candidate’s written agreement and certification implicitly recognizes the voluntary nature of participation in the program. In addition, the Supreme Court held that the voluntary nature of all of the public funding programs permits the related expenditure limits, while it at the same time found expenditure limits that were not voluntarily accepted as part of a public funding program to be unconstitutional. See Buckley v Valeo, 424 U.S. 1, 57 n. 65 (1976). The voluntary nature of the program supports the conclusion that a candidate may withdraw from the program prior to receiving payments.

The Commission’s previous resolution of similar issues is also consistent with allowing a candidate to withdraw prior to receiving payments. In 1999 the Commission allowed Elizabeth H. Dole to withdraw from the program. Al-

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though Ms. Dole withdrew from the primary election before asking to withdraw from the matching program, her withdrawal from the election did not require her to relinquish her claim to matching funds. Indeed, other candidates in that election cycle received public funds to cover qualified campaign expenses even though their campaigns ended before the initial payment of matching funds.2

Finally, the Matching Payment Act, Commission regulations and the U.S. Treasury Department all require the Secretary of the Treasury to distribute the available funds equally and to consider the sequence in which the funds are certified for candidates. 26 U.S.C. §9037(b). In the event of a shortfall, the Secretary considers all funds certified for all candidates in order to determine how the funds should be distributed. If the Commission withdraws its certification of funds for a candidate, those funds will become available for distribution to the remaining eligible candidates. Thus, withdrawing the certification of eligibility for a candidate prior to the date of payment would not prejudice the other fund recipients.

In light of all of these factors, the Commission would withdraw a certification of a candidate’s eligibility to receive matching funds prior to initial the payment date for that candidate if the Commission received a written request to do so signed by the candidate.3 The Commission’s withdrawal of its certification would constitute its agreement to a candidate’s request to rescind the Candidate and Committee Agreements and Certifications.4

Treatment of contributions. Withdrawing from the public funding program does not require the committee to refund contributions or obtain authorization from contributors to retain their contributions. The presumed intent of the contributors is to assist in Congressman Gephardt’s 2004 Presidential primary campaign, and the Committee’s use of the contributions for this purpose satisfies that intent. Moreover, in some instances a publicly funded candidate does not submit contributions for matching. In these cases the Commission does not require that the contribution be refunded—whether a contribution is matched by public funds is not an aspect of contributor intent that the Commission has previously considered sufficient to trigger refund obligations.

Legal requirements of the Matching Payment Act. The Commission’s withdrawal of its certification would be its agreement to rescind the Candidate and Committee Agreements and Certifications submitted by Congressman Gephardt. Thus, the Congressman, the Committee and the Commission would not be bound by the Matching Payment Act obligations that are imposed solely by virtue of that contract. For example, Congressman Gephardt and the Committee would not be required to abide by the expenditure limitations in 11 CFR part 9035 or to permit an audit and examination under 11 CFR part 9038. They would, of course, remain subject to the Federal Election Campaign Act and Commission regulations, and could be subject to an audit under 2 U.S.C. §438(b).

Deferring matching payments. The Matching Payment Act, Commission regulations and the U.S. Treasury Department all require that the Commission promptly certify the amounts to which candidates are eligible. As a result, the Commission may not delay certification of eligible funds while a candidate determines whether he or she wants to participate in the program. However, candidates may choose to withhold their threshold submission until they are prepared to accept matching payments and participate in the program. See 11 CFR 9036.1(a).

Having already made his threshold submission, Congressman Gephardt’s only legal option to delay payment is to request that the Commission withdraw its certification, thus entirely nullifying the agreement. No provision of law would prevent the Congressman from submitting another Candidate and Committee Agreement and Certifications at a later point, and any matchable contributions may be included in a subsequent threshold submission.

Date Issued: December 12, 2003;
Length: 7 pages.

—Amy Kort

2 This withdrawal of certification was distinguished from AO 1996-7, in which the Commission refused to consider a candidate’s eligibility because he had stated his ideological opposition to accepting matching funds. In this case, the Commission determined that the candidate did not give the necessary assent to the Candidate Agreement under 26 U.S.C. §9033(a) and 11 CFR 9033.1(a)(2), and to all the conditions stated therein.

3 The certification of funds must not be pledged as security for private financing.

4 The Commission cautions, however, that it must receive request no later than December 30, 2003, so that it has one business day to deliver a certification of withdrawal to the Secretary of the Treasury before he issues payments on the first business day of the Presidential election year.

AO 2003-36
Fundraising by Federal Candidate/Officeholder for Section 527 Organization

Federal candidates and/or officeholders participating in fundraising activities on behalf of the Republican Governors Association (RGA) may not solicit donations outside the
contribution limits and source prohibitions of the Federal Election Campaign Act (the Act). RGA, which is registered with the IRS under section 527 and acts as the political and public policy organization of the Republican State Governors, conducts its activities in connection with elections other than federal elections. As a result, the Act limits federal candidates’ and officeholders’ ability to raise funds to support these activities. 2 U.S.C. §441i(e). Federal candidates and/or officeholders may, however, attend and participate in RGA’s fundraising events held to support state candidates, state issue messages, RGA and RGA’s “Conference Account,” and they may solicit funds within the Act’s limits and prohibitions, so long as certain procedures are followed. Moreover, because RGA’s activities are in connection with nonfederal elections, it may not accept into any of its accounts donations from sources that are prohibited under the Act from making a contribution in connection with any election to any political office, such as the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association. 2 U.S.C. §441b(a).

Background

RGA is not affiliated with a national, state or local political party committee. It raises exclusively nonfederal funds, does not participate in federal elections and has not engaged, and does not anticipate engaging, in “federal election activity.” See 2 U.S.C. §431(20) and 11 CFR 100.24. RGA’s mission is to aid Republican Governors, gubernatorial candidates and other state candidates by:

- Assisting in their elections, as permitted by state law, through direct contributions and participation in the discussion of state and local issues;
- Providing policy assistance through conferences, debates and public messages; and
- Providing a platform for the Governors to express, develop and promote their governing philosophies.

Fundraising for State Candidates, State Messages and RGA

RGA intends for federal candidates and/or officeholders to participate in its fundraising activities:

- As featured guests at RGA fundraising events;
- By having their names appear on a written solicitation for RGA fundraising events as the featured guests or speakers; or
- By signing RGA’s written fundraising solicitations.

For any of these fundraising activities, the following conditions will apply:

- Funds raised will be either explicitly solicited for the purpose of assisting only in the election of state candidates or in messages on state issues mentioning only state officials, or solicited only for RGA and not to support any specific state candidates.
- Donations in excess of the federal contribution limits or from prohibited sources will be solicited, however, in solicitations by federal candidates/officeholders, notice will be given to the solicitees that the federal candidate/officeholder is not raising funds outside the Act’s amount limits or source prohibitions.
- Oral and written solicitations by federal candidates/officeholders will refer to nonfederal candidates, but will not refer to any federal candidates (other than to name the individual making the solicitation).
- Funds solicited “only for the RGA and not to support any specific State candidates” will be used for RGA’s administrative and overhead expenses. They may also be used to pay for public communications that would include a mass mailing fundraising letter not mentioning any federal candidate and signed by the RGA Chair or for an issue message concerning a state issue.

Application of Bipartisan Campaign Reform Act (BCRA), As amended by the BCRA, the Act regulates the conduct of federal candidates and officeholders, their agents and entities directly or indirectly established, maintained, financed or controlled by them when they raise or spend funds in connection with either federal or nonfederal elections. 2 U.S.C. §441i(e)(1). The Commission’s regulations stipulate that these persons may solicit, receive, direct, transfer, spend or disburse funds in connection with any nonfederal election only in amounts and from sources that are consistent with state law and that do not exceed the Act’s contribution limits or come from prohibited sources under the Act. 11 CFR 300.62.

Commission regulations define the terms “to solicit” and “to direct” as “to ask.” 11 CFR 300.2(m) and (n). Thus, a federal candidate will not be held liable for soliciting funds in violation of these restrictions merely by virtue of attending or participating in a fundraising event at which nonfederal funds are raised. See AOs 2003-3 and 2003-5. In AO 2003-3, the Commission addressed appearances, speeches and solicitations by a federal candidate/officeholder at fundraising events for nonfederal candidates where nonfederal funds were raised. The Commission interpreted the Act and regulations to permit oral solicitations and signatures on written solicitations by the candidate/officeholder, so long as the solicitations included or were accompanied by a disclaimer.
indicating that the federal candidate/officeholder was only asking for federally permissible funds. See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

May a covered individual participate as a featured guest at an RGA fundraising event? RGA’s activities are in connection with the election of gubernatorial and other state candidates. Thus, federal candidates/officeholders may solicit funds for these activities only in amounts that do not exceed the Act’s contribution limits or source prohibitions. 11 CFR 300.62. Federal candidates/officeholders may, subject to certain conditions, appear as featured guests or speakers at RGA fundraisers, and they may otherwise participate in the fundraising activities so long as they do not solicit, direct, receive, transfer or spend funds outside the Act’s limits and prohibitions.

If a federal candidate/officeholder makes a speech without asking for donations, he or she does not need to issue a disclaimer, even though speeches by others solicit funds. If the federal candidate/officeholder gives a speech generally soliciting funds without mentioning specific amounts, sources or limitations, written notices must be clearly and conspicuously displayed at the event indicating that the federal candidate/officeholder is soliciting only federally permissible funds. In the absence of written disclaimers, a federal candidate/officeholder must make an oral disclaimer, which need only be made once and need not be made during his or her one-on-one discussions with donors or other people at the event. A federal candidate/officeholder may not inoculate a solicitation of nonfederal funds by reciting a rote limitation, but then encouraging the potential donor to disregard the limitation. See AO 2003-3.

May a federal candidate/officeholder participate by having his or her name appear on written solicitations for an RGA fundraising event as the featured guest or speaker. May he or she sign an RGA solicitation letter?

The significant issues in determining whether a publicity statement is subject to the Act’s and regulations’ restrictions on fundraising are:

- Whether the publicity constitutes a solicitation for funds; and
- Whether the federal candidate/officeholder approved, authorized, agreed or consented to be featured, or named, in the publicity.

The mere mention of a federal candidate or officeholder in the text of a written solicitation does not, in itself, constitute a solicitation or direction of nonfederal funds by that individual. See AO 2003-3.

If a federal candidate or officeholder agrees to be named or featured in a solicitation, then the solicitation must contain a clear and conspicuous express statement that it is limited to funds that comply with the Act’s limits and prohibitions. Similarly, such a statement must be provided if the federal candidate or officeholder signs a written fundraising solicitation for RGA. Note that including a disclaimer in a fundraiser’s publicity does not relieve a federal candidate/officeholder of the requirements to provide a disclaimer, if required, at his or her actual appearance at the subsequent event.¹

### Fundraising for the Conference Account

RGA also maintains a segregated Conference Account, from which it pays for the administrative and event costs associated with the RGA’s Annual Conference and its nationwide series of Governors’ Forums. Events funded by the Conference Account are policy discussions and not political events, and they do not include planning for campaigning or fundraising or for the solicitation of funds for federal or nonfederal candidates or political committees. The large majority of Conference Account expenses pay for hotel fees, catering and meeting space. Funds received and disbursed by the Conference Account are not incorporated into RGA’s reports filed with the states in which it conducts its activities. However, funds received and disbursed by the Conference Account are included in RGA’s filings with the IRS and are not separated out from the other activities of RGA in those filings.

¹ Although Advisory Opinion 2003-3 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations “in amounts exceeding the Act’s limitations and from sources prohibited from contributing under the Act,” that was not the Commission’s meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that would constitute a solicitation by the covered person of funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer. However, the Commission could not agree whether the use of a covered person’s name in a position not specifically related to fundraising, such as “honorary chairperson,” on a solicitation not signed by the covered person, is prohibited under the Act.
A federal candidate/officeholder must comply with the requirements described above when participating in fundraising activities specifically for RGA’s Conference Account. RGA is registered with the IRS as a section 527 political organization. As recognized by the Supreme Court in *McConnell v. Federal Election Commission*, “[s]ection 527 political organizations are, unlike 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any ‘party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures’ for the purpose of ‘influencing or attempting to influence the selection, nomination, or appointment of any individual for Federal, State, or local public office.’” 26 U.S.C. §527(e). *McConnell*, 124 S.Ct., at 678, n.67.

RGA states as its purpose on its IRS registration form that it “supports the election of Republican Governors and other nonfederal candidates, promotes Republican policies, and engages in other state and local election activities.” Additionally, the RGA may have claimed that Conference Account income is exempt function income under 26 U.S.C. §527. As such, donations or “contributions” to the Conference Account must be treated in the same manner as donations for other purposes of RGA. Therefore, the solicitation of funds for the Conference Account constitutes fundraising in connection with an election other than an election for federal office under 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62. Moreover, the Conference Account may not accept donations from a corporation established by authority of Congress. The Act prohibits “any corporation established by authority of any law of Congress” from making a contribution in connection with any election to any political office. 2 U.S.C. §441b(a). As indicated above, contributions or donations to RGA’s Conference Account would be in connection with a nonfederal election. Therefore, the Conference Account may not accept contributions or donations from the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

**Date Issued:** January 12, 2004; Length: 8 pages.✦

—Amy Kort

### Advisory Opinion Requests

**AOR 2003-39**

Permissibility of trade association plan to match SSF contributions with donations to charities (Credit Union National Association, Credit Union Legislative Action Council of CUNA and North Carolina Local Government Employees’ Federal Credit Union, December 30, 2003)

**AOR 2003-40**

Aggregating independent expenditures to trigger 48-hour notice requirement (U.S. Navy Veterans’ Good Government Fund, December 31, 2003)

**AOR 2004-1**

Presidential candidate’s endorsement of federal candidate in public communication within 120 days of election; implication of coordination between the campaigns (Bush-Cheney ’04 and Alice Forgy Kerr for Congress, January 12, 2004—20-day expedited response)✦

### BCRA on the FEC’s Web Site

The Commission has a section on its web site ([www.fec.gov](http://www.fec.gov)) devoted to the Bipartisan Campaign Reform Act of 2002 (BCRA). The page provides links to:

- The Federal Election Campaign Act, as amended by the BCRA;
- Summaries of major BCRA-related changes to the federal campaign finance law;
- Summaries of litigation involving challenges to the new law;
- Federal Register notices announcing new and revised Commission regulations that implement the BCRA;
- BCRA-related advisory opinions; and
- Information on educational outreach offered by the Commission, including upcoming Roundtable sessions and the Commission’s 2004 conference schedule.

The section also allows individuals to view the Commission’s calendar for rulemakings, including dates for the Notices of Proposed Rulemaking, public hearings, final rules and effective dates for regulations concerning:

- Soft money;
- Electioneering Communications;
- Contribution Limitations and Prohibitions;
- Coordinated and Independent Expenditures;
- The Millionaires’ Amendment;
- Consolidated Reporting rules; and
- Other provisions of the BCRA.

The BCRA section of the web site will be continuously updated. Visit [www.fec.gov](http://www.fec.gov) and click on the BCRA icon.
Compliance
(continued from page 1)

treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. §441b(a).
In addition, the Act prohibits making a contribution in the name of another, knowingly permitting one’s name to be used to effect such a contribution and knowingly accepting such a contribution.
Further, no person may knowingly help or assist any person in making a contribution in the name of another. 2 U.S.C. §441f and 11 CFR 110.4(b)(1)(iii). This prohibition also applies to any person who provides the money to others to effect contributions in their names. 11 CFR 110.4(b)(2).
CCG is a wholly-owned subsidiary of Centex Corporation and acts as an umbrella group for regional construction units, including Rooney. In March 1998, Mr. Moss, who was at the time the Chairman, President and CEO of Rooney, met with CCG President Brice Hill and its former Executive Vice President and COO Kenneth Bailey to discuss the company’s discretionary bonus program. Mr. Moss suggested that the company should compensate or reward Rooney employees for political contributions they made during the year by recognizing the contributions as the primary component of the discretionary bonus process paid out of a CCG account. Mr. Hill agreed that it would be appropriate to consider employee political contributions, as well as other political and community activities, when determining bonus amounts.

Rooney management encouraged employees to send copies of contribution checks to either Mr. Moss or Gary Esporrin, then Rooney’s CFO. Employees understood that each of these political contributions would be considered in determining their year-end bonuses. Some of these contributions were solicited by Rooney executives, including Mr. Moss. At bonus time, the contribution amounts were increased to offset tax liability and added to the bonus amounts each employee would have otherwise received from any incentive plan. Mr. Moss ultimately approved the discretionary management bonuses, and the Rooney bonus pool was reviewed and approved by CCG. The plan continued from fiscal year 1998 through fiscal year 2003.

There is no indication that any Centex Corporation executive or any of the recipient federal candidates and political committees were aware that the contributions were being reimbursed with corporate funds.1 When Centex Corporation senior management learned of the reimbursement scheme, it began an internal investigation that resulted in the voluntary disclosure made to the Commission. All of the respondents fully cooperated with the Commission throughout the course of its investigation, which helped facilitate a timely resolution of the matter.

Civil Penalties

Centex Construction Group, Inc., Centex-Rooney Construction Co., Inc., and the following corporate officers who consented to the reimbursement plan are responsible for $112,000 of the civil penalty: Mr. Moss, Mr. Esporrin, Mr. Hill, Mr. Bailey, Chris Genry and Mark Layman. These respondents agreed to cease and desist from further such violations of the Act and waived their rights to a refund of all political contributions from the recipient committees. In addition, CCG and Rooney will instruct the recipient committees to disgorge the prohibited contributions in question to the U.S. Treasury.

The officers and employees who served as conduits for the contributions were Mr. Moss, Mr. Esporrin, Bruce Moldow, Gary Glenewinkel, D.J. McGlothern, Albert Petrangeli, Ted Adams, J. Michael Wood, Raymond Southern, Larry Casey and David Hamlin. They are responsible for $56,000 of the civil penalty and also agreed to cease and desist from further such violations of the Act and to waive their rights to a refund of all political contributions from the recipient committees. •

—Amy Kort

1 When Mr. Moss was promoted to CEO of CCG in January 2000, he met the Chairman and CEO of Centex Corporation. Mr. Moss raised the issue of the company’s political contribution strategy, but did not discuss the discretionary management bonus program with the CEO. The CEO told Mr. Moss to follow company guidelines and legal advice. After the meeting, Mr. Moss told certain CCG personnel that the discretionary management bonus program should be continued.
Public Funding

Commission Certifies Matching Funds for Presidential Candidates


Under the Presidential Primary Matching Payment Account Act, the federal government will match up to $250 of an individual’s total contributions to an eligible Presidential primary candidate. A candidate must establish eligibility to receive matching payments by raising in excess of $5,000 in each of at least 20 states (i.e., over $100,000). Although an individual may contribute up to $2,000 to a primary candidate, only a maximum of $250 per individual applies toward the $5,000 threshold in each state. Candidates who receive matching payments must agree to limit their spending and submit to an audit by the Commission. 26 U.S.C. §9033(a) and (b); 11 CFR 9033.1 and 9033.3.

Candidates may submit requests for matching funds once each month. The Commission will certify an amount to be paid by the U.S. Treasury the following month. Only contributions from individuals in amounts of $250 or less are matchable. The chart below lists the amount certified to each candidate.

While the current Fund balance is sufficient to pay these certifications in full, there may not be enough money in the Fund to pay full certifications in February. In the event of a shortfall in the Fund, the U.S. Treasury will make reduced payments until the Fund has been replenished by future checkoff designations on 2003 tax returns, at which time each campaign will receive the amount it is due. See the January 2004 Record, page 23.

The Commission has also certified $14,592,000 to each of the two major political parties, for their 2004 Presidential Nominating Conventions.

Note that Howard Dean, John Kerry and President Bush have declined to participate in the Matching Fund program.

Dean Requests Withdrawal of Certification for Matching Funds

On December 18, 2003, the Commission withdrew its certification that Presidential candidate Howard Dean and his authorized committee, Dean for America (the Committee), were eligible to receive public matching payments. The action came after Dr. Dean informed the Commission that he “no longer wish[es] to participate in the Matching Payment system administered by the Commission” and “withdraw[s] the candidate agreement filed with the Commission pursuant to 11 C.F.R. § 9033.1 and 2.” Since the Committee will not be receiving federal matching funds, the Commission will not conduct a mandatory audit of the Committee pursuant to 26 U.S.C. §9038(a). —Amy Kort

Conference in Tampa

Late registration for the FEC’s February 11-12 conference in Tampa, FL, will be accepted on a first-come, first served basis. The conference will address issues of concern to House and Senate campaigns, political party committees and corporations, labor organizations, trade associations, membership organizations and their respective PACs. The two person per organization limit has been waived for this conference. For complete, up-to-date registration information visit the FEC web site at http://www.fec.gov/pages/infosvc.htm#Conferences.

Matching Funds for 2004 Presidential Candidates: December Certification

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<tr>
<th>Candidate</th>
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<th>Cumulative Certifications</th>
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<tr>
<td>Joseph Lieberman (D)</td>
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<td>$3,609,658.04</td>
</tr>
</tbody>
</table>
Committees Fined for Nonfiled and Late Reports

The Commission recently publicized its final action on 41 new Administrative Fine cases, bringing the total number of cases released to the public to 874, with $1,164,638 in fines collected by the Commission.

Civil money penalties for late reports are determined by the number of days the report was late, the amount of financial activity involved and any prior penalties for violations under the administrative fines regulations. Penalties for late reports—and for reports filed so late as to be considered nonfiled—are also determined by the financial activity for the reporting period and any prior violations. Election sensitive reports, which include reports and notices filed prior to an election (i.e., 12 day pre-election, October quarterly and October monthly reports), receive higher penalties. Penalties for 48-hour notices that are filed late or not at all are determined by the amount of the contribution(s) not timely reported and any prior violations.

The committees and the treasurers are assessed civil money penalties when the Commission makes its final determination. Unpaid civil money penalties are referred to the Department of the Treasury for collection.

The committees listed in the chart at right, along with their treasurers, were assessed civil money penalties under the administrative fines regulations.

Closed Administrative Fine case files are available through the FEC Press Office, at 800/424-9530 (press 2), and the Public Records Office, at 800/424-9530 (press 3). ✦

—Amy Kort

Committees Fined and Penalties Assessed

1. Akram for Congress, Inc. $4,375 1
2. Americans United in Support of Democracy $900 1
3. Bakery Confectionery Tobacco Workers & Grain Millers International Union Local No. 19 Political Organization (BCTGM) $312 1
4. Barham for Congress, Inc. $0 2
5. Battles for Congress $3,375 1
6. Ben Jones for Congress $900
7. Brighthart for Congress $598
8. Committee to Elect Kutsch $1,800 1
9. Dorsey National Fund October Quarterly 2002 $2,500
10. Dorsey National Fund 12 Day Pre-General 2002 $1,250
11. Dub Maines for Congress $1,350 1,2
12. Ed Tinsley for Congress $0 2
13. Friends for Farley $900
14. Friends of Bob Gross Committee $2,700 1
15. Friends of Margaret Workman $11,250 1
16. Jay Blossman for U.S. Senate $525 2
17. Jeff Fink for Congress $186
18. Joe Grimaud for Congress Committee $5,500 3
19. Joe Slovinec for Congress Campaign Committee $0 2
20. John Taylor for Congress $1,125 2
21. Kennecott Holdings Corporation PAC (aka Kennecott PAC) $1,000
22. Lori Lustig for Congress $1,800 1
23. Mike Greene for Congress Committee $5,625 1
24. Mike Hathorn for Congress Committee $800
25. National Italian American Political Action Committee $2,025 1,2
26. Ogles for Congress $2,700
27. Philip Lowe for Congress $11,875 1
28. Randy Knepper for Congress $4,500 1
29. Riverside County Republican Central Committee $4
30. Roberts 2002 $5,650 1
31. Skorski for Congress $2,700 1
32. Stephanie Tubbs Jones for US Congress $400
33. Stuart Johnson for Congress $2,700 3
34. Syed Mahmood for Congress $2,250 1

1 This civil money penalty has not been collected.
2 This penalty was reduced due to the level of activity on the report.
3 This penalty was reviewed in the U.S. District Court for the District of South Carolina, Columbia Division. The court entered a judgment in the Commission’s favor on August 18, 2003. The Commission referred the debt for collection after the respondents did not appeal within 60 days of the court’s decision. See Cannon v. FEC, summarized in the October 2003 Record, page 13.
4 The Commission took no further action in this case.
5 The Commission has collected $1,045.59 of the penalty.
DC Conference for House and Senate Campaigns and Party Committees

The FEC will hold a conference in Washington, DC, March 16-17, 2004, for House and Senate campaigns and political party committees. The conference will consist of a series of workshops conducted by Commissioners and experienced FEC staff who will explain how the federal campaign finance law, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), applies to each of these groups. Workshops will specifically address rules for fundraising and reporting and will explain the new provisions of the BCRA. A representative from the IRS will also be available to answer election-related tax questions.

The conference will be held at the Loews L’Enfant Plaza Hotel, located near the National Mall and Smithsonian museums in Washington, DC. The conference registration fee is $350, which covers the cost of the conference, materials and meals.

A $10 late fee will be assessed for registration forms received after February 20.

The Loews L’Enfant Plaza Hotel is located at 480 L’Enfant Plaza S.W., Washington, DC. A room rate of $189 per night (single or double) is available for conference attendees who make reservations on or before February 20. To make reservations, call toll free (800/635-5065) or locally (202/484-1000, ext. 5000) and state that you are attending the FEC conference. After February 20, room rates are based on availability. Parking is available at the hotel for a fee of $15 per day and $22 overnight. The hotel is located near the L’Enfant Plaza Metro and the Virginia Railway Express stations.

Registration

The conference will be held at the Loews L’Enfant Plaza Hotel, located near the National Mall and Smithsonian museums in Washington, DC. The conference registration fee is $350, which covers the cost of the conference, materials and meals.

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Registration

Complete conference program and registration information is available online. Conference registrations will be accepted on a first-come, first-served basis, and registrations are limited to two representatives per organization. FEC conferences are selling out quickly, so please register early. For registration information concerning any FEC conference:

• Call Sylvester Management Corporation at 800/246-7277;
• Visit the FEC web site at http://www.fec.gov/pages/infosvc.htm#Conferences; or
• Send an e-mail to lauren@sylvestermanagement.com.♦

—Amy Kort

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