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Commission

Commission Statement on Citizens United v. FEC

On February 5, 2010, the Commission announced that, due to the Supreme Court's decision in *Citizens United v. FEC*, it will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications. The Commission also announced several actions it is taking to fully implement the *Citizens United* decision.

In *Citizens United v. FEC*, issued on January 21, 2010, the Supreme Court held that the prohibitions in the Federal Election Campaign Act (the Act) against corporate spending on independent expenditures or electioneering communications are unconstitutional. The Supreme Court upheld statutory provisions that require political ads to contain disclaimers and be reported to the Commission. Provisions addressed by the decision are described below:

- The Court struck down 2 U.S.C. §441b, which prohibits, in part, corporations and labor organizations from making electioneering communications and from making independent expenditures—communications to the general public that expressly advocate

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Court Cases

Cao v. FEC

On January 27, 2010, the U.S. District Court for the Eastern District of Louisiana granted in part and denied in part the motion of Louisiana Congressman Anh “Joseph” Cao, the Republican National Committee (RNC) and the Republican Party of Louisiana (LA-GOP, formerly “RPL”) (collectively, the Plaintiffs) to certify to the Fifth Circuit Court of Appeals challenges to the constitutionality of the coordinated party expenditure limits and party contribution limits. The court certified questions regarding whether the Plaintiffs had sufficient injury to create a constitutional case, whether certain coordinated expenditure and contribution limits as applied to coordinated communications violate the Plaintiffs’ First Amendment rights and whether the \$5,000 limit on contributions from political parties to candidate campaigns violates a political party’s First Amendment rights because it is the same limit as for political action committees and the limit is not adjusted for inflation. The district court denied certification and granted summary judgment in favor of the FEC on all of Plaintiffs’ other claims.

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Commission

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the election or defeat of clearly identified federal candidates;

- The Court upheld 2 U.S.C. §441d, which requires that political advertising consisting of independent expenditures or electioneering communications contain a disclaimer clearly stating who paid for such communication; and
- The Court upheld 2 U.S.C. §434, which requires certain information about electioneering communications and independent expenditures, and the contribu-

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tions received for such spending, to be disclosed to the Commission and to be made public.

The Commission is taking the following steps to conform to the Supreme Court's decision:

- The Commission will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications;
- The Commission is reviewing all pending enforcement matters to determine which matters may be affected by the *Citizens United* decision and will no longer pursue claims involving violations of the invalidated provisions. In addition, the Commission will no longer pursue information requests or audit issues with respect to the invalidated provisions; and
- The Commission is considering the effect of the *Citizens United* decision on its ongoing litigation.

The Commission intends to initiate a rulemaking to implement the *Citizens United* opinion. It is reviewing the regulations affected by the invalidated provisions, including but not necessarily limited to the following:

- 11 CFR 114.2(b)(2) and (3), which implement the Act's prohibition on corporate and labor organization independent expenditures and electioneering communications;
- 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
- 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures and electioneering communications under certain conditions;
- 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for elec-

tioning communications; and

- 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.

The Commission is also considering the effect of *Citizens United* on the ongoing Coordinated Communications rulemaking. 74 FR 53893 (Oct. 21, 2009). The Commission also issued a Supplemental Notice of Proposed Rulemaking (SNPRM) regarding issues presented by *Citizens United*. See page 7 for more information. The additional comment period closed on February 24, 2010. The Commission intends to hold a hearing on the Coordinated Communications rulemaking on March 2 and 3, 2010. The text of the SNPRM is available at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice2010-01.pdf.

Revisions to Commission reporting requirements, forms, instructions and electronic software may be required.

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:

- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

The Commission notes that the prohibitions on corporations or labor organizations making contributions contained in 2 U.S.C. §441b remain in effect.

The full text of the Commission's statement is available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.

Court Cases

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Background

On December 4, 2008, the Plaintiffs filed an amended complaint in the U.S. District Court for the Eastern District of Louisiana challenging the constitutionality of the party expenditure provision limits at 2 U.S.C. §§441a(d)(2)-(3) as applied to their planned coordinated party expenditures. The Plaintiffs alleged that the party expenditure provision of the Federal Election Campaign Act (the Act) and the \$5,000 contribution limit at 2 U.S.C. §441a(a)(2)(A) are unconstitutional as applied to party uncoordinated expenditures that are not “unambiguously campaign related” (*Buckley v Valeo*, 424 U.S. 1, 81 (1976)) or “functionally identical to contributions” (*FEC v. Colo. Rep. Fed. Campaign Comm.*, 533 U.S. 431, 468 n.2 (2001)) (“*Colorado IP*”). In addition, the Plaintiffs argued that the application of multiple coordinated expenditure limits for the same office is unconstitutional because it is ineffectual in preventing corruption and that the base amounts are too low. The Plaintiffs also challenged the constitutionality of the \$5,000 contribution limit on the grounds that the same limits apply to parties as to political action committees, and argued that the limit is too low and not indexed for inflation. The original complaint was filed by the Plaintiffs on November 13, 2008.

Under the Act, a national party committee and state party committees may make expenditures in connection with the general election campaigns of federal candidates that are coordinated with these candidates. 11 CFR 109.30. Coordinated party expenditures do not count against the contribution limits, but are subject to a separate set of limits. 11 CFR 109.32.

The Act provides a formula for calculating coordinated party expenditure limits. For House candidates, the coordinated party expenditure limit is \$10,000 increased by the Cost of Living Adjustment (COLA) or, in states with only one representative, the same as the Senate limit. For Senate candidates, the coordinated party expenditure limit is the greater of the number of the state voting age population multiplied by two cents and increased by the COLA, or \$20,000 increased by the COLA. For Presidential candidates, the coordinated party expenditure limit is the number of the national voting age population multiplied by two cents and increased by the COLA. 11 CFR 109.32.

District Court Decision

The district court granted in part the Plaintiffs’ Motion to Certify. Four questions were found non-frivolous and certified to *en banc* Fifth Circuit Court of Appeals. The defendant’s Motion for Summary Judgment was granted for all issues not certified to the Fifth Circuit.

Standing. The court found non-frivolous the question whether Plaintiffs had alleged sufficient injury to create a constitutional “case or controversy” within the judicial power of Article III. However, the court held that LA-GOP does not have standing to bring a Motion to Certify under §437h of the Act, as LA-GOP is neither a national committee of a political party nor an individual eligible to vote for President.

Unambiguously Campaign Related. The court found frivolous the Plaintiffs’ arguments that several provisions of the Act are vague, overbroad or beyond Congress’ authority to regulate because they allegedly restrict speech that is not “unambiguously campaign related.” The provisions challenged under that theory were those that limit expenditures “in connection” with a candidate’s campaign (§§441a(d)(2-3)),

limit to \$5,000 contributions from multicandidate political committees to any candidate (§441a(a)(2)(A)) and define expenditures “made in cooperation, consultation or concert” with a candidate as contributions (§441a(a)(7)(B)(i)).

Own Speech. The court found non-frivolous the Plaintiffs’ argument that coordinated expenditures

(continued on page 4)

Visit the FEC’s Redesigned Web Site

FEC staff recently completed a significant upgrade of the Commission’s web site, www.fec.gov. The redesigned site offers a wealth of information in a simple, clearly-organized format. Features include cascading menus that improve navigation and interactive pages that allow users to tailor content to their specific needs. Noteworthy among the new features is a search engine. This tool allows visitors to immediately access all pages on the site that contain a desired word or phrase. Another new feature, the Commission Calendar, helps users keep track of reporting deadlines, upcoming conferences and workshops, Commission meetings, comment deadlines and more.

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

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

Court Cases

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cannot be constitutionally limited if they are the party's "own speech." The court noted that in both *Buckley*, 424 U.S. at 47, and *Colorado II*, 533 U.S. at 457, 463-64, the Supreme Court reaffirmed that coordinated expenditures are comparable to contributions under First Amendment analysis. However, the district court stated that coordinated expenditures that explicitly convey an underlying basis for support arguably begin to look more like a "direct restraint . . . on political communication." *Buckley*, 424 U.S. at 21. Thus, the court found the argument non-frivolous.

Constitutionality of Coordinated Expenditure Limits. The court found frivolous the Plaintiffs' argument that Congressional discretion to set different coordinated expenditure limits in different races in different states violates Plaintiffs' First Amendment rights. The court also held that the variable voting-age-population formula is constitutional. The court noted that legislators should determine and assess limits, not judges.

The court did not certify Plaintiffs' argument that current coordinated expenditure limits are unconstitutionally low and violate First Amendment rights. The court found no evidence that the effect of then-candidate Cao's speech was weakened by a lack of resources due to these limits.

The court granted the FEC's Motion for Summary Judgment on these issues.

Constitutionality of \$5,000 Party Contribution Limit. The court found non-frivolous Plaintiffs' question as to whether the \$5,000 contribution limit in 2 U.S.C. §441a(2)(A) is unconstitutional because it imposes the same limits on parties as it does on political action committees (PACs). The district court stated that *Colorado II* had suggested that parties may warrant additional constitutional protections but had at the

time declined to address this specific question. 533 U.S. at 448 n.10. The district court stated that this was sufficient for the court to find the Plaintiffs' argument non-frivolous.

The court also found non-frivolous the Plaintiffs' argument that the \$5,000 contribution limit in §441(a)(2)(A) is unconstitutional because it is not adjusted for inflation. The court stated that inflation in the years after passage of the statute presents a valid basis for a facial challenge and that the \$5,000 limit (which adjusted for inflation today would represent \$19,000) might be unconstitutionally low.

Finally, the court found frivolous the Plaintiffs' argument that the limit is too low to allow political parties to fulfill their historic and important role. The court determined that there was insufficient evidence presented to show that limits hindered the parties' ability to support candidates in the most recent election cycle.

Constitutionality of Additional Party Contribution Limit For Senate Races. The court found frivolous Plaintiffs' argument that the provision in 2 U.S.C. §441a(h) that allows national party committees to contribute an additional \$35,000 (adjusted for inflation to \$39,900 in 2008) to candidates for Senate vitiates the anti-corruption interest of any lower limits for either Senators or Representatives. The court stated that these limits are best left to Congressional discretion.

The court certified the following questions to the Fifth Circuit:

- Has each of the Plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial powers of Article III?

- Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§441a(d)(2-3), 441a(a)(2)(A) and 441a(a)(7)(B) (i) violate the First Amendment rights of one or more of Plaintiffs as applied to coordinated communications that convey the basis for the expressed support?
- Does the \$5,000 contribution limit at 2 U.S.C. §441a(a)(2)(A) violate the First Amendment rights of one or more Plaintiffs as applied to a political party's in-kind and direct contributions because it imposes the same limits on parties as on political action committees?
- Does the \$5,000 contribution limit at 2 U.S.C. §441a(a)(2)(A) facially violate the First Amendment rights of one or more Plaintiffs because it is not adjusted for inflation?

The text of the court's opinion is available at http://www.fec.gov/law/litigation/cao_order.pdf.

U.S. District Court for the Eastern District of Louisiana (No. 08-4887).

—Stephanie Caccamo

PACRONYMS Now Available

The December 2009 edition of PACRONYMS, a list of the acronyms, abbreviations and common names of federal political action committees (PACs) is available on the Commission's website. This list is updated annually by the staff of the Public Records Office from the registration statements and campaign finance disclosure reports on file with the Commission.

PACRONYMS is available at <http://www.fec.gov/pubrec/pacronyms/pacronyms.shtml> and is also available from the FEC's Public Records Office at (202) 694-1120.

Inflation Adjustments

2010 Coordinated Party Expenditure Limits

The 2010 coordinated party expenditure limits are now available. The limits are:

- \$87,000 for House nominees in states that have only one U.S. House Representative;
- \$43,500 for House nominees in states that have more than one U.S. House Representative; and
- A range from \$87,000 to \$2,395,400 for Senate nominees, depending on each state’s voting age population.

Party committees may make these special expenditures on behalf of their 2010 general election nominees. National party committees have a separate limit for each nominee.¹ Each state party committee has a separate limit for each House and Senate nominee in its state. Local party committees do not have their own separate limit. One party committee may authorize another committee of that party to make an expenditure against the authorizing committee’s limit. Local committees may only make coordinated party expenditures with advance authorization from another committee within in the party.

Coordinated party expenditure limits are separate from the contribution limits; they also differ from contributions in that the party committee must spend the funds on behalf of

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¹The national Senatorial and Congressional committees do not have separate coordinated party expenditure limits, but may receive authorization to spend against the national limit or state party limits.

Authority to Make Coordinated Party Expenditures on Behalf of House and Senate Nominees

National Party Committee	May make expenditures on behalf of House and Senate nominees. May authorize ¹ other party committees to make expenditures against its own spending limits. National Congressional and Senatorial campaign committees do not have separate limits.
State Party Committee	May make expenditures on behalf of House and Senate nominees seeking election in the committee’s state. May authorize ¹ other party committees to make expenditures against its own spending limits.
Local Party Committee	May be authorized ¹ by national or state party committee to make expenditures against its limits.

Calculating 2010 Coordinated Party Expenditure Limits

	Amount	Formula
Senate Nominee	See table on page 6	The greater of: \$20,000 x COLA or 2¢ x state VAP ² x COLA ³
House Nominee in States with Only One Representative	\$87,000	\$20,000 x COLA
House Nominee in Other States	\$43,500	\$10,000 x COLA
Nominee for Delegate or Resident Commissioner⁴	\$43,500	\$10,000 x COLA

¹The authorizing committee must provide prior authorization specifying the amount the committee may spend.

²VAP means voting age population.

³COLA means cost-of-living adjustment. The applicable COLA is 4.35110.

⁴American Samoa, the District of Columbia, Guam, the Virgin Islands and the Northern Mariana Islands elect Delegates; Puerto Rico elects a Resident Commissioner.

Inflation Adjustments

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the candidate rather than give the money directly to the campaign. Although these expenditures may be made in consultation with the candidate, only the party committee making the expenditure—not the candidate committee—must report them. (Coordinated party expenditures are reported on FEC Form 3X, line 25, and are always itemized on Schedule F, regardless of amount.)

The accompanying tables on pages 5 and 6 include:

- Information on which party committees have the authority to make coordinated party expenditures;
- The formula used to calculate the coordinated party expenditure limits; and
- A listing of the state-by-state coordinated party expenditure limits.

—Elizabeth Kurland

Lobbyist Bundling Threshold Unchanged for 2010

The Federal Election Campaign Act, as amended by the Honest Leadership and Open Government Act of 2007 (HLOGA), requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant PACs once the contributions exceed a specified threshold amount. The Commission must adjust the threshold amount at the beginning of each calendar year.

The threshold is increased by multiplying the \$15,000 statutory threshold by the difference between the price index as certified by the Secretary of Labor and the price index for the base period (CY 2006). The resulting amount is rounded to the nearest multiple of \$100. 2 U.S.C. §441a (c)(1)(B)(iii). Based

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Coordinated Party Expenditure Limits for 2010 General Election Senate Nominees

State	Voting Age Population (in thousands)	Expenditure Limit
Alabama	3,580	\$311,500
Alaska*	515	\$87,000
Arizona	4,864	\$423,300
Arkansas	2,180	\$189,700
California	27,526	\$2,395,400
Colorado	3,797	\$330,400
Connecticut	2,710	\$235,800
Delaware*	678	\$87,000
Florida	14,480	\$1,260,100
Georgia	7,245	\$630,500
Hawaii	1,005	\$87,500
Idaho	1,127	\$98,100
Illinois	9,733	\$847,000
Indiana	4,834	\$420,700
Iowa	2,295	\$199,700
Kansas	2,114	\$184,000
Kentucky	3,300	\$287,200
Louisiana	3,369	\$293,200
Maine	1,047	\$91,100
Maryland	4,348	\$378,400
Massachusetts	5,161	\$449,100
Michigan	7,620	\$663,100
Minnesota	4,005	\$348,500
Mississippi	2,184	\$190,100
Missouri	4,556	\$396,500
Montana*	755	\$87,000
Nebraska	1,345	\$117,000
Nevada	1,962	\$170,700
New Hampshire	1,036	\$90,200
New Jersey	6,662	\$579,700
New Mexico	1,499	\$130,400
New York	15,117	\$1,315,500
North Carolina	7,103	\$618,100
North Dakota*	503	\$87,000
Ohio	8,828	\$768,200
Oklahoma	2,769	\$241,000
Oregon	2,953	\$257,000
Pennsylvania	9,830	\$855,400
Rhode Island	826	\$87,000
South Carolina	3,481	\$302,900
South Dakota*	613	\$87,000
Tennessee	4,803	\$418,000
Texas	17,886	\$1,556,500
Utah	1,916	\$166,700
Vermont*	495	\$87,000
Virginia	6,035	\$525,200
Washington	5,095	\$443,400
West Virginia	1,433	\$124,700
Wisconsin	4,345	\$378,100
Wyoming*	412	\$87,000

* In these states, which have only one U.S. House Representative, the spending limit for the House nominee is \$87,000. In other states, the limit for each House nominee is \$43,500.

Inflation Adjustments

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on this formula, the lobbyist bundling disclosure threshold for 2010 will remain at the 2009 level of \$16,000.

—Christopher Berg

Regulations

Supplemental NPRM on Coordinated Communications

In order to elicit comments addressing the impact of the Supreme Court's decision in *Citizens United v. FEC (Citizens United)* on the Commission's proposed rules regarding coordinated communications, the Commission published a Supplemental Notice of Proposed Rulemaking (NPRM), for the NPRM on Coordinated Communications originally published on October 21, 2009. The Commission also an-

nounced a public hearing on March 2-3, 2010. The Supplemental NPRM was published in the *Federal Register* on February 10, and comments were due February 24, 2010.

The original NPRM proposed changes to the Commission's "coordinated communications" regulations at 11 CFR 109.21 in response to the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*"). The deadline for comments on that NPRM was January 19, 2010. However, two days after the close of the NPRM's comment period, the Supreme Court issued its opinion in *Citizens United*, which may raise issues relevant to the coordinated communications rulemaking. Therefore, the Commission re-opened the comment period for this particular rulemaking.

In the Supplemental NPRM the Commission sought comment on the effect, if any, of the *Citizens United* decision on the proposed rules as published by the Commission on October 21, 2009. See the November 2009 *Record*, page 1. The Commission noted possible issues raised by the *Citizens United* decision included, but are not limited to, whether the Commission should modify its proposed rules regarding the definition of PASO and the content of communications that are coordinated; whether the Commission should examine how it conducts enforcement investigations of coordinated communications; whether the Commission should modify the proposed safe harbors to the coordination test regarding communications paid for by 501(c)(3) organizations or candidates' businesses; and whether the proposed changes are affected by the court's analysis of the "media exemption."

The Commission will hold a public hearing on Tuesday, March 2, 2010, and Wednesday, March 3, 2010. The witnesses will be those individuals who indicated in their timely comments, whether to the NPRM published on October 21, 2009, or to the Supplemental NPRM, that they wished to testify at the hearing.

The text of the Supplemental NPRM is available on the Commission's website at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice2010-01.pdf. The original NPRM published by the Commission is available at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf. Additionally, the text of the Supreme Court's opinion in *Citizens United* is available at http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf.

—Myles Martin

Petition for Rulemaking on Citizens United

On January 26, 2010, the James Madison Center for Free Speech submitted a Petition for Rulemaking to the Commission following the Supreme Court's decision in *Citizens United v. FEC (Citizens United)*, which the Court issued on January 21, 2010. The petition requested that the Commission adopt temporary and permanent regulations stating that it will not enforce provisions of the Federal Election Campaign Act (the Act) which prohibit corporations, labor organizations and membership organizations from making certain independent expenditures and electioneering communications. 2 U.S.C. §441b. The petition also requested that the Commission adopt conforming regulations to the Court's decision in *Citizens United*.

The petition requests that the Commission's conforming regulations should include the following:

Rescheduled Public Hearing

Public Hearing on Federal Candidate and Officeholder Participation in Nonfederal Fundraising Events

FEC Headquarters
999 E Street NW
Washington, DC 20463
March 16, 2010
10 a.m.

The Commission has rescheduled a public hearing for March 16, 2010, at 10 a.m. relating to participation by federal candidates and officeholders in nonfederal fundraising events. The comment periods for this rulemaking have not changed. The hearing had been originally scheduled for March 10, 2010.

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Regulations

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- A repeal of 11 CFR 114.2 and 114.14 insofar as they implement the prohibitions of 2 U.S.C. §441b that *Citizens United* struck down;
- Acknowledging that §441b no longer bans corporations, unions or membership organizations from engaging in independent spending for political speech beyond their restricted classes and repealing 11 CFR 114.4 insofar as it bans such speech;
- A repeal of 11 CFR 114.9 insofar as it implements 2 U.S.C. §441b and bans independent spending for political speech;
- A repeal of 11 CFR 114.10 as *Citizens United* renders this section unnecessary because it functioned as an exception to the Section 441b prohibition on corporate independent expenditures; and
- A repeal of 11 CFR 114.15, as the “appeal-to-vote test” contained therein only applies to electioneering communications and *Citizens United* removed the §441b ban on electioneering communications as unconstitutional regardless of whether their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate or candidates in the jurisdiction.

The Petition for Rulemaking is available on the FEC’s website at http://www.fec.gov/pdf/nprm/citizensunited2010/james_madison_petition.pdf.

—Myles Martin

Hearing on Proposed Federal Election Activity (FEA) Rules

The Commission held a public hearing on Tuesday, December 16, 2009, to address proposed rules on certain aspects of federal elec-

tion activity (FEA) definitions. The proposed rules would redefine “voter registration activity” and “get out the vote activity” (“GOTV activity”). The proposed changes are in response the Court of Appeals for the District of Columbia Circuit’s 2008 finding in *Shays v. FEC* (“*Shays III*”) that the Commission’s regulatory definitions of those terms contravened the intent of the Bipartisan Campaign Reform Act of 2002 (BCRA) by creating loopholes that allowed for the use of nonfederal funds for federal elections.

Background

Current Commission regulations at 100.24(a)(2) define “voter registration activity” as “contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote.” The court of appeals in *Shays III* found this definition to be deficient for two reasons. First, it requires that the party contacting potential voters actually “assist” them in voting or registering to vote, thus excluding efforts that actively encourage people to vote or register to vote and dramatically narrowing which activities are covered. Second, the definition requires the contact to be “by telephone, in person, or by other individualized means,” therefore excluding mass communications targeted large numbers of people. The court concluded that these elements of the definition created loopholes in violation of BCRA’s purpose and allowed the use of soft money to influence federal elections. To comply with the court’s decision and close the loopholes, the Commission published a Notice of Proposed Rulemaking (NPRM), in the October 20, 2009, *Federal Register*. In that publication, the Commission proposed amending the definition of “voter registration activity” to include “encouraging or assisting potential voters in registering to vote.”

Commission regulations define GOTV activity as “contacting regis-

tered voters by telephone, in person or by other individualized means to assist them in voting.” 100.24(a)(3). As it did with the definition of voter registration activity, the court of Appeals in *Shays III* found the definition of GOTV activity to be deficient in that it required actual assistance by individualized means, thereby creating two loopholes in the definition that violated BCRA’s purpose. The Commission proposes revising the definition of GOTV activity by eliminating the “assistance” and “individualized means” requirements from the current definition. Specifically, the Commission proposes redefining GOTV activity as “encouraging or assisting potential voters to vote.”

Hearing

Seven individuals¹ testified before the Commission in response to the NPRM. Neil Reiff and Joseph Sandler of Sandler, Reiff and Young, P.C., testified that the terms voter registration activity and GOTV activity were not meant to cover all types of activity by state or local party committees. If the Commission expands the definition of these two terms, Mr. Reiff argued, the regulations could cover any and all activities undertaken by party committees and associations of state and local candidates. Karl Sandstrom, speaking on behalf of the Association of State Democratic Chairs, also argued that the Commission’s proposed rules would federalize much activity undertaken by nonfederal political committees.

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¹ Witnesses at the public hearing included: Karl Sandstrom, Association of State Democratic Chairs; Paul Ryan, Campaign Legal Center; Brian Svoboda, Democratic Legislative Campaign Committee; Neil Reiff and Joseph Sandler, Sandler, Reiff and Young, P.C.; Ron Nehring, Republican State Chairmen’s Committee of the RNC and the California Republican Party, and his counsel John Phillippe, RNC.

Regulations

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Brian Svoboda, on behalf of the Democratic Legislative Campaign Committee, said that the proposed redefinitions of GOTV activity and voter registration activity would restrict nonfederal activity that does not have the purpose or effect of influencing federal elections. He said the rules would disproportionately affect associations of state and local candidates, which do not have the ability to raise and spend Levin funds — a category of funds raised by state and local party committees that may include donations from sources ordinarily prohibited by federal law. He suggested defining the terms as communications intended to persuade people to vote a certain way. He also argued that the new definitions should not encompass communications aimed at increasing popular support for nonfederal candidates.

Ron Nehring of the Republican National Committee's Republican State Chairmen's Committee and his counsel, John Phillippe of the Republican National Committee, testified before the Commission that state and local party committees are focused on electing state and local candidates largely through grassroots activity. Mr. Nehring said voter registration and GOTV activities make up a substantial part of operations at the state party and county committee level. He expressed concern that the Commission's proposed regulations would federalize some activity that is focused on state and local candidates and state ballot measures.

Paul Ryan of the Campaign Legal Center supported the rules proposed in the NPRM. He said that the proposed definitions of voter registration activity and GOTV adequately address the court's concerns and close the loopholes identified by the court. Mr. Ryan said the proposed rules provide adequate guidance

regarding which activities would be covered by the redefined terms.

The full text of the NPRM, written comments in response to the NPRM, audio files of the hearing and a transcript of the hearing are available on the FEC website at <http://www.fec.gov/pages/hearings/shaysfea09hearing.shtml>.

—Isaac J. Baker

Advisory Opinions

AO 2009-30

Trade Association Corporate Members May Use Treasury Funds to Assist Their SSFs

A trade association's corporate members may use their general treasury funds to pay for fundraising services to assist the members' separate segregated funds (SSFs). The trade association would not be making contributions to the SSFs as long as it charges its corporate members the fair market value for the services.

Background

TechNet is an incorporated trade association whose members include corporations and executives in the technology industry. TechNet currently provides government relations services, issues briefings and provides continuing education to its members. The costs for these services are included in the corporate members' annual membership dues. TechNet would like to offer additional fundraising assistance services to its member corporations for their SSFs. The services would include an assessment of the SSF's recent fundraising activities and recommendations for future efforts, a periodic newsletter, fundraising and marketing materials and assistance with planning and executing fundraising events. The corporate members would pay for

the fundraising assistance services as an additional assessment in their annual membership dues. The amount charged would be set at a level that ensures that TechNet receives the fair market value of its services.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from using general treasury funds to make any contribution in connection with a federal election. 2 U.S.C. §441b; 11 CFR 114.2. However, the Act and Commission regulations permit a corporation, including an incorporated trade association, to pay for the establishment, solicitation and administrative costs of a separate segregated fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). Establishment, solicitation and administrative costs include the costs of fundraising and other expenses incurred in setting up and running a separate segregated fund. 11 CFR 114.1(b). In previous advisory opinions, the Commission concluded that payments by corporations to help their SSFs increase their fundraising are permissible "establishment, administration and solicitation" costs. AOs 2006-33 and 1980-50. Here, TechNet's corporate members would pay for the proposed services in order to help their SSFs with fundraising activities. The payments for the fundraising services would constitute fundraising expenses under 11 CFR 114.1(b). Therefore, TechNet's corporate members may use their general treasury funds to pay for TechNet's fundraising services for the members' SSFs.

The Commission also analyzed whether TechNet would be making a prohibited contribution to its members' SSFs by providing the fundraising services. As an incorporated trade association, TechNet would be prohibited from making contributions in connection with a federal election. 2 U.S.C. §441b; 11 CFR 114.2. A contribution includes

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the provision of goods and services without charge or at a charge that is less than the usual and normal charge for such goods or services. 11 CFR 100.52(d)(1). The “usual and normal charge” for goods means “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.” The “usual and normal charge” for services means “the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.” 11 CFR 100.52(d)(2). In this case, since TechNet’s proposal would charge its corporate members the fair market value for the fundraising services, TechNet would not make prohibited contributions to its member corporations’ SSFs.

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Length: 4 pages.

—Zainab Smith

AO 2009-31

Employees May Use Credits to Make Contributions to SSF

MAXIMUS, a corporation whose employees earn “credits” redeemable for cash value as part of their regular compensation, may expand this credit program to allow restricted class employees to redeem these credits and use them to make contributions to its separate segregated fund, MAXPAC.

Background

MAXIMUS is a corporation whose employees earn “credits” as part of their regular compensation in addition to their salaries. These credits hold a cash value based on a *pro rata* share of the employee’s salary, and may be redeemed for the following purposes:

- To receive pay while on personal leave;

- To receive pay during times of financial or personal hardship; and
- To receive a lump sum payment upon permanently leaving employment at MAXIMUS.

MAXIMUS wishes to revise its compensation plan to allow its restricted class employees to redeem credits for cash value for two additional purposes: to contribute it to MAXIMUS’s charitable foundation, or to allow restricted class employees to make a contribution to MAXPAC, MAXIMUS’s separate segregated fund (SSF). MAXIMUS would permit restricted class employees to voluntarily complete and submit a form authorizing MAXIMUS to redeem an employee-specified number of credits, the cash value of which would be contributed to MAXPAC. The form would be distributed only to restricted class employees and would contain all notifications required under the Federal Election Campaign Act (the Act) and Commission regulations for solicitations to an SSF’s restricted class.

Analysis

The Act and Commission regulations permit a corporation to solicit its restricted class for contributions to the corporation’s SSF. 2 U.S.C. §§441b(b)(2)(C) and (4)(A)(i); 11 CFR 114.1(a)(2)(iii), (c), (f) and (j); 114.2(f)(1) and (4)(i); 114.5(g)(1). Solicitations of the restricted class for contributions to the corporation’s SSF must inform the employee of the political purpose of the SSF and of the employee’s right to refuse to contribute without reprisal. 11 CFR 114.5(a). Among possible methods of solicitation for the SSF are payroll deduction, checkoff systems, periodic payment plans or return envelopes enclosed in a solicitation request. 11 CFR 114.1(f), 114.2(f)(4)(i), 114.5(g)(1) and (k); AO 1999-3. Corporations may not use treasury funds to pay any contributor for his or her contribution through a bonus or any other form of direct

or indirect compensation. 11 CFR 114.5(b)(1).

Because MAXIMUS’s existing credit system is part of a regular compensation plan provided to each employee, earned in the normal course of employment at a regular, predetermined rate, and because employees control the use of any credits earned and may redeem them in a variety of situations, the proposal is materially distinguishable from the proposal presented in AO 1986-41, in which the Commission concluded that providing additional compensation to some employees in recognition of their political contributions would be contrary to the Act and Commission regulations.

MAXIMUS’s proposal does not augment employee compensation to effect a contribution. The proposed expansion of MAXIMUS’s credit program is analogous to a corporate payroll deduction plan, which the Commission has found to be an acceptable method of facilitating contributions to a corporation’s SSF. 11 CFR 114.1(c) and (f), 114.5(k)(1); AOs 1999-3 and 1996-42. As a result, the Commission concludes that the proposal by MAXIMUS would not constitute such a prohibited use of treasury funds to compensate employees for contributions to MAXPAC.

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—Christopher Berg

AO 2009-32

Proposed Sale of Art on Behalf of Committees is Not a Contribution

An individual who conducts a web-based business as a sole proprietor may sell artwork as fundraising items for political committees and provide the political committees with solicitation e-mails. The sale of these fundraising items, and the provision of the solicitation e-mails,

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would not constitute contributions from the sole proprietor to the political committees as long as the fee received by the sole proprietor is the usual and normal charge.

Background

The requestor, Richard Jorgensen, operates a web-based business as a sole proprietor. Through this website, Dr. Jorgensen sells, among other things, prints of President Barack Obama and Secretary of State Hillary Clinton. Dr. Jorgensen sells these prints for \$49.95 plus \$5 for shipping and handling.

Dr. Jorgensen proposes to enter into agreements with political committees to sell these prints as fundraising items. Dr. Jorgensen plans to draft solicitation e-mails

promoting the artwork and provide those solicitation e-mails to the committees he deals with. The political committees can request changes to the solicitation e-mails or customize them. Dr. Jorgensen will charge the political committees a fee for providing the solicitation e-mails, and the committees will disseminate the e-mails through their own distribution lists.

The e-mails will contain images of the products offered for sale and hyperlinks to purchase the products from Dr. Jorgensen's website. The hyperlinks will contain an embedded ID tag, unique to each political committee, so that purchases resulting from each committee's fundraising efforts can be appropriately credited to that committee and contributor information can be collected and forwarded to the political committee for reporting purposes. Dr. Jorgensen will request and provide to the committees information from contributors, including their names, addresses and the amount of their purchases and, for contributors whose purchases exceed \$200, their occupations and employers.

For sales made through the proposed arrangements with political committees, the price will be marked up by an amount that Dr. Jorgensen and the political committee agree upon, so that Dr. Jorgensen will receive the same dollar amount he would receive from any other sale. When purchases are made from the website, payment will be collected via PayPal Pro, and deposited on a weekly basis into a separate bank account for each political committee. From those accounts, funds will be sent to the artist for the prints and shipping costs, to PayPal Pro for transaction fees and to Dr. Jorgensen for his commissions. The political committees will retain the remaining amount.

Analysis

Dr. Jorgensen asked the Commission whether he could provide solicitation e-mails to the political

committees without the provision of those e-mails constituting a contribution to the political committees. The Commission determined that Dr. Jorgensen could provide solicitation e-mails to the political committees, and that his provision of those e-mails would not constitute contributions to the political committees as long as Dr. Jorgensen receives the usual and normal charge for such services. Under Commission regulations, the "usual and normal charge" for services means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.52(d) (2). As long as the fee for drafting the solicitation e-mail is commercially reasonable at the time the service is provided, it will constitute the "usual and normal charge" and therefore not result in a contribution. The Commission also determined that Dr. Jorgensen could sell artwork on behalf of political committees as fundraising items, and that his provision of the artwork will not constitute a contribution to the purchasing committees because the commission Dr. Jorgensen proposes to receive is the usual and normal charge in a commercially reasonable transaction.

Dr. Jorgensen proposes to sell the artwork for \$49.95 in addition to a markup to be agreed upon with the political committees and a \$5 fee for shipping and handling. The Commission determined that Dr. Jorgensen will not be making contributions to the political committees because the amount he will receive on sales to the political committees would be the same amount he would receive on sales that are not made to political committees. 11 CFR 100.52(d). Because the political committees will receive funds from individual contributors and not from Dr. Jorgensen's sole proprietorship, the transactions will not result

Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1992 are available on the FEC web site as PDF files. Visit the FEC web site at <http://www.fec.gov/pages/record.shtml> to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1992. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

You will need Adobe® Acrobat® Reader software to view the publication. The FEC's web site has a link that will take you to Adobe's web site, where you can download the latest version of the software for free.

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in contributions from Dr. Jorgensen. See, e.g., AO 2008-18.

The Commission noted that the political committees participating in this proposed plan will authorize Dr. Jorgensen as their agent to receive contributions, and, therefore, Dr. Jorgensen will be subject to certain recordkeeping and reporting obligations. 11 CFR 102.9. Dr. Jorgensen will have to request and forward to the political committees the name and address of any person contributing more than \$50, and the date and full amount of the contribution, as well as the occupation and employer of anyone who contributes more than \$200 to a particular committee. 2 U.S.C. §432(c); 11 CFR 102.9(a). Also, Dr. Jorgensen will have to forward the contributions, along with the required contributor information, to the treasurer of the recipient committee within the required time period. 2 U.S.C. §432(b)(1); 11 CFR 102.8(a).

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—Isaac J. Baker

Nonfilers

Committees Fail to File Illinois and Texas Pre-Primary Reports

The Commission cited several campaign committees for failing to file the 12-Day Pre-Primary Election Report required by the Federal Election Campaign Act (the Act) for the Illinois Primary Election that was held on February 2, 2010, and for the Texas Primary Election held on March 2, 2010.

Illinois Pre-Primary Report

As of January 29, 2010, the required disclosure report had not been received from:

- Gutierrez for Congress (IL-4);
- Friends of Darlena Williams Burnett (IL-7); and
- Citizens to Elect Robert Marshall (IL-Senate).

Committees participating in the Illinois primary had the option to file either a consolidated Pre-Primary and Year-End Report or separate reports covering 2009 and 2010 activity. Committees that chose to consolidate the Pre-Primary and Year-End Reports were required to file both by January 21, 2010. Committees that chose to file separate reports were required to file the 12-Day Pre-Primary Election Report by January 21, 2010, and a 2009 Year-End Report by January 31, 2010. If sent by certified or registered mail, the Pre-Primary Report should have been certified or registered by January 18, 2010.

The FEC notified committees involved in the February 2 Illinois primary of their potential filing requirements on December 28, 2009. Those committees that did not file on the due date were notified on January 22, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Texas Pre-Primary Report

As of February 26, 2010, the required disclosure report had not been received from:

- Angels for John Gay (TX-14); and
- Doug Purl for Congress (TX-15).

The reports were due on February 18, 2010, and should have included financial activity for the period January 1, 2010, through February 10, 2010. If sent by certified or registered mail, the report should have been postmarked by February 15, 2010.

The FEC notified committees involved in the March 2 Texas Primary of their potential filing requirements on January 25, 2010. Those com-

mittees that did not file on the due date were notified on February 19, 2010, that their reports had not been received and that their names would be published if they did not respond within four business days.

Additional Information

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000 or less, he or she is not considered a “candidate” subject to reporting under the Act.

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

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

—Myles Martin

Outreach

Washington, DC, Conference for Corporations and their PACs

The Commission will hold a conference in Washington, DC, on March 9-10, 2010, for corporations and their PACs. At the conference, FEC staff will conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more

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Outreach

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experienced in campaign finance law. To view the conference agenda or register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2010/corporate10.shtml>.

Hotel Information. The conference will be held at the Westin Washington, DC City Center hotel, in downtown Washington, DC, near several Metro subway stations and the K Street corridor. To make your hotel reservations, please call 1/800-937-8461 or visit the hotel website at <http://www.starwoodmeeting.com/StarGroupsWeb/booking/reservation?id=0912145565&key=64F0C> and identify yourself as attending the Federal Election Commission conference. The hotel will charge the prevailing sales tax, currently 14.5 percent. The FEC recommends waiting to make hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

Registration Information. The registration fee for this conference is \$550. Complete registration information is available online at <http://www.fec.gov/info/conferences/2010/corporate10.shtml>.

—Katherine Carothers

Seminar for Nonconnected Political Action Committees

On April 7, 2010, the Commission will hold a one-day seminar for nonconnected committees (i.e., PACs not sponsored by a corporation, union, trade association or incorporated membership organization) at its headquarters at 999 E Street, NW, in Washington, DC. This seminar is recommended for:

- Treasurers of leadership PACs, partnership PACs and other nonconnected PACs;
- Staff of the above organizations who have responsibility for

compliance with federal campaign finance laws;

- Attorneys, accountants and consultants who have clients that are nonconnected PACs or unregistered “section 527” organizations; and
- Anyone who wants to gain in-depth knowledge of federal campaign finance laws, including the recently enacted lobbyist bundling and disclosure rules, as they apply to leadership PACs and other types of nonconnected committees.

The seminar will address issues such as fundraising and reporting, as well as the FEC’s rules on when section 527 organizations trigger federal reporting requirements. Experienced FEC staff will specifically discuss recent changes to the campaign finance law, as well as the rules specific to leadership PACs and partnership PACs.

The registration fee for this seminar is \$100 per attendee. Payment by credit card is required prior to the seminar. A full refund will be made for all cancellations received before 5 p.m. EST on April 2. Complete information is available on the FEC website at <http://www.fec.gov/info/conferences/2010/nonconnected2010.shtml>, along with the seminar agenda and a list of hotels located near the FEC. Further questions about the seminar should be directed to the Information Division by phone at 800/424-9530 (press 6), or locally at 202/694-1100, or via e-mail to Conferences@fec.gov.

—Katherine Carothers

Washington, DC, Conference for Campaigns and Political Party Committees

The Commission will hold its annual conference for House and Senate campaigns and political party committees in Washington, DC, on May 3-4, 2010. Commissioners and staff will conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. For additional information, to view the conference agenda or to register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2010/candparty10.shtml>.

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New Orleans Regional Conference Rescheduled

The Commission has rescheduled its Regional Conference for Candidates, Party Committees and Corporate/Labor/Trade PACs in New Orleans, LA, to March 23-24, 2010. The conference will be held at the Intercontinental New Orleans Hotel near the French Quarter.

Previously registered attendees should e-mail Sylvester Management Corporation as soon as possible at rosalyn@sylvestermanagement.com to confirm that they are still attending. Persons not previously registered who wish to attend may click the link on the FEC website at <http://www.fec.gov/info/conferences/2010/neworleans.shtml> to register.

The last day to request a refund for previously registered attendees is March 6, 2010.

Outreach

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Hotel Information. The conference will be held at the Omni Shoreham hotel in northwest Washington, DC, near the National Zoo and the Woodley Park-National Zoo Metro subway station (Red Line). A room rate of \$259 is available to conference attendees who make reservations on or before April 2, 2010. To make your hotel reservations and reserve this group rate, call 1-800-THE-OMNI and identify yourself as attending the Federal Election Commission conference. (Alternatively, click the link on the

Conferences in 2010

Conference for Corporations and Their PACs

March 9-10, 2010
Westin Washington, DC City Center
Washington, DC

Regional Conference for Candidates, Political Parties and Corporate/Labor/Trade PACs

March 23-24, 2010
Intercontinental New Orleans
New Orleans, LA

Nonconnected Committees Seminar

April 7, 2010
FEC Headquarters
Washington, DC

Conference for Candidates and Party Committees

May 3-4, 2010
Omni Shoreham Hotel
Washington, DC

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

June 8-9, 2010
Doubletree Crystal City
Arlington, VA

FEC's conference website.) The FEC recommends waiting to make hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

Registration Information. The registration fee for this conference is \$499, which covers the cost of the conference, materials and meals. A \$51 late fee will be added to registrations received after 5 p.m. EDT, April 2, 2010. Complete registration information is available online at <http://www.fec.gov/info/conferences/2010/candparty10.shtml>.

FEC Conference Questions

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; e-mail: toni@sylvestermanagement.com). For questions about other conferences and workshops in 2010, please call the FEC's Information Division at 1-202/694-1100, or send an e-mail to Conferences@fec.gov.
—Katherine Carothers

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