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Regulations

Notice of Proposed Rulemaking on Internet Communications

On March 24, 2005, the Commission approved a Notice of Proposed Rulemaking (NPRM) seeking comments on a proposed rule to define paid Internet ads as “public communications.” The NPRM also republishes and invites comments on the current definition of “generic campaign activity.” These actions are in response to the U.S. District Court for the District of Columbia’s recent decision in *Shays v. FEC*, which held that the current definitions of “public communication” and “generic campaign activity” impermissibly exclude all Internet communications.

The proposed addition of paid Internet ads to the definition of “public communication” would affect all other Commission rules that incorporate the term “public communication.” In addition to the definition of “generic campaign activity,” these would include rules governing state, district and local party committees and disclaimers.

The NPRM also invites comments on proposals to:

- Modify the Commission’s rules concerning which Internet communications require disclaimers;

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Legislation

Commission Sends Annual Legislative Recommendations to President and Congress

On March 25, 2005, the Commission transmitted to the President and Congress its annual recommendations for changes to the Federal Election Campaign Act. Of the 16 recommendations transmitted, the Commission identified as high priority:

- Adding the FEC to the list of agencies authorized to issue immunity orders under 18 U.S.C. §6001(1);
- Increasing the record retention period from three to five years under 2 U.S.C. §432(d);
- Providing that any person may later be named a respondent if that person is found, during an enforcement action, to have aided or abetted another party in violating the Act (if passed into law, this would be new section 2 U.S.C. §441j);
- Making the administrative fine program permanent under 2 U.S.C. §437g; and
- Requiring Senate candidates to file electronically at the same thresholds as House and Presidential campaign committees under 2 U.S.C. §§432(g) and 434(a)(11).

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Legislation

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Some of the other 11 recommendations in the legislative package include stabilizing the Presidential Public Funding Program and indexing for inflation both the limit on contributions by one authorized committee to another and the contribution limits applicable to multicandidate political committees. Other recommendations address issues that arose when rules were implemented for the 2003-2004 election cycle under the Bipartisan Campaign Reform Act of 2002, including recommendations to:

- Eliminate the requirement that candidates disclose on their Statement of Candidacy the amount by which they intend to exceed the personal spending threshold under the Millionaires' Amendment at 2 U.S.C. §§434(a)(6)(B) and 441a-1(b); and
- Modify the definition of "federal election activity" to allow state,

district and local party committees to compensate an employee in biweekly, semimonthly or monthly periods when he or she spend more than 25 percent of his or her time in connection with a federal election, under 2 U.S.C. §431(20)(A)(iv).

The full text of the Commission's 2005 Legislative Recommendations is available on the FEC web site at http://www.fec.gov/law/legislative_recommendations_2005.shtml.

—Amy Kort

Regulations

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- Add new rules specifically excepting certain volunteer activity on the Internet from the definitions of "contribution" and "expenditure"; and
- Expressly exempt from the definitions of "contribution" and "expenditure" certain media activity over the Internet.

The rules proposed in the NPRM are intended primarily to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections.

Definition of "Public Communication"

The proposed rule would amend the definition of "public communication" at 11 CFR 100.26 to include paid Internet ads placed on another individual's or entity's web site as a form of "general public political advertising." The Commission invites comments on this proposal and asks whether it is appropriate to include only Internet ads that are placed for a fee. Should "general public political advertising" also include ads where the space was provided for something of value other than a monetary payment, such as through an exchange of comparable advertising? Should the Commission

additionally amend its regulation to explicitly state that "bloggers" are not included in the "public communication" definition?

Party Committee Web Sites

State, district and local party committees must use entirely federal funds to pay for public communications that promote, attack, support or oppose (PASO) a clearly identified federal candidate. 2 U.S.C. §431(20)(A)(iii) and 11 CFR 100.24(b)(3). The proposed rule would still allow these party committees to reference federal candidates on their official sites without automatically federalizing the year-round costs of maintaining the site. The Commission seeks comments on this approach, as well as on whether the costs of a web site that includes a public communication that PASOs a candidate could be paid in part with nonfederal funds and how an allocation ratio could be determined.

Disclaimers

Currently, the Commission's disclaimer rules apply to any "public communication," which in the context of disclaimers includes more than 500 substantially similar unsolicited emails sent within any 30-day period and political committee web sites that are available to the general public. 11 CFR 110.11(a). The Commission proposes to add a definition of "unsolicited email" to the rule that focuses on whether the email addresses were acquired through a commercial transaction. The Commission seeks comments on this approach, asking whether the definition should include a minimum cost for obtaining the email address and whether there is a more appropriate definition of "unsolicited email."

The Commission also proposes to apply the proposed expansion of the definition of "public communication" at 11 CFR 100.26 to the disclaimer requirements. As a result, an ad placed for a fee on another person's web site would require a

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disclaimer if it expressly advocated the election or defeat of a federal candidate or solicited contributions.

Bloggers Paid by Candidates

The Federal Election Campaign Act (the Act) and Commission regulations require a political committee to report disbursements to the Commission, including any disbursement made to a blogger, and the Commission makes these reports publicly available. The Commission does not, therefore, propose to change the disclaimer rules to require bloggers to disclose payments from a candidate, a campaign or a political committee. The Commission asks whether this approach is appropriate and whether, in the alternative, a blogger could or should be required to disclose payments.

Coordinated Communications

Under the proposed expansion of the definition of “public communication” at 11 CFR 100.26, certain Internet ads could be considered “coordinated communications” (and thus in-kind contributions to the candidate or committee) if they are:

- Placed on another person’s or entity’s web site for a fee; and
- Coordinated with a candidate, campaign committee or party committee. 11 CFR 109.21.

The proposed rules would continue to exempt from the definition of “coordinated communication” ads that are created by outside vendors for a fee but placed on the payor’s own web site—including the web site of a corporation or other prohibited source. The rules would also continue to exempt from the coordinated communication rules ads that are placed on a prohibited source’s web site for free, even though a fee would normally be charged. The Commission asks whether this is an appropriate approach and whether any of the Commission’s other rules already regulate this type of activity.

Dissemination, distribution or republication of campaign material. A

person who finances a public communication that disseminates, distributes or republishes, in whole or in part, campaign-prepared materials may, under certain circumstances, be found to have made a coordinated communication under the current regulations. 11 CFR 109.21(c)(2). Changes to the definition of “public communication” would expand the reach of this regulation to include certain Internet ads placed for a fee on another entity’s web site, but would not affect content placed by an individual on his or her own web site, blog or email. The Commission asks whether it should specifically exempt all dissemination, distribution or republication of campaign material on the Internet.

Media Exemption

Under the Act, a news story, commentary or editorial distributed through the facilities of a broadcasting station, newspaper, magazine or other periodical publication is not considered an “expenditure” unless the facilities are owned or controlled by a political party, political committee or candidate. 2 U.S.C. §431(9)(B)(i). This “media exemption” assures that newspapers, television stations and other media can freely cover and comment on political campaigns. The Commission proposes to amend its regulations to make clear that any media activities that otherwise would be entitled to the “media exemption” are likewise exempt when they are transmitted over the Internet. 2 U.S.C. §431(9)(B)(i). The Commission requests comments on this proposal and asks whether the exemption should be limited to the Internet activities of media entities that are covering or carrying a news story, commentary or editorial and/or to media entities that also have off-line operations. Additionally, the Commission asks whether bloggers and/or on-line forums should be entitled to this exemption. Does it make any difference under the statute if a blogger receives compen-

sation or any other form of payment from any candidate, political party or political committee for his or her editorial content? Would such a payment mean that the blogger is “controlled” by a candidate or party committee and, thus, not entitled to the press exemption under 2 U.S.C. §431(9)(B)(i)?

Definition of “Contribution” and “Expenditure”

The Commission proposes to create exceptions from the definitions of “contribution” and “expenditure” for certain individual or volunteer Internet activity. Under these proposed rules, an uncompensated individual acting independently or as a volunteer would not make a contribution or expenditure simply by using computer equipment or Internet services to engage in Internet activities for the purpose of influencing a federal election. The proposed rule would apply to computers and other facilities that the individual would ordinarily have access to—including those provided at a public library or school—but would not permit someone to purchase this equipment for the sole purpose of allowing another person to participate in volunteer activity. The purchase of mailing lists, including email lists, for the purpose of forwarding candidate and political committee communications would continue to be considered an expenditure. Likewise, the exceptions would not apply to paid advertising or payments for the use of another person’s web site, other than a nominal fee.

Under these proposed rules, an individual or volunteer producing or maintaining a web site or blog, or conducting grass-roots campaign activity on the Internet, from his or her own home or elsewhere, would not make a contribution or expenditure and would not incur any reporting responsibilities for that activity. Thus, an individual could download materials from a candidate or party

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Regulations

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web site or forward a candidate's or party's emails without that activity being considered the republication of campaign materials or an in-kind contribution. The Commission seeks comments on these proposals, as well as on whether additional regulatory amendments are needed to address volunteers' use of corporate or labor union facilities for volunteer activities. See 11 CFR 114.9(a)(1) and (b)(1).

Comments

All comments must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and submitted in either electronic, fax or hard copy form by June 3, 2005. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Hard copy comments should be sent to the Federal Election Commission, 999 E Street NW, Washington, DC 20463. Faxed comments should be sent to 202/219-3923, with a hard copy follow-up to insure legibility. Electronic mail comments should be sent to internet@fec.gov or submitted through the Federal eRegulations Portal at www.regulations.gov. All comments must be submitted in writing and include the full name and postal service address of the commenter. Comments that do not contain this information will not be considered.

Public Hearing

The Commission will post comments on its web site at the end of the comment period. A public hearing on this NPRM will be held June 28-29, 2005, in the Commission's 9th floor Hearing Room, 999 E Street, NW, Washington DC. Any commenters who submit comments electronically and wish to testify at the hearing must also send a copy of their comments to internettestify@fec.gov.

Additional Information

The NPRM was published in the April 4, 2005, *Federal Register* (70 FR 16967) and is available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml and from the FEC faxline, 202/501-3413.

—Amy Kort

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 postmark¹ if it is sent by:

- Registered or certified mail;
- Priority or Express Mail with a delivery confirmation; or
- Overnight delivery service²—the document must be scheduled to be

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.

delivered the next business day after the date of deposit and must be recorded in the overnight delivery service's on-line tracking system.

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

Final Rules on Party Committee Donations to Tax-Exempt Organizations and Political Organizations

On March 10, 2005, the Commission approved amendments to its rules governing the limits on national, state and local party committees' donations to certain tax-exempt organizations and political organizations. The amended rules conform to the U.S. Supreme Court decision in *McConnell v. FEC*. In that decision, the Court upheld the Bipartisan Campaign Reform Act's (BCRA) restrictions on party committees soliciting any funds for, or making or directing donations of nonfederal funds to:

- 501(c) organizations that are exempt from tax under 26 U.S.C. §501(a) (or have submitted an application to obtain this tax status)

and make expenditures or disbursements in connection with an election for federal office, including expenditures or disbursements for “federal election activity”; and

- Political organizations described in 26 U.S.C. §527 that are not a political committee under the Federal Election Campaign Act (FECA), a state, district or local committee of a political party or the authorized campaign committee of a state or local candidate.

2 U.S.C. §441i(d).

However, the Court stated that this provision of the BCRA could be considered overbroad “if read to restrict donations from a party’s federal account—*i.e.*, funds that have already been raised in compliance with FECA’s source, amount and disclosure limitations.” *McConnell*, 124 S.Ct. at 179.

National Party Committees

The Commission’s amended rules at 11 CFR 300.11(a) and 300.50(a)

prohibit national party committees from making or directing donations of *nonfederal* funds to tax-exempt organizations that actively participate in federal elections. However, national party committees may make or direct donations of *federal* funds to these tax-exempt organizations. The prohibition on soliciting funds for tax-exempt organizations that actively participate in federal elections remains in the revised regulation.

State, District and Local Party Committees

The Commission made similar changes to its rules at 11 CFR 300.37(a) and 300.51(a), which govern state, district and local party committee donations to tax-exempt organizations. The revised rules limit the prohibition to donations of *nonfederal* funds to tax-exempt groups that actively participate in federal elections. The prohibition on soliciting funds for these tax-exempt organizations remains in the revised regulation.

Levin Funds. The new regulations specifically list Levin funds as a type of nonfederal funds that may not be donated or directed to these tax-exempt groups. Levin funds are funds donated to state, district and local party committees, in accordance with state law, from corporations, labor organizations and other persons in amounts not to exceed \$10,000 per calendar year. A party committee may not use Levin funds, or other nonfederal funds, to pay for certain communications or certain federal election activities. The Commission concluded that treating Levin funds as a type of nonfederal funds for the purpose of the prohibition on party committee donations was consistent with the Commission’s previous treatment of Levin funds. Moreover, allowing state, district and local party committees to make or direct Levin fund donations to tax exempt organizations, which are not equally restricted in how they may pay for communications and federal election activity, risked the circumvention

of the party committee soft money restrictions.

Additional Information

The final rules were published in the March 16, 2005, *Federal Register* (70 FR 12787) and are available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml. The rules took effect on April 15, 2005.

—Amy Kort

Commission to Hold Public Hearing on Proposed Rules

On May 17, 2005, the Commission will hold a hearing to receive testimony on proposed rules regarding:

- Federal candidate and officeholder solicitation at state, district and local party committee fundraisers;
 - The definition of “agent” for the Commission’s coordinated and independent expenditure rules and nonfederal fund regulations; and
 - Payroll deductions for contributions to trade association separate segregated funds.
- (See the April 2005 *Record*, page 4; March 2005 *Record*, page 4; and February 2005 *Record*, page 2.)

The hearing will begin at 10:00 a.m. in the FEC’s 9th Floor Hearing Room, 999 E Street, NW, Washington, DC.

—Amy Kort

Federal Register

Federal Register notices are available from the FEC’s Public Records Office, on the web site at http://www.fec.gov/law/law_rulemakings.shtml and from the FEC faxline, 202/501-3413.

Notice 2005-8

Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations, Final Rules, (70 FR 12787, March 16, 2005)

Notice 2005-9

Filing Documents by Priority Mail, Express Mail and Overnight Delivery Service, Final Rules (70 FR 13089, March 18, 2005)

Notice 2005-10

Internet Communications, Notice of Proposed Rulemaking (70 FR 16967, April 4, 2005)

Statistics

Party Committees Raise Nearly \$1.5 Billion

Democratic and Republican party committees raised nearly \$1.5 billion and spent \$1.41 billion between January 1, 2003, and December 31, 2004. Republican national, state and local committees who report to the Commission raised \$784.8 million in federal funds, or “hard money,”

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Statistics

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during 2003-2004. Democratic committees raised \$683.8 million. Democratic party receipts were more than 89 percent higher than in the comparable period during the 2000 Presidential campaign, while Republican party fundraising grew by 46 percent when compared with the same period.

The 2004 election cycle is the first in which national parties have been prohibited from receiving non-federal funds, or “soft money,” as a result of the Bipartisan Campaign Reform Act of 2002 (BCRA). Overall, the federal fundraising totals for both parties’ national committees were greater during the 2004 cycle than their combined federal and nonfederal fundraising in any prior campaign.

However, while the Democratic National Committee (DNC) and Republican National Committee (RNC) raised substantially more this cycle than before—even counting nonfederal funds raised in prior election cycles—both parties’ Senatorial committees raised less in 2004 than they had in previous cycles.

The charts below show fundraising totals over the past three election cycles for the DNC, the

Democratic Senatorial Campaign Committee (DSCC), the Democratic Congressional Campaign Committee (DCCC), the RNC, the National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC). Note that no nonfederal funds were raised by national party committees for the 2004 cycle. However, for the 2002 and 2000 cycles, nonfederal funds generally represent a substantial portion of the total funds raised by each committee—in some cases as much as two-thirds of the total amount.

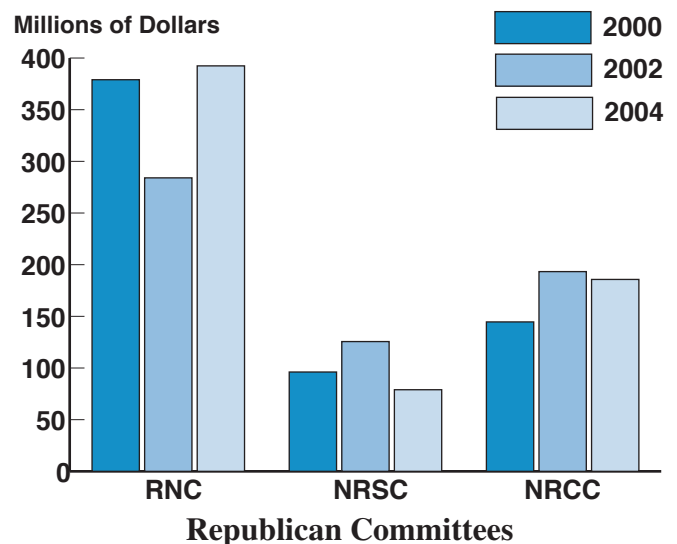
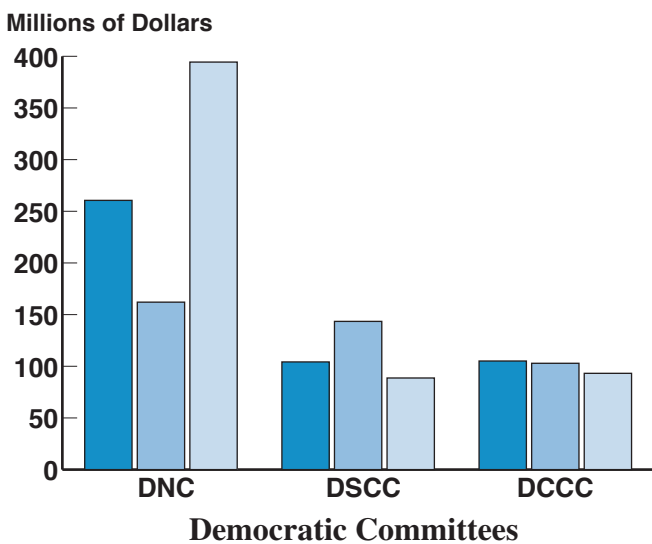
Spending directly in support of federal candidates also increased substantially in 2004. Democratic party committees reported a total of \$176.5 million in independent expenditures. Of this amount, the DNC alone reported independent expenditures of \$120.3 million on Presidential candidates. In addition, Democratic committees spent a total of \$33.1 million in coordinated expenditures on behalf of general election candidates. Republican party committees reported \$88 million in independent expenditures and \$29 million in coordinated expenditures. Spending on these activities had declined during the period when soft money was increasing for the

parties. In addition, while the RNC reported making \$18.3 million in independent expenditures, they also reported \$45.8 million in “generic media expenses,” which are ads in which they shared the costs with Bush-Cheney ’04. The DNC spent an additional \$24 million during the general election period for media production and consulting not included in the independent expenditure totals.

The 2004 cycle was also unusual for party committees with respect to their funding sources. All national committees of the two parties substantially increased their contributions from individuals and also the financial support they received from federal candidates. Particularly noteworthy were the large transfers the DNC and RNC received from their Presidential nominees during the final weeks of the campaign, along with the number and size of transfers from members of Congress to their respective party campaign committees.

A breakdown of individual contributions by size shows that while proceeds from small unitemized contributions grew considerably for each committee, they made up a smaller proportion of all federal contributions than in earlier cycles. Con-

Total Fundraising By National Party Committees, 2000-2004 Election Cycles



tributions of the maximum amount, on the other hand, made up a greater proportion of contributions than was previously the case for each national committee. The BCRA increased the contribution limit for individuals to a national party committee from \$20,000 per year to \$25,000. Note, however, that in previous cycles national committees also received unlimited nonfederal donations in amounts that were generally greater than the \$20,000 federal limit.

Additional information on party committee financial activity is available in a press release dated March 2, 2005. That release includes detailed tables showing, among other things, the effect of the BCRA on state and local party activity. The BCRA limited the role of soft money in the financing of state and local party activity in the 2004 cycle. As the tables detail, overall increases in hard money spending were offset during this cycle by greater declines in allocated federal/nonfederal spending by these committees.

The release is available on the FEC web site at <http://www.fec.gov/press/press2005/2005news.shtml>.

—Amy Kort

Alternative Dispute Resolution

ADR Program Update

The Commission recently resolved eight additional cases under the Alternative Dispute Resolution (ADR) program. The respondents, the alleged violations of the Federal Election Campaign Act (the Act) and the final disposition of the cases are listed below.

1. The Commission reached a revised agreement with the Leelanau County Democratic Committee regarding its failure to register as a committee. The respondent acknowledged that it violated the Act by fail-

ing to register with the Commission after it contributed more than \$1,000 to federal election campaigns. The respondent agreed to pay a \$1,000 civil penalty. In order to resolve this matter and avoid violating federal election campaign regulations in the future, the respondent additionally agreed to complete the process of registering the Committee and to establish and maintain in its offices a file on FEC regulations to provide guidance to the Committee on matters pertaining to federal election campaign activity. See the September 2003 *Record*, page 13, for a description of the initial negotiated settlement. (ADR 108 /MUR 5309)

2. The Commission reached agreement with U.S. Protect Corporation regarding corporate contributions and contributions made in the name of another. This matter was brought before the Commission by the respondent itself. Upon learning of its violation of the Act, the respondent took steps to remedy its situation and to prevent violations from being repeated. The respondent established internal procedures to ensure future compliance with the law by promulgating and posting a company policy prohibiting corporate contributions to federal election campaigns.

In its negotiated settlement, the respondent agreed to pay a \$6,000 civil penalty and to notify the three campaign committees that were recipients of the prohibited contributions that the contributions need to be disgorged and forwarded to the U.S. Treasury. In order to resolve this matter and avoid similar problems in the future, the respondent will also identify a senior corporate employee to be responsible for ensuring compliance with the Act and will select an appropriate representative to attend, within twelve months following the effective date of this agreement, an FEC seminar on federal election campaign reporting responsibilities. The respondent will additionally modify the com-

pany's policy prohibiting corporate contributions to federal election campaigns to encompass corporate officers and directors. (ADR 194/ Pre-MUR422: *Sua sponte*)

3. The Commission reached agreement with Bruderly for Congress and its treasurer, David Bruderly, regarding the Committee's failure to report receipts and disbursements accurately and to file timely disclosure reports. Citing software and data entry problems, the respondents acknowledge that there were inaccuracies in their initial April and July 2004 Quarterly Reports and that they filed the April report five days late. In order to resolve this matter and avoid similar errors in the future, the respondents agreed to take steps to ensure that the Committee complies with the Act's reporting and filing requirements. In addition, the respondents agree to the appointment of an appropriate Committee representative to attend, within twelve months of the effective date of this agreement, an FEC seminar on federal election campaign finance reporting requirements. In the event that the Committee determines to conclude its activities and is unable to attend an FEC seminar, the respondents agreed to work with Commission staff to expeditiously terminate the Committee. (ADR 209/MUR 5483)

4. The Commission closed the file involving Michael Jaliman for U.S. House of Representatives and M. Kathryn Jaliman, its treasurer, regarding the Committee's alleged failure to register timely with the Commission and their alleged violation of the Act's prohibition on corporate contributions. After reviewing the complaint, the response and documents on file, and considering the lack of evidence to the contrary, the ADR Office concluded that the alleged violations of the Act were unsubstantiated. The Commission concurred and closed the file. (ADR 210/MUR 5508)

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Alternative Dispute Resolution

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5. The Commission reached agreement with Jack Davis for Congress and Robert Davis, its treasurer, regarding the Committee's violation of the Act's disclaimer requirements. The respondents acknowledged failing to place disclaimers on printed materials in boxes and in an appropriate type size and contrast, as required by Commission regulations. The respondents also noted that, while some campaign material and mailings failed to advise that the communications were paid for by Jack Davis, they believed they complied with the "spirit of the law." In order to resolve this matter and avoid similar errors in the future, the respondents agreed to pay a \$1,000 civil penalty and to send the Committee's treasurer to an FEC seminar on federal election campaign finance reporting requirements. In the event that the Committee decides to conclude its activities and, therefore, not attend an FEC seminar, the respondents agreed to work with Commission staff to expeditiously terminate the Committee. (ADR 215/MUR 5593)

6. The Commission closed the file involving WBZ-TV (Boston) involving the "equal time" provisions for broadcasters. The ADR Office recommended that the case be closed, and the Commission agreed and closed the file. (ADR 228/ MUR 5471)

7. The Commission closed the file involving Congressman Anibal Acevedo-Vila, committee treasurer Ramon Velasco and Dr. Richard Machado regarding the alleged failure to register timely with the Commission, excessive contributions and the failure to report the receipt of contributions. The ADR Office recommended that the case be closed, and the Commission agreed and closed the file. (ADR 230/MUR 5481)

8. The Commission closed the file involving Walker for Congress and Pat Cox, its treasurer, regarding the alleged violation of the Act's disclaimer requirements. The ADR Office recommended that the case be closed, and the Commission agreed and closed the file. (ADR 231/MUR 5500)

—Amy Kort

Advisory Opinions

AO 2005-1

Indian Tribe Not a Federal Contractor

The Mississippi Band of Choctaw Indians (the Tribe), a federally recognized Indian tribe, will not become a federal contractor for the purposes of the Federal Election Campaign Act (the Act) when IKBI, Inc. (IKBI), a corporation owned and controlled by the Tribe, becomes a federal contractor. Although though the Tribe will act as co-indemnitor on bonds related to IKBI's federal contracts, IKBI is a separate entity from the Tribe and its commercial activity is separate from the Tribe's political activities. Thus, IKBI's status as a federal contractor will not affect the Tribe's ability to make contributions to federal candidates, political parties and political committees.

Background

The Tribe is an unincorporated entity that is considered a "person" under the Act and may make federal political contributions. 2 U.S.C. §431(11). See AO 1993-12. Federal government contractors, however, are prohibited from making, or promising to make, contributions to any federal candidate, party or political committee. 2 U.S.C. §441c and 11 CFR 115.2(a). This prohibition extends from the beginning of contract negotiations until the comple-

tion of the contract performance or the termination of negotiations. 11 CFR 115.1(b) and 115.2(b).

The Tribe established and chartered IKBI in 2004 as a "separate corporation." Most of IKBI's planned work consists of construction projects for the U.S. Government or federal agencies. IKBI is governed by a board of directors, which is elected by its sole shareholder, the Choctaw Development Enterprise (CDE), acting on behalf of the Tribe. CDE, in turn, is operated and managed by its five-member enterprise board, which is appointed by the Tribal Council with Tribal Chief and the Tribal Secretary-Treasurer serving as the enterprise board's Chairman and Treasurer, respectively.

Although the Tribal Council retains the authority to issue shares of IKBI stock, IKBI's board of directors manages the business and affairs of the corporation. Board members must be members of the Tribe, but no member of the Tribal Council may serve on the board. IKBI has its own tax identification number separate from that of the Tribe and has its own separate legal counsel. It maintains separate office space and has its own bank account separate from the Tribe. It leases or owns its own property, has its own corporate employees and personnel policies and provides employee benefits separate from the Tribe.

For all its construction projects, both federal and nonfederal, the owner/purchaser will require IKBI to obtain bonds from a reputable bonding company. As a condition for issuing the bonds, the bonding agent will require the Tribe, (through CDE as the sole stockholder of IKBI), to sign an "agreement of indemnity" obligating the Tribe (through CDE) to act as co-indemnitor (along with IKBI) for any losses and liabilities on the bonds.

Analysis

In AO 1999-32, the Commission concluded that if a tribal enterprise

has a distinct and separate identity from the Indian tribe itself, then the Act does not prohibit a tribe from making contributions because of the federal contractor status of the tribal enterprise. The facts presented in this case are substantially similar to those considered in AO 1999-32, including:

- IKBI’s separate incorporation;
- IKBI’s separate leasing and ownership of property;
- Tribal council members’ inability to serve on the IKBI board;
- IKBI’s separate legal counsel, bank account, tax identification number and separate employees, personnel and benefit policies; and
- The fact that funds from IKBI are not intermingled with other Tribal funds and revenues from IKBI may not be used to make contributions to federal candidates or political committees.

These circumstances indicate that IKBI is a separate and distinct entity from the Tribe. Accordingly, Tribe will not become a federal contractor by virtue of IKBI’s status as a federal contractor. The Tribe may continue to make contributions as a “person” under the Act subject to the condition that revenues from IKBI may not be used to fund these contributions.

Dissenting Opinion

Vice-Chairman Toner and Commissioner Mason issued a dissenting opinion on March 14, 2005.

Date Issued: March 14, 2005;
Length: 5 pages.

—Amy Kort

Advisory Opinion Request

AOR 2005-4

Reporting payments resulting from court-ordered restitution after payments are assigned to charitable organization; reporting embezzled funds as debt (John Boehner and Friends of John Boehner, March 24, 2005)

Public Funding

Commission Certifies Final Matching Funds for Presidential Candidates

On March 29, 2005, the Commission certified the final matching payments for Presidential candidates in the 2004 primaries. The Commission certified \$53,237 in payments to two Presidential candidates, and the U.S. Treasury Department made the payments on April 1. Including these payments, the Commission certified a total of \$28,433,885.61 in federal

funds to eight Presidential candidates in the 2004 primaries under the Matching Payment Account Act.

Presidential Matching Payment Account

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

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Matching Funds for 2004 Presidential Primary Candidates: March Certifications

Candidate	Certification March 2005	Cumulative Certifications
Wesley K. Clark (D) ¹	\$0	\$7,615,360.39
John R. Edwards (D) ²	\$52,297.00	\$6,706,458.44
Richard A. Gephardt (D) ³	\$0	\$4,104,319.82
Dennis J. Kucinich (D) ⁴	\$0	\$3,291,962.59
Lyndon H. LaRouche, Jr. (D) ⁵	\$0	\$1,456,019.13
Joseph Lieberman (D) ⁶	\$0	\$4,267,796.85
Ralph Nader (I) ⁷	\$940.00	\$891,968.39
Alfred C. Sharpton (D)	\$0	\$100,000.00 ⁸

¹ General Clark publicly withdrew from the Presidential race on February 11, 2004.

² Senator Edwards publicly withdrew from the Presidential race on March 3, 2004.

³ Congressman Gephardt publicly withdrew from the Presidential race on January 2, 2004.

⁴ Congressman Kucinich became ineligible to receive matching funds on March 4, 2004.

⁵ Mr. LaRouche became ineligible to receive matching funds on March 4, 2004.

⁶ Senator Lieberman publicly withdrew from the Presidential race on February 3, 2004.

⁷ Ralph Nader became ineligible to receive matching funds on September 2, 2004.

⁸ On May 10, 2004, the Commission determined that Reverend Sharpton must repay this amount to the U.S. Treasury for matching funds he received in excess of his entitlement. See the July 2004 Record, page 8.

Public Funding

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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 committee's spending, limit their personal spending for the campaign to \$50,000 and submit to an audit by the Commission. 26 U.S.C. §§9033(a) and (b) and 9035; 11 CFR 9033.1, 9033.2, 9035.1(a)(2) and 9035.2(a)(1).

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. 26 CFR 702.9037-2. Only contributions from individuals in amounts of \$250 or less are matchable.

The chart on page 9 lists the amount most recently certified to each eligible candidate who elected to participate in the matching fund program, along with the cumulative amount certified to each candidate.

—Amy Kort

Outreach

Reporting Roundtables

On July 13, 2005, the Commission will host two roundtable sessions on reporting, including disclosure requirements under the Bipartisan Campaign Reform Act of 2002 (BCRA) and recent FEC regulations. See the chart at right for details. Both sessions will be followed by a half-hour reception at which each attendee will have an opportunity to meet the campaign finance analyst who reviews his or her committee's reports. Representatives from the FEC's Electronic Filing Office will also be available to meet with attendees.

Attendance is limited to 30 people per session, and registration

is accepted on a first-come, first-served basis. Please call the FEC before registering or sending money to ensure that openings remain. The registration form is available on the FEC web site at <http://www.fec.gov/info/outreach.shtml#roundtables> and from Faxline, the FEC's automated fax system (202/501-3413, request document 590). For more information, call the Information Division at 800/424-9530, or locally at 202/694-1100.

—Amy Kort

FEC to Hold State Outreach Workshops in July and August

As part of the FEC's State Outreach Program, Public Affairs Specialists conduct informal meetings in different cities across the country to brief PACs, party committees and candidate committees on areas of the law specific to their needs. This summer, FEC staff will hold workshops in the following cities:

- Savannah, GA, July 26-27;
- Denver, CO, August 10-11; and
- Portland, OR, August 23-24.

For more information about this outreach program, or to receive e-mail notification when registration begins, call the FEC's Information Division at 1-800/424-9530 (or

locally at 202/694-1100) or send an e-mail to Conferences@fec.gov. Registration information is available online at <http://www.fec.gov/info/outreach.shtml#state>.

—Amy Kort

FEC Campaign Finance Law Conferences in 2005

Each year the Federal Election Commission sponsors a number of conferences where Commissioners and FEC staff conduct a variety of technical workshops on the campaign finance law. Discussion topics include fundraising, reporting and communications. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. The schedule on page 11 lists the dates and locations for conferences to be held in 2005.

Because FEC conferences are selling out this year, we recommend that you do not make hotel or air reservations until you have received confirmation of your conference registration.

Conference for Trade Associations, Labor Organizations, Membership Organizations and their PACs

The FEC will host its annual conference for trade associations,

Roundtable Schedule

Date	Subject	Intended Audience
July 13 9:30-11 a.m. Reception 11-11:30 a.m.	Reporting for PACs and Party Committees, plus "Meet Your Analyst" reception	Individuals responsible for filing FEC reports for PACs and Party Committees (Up to 30 may Attend)
July 13 1:30-3 p.m. Reception 3-3:30 p.m.	Reporting for Candidates and Their Committees, plus "Meet Your Analyst" reception	Individuals responsible for filing FEC reports for Candidate Committees (Up to 30 may Attend)

labor organizations and membership organizations (and the PACs of any of these groups) June 1-3 in Chicago, IL. The registration fee is \$400 per attendee, and a late fee of \$10 will be added to registrations received after May 11.

The conference will be held at the Hyatt Regency Chicago on the Riverwalk, 151 E. Wacker Drive, Chicago, IL 60601. The hotel is located one block off of Chicago's Magnificent Mile.

Attendees are responsible for making their own hotel reservations. Call 1-888/421-1442 or click on the link on the FEC's conference web page (<http://www.fec.gov/info/outreach.shtml#conferences>) to make hotel reservations and receive a special group rate of \$199/single or \$224/double per night. You must mention that you are attending the conference to receive the group rate. After May 11, room rates will be based on availability.

Upcoming 2005 Conferences

Conference for Trade Associations, Membership Organizations, Labor Organizations and their PACs
June 1-3, 2005
Hyatt Regency Chicago
Chicago, IL

Conference for Campaigns, Parties and Corporate/Labor/Trade PACs
September 14-15, 2005
Hyatt Regency Islandia
San Diego, CA

Conference for Campaigns, Parties and Corporate/Labor/Trade PACs
October 25-26, 2005
Crowne Plaza Hotel
San Antonio Riverwalk
San Antonio, TX

Registration Information

Complete registration information for FEC conferences is available on the FEC web site at <http://www.fec.gov/info/outreach.shtml#conferences>.

Please direct all questions about conference registration and fees to Sylvester Management Corporation at 1-800/246-7277. For questions about the conference program, or to receive e-mail notification when registration begins for the Fall conferences, call the FEC's Information Division at 1-800/424-9530 (or locally at 202/694-1100) or send an e-mail to Conferences@fec.gov.

—Amy Kort

Publications

Updated Brochures Available

The Commission has updated three brochures, "Contributions," "Committee Treasurers" and "The FEC and the Federal Campaign Finance Law," to reflect recent changes in the campaign finance law. The brochures are available on the FEC web site at <http://www.fec.gov/pages/brochures/brochures.shtml>. A limited number of printed copies are also now available for those without Internet access. To request a printed copy, call the Information Division at 800/424-9530 or 202/694-1100.

—Amy Kort

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