FEC Record October 2012

Contents

Federal Election Commission
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Reporting

October Reporting Reminder

The following reports are due in October:

- All principal campaign committees of House and Senate candidates must file a quarterly report by October 15, 2012. The report covers financial activity from July 1 (or the day after the closing date of the last report) through September 30;
- Principal campaign committees of Presidential candidates must file a report by October 15, if they are quarterly filers (the report covers financial activity from July 1 through September 30), or by October 20, if they are monthly filers (the report covers activity for the month of September);
- All political action committees (PACs) and party committees that follow a quarterly reporting schedule must file a quarterly report by October 15, 2012. The report covers financial activity from July 1 (or the day after the closing date of the last report) through September 30;
- National party committees, PACs following a monthly filing schedule and state, district and local party committees that engage in reportable "federal election activity" must file a monthly report by October 20. This report covers activity for the month of September. 11 CFR 104.5.; and
- Pre-General reports are due on October 25 (close of books, October 17). Candidate committees must file this report if their candidate is running in the general election. PACs and party committees that file quarterly must file this report if they make contributions or expenditures in connection with the general election during the October 1-17 reporting period. PACs and party committees that file on a monthly schedule **must** file the Pre-General report in lieu of the regular November 20 monthly report.

Notification of Filing Deadlines

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

Treasurer's Responsibilities

The Commission provides reminders of upcoming filing dates as a courtesy to help committees comply with the filing deadlines set forth in the Federal Election Campaign Act and Commission regulations. Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline. Accordingly, reports filed by methods other than electronically, or other than Registered, Certified or Overnight Mail must be received by the Commission's (or the Secretary of the Senate Public Records Office's) close of business on the last business day before the deadline.

Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures, in excess of $50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC electronically. [fn1] Reports filed electronically must be received and validated by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the applicable filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines. 11 CFR 104.18(e).

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial copy of their reports with the Commission in order to speed disclosure. The Commission's electronic filing software, FECFile, is free and can be downloaded from the FEC's website. The latest version of FECFile is Version 8.0.1.8, which is available at http://www.fec.gov/elecfil/updatelist.html. All reports filed after June 26, 2012, must be filed in Format Version 8.0.1.8. Reports filed in previous formats will not be accepted. Filers may also use commercial or privately developed software as long as the software meets the Commission's format specifications, which are available on the Commission's website. Committees using commercial software should contact their vendors for more information about the Commission's latest software release.

Timely Filing for Paper Filers

Registered and Certified Mail. Reports sent by registered or certified mail must be postmarked on or before the mailing deadline to be considered timely filed. A committee sending its reports by certified or registered mail should keep its mailing receipt with the U.S.

Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5 (e).

Overnight Mail. Reports filed via overnight mail [fn2] will be considered timely filed if the report is received by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

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

Paper forms are available for downloading at the FEC's website (http://www.fec.gov/info/forms.shtml) and from FEC Faxline, the agency's automated fax system (202/501-3413). The 2012 Reporting Schedule is also available on the FEC's website (http://www.fec.gov/info/report_dates_2012.shtml), and from Faxline. For more information on reporting, call the FEC at 800/424-9530 or 202/694-1100.

State, District and Local Party Committees

State, district and local party committees that engage in certain levels of "federal election activity" must file on a monthly schedule. See 11 CFR 300.36(b) and (c)(1). Committees that do not engage in reportable "federal election activity" may file on a quarterly basis in 2012. See 11 CFR 104.5(c)(1)(i).

National Party Committees

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

Political Action Committees

PACs (separate segregated funds and nonconnected committees, including Independent Expenditure-Only committees, which are commonly referred to as "Super PACs") that filed on a semi-annual basis in 2011 file on a quarterly basis in 2012. Monthly filers continue on the monthly schedule. PACs may change their filing schedule, but must first notify the Commission in writing. Electronic filers must file this request electronically. A committee may change its filing frequency only once a year, after giving notice of change in filing frequency to the Commission. The committee will receive notification indicating the Commission's acknowledgment of the request. All future reports must follow the new filing frequency. 11 CFR 104.5(c).

Additional Information

For more information on 2012 reporting dates:

- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Fax the reporting tables to yourself using the FEC's Faxline (202/501-3413, document586); or
- Visit the FEC's reporting website at to view the reporting tables online.

FOOTNOTES:

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

2 "Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system. See also, generally, 11 CFR 100.19(b).

(Posted 9/26/12; By: Myles Martin)

Resources:

- 2012 Reporting Dates
- FEC Compliance Map
- FEC Electronic Filing

Kentucky Special Election Reporting: 4th District

Kentucky will hold a Special General Election to fill the U.S. House seat in Kentucky's 4th Congressional District vacated by Representative Geoff Davis. The Special General will be held November 6, 2012.

Candidate committees involved in this election must follow the reporting schedule posted at http://www.fec.gov/pages/report_notices/2012/ky04.shtml. PACs and party committees that file on a quarterly basis in 2012 and participate in this election must also follow the reporting schedule detailed in the same website link above. PACs and party committees that file monthly should continue to file according to their regular filing schedule. Please note that the FEC does not have authority to extend filing deadlines, even when they fall on weekends or holidays.

Filing Electronically

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

Timely Filing for Paper Filers

Registered and Certified Mail. Reports sent by registered or certified mail must be postmarked on or before the mailing deadline to be considered timely filed. A committee sending its reports by registered or certified mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. 2 U.S.C. §434(a)(5) and 11 CFR 100.19 and 104.5(e).

Overnight Mail. Reports filed via overnight mail [fn1] will be considered timely filed if the report is received by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports. 2 U.S.C. §434(a)(5) and 11 CFR 100.19 and 104.5(e).

Other Means of Filing. Reports sent by other means—including first class mail and courier—must be received by the FEC before the Commission's close of business on the filing deadline. 11 CFR 100.19 and 104.5(e).

Forms are available for downloading and printing at the FEC's website (http://www.fec.gov/info/forms.shtml) and from FEC Faxline, the agency's automated fax system (202/501-3413).

48-Hour Contribution Notices

Note that 48-hour notices are required of the participating candidate's principal campaign committee if it receives any contribution of $1,000 or more per source between October 18, 2012, and November 3, 2012.

24- and 48-Hour Reports of Independent Expenditures

Political committees and other persons must file 24-hour reports of independent expenditures that aggregate at or above $1,000 between October 18, 2012, and November 4, 2012. This requirement is in addition to that of filing 48-hour reports of independent expenditures that aggregate $10,000 or more during the calendar year up to and including the 20th day before an election. The 48-hour reporting requirement applies to independent expenditures that aggregate at or above $10,000 prior to October 18, 2012.

Electioneering Communications

The 60-day electioneering communications period in connection with the Special General Election runs from September 7, 2012, through November 6, 2012.

Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and leadership PACs that are otherwise required to file reports in connection with the special election must simultaneously file FEC Form 3L if they receive two or more bundled contributions from any lobbyist/registrant or lobbyist/ registrant PAC that aggregate in excess of $16,700 during the special election reporting period. 11 CFR 104.22(a)(5)(v). For more information on these requirements, see the March 2009 *Record*.

FOOTNOTE:

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

(Posted 9/11/12; By: Elizabeth Kurland)

Resources:

- Kentucky 4th District Special Election Prior Notice
- 2012 Reporting Dates
- Kentucky 4th District Special Election Compliance Page

Advisory Opinions

AO 2012-30 Company May Process Larger Text Contributions and Share Short Codes

A telecommunications company may use text messaging technology to process campaign contributions in excess of $50 per billing cycle and $200 per calendar year or election cycle. It may also share premium common short codes among various federal campaigns and committees when processing such texted transactions.

Background

Revolution Messaging, LLC is a Washington, DC-based full-service digital technology and strategy company that specializes in providing mobile communications strategies, content and text messaging services to progressive organizations.

The global communications provider asked whether it may process contributions by text message totaling more than $50 per month or $200 per calendar year or election cycle.

Donations of this size trigger certain recordkeeping and disclosure requirements under the Federal Election Campaign Act (the Act) and Commission regulations. Revolution Messaging proposes to collect contributor information and provide it to the recipient political committees to enable treasurers to comply with those requirements.

The company also would like political committees to be able to share the common short codes used to designate the recipient of a text contribution. The company plans to assign unique keywords to each committee to identify the intended recipient.

Analysis

Under the Act and Commission regulations, committees are solely responsible for determining the eligibility of contributors and satisfying other legal requirements.

A treasurer of a political committee must "keep an account of (1) all contributions received by or on behalf of such political committee; (2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person; [and] (3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution." 2 U.S.C. §432(c)(l)-(3); see also 11 CFR 110.4 (c). Committees must itemize on their FEC reports individual contributions that exceed $200 in a calendar year (or election cycle, for authorized committees). 11 CFR 104.8(b).

The Commission determined that Revolution Messaging's plan to obtain the necessary contributor information and to block further contributions from those who fail to provide it would enable committees to fulfill their recordkeeping and reporting requirements.

The Commission also found that the use of shared common short codes with unique keywords to identify recipients would ensure that committees receive their contributions and prevent inadvertent transmittal of corporate funds to a committee.

Date Issued: September 4, 2012; Length: 8 pages.

(Posted 9/13/12; By: Alex Knott)

Resources:

- Advisory Opinion 2012-30 [PDF; 8 pages]
- Commission Discussion of AO 2012-30

AO 2012-31 Reduced Rates for Text Fundraising Not Considered a Contribution

A wireless cell phone service provider may charge political committees a lower rate for fundraising by text message than it charges to commercial content providers, without making a prohibited corporate contribution.

Background

AT&T proposes to establish a new rate structure for political committees that receive contributions by text message over the company's premium SMS platform as described in AO 2012-28 (CTIA II). The rates would likely be substantially lower than those AT&T charges commercial content providers to use its text message platform, but would cover the company's costs as well as a profit. The rates would be based on commercial considerations, and would be offered on the same terms to all political customers.

AT&T asked if this new lower rate structure for processing contributions to political committees would be viewed as a prohibited in-kind contribution from the corporation under the Federal Election Campaign Act (the Act) and Commission regulations.

Analysis

The Act and Commission regulations prohibit corporations from making contributions in connection with federal elections. See 2 U.S.C. §441b(a); 11 CFR 114.2(b)(1). A contribution includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office." 2 U.S.C. §431(8)(A)(i); 11 CFR 100.52(a); see also 2 U.S.C. §441b(b)(2); 11 CFR 114.2(b)(1).

"Anything of value includes all in-kind contributions," including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. See 11 CFR 100.52(d)(1). "Usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. See 11 CFR 100.52(d)(2).

The Commission determined that AT&T's proposal to charge political committees lower rates than commercial content providers will not result in a prohibited contribution because it reflects commercial considerations and does not reflect considerations outside of a business relationship.

Date Issued: September 20, 2012; Length: 5 pages.

(Posted 9/21/12; By: Alex Knott)

Resources:

- Advisory Opinion 2012-31 [PDF; 5 pages]
- Commission Discussion of AO 2012-31

Litigation

James v. FEC

On August 31, 2012, Virginia James filed suit against the Commission in the U.S. District Court for the District of Columbia challenging the Federal Election Campaign Act's (the Act) biennial limit on an individual's contributions to federal candidates. The plaintiff claims this limit impinges upon her First Amendment rights to association and speech.

The suit challenges the constitutionality of 2 U.S.C. §441a(a)(3)(A), which limits individual contributions to federal candidates to $46,200 over the course of a two-year election cycle. Ms. James, a New Jersey resident, asserts she would like to make contributions to federal candidates in increments of $2,500 or less that would collectively exceed that biennial limit.

Background

In addition to an individual's per-committee contribution limit, the Act limits the aggregate amount that an individual may contribute to federal candidates, parties and PACs in a two-year period. This biennial limit is adjusted for inflation in odd-numbered years. In 2011-12, the overall limit is $117,000. Of this amount, the Act stipulates that no more than $46,200 may be contributed to candidates and no more than $70,800 may be contributed to party committees and PACs. 2 U.S.C. §§441a(a)(3)(A) and (B).

Constitutional Challenge

Ms. James is not challenging the biennial limit as a whole. The plaintiff claims she will abide by the overall aggregate limit of $117,000. Rather, the plaintiff in this case is only challenging 2 U.S.C. §441a(a)(3)(A), which caps biennial contributions to federal candidates at $46,200. The plaintiff asserts that this limit is an unconstitutional burden on her associational right to contribute to the candidates of her choosing. The suit argues that the $46,200 limit fails exacting scrutiny because it is not closely drawn to a sufficiently important governmental interest.

The suit asks the court to enjoin the Commission from enforcing 2 U.S.C. §441a(a)(3)(A) and declare that section unconstitutional, both on its face and as applied to the plaintiff. The plaintiff also seeks attorney's fees and other relief as the court deems appropriate.

On September 5, the FEC filed a motion in the D.C. District Court to designate the *James* lawsuit as related to another case, *McCutcheon v. FEC* (D.D.C. Civ. No. 12-1034), which is pending before a three-judge panel. Although the *James* suit is narrower in its scope than *McCutcheon*, both of these cases challenge the constitutionality of the same section of the FECA, §441a(a)(3), which limits the aggregate amount of money any one person can contribute to certain political committees during a two-year election cycle. In its filing the Commission argues that, "the *James* complaint is subsumed — both factually and legally — within the *McCutcheon* complaint."

(Posted 9/12/12; By: Isaac Baker)

Resources:

- *James v. FEC* Ongoing Litigation Page
- The Biennial Limit Brochure

La Botz v. FEC

On September 5, 2012, the U.S. District Court for the District of Columbia issued an Order and Memorandum Opinion denying the FEC's Motion to Dismiss. The court concluded that the FEC's decision in dismissing an administrative complaint filed by Dan La Botz, a member of Ohio's Socialist Party and a candidate for U.S. Senate in 2010, was contrary to law and was not supported by substantial evidence. The court remanded the matter back to the FEC.

Background

The Federal Election Campaign Act (the Act) and Commission regulations regulate the staging of public debates. Candidate debates may be sponsored by a broadcaster, bona fide newspapers, magazines and other periodical publications, or a tax-exempt (501(c)(3) or (c)(4)) nonprofit organization. 11 CFR 110.13(a). The debate will not be considered an in-kind contribution to the participating candidates as long as certain conditions are met: the staging organization must use pre-established objective criteria to determine which candidates may participate; the debate must not promote or advance one candidate over another; and the debate must include at least two candidates. 11 CFR 110.13(b)-(c). The structure of the debate is otherwise left to the discretion of the staging organization. 11 CFR 110.13(b).

On September 21, 2010, Mr. La Botz filed a complaint with the FEC's Office of General Counsel alleging that the Ohio News Organization and its member newspapers (collectively, "ONO") failed to use pre-established and objective standards when inviting participants to a series of televised debates. Mr. La Botz alleged that he was not informed of the debate schedule and was told that he had not met the debate-participation criteria. (Only two candidates were invited to participate in the debate—Democratic Party nominee Lee Fisher and Republican Party nominee Rob Portman.) Mr. La Botz alleged that ONO's failure to apply any pre-established and objective standards under the Act resulted in an illegal, in-kind corporate contribution. The Commission found no reason to believe that ONO violated the Act or Commission regulations and dismissed the complaint on May 19, 2011. It concluded that ONO's criteria for participation in the debate were pre-established and objective, and were consistent with criteria the Commission previously found to have been acceptable, such as percentage of votes a candidate received in a previous election and a candidate's fundraising ability and/or standing in polls.

Complaint and Court Decision

On July 8, 2011, Mr. La Botz filed a complaint in the U.S. District Court for the District of Columbia alleging that the FEC wrongfully dismissed his administrative complaint. The complaint alleged that the FEC's dismissal was contrary to law in that ONO violated the Act and Commission regulations by using criteria designed to allow only the two Democratic and Republican Party candidates to participate in the debate while excluding all other qualified candidates. The FEC filed a Motion to Dismiss arguing that the court lacked jurisdiction and that Mr. La Botz failed to state a claim.

The District Court for the District of Columbia disagreed. The court found that it not only had jurisdiction to decide the merits of the case, but that the FEC's dismissal of the administrative complaint was not based on substantial evidence. Although the court noted the judicial deference usually granted to agency decisions, it found that the FEC's dismissal was based on an affidavit which suffered from "serious flaws." The court concluded that the affidavit, which was submitted by an editor for one member of the ONO consortium and described the group's selection criteria, was written in summary fashion and did not establish that it was based on personal knowledge. The court also noted a lack of contemporaneous evidence that ONO had employed "pre-established" selection criteria and noted that the affidavit was only submitted after the FEC inquiry had begun. (The court pointed out

that, although the Commission regulations do not require staging organizations to reduce their selection criteria to writing, the FEC "strongly encourage[s]" the practice and recommends that the criteria be made available to all candidates before a debate. *See* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64260-01 (Dec. 14, 1995).) Finally, the court pointed to a contemporaneous ONO document in the record which stated that its candidate selection criteria "follows the structure used by the Commission on Presidential Debates, which allows for only the *major -party candidates* to debate." [Emphasis in court opinion.] The court found that this document contradicted ONO's affidavit, and found no indication in the record that the document was considered in the FEC's decision making. For these reasons, the court concluded that the FEC's decision in dismissing the administrative complaint was not supported by substantial evidence and was contrary to law. The court remanded the matter back to the FEC for proceedings consistent with the court's order.

(Posted 9/13/12; By: Zainab Smith)

Resources:

- *La Botz v. FEC* Ongoing Litigation Page

Hispanic Leadership Fund, Inc. v. FEC

On August 10, 2012, the Hispanic Leadership Fund, Inc. ("HLF"), a Virginia-based 501 (c)(4) non-profit organization, filed a complaint in the U.S. District Court for the Eastern District of Virginia. The case is a pre-enforcement, as-applied challenge to the FEC's application of the "clearly identified federal candidate" provision at 2 U.S.C. §431(18), in the context of disclosure requirements for "electioneering communications," 2 U.S.C. §434(f). HLF also filed a Motion for Preliminary and Permanent Injunction.

On July 30, 2012, HLF filed a similar complaint and motion in the U.S. District Court for the Southern District of Iowa. On August 9, 2012, that court dismissed the case for improper venue.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an electioneering communication is any broadcast, cable or satellite communication that 1) references a clearly identified candidate for federal office; 2) is publicly distributed within certain time periods before an election; and 3) is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i); 11 CFR 100.29(a). A candidate is "clearly identified" if the candidate's name, nickname, photograph, or drawing appears in the communication, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." 11 CFR 100.29(b)(2). *See also* 2 U.S.C. §431(18); 11 CFR 100.17.

On April 18, 2012, American Future Fund ("AFF") sought an advisory opinion asking whether eight proposed television advertisements referenced "clearly identified federal candidate[s]" under the Act. In its response (Advisory Opinion 2012-19), the Commission determined that one of AFF's proposed advertisements did not refer to a clearly identified Federal candidate, but that the two advertisements referencing "Obamacare" and "Romneycare" did reference clearly identified Federal candidates and would be electioneering communications. The Commission could not approve a response by four affirmative votes regarding the other five proposed advertisements. These advertisements used terms such as "this administration," and "the White House" (with visual depictions of the White House), and one also included President Obama's voice.

Complaint

HLF's complaint states that it would like to produce advertisements similar to those proposed by AFF, but that the advertisements are not being produced due to the FEC's "failure to correctly apply [the Act] and controlling precedent" to the five advertisements in the AFF advisory opinion request as to which the Commission did not approve an advisory opinion. HLF states that its proposed advertisements refer to "the administration" or "this administration;" use the phrase "the White House" or contain images of the White House; and that one proposed advertisement contains an audio clip of President Obama speaking. HLF claims that its proposed advertisements are not electioneering communications referring to clearly identified candidates, but are issue advocacy communications under *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), that "address substantive policy issues facing the federal government."

HLF claims that the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) provided a specific definition of "clearly identified federal candidate," but that the FEC failed to apply this definition in the AFF advisory opinion. As a result, HLF claims that the FEC's pre-enforcement application of the "clearly identified federal candidate" standard to similar proposed advertisements is inconsistent with law and burdens its constitutional rights.

Relief

HLF seeks a permanent injunction against the FEC's enforcement of 2 U.S.C §431(18), 2 U.S.C. §434(f), 11 CFR 100.29(a) and 11 CFR 100.29(b)(2) as applied to its proposed activities and a declaration that such enforcement would be unlawful, as well as an award of nominal damages, costs and attorneys fees.

(Posted 9/13/12; By: Zainab Smith)

Resources:

- *Hispanic Leadership Fund, Inc. v. FEC* Ongoing Litigation Page
- FEC's Electioneering Communications Brochure

Van Hollen v. FEC

On September 18, 2012, the U.S. District Court of Appeals for the District of Columbia reversed the judgment of the District Court in *Van Hollen v. FEC*. The Court of Appeals found that the lower court erred in holding that Congress "spoke plainly" when it enacted 2 U.S.C. §434(f) of the Bipartisan Campaign Reform Act, thus foreclosing any regulatory construction of the statute by the FEC.

The appeals court remanded the case with instructions to "refer the matter to the FEC for further consideration." On September 20, 2012, the district court directed the Commission to inform the court by October 12, 2012, whether the Commission "intends to pursue rulemaking or defend its current regulation."

Background

The Bipartisan Campaign Reform Act (BCRA) defines an electioneering communication as any broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within certain time periods before an election and is targeted to the relevant electorate. 2 U.S.C. §434(f)(3). Under the BCRA, every person who makes disbursements for an electioneering communication aggregating over $10,000 per year must file a report with the FEC identifying, among other things, the person who made the disbursement. 2 U.S.C. §434(f)(1), (2). If the disbursement is paid out of a segregated account consisting of funds contributed by individuals directly to the account for electioneering communications, then the report must disclose the names and addresses of all those who contributed an aggregate of $1,000 or more within a certain time period to the account. If the disbursements were not made from a segregated account, then the report must disclose the names and addresses of all contributors who contributed over $1,000 within a certain time period to the person making the disbursement. 2 U.S.C. §434(f)(2)(E).

At the time BCRA was passed, all labor unions and almost all corporations were prohibited from making electioneering communications, so Congress did not specify a particular disclosure regime for such communications. The regulation at issue in this case, 11 CFR 104.20(c)(9), was promulgated by the FEC in 2007 after the Supreme Court's decision in *Wisconsin Right to Life*, which allowed corporations and unions to make certain types of electioneering communications for the first time. The regulation requires corporations or labor organizations that make *WRTL*-permitted electioneering communications to disclose the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, *which was made for the purpose of furthering electioneering communications*. 104.20(c)(9). (Emphasis added.)

The District Court found that BCRA clearly requires every person who funds electioneering communications to disclose *all contributors*, "and there are no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose" of making electioneering communications. The court also stated that Congress did not delegate authority to the FEC to narrow BCRA's disclosure requirement through agency rulemaking.

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Analysis and Decision

The Court of Appeals rejected this analysis and reversed the lower court's decision. The Court of Appeals found that the lower court erred in holding that Congress spoke plainly in enacting 2 U.S.C. §434(f). The appellate court concluded that 2 U.S.C. §434(f) is "anything but clear, especially when viewed in the light of the Supreme Court's decisions in [*Citizens United v. FEC* and *WRTL v. FEC*]." Instead, it found that 2 U.S.C. §434(f)(2)(F) could be construed to include a "purpose" requirement since that subsection only applied to disbursements for the direct costs of producing and airing electioneering communications. The appellate court also noted that there was no indication that Congress anticipated the circumstances at issue in this case. The court found that it was "due to the complicated situation that confronted [the FEC in promulgating 104.20(c)(9)] in 2007 and the absence of plain meaning in the statute that the FEC acted pursuant to its delegated authority… to fill 'a gap' in the statute…" The FEC's promulgation of 11 CFR 104.20(c)(9) reflects an attempt by the agency to provide regulatory guidance under the BCRA following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of 'electioneering communications.'"

The Court of Appeals stated that, since the FEC did not participate in the appeal, the court did not fully understand the FEC's position and would not "divine how the FEC would resolve the many issues raised in the appeal." Instead, the Court of Appeals vacated the District Court's decision and remanded the case to the District Court with an order to refer the matter back to the FEC for a "prompt" decision on whether it intends to pursue a rulemaking or whether it will further defend the current regulation in District Court.

On September 20, 2012, the District Court issued an order referring the matter back to the FEC with instructions to file a status report on or before October 12, 2012. At that time, the FEC must advise the court of whether it intends to pursue a rulemaking or defend the current regulation.

The full text of the Court's Judgment may be found at: http://www.fec.gov/law/litigation/van_hollen_ac_judgment.pdf.

U.S. District Court of Appeals for the District of Columbia Circuit: Case 12:5117.

(Posted 9/25/12; By: Zainab Smith)

Resources:

- *Van Hollen v. FEC* Ongoing Litigation Page

Compliance

Commission Cites Committee for Failure to File Massachusetts Pre-Primary Report

On September 4, 2012, the Commission cited one campaign committee for failing to file the 12-Day Pre-Primary Election Report required by the Federal Election Campaign Act (the Act) for the Massachusetts primary election held on September 6, 2012.

As of September 4, 2012, the required disclosure report had not been received from:

- Friends of Matt Temperley (MA/08)

The report was due on August 25, 2012, and should have included financial activity for the period July 1, 2012, through August 17, 2012. If sent by certified or registered mail, the report should have been postmarked by August 22, 2012.

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.

The Commission notified committees involved in the Massachusetts primary election of their potential filing requirements on August 1, 2012. Those committees that did not file on the due date were sent notification on August 27, 2012 that their reports had not been received and that their names would be published if they did not respond within four business days.

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.

(Posted 9/4/2012; By: Myles Martin)

Resources:

- FEC Non-Filer Press Release
- FEC Compliance Map

Outreach

Contributions By Text Message

Recently, the FEC has issued several Advisory Opinions (AOs) regarding the use of text messages to make contributions in connection with federal elections. This article answers common questions about political contributions made and received by text message.

Who is responsible for determining the eligibility of the contributor to make a contribution by text?

Under the proposals that the Commission has approved, the recipient political committee is solely responsible for ensuring that a text contribution is lawful under the Act and Commission regulations. *See* AO 2012-28 (CTIA II).

What if we receive a contribution by text that we later discover is from a prohibited source?

Committee treasurers must return or refund any contribution that the committee receives if the treasurer subsequently learns that the contribution came from a prohibited source. *See generally* 103.3(b), 110.20(a)(4), (g) and AO 2012-26, n.8 (m-Qube II).

When is a contribution that is sent by text "received"?

Under the proposals approved by the Commission, a contribution that is sent by text message is considered "received" when a user completes an "opt-in," that is, when a user confirms that he or she intends to make the contribution and certifies that he or she is eligible to make contributions under the Act and Commission regulations. *See* AO 2012-17 (m-Qube I).

May individuals contribute more than $200 by text message?

Yes. The Commission has approved proposals that would allow political committees to receive more than $200 in contributions by text message. In AO 2012-30 (Revolution Messaging), for example, the Commission approved a proposal for a text messaging application provider to process contributions to political committees that aggregated more than $200 per year (or election cycle, as applicable) so long as the contributor provided at least his or her name and address in response to requests for name, address, occupation, and name of employer. Under the proposal, the application provider would work with the recipient political committees to combine this information with information about the contributors that the political committees had obtained through other means. *See also* AO 2012-26 (m-Qube II).

Would our committee receive a prohibited in-kind corporate contribution if our wireless service provider offers us a discounted rate or establishes a new rate structure for political committees when providing its services?

Not necessarily. While a discount or new fee structure for political committees that is less than what a vendor typically charges can result in a contribution, the Commission has determined that a prohibited corporate in-kind contribution would not result if a wireless service provider charges reduced rates that reflect commercial considerations and that do not reflect considerations outside of a business relationship. *See* AOs 2012-26 (m-Qube II), 2012-28 (CTIA II), 2012-31 (AT&T Inc.).

Our committee would like to share a single short code with other committees for text contributions. Is this permissible?

Yes. In AO 2012-30 (Revolution Messaging), the Commission approved a proposed service that would allow multiple Federal political committees to share one premium short code for receiving contributions by text message, when each political committee would be assigned one or more unique keywords to ensure that each contribution would be associated with only one political committee. Under the proposal, the contributor would send both the shared short code and the unique keyword in the text message, and the transaction would be assigned to the correct recipient political committee's account, based on the keyword in the text message. The Commission concluded that this method would "ensure that contributions will be properly accounted for and that corporate funds will not be inadvertently transmitted to political committees." For more information, *see* AO 2012-30 (Revolution Messaging).

(Posted 9/25/2012; By: Zainab Smith)

Resources:

- Advisory Opinion 2012-17 (m-Qube I)
- Advisory Opinion 2012-26 (m-Qube II)
- Advisory Opinion 2012-28 (CTIA-II)
- Advisory Opinion 2012-30 (Revolution Messaging)
- Advisory Opinion 2012-31 (AT&T)

Voter Registration Activity and GOTV

Now that the general election Federal Election Activity (FEA) time periods have begun, party committees may want to review the definitions of "voter registration activity" and "get-out-the-vote-activity" (GOTV), which were revised in 2010. This article answers common questions about those revised regulations. For more information about FEA, please consult the *Campaign Guide for Political Party Committees*.

How did the voter registration activity and GOTV definitions change under the revised rules?

In response to the decision in *Shays v. FEC* (Shays III Appeal), the Commission expanded the definitions of voter registration and GOTV activities to cover activities that urge, encourage or assist potential voters in registering to vote or in voting regardless of whether the message is delivered individually or to a group of people via mass communication. The Commission also created exceptions for brief, incidental exhortations to register to vote or to vote; GOTV and voter identification activities conducted solely in connection with a nonfederal election; and for certain *de minimis* activities.

Under the revised rules, voter registration activity means:

- Encouraging or urging potential voters to register to vote, whether by mail, (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means;
- Preparing and distributing information about registration and voting;
- Distributing voter registration forms or instructions to potential voters;
- Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms;
- Submitting or delivering a completed voter registration form on behalf of a potential voter;
- Offering or arranging to transport, or actually transporting, potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
- Any other activity that assists potential voters to register to vote. 100.24(a)(2).

GOTV activity means:

- Encouraging or urging potential voters to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means;
- Informing potential voters, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means, about the hours or location of polling places, or about early voting or voting by absentee ballot;
- Offering or arranging to transport, or actually transporting, voters to the polls;
- Any other activity that assists potential voters in voting. 100.24(a)(3).

The Commission carved out exceptions to both of these definitions for brief exhortations to register to vote or to vote, so long as the exhortations are incidental to a communication, activity or event. 100.24(a)(2)(ii). Exhortations must be both brief *and* incidental to qualify for the exception.

Can you give examples of activities that qualify for the "brief and incidental exhortation" exemption?

Under the revised rules, a phone call for a state party committee fundraiser that provides recipients with information about the event, solicits donations and concludes by reminding the listener, "Don't forget to register to vote," would qualify for the exemption because the exhortation to register to vote is both brief and incidental. Also, a mailer praising the public service record of a mayoral candidate and/or discussing the candidate's platform that concludes by reminding the recipients to "Vote [for mayoral candidate] in November!" would qualify for the exemption because the exhortation to vote is both brief and incidental.

Our local party committee would like to send out two mailers during the FEA time periods: 1) a mailer with a call to register to vote that occupies a large amount of space on the mailer and 2) a GOTV mailer that simply states "Vote on Election Day!" Would either mailer qualify for the exemption?

No. An exhortation to register to vote that occupies a large amount of space on a mailer would not qualify for the exception because the exhortation would not be brief. Also, a message that simply states "Vote on Election Day!" without any other text is not incidental and would not qualify for the exemption. Remember, to qualify for the exemption, the exhortation must be brief *and* incidental.

Our state party committee posts voter registration forms on our website for downloading. Is this considered FEA?

No. In addition to the FEA exceptions listed in 100.24(c), the following activities by a state or local party committee are not considered FEA under the revised regulations:

- *De minimis* costs associated with posting a hyperlink on the party's webpage to a state or local election board's webpage containing information on voting or registering to vote; enabling visitors to download a voter registration form or absentee ballot application; posting information on the party's website about voting dates and/or polling locations and hours of operation; or placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee.
- GOTV activity conducted solely in connection with a nonfederal election held on a date on which no federal election is held, as long as any communication made as part of such activity refers exclusively to nonfederal candidates participating in the nonfederal election, if the nonfederal candidates are not also federal candidates; ballot referenda or initiatives scheduled for the date of the nonfederal election; or the date, polling hours, and locations of the nonfederal election. 100.24(c).

Where can I get more information about FEA?

For more information about the revisions discussed in this article, please see the Final Rules on the Definition of Federal Election Activity, 75 FR 55257 (Sept 10, 2010). The Campaign Guide for Political Party Committees [PDF] also provides detailed information about FEA as well as instructions for reporting FEA. All of the FEA time periods for each state are available on the FEC's website at www.fec.gov/info/ElectionDate. For further information, please contact the FEC's Information Division at 1-800-424-9530 (press 6) or email info@fec.gov.

(Posted 9/27/2012; By: Zainab Smith)

Resources:

- Campaign Guide for Political Party Committees
- FEC Brochure on Local Party Activity
- Final Rules on Definition of Federal Election Activity (September 10, 2010)
- Federal Election Activity Dates for 2012