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PARTY GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to political party committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of political party committees. It should be used in conjunction with the FEC's August 2007 *Campaign Guide for Political Party Committees*, which provides more comprehensive information on compliance for these organizations.

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Advisory Opinions

AO 2007-17 Contributor Signature Not Required on Contributions Made Through Online Banking Services

The Democratic Senatorial Campaign Committee (DSCC) may collect contributions from individuals using online banking services, which often take the form of electronic payments or bank-issued checks that are signed by bank officials. The DSCC is not required to collect a signature from the individual contributor as long as the check was executed by a bank official in accordance with the individual contributor's instructions and clearly indicates the personal account from which the check is drawn.

Background

The DSCC collects a number of contributions from individuals who use online banking services. This involves a bank customer registering his or her account online and scheduling payments to any person or entity he or she wishes to pay by transmitting this information to the bank via the Internet. The bank will either issue payment to the payee electronically or by means of a written check. Checks produced in this manner typically contain the account holder's name, checking account number and other identifying information.

Contribution checks issued to the DSCC by individual contributors through this method are frequently signed by a bank official rather than the account holder. The DSCC typically sends a follow-up letter to the contributor to obtain a written signature. The DSCC proposes to cease this follow-up procedure in cases where it has all of the necessary contributor information.

Legal Analysis

The Federal Election Campaign Act (the Act) and Commission regulations require that all contributions be properly attributed to the actual contributor. Any contribution made by check, money order or other written instrument must be reported as a contribution by the last person signing it prior to delivery to the candidate or committee, "absent evidence to the contrary." 11 CFR 104.8(c).

In cases where the individual contributor directs a contribution to be made to a political committee, if the check is drawn from the contributor's account and signed by a bank official at the direction of the account holder, then the check itself would provide adequate evidence that the account holder is the actual contributor (and consequently the person to whom the contribution must be attributed).

Accordingly, the DSCC is not required to send a follow-up letter to obtain a written signature from the contributor, as long as the DSCC has received all necessary contributor information. In the event that the DSCC does not have all necessary contributor information, they must use "best efforts" to obtain, maintain and report such information. 11 CFR 102.9(d).

In the case of a check drawn on a joint checking account, the DSCC must contact the individuals to ascertain their intent if the account holders do not specify how the contribution is to be attributed. 11CFR 110.1(k)(3)(ii)(A). However, if there is only one way to attribute the contribution consistent with the Act's contribution limits and prohibitions, then the DSCC may attribute the contribution according to the rules for "presumptive reattribution," and would not need to obtain a written attribution from the contributors. 11 CFR 110.1(k)(3)(ii)(B).

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—*Myles Martin*

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

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

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Greg J. Scott, Assistant Staff Director
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http://www.fec.gov

AO 2007-23 State Party Committee Status for Independence Party of New York

The Independence Party of New York (IPNY) satisfies the requirements for state party committee status.

Background

The Federal Election Campaign Act (the Act) defines a "state committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission." 2 U.S.C. §431(15). *See also* 11 CFR 100.14(a).

In order for an organization to achieve state party committee status under FEC regulations, the Commission must first determine whether the organization qualifies as a "political party" under the Act and Commission regulations. See AO 2007-6. Commission regulations define a "political party" as an "association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 11 CFR 100.15; 2 U.S.C. §431(16).

Secondly, the organization must, by virtue of its bylaws, be responsible for the day-to-day operations of the political party at the state level. See 2 U.S.C. §431(15). A state party organization need not be affiliated with a national political party to obtain state party committee status; in such cases, the Commission considers whether the party's rules "set out a comprehensive organizational structure for the party" and "clearly identify the role of the party" in administering the operations of the party at a state level. See AO 2000-21 and 2000-14.

Analysis

IPNY meets all of the requirements for state party committee status. IPNY has successfully placed candidates for federal office on the ballot in New York. Thus, IPNY satisfies the definition of "political party." Additionally, IPNY's bylaws (called "Rules" by IPNY) establish a comprehensive organizational structure for the party from the state level down to the local level and clearly identify the role of the party organization. The Rules address the day-to-day operations of a political party on the state level and are similar to the bylaws examined in past advisory opinions in which the Commission has recognized state party committee status. Also, under New York Election Law, IPNY has achieved ballot access status in New York as the official "Independence Party of the State of New York."

Date Issued: December 10, 2007

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—Meredith Metzler

AO 2007-33 "Stand-By-Your-Ad" Disclaimer Required for Brief Television Advertisements

A series of 10- and 15-second independent expenditure television ads Club for Growth Political Action Committee (Club for Growth PAC) plans to air in support of a federal candidate must contain the full, spoken "stand-by-your-ad" disclaimer in addition to meeting other disclaimer requirements.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, when express advocacy ads are paid for by a political committee, such as Club for Growth PAC, and are not authorized by any candidate, the disclaimer must clearly state the full name, permanent address, telephone number or web address of the person who paid for the communication and indicate that the communication is not authorized by any candidate or candidate's committee. 11 CFR 110.11(b)(3). For televised ads, this disclaimer must appear in writing equal to or greater than four percent of the vertical picture height for at least four seconds. 11 CFR 110.11 (c)(3)(iii). Radio and television ads must also include an audio statement identifying the political committee or other person responsible for the content of the ad. 11 CFR 110.11(c)(4)(i).

In this case, Club for Growth PAC intends to pay for 10- and 15-second television ads that expressly advocate the election of a federal candidate. It plans to include the required written disclaimer indicating that it is responsible for the content and that the ads are not authorized by any candidate or candidate's committee.

However, Club for Growth PAC requested it be allowed to omit or truncate the required spoken disclaimer. Since the ads are shorter than most other political ads, which run for 30 to 60 seconds, Club for Growth PAC argued the spoken disclaimer would limit the ad's ability to get its message to viewers.

Analysis

In previous advisory opinions, the Commission has recognized that in certain types of communications it is impracticable to include a full disclaimer as required by the Act and Commission regulations. For example, in AO 2004-10, the Commission found that the specific physical and technological limitations of ads read during live reports broadcast from a helicopter made it impracticable for a candidate to read the required disclaimer himself or herself.

Likewise, in AO 2002-09, the Commission determined that certain candidate-sponsored text messages were eligible for the "small items" exception from the disclaimer requirements. Under this exception, bumper stickers, pins and other small items are not required to carry a printed disclaimer because their size would make doing so impracticable. 11 CFR 110.11(f)(l)(i).

However, Club for Growth PAC's plan presents facts that are materially different from those presented in these advisory opinions. AO 2004-10 did not dispense with the spoken disclaimer, but rather allowed the broadcaster, rather than the candidate, to read it. Moreover, the 10- and 15-second ads proposed by Club for Growth PAC do not present the same physical or technological limitations as those described in previous advisory opinions.

Likewise, the "small items" exception does not apply to the spoken disclaimer requirements for televised ads. Under Commission regulations, the "small items" exception applies only to "bumper stickers, pins, buttons, pens and other similar items upon which the disclaimer cannot be conveniently printed." 11 CFR 110.11(f)(1)(i). Thus, it does not apply to the *spoken* disclaimer for the television ads that Club for Growth PAC plans to sponsor. Additionally, the Commission noted that the Act provides no exemptions from the spoken disclaimer requirement simply because the ads are only 10 or 15 seconds long. Thus, Club for Growth PAC must include the full spoken disclaimer in its 10- and 15-second television ads.

Date Issued: July 29, 2008;

Length: 4 pages.

—Isaac J. Baker

Party Activities

2008 Coordinated Party Expenditure Limits

The 2008 coordinated party expenditure limits are now available.

The limits are:

- $19,151,200 for Presidential nominees;
- $84,100 for House nominees in states that have only one U.S. House Representative;
- $42,100 for House nominees in states that have more than one U.S. House Representative; and
- A range from $84,100 to $2,284,900 for Senate nominees, depending on each state's voting age population.

Party committees may make these special expenditures on behalf of their 2008 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 party committee to make an expenditure against its limit. Local committees may only make coordinated party expenditures with advance authorization from another committee.

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 the candidate rather than give the money directly to the campaign. Although these expenditures

[1] *The 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 2008 Coordinated Party Expenditure Limits

	Amount	**Formula**
Senate Nominee	See table on page 7	The greater of: $20,000 x COLA or 2¢ x state VAP[2] x COLA[3]
House Nominee in States with Only One Representative	$84,100	$20,000 x COLA
House Nominee in Other States	$42,100	$10,000 x COLA
Nominee for Delegate or Resident Commissioner[4]	$42,100	$10,000 x COLA

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

[2] *VAP means voting age population.*

[3] *COLA means cost-of-living adjustment. The applicable COLA is 4.205.*

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

Coordinated Party Expenditure Limits for 2008 General Election Senate Nominees

State	Voting Age Population (in thousands)	Expenditure Limit
Alabama	3,504	$294,700
Alaska*	501	$84,100
Arizona	4,669	$392,700
Arkansas	2,134	$179,500
California	27,169	$2,284,900
Colorado	3,669	$308,600
Connecticut	2,682	$225,600
Delaware*	659	$84,100
Florida	14,208	$1,194,900
Georgia	7,013	$589,800
Hawaii	998	$84,100
Idaho	1,092	$91,800
Illinois	9,653	$811,800
Indiana	4,759	$400,200
Iowa	2,277	$191,500
Kansas	2,080	$174,900
Kentucky	3,238	$272,300
Louisiana	3,214	$270,300
Maine	1,038	$87,300
Maryland	4,260	$358,300
Massachusetts	5,017	$421,900
Michigan	7,625	$641,300
Minnesota	3,937	$331,100
Mississippi	2,150	$180,800
Missouri	4,454	$374,600
Montana*	738	$84,100
Nebraska	1,328	$111,700
Nevada	1,905	$160,200
New Hampshire	1,018	$85,600
New Jersey	6,622	$556,900
New Mexico	1,470	$123,600
New York	14,884	$1,251,700
North Carolina	6,843	$575,500
North Dakota*	497	$84,100
Ohio	8,715	$732,900
Oklahoma	2,718	$228,600
Oregon	2,885	$242,600
Pennsylvania	9,646	$811,200
Rhode Island	825	$84,100
South Carolina	3,348	$281,600
South Dakota*	599	$84,100
Tennessee	4,685	$394,000
Texas	17,281	$1,453,300
Utah	1,829	$153,800
Vermont*	490	$84,100
Virginia	5,886	$495,000
Washington	4,932	$414,800
West Virginia	1,425	$119,800
Wisconsin	4,280	$359,900
Wyoming*	397	$84,100

** In these states, which have only one U.S. House Representative, the spending limit for the House nominee is $84,100. In other states, the limit for each House nominee is $42,100.*

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 4 and 5 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*

800 Line

FEC Rules for National Convention Delegates

In recent weeks, the Commission has received a number of questions concerning the application of campaign finance laws to national convention delegates and individuals seeking selection as a delegate. The material that follows offers answers to frequently asked questions about FEC rules governing delegates to national nominating conventions.

To whom do these rules apply?

These rules apply to any individual who is seeking selection as a delegate, or who has already been selected as a delegate, at any level of the delegate selection process (local, state or national). 11 CFR 110.14(b)(1).

Do delegates have to file reports with the FEC?

No. Individual delegates are not required to register or file regular reports of the funds they raise and spend for their personal delegate activity. 11 CFR 110.14(d)(3) and (e)(2). However, delegates acting as a group may have to file reports as a delegate committee. See "Do delegate committees have to file FEC reports?" below.

How are funds raised and spent for delegate activity treated under federal campaign finance law?

Funds raised and spent for delegate selection are considered "contributions" and "expenditures" made for the purpose of influencing a federal election[1] and are therefore subject to the federal law's prohibitions.[2] 11 CFR 110.14(c)(1) and (2). Although the law generally does not limit contributions per delegate (see 11 CFR 110.1(m)(1) and 110.14(d)), certain other contribution limits apply. See, e.g., 11 CFR 110.5(e). Please note that these prohibitions and limits apply to contributions of goods and services (in-kind contributions) as well as to monetary contributions. 11 CFR 100.52(d).

Who is prohibited from contributing to a delegate?

Individual delegates may not accept any contributions from sources prohibited from making contributions in connection with federal elections. 11 CFR 110.14(c)(2). These sources include:

- Corporations (including banks and nonprofit corporations);
- Labor organizations;
- Foreign nationals or businesses (except "green card" holders—those admitted to the United States for permanent residence); and
- Federal government contractors (such as partnerships and sole proprietors with federal contracts).

11 CFR 110.20; 114.2; 115.2, 115.4 and 115.5.

What are the limits on contributions to delegates?

Although contributions to an individual delegate are not subject to any per delegate limit, they do count against an individual contributor's biennial contribution limit of $108,200. 11 CFR 110.1(m); 110.5(e) and 110.14(d)(1).[3]

Do these rules apply if I, as a delegate, am only raising money to pay for travel to the convention?

Yes. Travel and subsistence expenses related to the delegate selection process and the national nominating convention are considered "expenditures." 11 CFR 110.14(e). Thus, a delegate may not use prohibited funds to pay for travel to attend the national convention and related food and lodging expenses. Advisory Opinions 2000-38 and 1980-64.

I'm a federal officeholder who will serve as a delegate. May I use my campaign funds to pay for my travel to the convention?

Special rules apply to federal candidates or officeholders who attend the convention as delegates. While campaign funds may not be used to pay for anyone's personal expenses (i.e., expenses that would exist irrespective of the candidate's campaign or his/her duties as a federal officeholder), candidates who attend the convention as delegates may use campaign funds to pay for their own convention-related travel, food and lodging expenses. 11 CFR 110.14(c) and (e); Advisory Opinion 1995-47 n.4. The Commission has issued advisory opinions clarifying that such candidates may also use campaign funds to pay the travel and subsistence expenses of other individuals (e.g., spouse, child, Congressional staff person) in connection with the convention if the individual will be engaging in significant campaign-related or officeholder-related activity on the candidate's behalf during the convention. 11 CFR 113.1(g); Advisory Opinions 1996-20, 1996-19 and 1995-47.

Although the use of campaign funds to pay someone's personal expenses is a violation of the personal use prohibition, when travel involves both personal activities and campaign (or officeholder) activities, campaign funds may be used to pay the personal portion of travel and subsistence costs if the individual reimburses the campaign within 30 days. 11 CFR 113.1(g)(1)(ii)(C); Advisory Opinion 2000-12.

Do expenditures I, as a delegate, make for my own selection and travel count as contributions to a candidate?

No. Expenditures made by delegates or delegate committees solely to further their selection are not considered contributions to any candidate and are not chargeable to a publicly funded candidate's spending limits. Examples of such expenditures include, for example:

- A communication which advocates the selection of delegates only; and
- Travel and subsistence expenses related to the delegate selection process and the national nominating convention. 11 CFR 110.14(e) (1) and (h)(1).

May delegates join together to raise and spend funds?

Yes. Under FEC regulations, they would be acting as a delegate committee. A delegate committee is a group that raises or spends funds to influence the selection of one or

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[1] A national nominating convention is considered a federal election. 11 CFR 100.2(e).

[2] Ballot access fees paid by an individual delegate to a political party are not considered contributions or expenditures; nor are administrative payments made by a party committee (including an unregistered organization) for sponsoring a convention or caucus to select delegates. Nevertheless, the funds used to pay these expenses are subject to the law's prohibitions and limits. 11 CFR 110.14(c)(1)(i) and (ii) and (c)(2).

[3] Presidential primary candidates receiving public funding must comply with an overall spending limit and a spending limit in each state. 11 CFR 9035.1.

more delegates. A delegate committee may be a group of delegates or a group that supports delegates. 11 CFR 110.14(b)(2).

Do delegate committees have to file FEC reports?

Possibly. A delegate committee becomes a "political committee" under federal law once it receives contributions or makes expenditures exceeding $1,000 in a calendar year. 11 CFR 100.5(a) and (e)(5); 110.14(b)(2). At that point, the committee must register with the FEC within 10 days and begin filing periodic FEC reports to disclose its receipts and disbursements. 11 CFR 102.1(d) and 104.1(a). All pre-registration activity must be disclosed in the first report. 11 CFR 104.3(a) and (b). Note that a delegate committee that has triggered status as a federal political committee must include the word "delegate" or "delegates" in its name. It may also include the name of the Presidential candidate it supports. 11 CFR 102.14(b)(1).

Do contribution prohibitions and limits apply to delegate committees?

The same sources that are listed above as prohibited from making contributions to a delegate are also prohibited from making contributions to a delegate committee. 11 CFR 110.14(c)(2). The following limits apply to contributions made to delegate committees:

- Contributions from permissible sources to a delegate committee are subject to an aggregate limit of $5,000 per calendar year. 11 CFR 110.1(d) and (m)(2); 110.14(g)(1). Note, however, that if the delegate committee is affiliated with a Presidential campaign, it will share the limit applicable to the Presidential campaign. 11 CFR 110.3(a).
- Contributions by individuals to delegate committees count against an individual contributor's biennial contribution limit of $108,200. 11 CFR 110.5(e).

Supporting Presidential Candidates

May a delegate or delegate committee make contributions to candidates?

A delegate or delegate committee may contribute a maximum of $2,300 to a federal candidate, per election.[4] 11 CFR 110.1(b)(1). The primary and general are considered separate elections but, in the case of Presidential candidates, the entire primary season is considered only one election. 11 CFR 100.2 and 11 CFR 110.1(j)(1).

Note that a contribution to a candidate must be reported by the candidate's committee. 11 CFR 104.1(a) and 104.3(a). For this reason, when making an in-kind contribution, a delegate or delegate committee should notify the candidate's committee of the monetary value. 11 CFR 104.13(a)(1). Note also that in-kind contributions generally count against a publicly funded Presidential candidate's expenditure limits. 11 CFR 9035.1(a)(3).

May a delegate or delegate committee put out a communication that promotes both the delegate(s) and the Presidential candidate supported?

Yes. An individual delegate or a delegate committee may pay for communications that both:

- Advocate the selection of that individual delegate or of the delegates promoted by the delegate committee; and
- Refer to, provide information on or expressly advocate the election or defeat of a Presidential candidate (or candidate for any public office). 11 CFR 110.14(f) and (i).

If such a communication meets the federal campaign finance law's definition of a "public communication," it will trigger certain election law provisions.[5] 11 CFR 100.26. Moreover, depending on the circumstances, a portion of a dual-purpose expenditure may have to be allocated as an in-kind contribution or an independent expenditure on behalf of any federal candidate mentioned in the ad. 11 CFR 110.14(f)(2) and (i)(2). Finally, the communication must include a disclaimer notice. 11 CFR 110.11.

May delegates undertake some small grassroots dual-purpose communications that do not trigger contribution limits?

Dual-purpose expenditures for campaign materials such as pins, bumper stickers, handbills, brochures, posters and yard signs are not considered in-kind contributions on behalf of the federal candidate mentioned in the materials as long as the materials are used in connection with volunteer activities (i.e., are distributed by volunteers) and are not conveyed through public politi-

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[4] *A federal candidate is a candidate seeking election to the Presidency, the Vice Presidency, the U.S. Senate or the U.S. House of Representatives. 11 CFR 100.4.*

[5] *A public communication is a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing (more than 500 pieces of mail or faxes of an identical or substantially similar nature within any 30-day period), telephone bank to the general public (meaning more than 500 telephone calls of an identical or substantially similar nature within any 30-day period) or any other form of general public political advertising. The term "general public political advertising" does not include communications over the Internet, except for communications placed for a fee on another person's web site. 11 CFR 100.26; 100.27 and 100.28.*

cal advertising.[6] 11 CFR 110.14(f)(1) and (i)(1).

When would a dual-purpose expenditure count against contribution limits to a candidate?

A portion of a dual-purpose expenditure is considered an in-kind contribution to the referenced candidate if the communication:

- Is conveyed through public political advertising (or is not distributed by volunteers); and
- Is a coordinated communication under 11 CFR 109.21.

11 CFR 110.14(f)(2)(i) and (i)(2)(i).

When would a dual-purpose expenditure be considered an independent expenditure?

A portion of a dual-purpose expenditure for a communication that is conveyed through public political advertising is considered an independent expenditure (rather than an in-kind contribution) on behalf of the candidate if the communication:

- Expressly advocates the election (or defeat) of a clearly identified candidate; and
- Is not a coordinated communication under 11 CFR 109.21.

11 CFR 110.14(f)(2)(ii) and (i)(2)(ii).

Note that an independent expenditure, whether done by a delegate or a delegate committee, must carry a disclaimer notice and is subject to reporting requirements. For more information on independent expenditures, consult 11 CFR Part 109. For more information on disclaimers, consult 11 CFR 110.11.

How do you determine what amount of a dual-purpose expenditure to allocate to the Presidential candidate?

The amount of a dual-purpose expenditure allocated as an in-kind contribution or independent expenditure on behalf of a candidate must be in proportion to the benefit the candidate receives, based on factors such as the amount of space or time devoted to the candidate compared with total space or time. 11 CFR 106.1(a)(1).

What if a delegate or delegate committee simply distributes materials prepared by the Presidential campaign?

Expenditures by a delegate or delegate committee to reproduce (in whole or in part) or to disseminate materials prepared by a Presidential candidate's committee (or other federal candidate's committee) are considered in-kind contributions to the candidate. Although subject to contribution limits, this type of contribution is not chargeable to a publicly funded Presidential candidate's spending limits as long as the expenditure is not a coordinated communication under 11 CFR 109.21. 11 CFR 110.14(f)(3) and (i)(3). The materials must include a disclaimer notice. 11 CFR 110.11.

Affiliation

Is a delegate committee considered an affiliate of the Presidential campaign? If yes, what rules apply?

Possibly. Delegate committees—including unregistered committees—need to determine whether they are affiliated with another delegate committee or a candidate's committee because affiliated committees are considered one political committee for purposes of the contribution limits, and thus, share the same limits on contributions received and made. 11 CFR 110.3(a)(1). (Affiliated committees, may, however, make unlimited transfers to one another. 11 CFR 102.6(a)(1)(i).) If a delegate committee is affiliated with the committee of a Presidential candidate receiving public funds, then all of the delegate committee's expenditures count against the Presidential candidate's expenditure limits.

What are the factors indicating affiliation?

In determining whether a delegate committee and a Presidential committee are affiliated, the Commission may consider, among other factors, whether:

- The Presidential campaign[7] played a significant role in forming the delegate committee;
- Any delegate associated with a delegate committee has been or is on the staff of the Presidential committee;
- The committees have overlapping officers or employees;
- The Presidential committee provides funds or goods to the delegate committee in a significant amount or on an ongoing basis (not including a transfer of joint fundraising proceeds);
- The Presidential campaign suggests or arranges for contributions to be made to the delegate committee;
- The committees show similar patterns of contributions received;
- One committee provides a mailing list to the other committee;
- The Presidential campaign provides on going administrative support to the delegate committee;
- The Presidential campaign directs or organizes the campaign activities of the delegate committee; and/or

[6] *For purposes of the delegate selection regulations, public political advertising means political advertising conveyed through broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public communication. 11 CFR 110.14(f)(2) and (i)(2). Direct mail means mailings by commercial vendors or mailings made from lists not developed by the individual delegate or delegate committee. 11 CFR 110.14(f)(4) and (i)(4).*

[7] *Campaign refers to the candidate, his or her authorized committee and other persons associated with the committee.*

- The Presidential campaign files statements or reports on behalf of the delegate committee. 11 CFR 110.14(j). See also, for example, Advisory Opinion 1988-1.

Do affiliation rules apply to delegate committees that have a relationship with each other?

Possibly. Delegate committees established, financed, maintained or controlled by the same person or group are affiliated. Factors that indicate affiliation between delegate committees are found at 11 CFR 100.5(g)(4). 11 CFR 110.14(k).

Additional Information

For additional information on delegates and delegate committees, contact the FEC's Information Division at 1-800/424-9530 or 202/694-1100.

—*Dorothy Yeager*

Court Cases

Shays v. FEC (III)

On June 13, 2008, a three-judge panel of the U.S. Court of Appeals for the District of Columbia affirmed in part and reversed in part the district court's judgment in the *Shays III* case. Specifically, the appeals court agreed with the district court in finding deficient regulations regarding the content standard for coordination, the 120-day coordination window for common vendors and former campaign employees and the definitions of "GOTV activity" and "voter registration activity." The appeals court reversed the district court's decision to uphold the provision allowing federal candidates to solicit funds without restriction at state and local party events. These regulations were remanded to the FEC to issue "regulations consistent with the Act's text and purpose." The court did not vacate the regulations, so they remain in effect, pending further action. The appeals court upheld the FEC's regulations regarding the firewall safe harbor for coordination by former employees and vendors, which the district court had found deficient.

Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a number of its Bipartisan Campaign Reform Act (BCRA) regulations. On July 11, 2006, U.S. Representative Christopher Shays and then-Representative Martin Meehan (the plaintiffs) filed another complaint in district court. The complaint challenged the FEC's recent revisions to, or expanded explanations for, regulations governing coordinated communications, federal election activity (FEA) and solicitations by federal candidates and officeholders at state party fundraising events. The plaintiffs claimed that the rules did not comply with the court's judgment in *Shays I* or with the BCRA. The complaint also alleged the FEC did not adequately explain and justify its actions.

On September 12, 2007, the district court granted in part and denied in part the parties' motions for summary judgment in this case. The court remanded to the FEC a number of regulations implementing the BCRA, including:

- The revised coordinated communications content standard at 11 CFR 109.21(c)(4);
- The 120-day window for coordination through common vendors and former employees under the conduct standard at 11 CFR 109.21(d)(4) and (d)(5);
- The safe harbor from the definition of "coordinated communication" for a common vendor, former employee, or political committee that establishes a "firewall" (11 CFR 109.21(h)(1) and (h)(2)); and
- The definitions of "voter registration activity" and "get-out-the-vote activity" (GOTV) at 11 CFR 100.24(a)(2)-(a)(3).

On October 16, 2007, the Commission filed a Notice of Appeal seeking appellate review of all of the adverse rulings issued by the district court. On October 23, 2007, Representative Shays cross-appealed the district court's judgment insofar as it denied the plaintiff's "claims or requested relief."

Appeals Court Decision

The appellate court upheld the majority of the district court's decision, including the remand of the content standard for coordination, the 120-day common vendor coordination time period and the definitions of GOTV activity and voter registration activity. While the district court had held the firewall safe harbor for coordination by former employees and vendors invalid, the court of appeals reversed the district court and upheld the safe harbor provision. The court of appeals reversed the district court's decision to uphold the provision permitting federal candidates to solicit funds without restriction at state or local party events.

Coordination Content Standard. The court of appeals held that, while the Commission's decision to regulate ads more strictly within the 90- and 120-day periods was "perfectly reasonable," the decision to regulate ads outside of the time period only if they republish campaign material or contain express advocacy was unacceptable. Although the vast majority of communications are run within the time periods and are thus subject to regulation as coordinated communications, the court held that the current regulation allows "soft money" to be used to make election-influencing communications outside of the time periods, thus frustrating the purpose of the BCRA. The appellate court remanded the regulations to the Commission to draft new regulations concerning the content standard.

Coordination by Common Vendors and Former Employees. The appellate court affirmed the district court's decision concerning the 120-day prohibition on the use of material information about "campaign plans, projects, activities and needs" by vendors or former employees of a campaign. The court held that some material could retain its usefulness for more than 120 days and also that the Commission did not sufficiently support its decision to use 120 days as the acceptable time period after which coordination would not occur.

Firewall Safe Harbor. Contrary to the decision of the district court, the court of appeals approved the firewall safe harbor regulation to stand as written. The safe harbor is designed to protect vendors and organizations in which some employees are working on a candidate's campaign and others are working for outside organizations making independent expenditures. The appellate court held that, although the firewall provision states generally as to what the firewall should actually look like, the court deferred to the Commission's decision to allow organizations to create functional firewalls that are best adapted to the particular organizations' unique structures.

Definitions of GOTV and Voter Registration Activity. The court of appeals upheld the district court's decision to remand the definitions of "GOTV" and "voter registration activity." The court held that the definitions impermissibly required "individualized" assistance directed towards voters and thus continued to allow the use of soft money to influence federal elections, contrary to Congress' intent.

Solicitations by federal candidates at state party fundraisers. While the district court had upheld the regulation permitting federal candidates and officeholders to speak without restriction at state party fundraisers, the court of appeals disagreed. The court stated that Congress did not explicitly state that federal candidates could raise soft money at state party fundraisers; rather, Congress permitted the federal candidates to "appear, speak, or be a featured guest." Congress set forth several exceptions to the ban on federal candidates raising soft money, and state party events were not included in the exceptions. Thus, the court found the regulation impermissible.

U.S. District Court of Appeals for the District of Columbia Circuit, 07-5360.

—*Meredith Metzler*

Davis v. FEC

On June 26, 2008, the Supreme Court ruled that provisions of the Bipartisan Campaign Reform Act (BCRA) known as the "Millionaires' Amendment" (2 U.S.C. §319(a) and (b)) unconstitutionally burden the First Amendment rights of self-financed candidates. The decision overturned an earlier ruling by the U.S. District Court for the District of Columbia that the Millionaires' Amendment posed no threat to self-financed candidates' First Amendment or Equal Protection rights.

Background

On March 30, 2006, Jack Davis, a candidate for the House of Representatives in New York's 26th District, filed a Statement of Candidacy with the FEC declaring his intent to spend over $350,000 of his own funds on his campaign.

On June 6, 2006, Davis asked the U.S. District Court for the District of Columbia to declare the Millionaires' Amendment provisions unconstitutional on their face, and to issue an injunction barring the FEC from enforcing those provisions. Mr. Davis argued that the Millionaires' Amendment violates the First Amendment by chilling speech by self-financed candidates, and violates the Equal Protection Clause of the Fifth Amendment by giving a competitive advantage to self-financed candidates' opponents.

Under the Millionaires' Amendment, candidates who spend more than certain threshold amounts of their own personal funds on their campaigns may render their opponents eligible to receive contributions from individuals at an increased limit. 2 U.S.C. § 441a-1. For House candidates, the threshold amount is $350,000. This level of personal campaign spending could trigger increased limits for the self-financed candidate's opponent depending upon the opponent's own campaign expenditures from personal funds and the amount of funds the candidate has raised from other sources in the year prior to the year of the election. If increased limits are triggered, then the eligible candidate may receive contributions from individuals at three times the usual limit of $2,300 per election and may benefit from party coordinated expenditures in excess of the usual limit.

District Court Decision

The district court held that Mr. Davis's First Amendment challenge failed at the outset because the Millionaires' Amendment did not "burden the exercise of political speech."

According to the district court, the Millionaires' Amendment "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors. Rather, the Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." In particular, the court cited the fact that Mr. Davis himself has twice chosen to self-finance his campaign. The court found that Mr. Davis failed to show how his speech had been limited by the benefits his opponents receive under the statute.

Mr. Davis additionally alleged that the disclosure requirements for self-financed candidates under the Millionaires' Amendment imposed an unfair burden on his right to speak in support of his own candidacy. The district court found that the Millionaires' Amendment reporting requirements are no more burdensome than other BCRA reporting requirements that the Supreme Court has already upheld.

The court also rejected the second prong of Mr. Davis's facial challenge, regarding the Equal Protection provision of the Fifth Amendment. In order to argue that a statute violates the Equal Protection Clause of the Fifth Amendment, a plaintiff must show that the statute treats similarly situated entities differently.

The district court found that the Millionaires' Amendment did not violate the Equal Protection Clause of the Fifth Amendment because Mr. Davis could not show that the statute treated similarly situated entities differently. The district court held that self-funded candidates, who can choose to use unlimited amounts of their personal funds for their campaigns, and candidates who raise their funds from limited contributions are not similarly situated. According to the court, "the reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." Thus, the court found no violation of the Fifth Amendment.

The District court granted the FEC's request for summary judgment in this case and denied Mr. Davis's request for summary judgment.

Supreme Court Decision

On June 26, 2008, the Supreme Court issued an opinion reversing the district court's decision. The Court held that the Millionaires' Amendment unconstitutionally violated self-financed candidates' First Amendment or Equal Protection rights. The Court also rejected the FEC's arguments that Davis lacked standing and that the case was moot.

Standing. The FEC argued that Davis lacked standing to challenge the unequal contribution limits of the Millionaires' Amendment, 2 U.S.C. §319(a), because Davis' opponent never received contributions at the increased limit and therefore, Davis had suffered no injury. The Court rejected this argument, noting that a party facing prospective injury has standing whenever the threat of injury is real, immediate and direct. The Court further noted that Davis faced such a prospect of injury from increased contribution limits at the time he filed his suit.

Mootness. The FEC also argued that Davis' argument was moot because the 2006 election had passed and Davis' claim would be capable of repetition only if Davis planned to self-finance another election for the U.S. House of Representatives. The FEC also argued that Davis' claim would not evade review as he could challenge the Amendment in court should the Commission file an enforcement action regarding his failure to file personal expenditure reports. Considering that Davis had subsequently made a public statement expressing his intent to run for a House seat and trigger the Millionaires' Amendment again, the Court concluded that Davis' challenge is not moot.

First Amendment and Equal Protection. In considering Davis' claim that imposing different fundraising limits on candidates running against one another impermissibly burdens his First Amendment right to free speech, the Court noted that it has never upheld the constitutionality of such a law. The Court referred to *Buckley v. Valeo*, in which it rejected a cap on a candidate's expenditure of personal funds for campaign speech and upheld the right of a candidate to "vigorously and tirelessly" advocate his or her own election. While the Millionaires' Amendment did not impose a spending cap on candidates, it effectively penalized candidates who spent large amounts of their own funds on their campaigns by increasing their opponents' contribution limits. The Court determined that the burden thus placed on wealthy candidates is not justified by any governmental interest in preventing corruption or the appearance of corruption, and that equalizing electoral opportunities for candidates of different personal wealth was not a permissible Congressional purpose.

The Court remanded the matter for action consistent with its decision. On June 26, 2008, the Commission issued a public statement outlining the general principles the Commission will apply to conform to the Court's decision. The full statement is printed on page 3.

U.S. Supreme Court, No. 07-320.

—*Gary Mullen*

Commission

Commission Statement on Davis v. FEC

On June 26, 2008, the Supreme Court issued its decision in *Davis v. FEC*, 554 U.S. __, No. 07-320, and found Sections 319(a) and 319(b) of the Bipartisan Campaign Reform Act of 2002[1]—the so-called "Millionaires' Amendment" (the "Amendment")—unconstitutional because they violate the First Amendment to the U.S. Constitution.[2] The Court's analysis in *Davis* precludes enforcement of the House provision and effectively precludes enforcement of the Senate provision as well.

This public statement outlines the general principles the Commission will apply to conform to the Court's decision.

- The Commission will no longer enforce the Amendment and will initiate a rulemaking shortly to conform its rules to the Court's decision.
- As of June 26, 2008, any FEC disclosure requirements related solely to the Amendment need not be followed. There is no longer a need to file the Declaration of Intent portion of the Statement of Candidacy (Lines 9A and 9B of Form 2), FEC Form 10, Form 11, Form 12, or Form 3Z-1.
- All other filing obligations unrelated to the Amendment remain the same. For example, contributions a candidate makes to his or her own campaign must still be reported.
- As of June 26, 2008, opponents of self-financed candidates who triggered the Amendment may not accept increased contributions.
- As of June 26, 2008, political parties may no longer make increased coordinated expenditures on behalf of opponents of self-financed candidates whose personal expenditures would have triggered the Amendment.

Regarding pending FEC matters that have not reached a final resolution, the Commission intends to proceed as follows:

- The Commission is reviewing all pending matters involving the Amendment and will no longer pursue claims solely involving violations of the Amendment. Moreover, the Commission will no longer pursue information requests or audit issues solely concerning potential compliance with the Amendment. However, not all activity related to the Amendment was affected by the *Davis* decision. If, for example, someone accepted a contribution *above* the amount allowed under the Amendment's increased limits, or accepted increased contributions without being eligible, the Commission will consider such matters as part of its normal enforcement process.
- The Commission will not require that candidates who received increased contributions in accordance with the Amendment before June 26, 2008, return those funds so long as the funds are properly expended in connection with the election for which they were raised. Similarly, the Commission will not request that political parties, if any, that made increased coordinated expenditures before June 26 consistent with the Amendment take any remedial action. Additionally, the Commission will not pursue individual contributors who made increased contributions, that were in accordance with the Amendment, before June 26, 2008.

Campaigns or party organizations with specific questions regarding their reporting obligations may contact the Reports Analysis Division at (800) 424-9530.

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[1] 2 U.S.C. § 441a-1.

[2] Under the "Millionaires' Amendment," when a candidate's personal expenditures exceeded certain thresholds, that candidate's opponent(s) became eligible to receive contributions from individuals at an increased limit and to benefit from enhanced coordinated party expenditures.