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CORPORATE/LABOR 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 candidate 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 corporations, labor unions, membership and trade organizations and their PACs. It should be used in conjunction with the FEC's January 2007 *Campaign Guide for Corporations and Labor Organizations*, which provides more comprehensive information on compliance for these organizations.

Table of Contents

Laws & Regulations

Honest Leadership and Open Government Act of 2007

On September 14, 2007, President Bush signed into law the Honest Leadership and Open Government Act of 2007 (HLOGA), which amends the House and Senate Ethics Rules and the Federal Election Campaign Act (FECA). In addition to making broad changes to the ethics rules for officeholders and candidates, the HLOGA also introduces new disclosure requirements for certain committees that receive bundled contributions from lobbyists and committees established or controlled by any lobbyist and new rules relating to travel on private jets.

The provisions of HLOGA that amend the FECA are briefly summarized below. The Commission will initiate rulemakings in the coming months to promulgate regulations to implement these statutory changes.

Disclosure of Bundled Contributions

The new law requires candidates' authorized committees, leadership PACs and party committees to disclose the name, address, employer of, and the bundled contribution amount credited to, each lobbyist (or lobbyist's committee) who has provided the committee with bundled contributions aggregating over $15,000 during specified time periods. The report discloses the fundraising activities of registered lobbyists, individuals listed on current lobbying reports filed under the Lobbying Disclosure Act of 1995 and political committees established or controlled by such individuals.

"Bundled" contributions include both contributions physically forwarded by a lobbyist and contributions for which a lobbyist receives credit by the candidate recipient through record, designation or some other form of recognition. For example, if a lobbyist were to receive an honorary title within the recipient's committee or gain access to an event reserved exclusively for those who generate a certain amount of contributions, he or she might be considered to have received "credit" for the bundled contributions. The provision applies to fundraising for a candidate's principal campaign committee, any Leadership PAC established, maintained, financed or controlled by a candidate or a federal officeholder and any party committee. This reporting obligation is in addition to the Commission's existing rules for disclosing earmarked contributions forwarded to a candidate's authorized committee through a "conduit." See 11 CFR 110.6(b) and 102.8. The new reporting requirement will take effect 90 days after the FEC promulgates final regulations implementing these provisions of §204.

Travel on Private Jets

HLOGA amends the FECA to prohibit Senate and Presidential candidates, and their authorized committees, from spending campaign funds for travel on non-commercial aircraft, unless they pay the charter rate. House candidates, and their authorized committees and Leadership PACs, are prohibited from spending any campaign funds for travel on private, non-commercial aircraft. Thus, candidates will no longer be permitted to pay the first-class or coach airfare, as appropriate, for travel on a private plane.[1] See 11 CFR 100.93(c)). This provision took effect on September 14, 2007. §601.

For additional information, see the FEC Press Release, dated September 24, 2007, at http://www.fec.gov/press/press2007/20070924travel.shtml.

Additional Provisions

HLOGA also makes a number of changes to laws other than the FECA, and to House and Senate rules, that affect the way that federal candidates conduct their campaigns. The complete text of the Honest Leadership and Open Government Act of 2007 is available on the FEC web site at http://www.fec.gov/law/feca/s1legislation.pdf.

—*Gary Mullen*

Final Rules and Explanation for Electioneering Communications

On December 14, 2007, the Commission voted to modify its regulations governing the funding

[1] *Travel on aircraft that is owned or leased by the candidate or his or her immediate family members (or non-public corporations in which the candidate or his or her immediate family members have an ownership interest) is exempted.*

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of "electioneering communications" (ECs) by corporations and labor organizations and to apply the EC reporting and disclaimer requirements to ECs made by corporations and labor organizations. The new rule is in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc*. (WRTL II). The revised rules allow corporations and labor organizations to distribute ECs, provided that they are not the "functional equivalent of express advocacy," and took effect December 26, 2007.

Background

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (the Act) to add a new type of political communication called "electioneering communications." The BCRA defined an EC as a broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary election or within 60 days of a general election and is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29(a). Corporations and labor organizations are prohibited from using their general treasury funds to finance ECs. 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(2)(iii). Those making ECs are subject to several reporting and disclosure requirements. 2 U.S.C. §§434(f)(1)-(2) and 441d(a).

In WRTL II, the Supreme Court reviewed an "as-applied challenge" to the EC funding prohibitions[1] where Wisconsin Right to Life, Inc., a nonprofit corporation, sought to use its own general treasury funds, which included donations it had received from other corporations, to pay for broadcast ads during the EC period that referred to both U.S. Senators from Wisconsin, one of whom was a clearly identified candidate for federal office in that election. The plaintiff argued that these communications were genuine issue ads run as part of a grassroots lobbying campaign on the issue of Senate filibusters of judicial nominations.

The Supreme Court held that because the ads in question were not the "functional equivalent of express advocacy," the prohibition on corporate or labor organization funding of ECs was unconstitutional as applied to the plaintiff's ads. The Court further held that a communication is the "functional equivalent of express advocacy" only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court determined that the content of WRTL's advertisements was "consistent with that of a genuine issue ad" and the communications lacked "indicia of express advocacy," because they did not mention an election, candidacy, political party or challenger, and the communications did not take a position on a candidate's character, qualifications or fitness for office.

In response to the Supreme Court's decision, the Commission published a Notice of Proposed Rulemaking (NPRM) on August 31, 2007, proposing changes to the EC regulations and held public hearings on the NPRM on October 17-18, 2007.

Final Rule

New section 11 CFR 114.15 provides a general exemption from the prohibition on corporate and labor organization funding of ECs unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate. The new rules create an exemption that allows the use of corporate and labor organization funds to finance ECs, but does not exempt such communications from the overall EC definition or the EC reporting and disclaimer requirements. Accordingly, corporations and labor organizations that finance ECs are required to file EC disclosure reports once they spend more than $10,000 in a calendar year on such communications. 11 CFR 104.20. ECs must also carry a disclaimer notice. 11 CFR 110.11.

Safe Harbor. The revised rules provide a safe harbor provision intended to give guidance regarding which ECs would qualify for the general exemption. Satisfying the safe harbor provision demonstrates that an EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a federal candidate, and thus is not the functional equivalent of express advocacy. If a communication satisfies the safe harbor provision, it may be paid for with corporate or labor organization funds. It is important to note, however, that this provision is merely a safe harbor, and an EC that does not qualify for the safe harbor still may come within the general exemption.

The safe harbor provision has three prongs. An EC qualifies for the safe harbor if it 1) does not mention "any election, candidacy, political party, opposing candidate, or voting by the general public"; 2) does not take a position on the candidate's character, qualifications or fitness for office; and 3) either focuses on a legislative, executive or judicial matter or issue, or proposes a commercial transaction. 11 CFR 114.15(b)(1)-(3).

The third prong of the final rule's safe harbor will be satisfied by certain lobbying communications or commercial advertisements. An EC meets this prong if it "focuses on a legislative, executive or judicial matter or issue" and either "urges a candidate to take a particular position or action with respect to the

[1] *In* McConnell v. FEC*, the Supreme Court held that BCRA's prohibition on corporate or labor organization funding of ECs was not facially overbroad. However, in* FEC v. Wisconsin Right to Life I (WRTL I)*, the Court held that McConnell did not preclude further "as applied" challenges to the corporate and labor organization funding prohibitions.*

matter or issue" or "urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue." 11 CFR 114.15(b)(3)(i)(A)-(B). Additionally, the last part of the safe harbor's third prong applies to an EC that proposes a commercial transaction such as the purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event. 11 CFR 114.15(b)(3)(ii). This prong of the safe harbor can be satisfied regardless of whether the product or service is provided by a business owned or operated by, or employing, the candidate referred to in the EC. Both ECs advertising a federal candidate's appearance to promote a business or other commercial product or service, and ECs in which the federal candidate is referred to as the subject of a book, video or movie, will be eligible for the safe harbor.

Rules of Interpretation. Corporations and labor organizations may still finance certain ECs that do not qualify for the safe harbor. If an EC does not qualify for the safe harbor, the Commission will consider two factors. The first is whether the communication includes any indicia of express advocacy, meaning that it mentions any election, candidacy, political party, opposing candidate or voting by the general public or takes a position on the candidate's character, qualifications or fitness for office. The second is whether the communication has content that would support a determination that it has an interpretation other than as an appeal to vote for or against a clearly identified federal candidate. A communication would meet this factor if it:

- Focused on a public policy issue and either urged a candidate to take a position on the issue or urged the public to contact the candidate about the issue;
- Proposed a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
- Included a call to action or other appeal that, interpreted in conjunction with the rest of the communication, urged an action other than voting for or against or contributing to a clearly identified federal candidate or political party. 11 CFR 114.15(c)(1)-(2).

The Commission will consider these two factors to determine whether, on balance, the communication has a reasonable interpretation other than as an appeal to vote for or against a federal candidate. If there is any doubt about whether the communication qualifies for the general exemption, the Commission will permit the communication. 11 CFR 114.15(c)(3).

Information Permissibly Considered. In making its determination the Commission will only consider the communication itself and basic background information necessary to put the communication into context. For example, the Commission may consider whether a named individual is a candidate and whether the communication describes a public policy issue. 11 CFR 114.15(d).

Examples. The Commission will provide a list of examples of permissible and impermissible communications on its web site at www.fec.gov. 11 CFR 114.15(e).

Reporting Requirements. The new final rule states that corporations and labor organizations that finance permissible ECs aggregating in excess of $10,000 in a calendar year must file reports with the Commission. The Act and current Commission regulations require any person that has made ECs aggregating in excess of $10,000 in a calendar year to file a disclosure statement. 2 U.S.C. §434(f)(1) and 11 CFR 104.20(b). Generally, these statements must disclose the identities of the persons making the EC, the cost of the EC, the clearly identified candidate appearing in the EC and the election in which he or she is a candidate and the disclosure date. 11 CFR 104.2(c)(1)-(6). Persons making ECs must also disclose the names and addresses of each person who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. 11 CFR 104.20(c)(8).

The Act and current Commission regulations permit persons making ECs to establish and maintain a segregated bank account for the purpose of funding ECs in order to limit the reporting of donors' identities to only the donors to that segregated account. 2 U.S.C. §434(f)(2)(E) and 11 CFR 104.20(c)(7). If a person does not create a segregated bank account and funds ECs from its general account, that person must disclose all donors of $1,000 or more to the entity during the current and preceding calendar years. 11 CFR 104.20(c)(8).

The Commission revised the EC reporting rules to require corporations and labor organizations making ECs under the new rule to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs made by that corporation or labor organization. 11 CFR 104.20(c)(9). All of the other reporting requirements that apply to persons making ECs also apply to corporations and labor organizations making ECs under the new regulations.

The Commission also revised the rules regarding segregated bank accounts. Individuals, unincorporated associations and qualified nonprofit corporations may continue to use a segregated bank account containing only funds from individuals to fund ECs that are outside the new exemption in 114.15. 11 CFR 104.20(c)(7)(i) and 114.14(d)(2)(ii). Any person, other than corporations and labor organizations, may also establish a segregated bank account containing donations from corporations or labor organizations to fund ECs and fall within the new exemption in 114.15. 11 CFR 104.20(c)(7)(ii) and 114.14(d)(2)(i). Corporations and labor organizations funding ECs under the new exemption are not permitted to use a segregated bank account, but are instead governed by the new reporting rules in 104.20(c)(9).

The full text of the Final Rule and Explanation and Justification is available in the *Federal Register* (72 FR 72899) and is also posted on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml#ec07.

—*Myles Martin*

Court Cases

FEC v. Wisconsin Right to Life, Inc.

On June 25, 2007, the Supreme Court upheld a district court ruling that the electioneering communication (EC) financing restrictions of the Bipartisan Campaign Reform Act were unconstitutional "as applied" to ads that Wisconsin Right to Life, Inc., a 501(c)(4) nonprofit corporation, intended to run before the 2004 elections. The Supreme Court concluded that the EC financing restrictions are unconstitutional as applied to these ads because:

- The ads are not express advocacy or its functional equivalent; and
- The Court found no sufficiently compelling governmental interest to justify burdening WRTL's speech.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an EC is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. Corporations may not make ECs using their general treasury funds.[1] 2 U.S.C. 441b(a)-(b) and 11 CFR 114.2 and 114.14.

WRTL originally filed suit in the U.S. District Court for the District of Columbia on July 28, 2004, asking the court to find the prohibition on the use of corporate funds to pay for ECs unconstitutional as applied to what it calls "grassroots lobbying" communications planned for the period before the 2004 elections. After the district court both denied WRTL's motion for a preliminary injunction and dismissed WRTL's complaint, WRTL appealed to the Supreme Court. On January 23, 2006, the Supreme Court vacated the judgment and remanded to the district court to reconsider the merits of WRTL's "as applied" challenge.

District Court Decision

The three communications in question were two radio advertisements and one television advertisement WRTL had planned to run before the 2004 primary and general elections concerning anticipated filibusters of President Bush's federal judicial nominees. The ads encouraged Wisconsin listeners and viewers to contact their Senators (Senators Feingold and Kohl) to urge them to oppose the filibusters. Senator Feingold was up for reelection in 2004, but Senator Kohl was not.

A three-judge panel of the District Court considered the "as applied" challenge to the EC provisions based on two main arguments: whether the ads contained express advocacy for or against a federal candidate or the "functional equivalent" of express advocacy; and, if they did not, whether the government had demonstrated a compelling interest in regulating these ads.

Express advocacy. To determine whether WRTL's 2004 anti-filibuster ads contained express advocacy, or its functional equivalent, the court considered only the text and images of the ads and declined to consider contextual factors bearing on the ads' purpose or likely effect. The court's evaluation was based upon whether the ads:

1. Described an issue that was or "likely" soon would be a "subject of legislative scrutiny";
2. Referred to the prior voting record or current position of the named candidate on the described issue;
3. Exhorted the audience to do anything other than contact the candidate about the described issue;
4. Promoted, attacked, supported or opposed the named candidate; and
5. Referred to an upcoming election, candidacy or party of the candidate.

Considering those five factors, the court found that the anti-filibuster ads did not contain express advocacy or its functional equivalent and thus were not "intended to influence the voters' decisions." The court noted that the ads did not mention an election, a candidacy or the individual's "fitness for office." While the ads discussed the filibuster issue, the court stated that they did not reference the Senators' voting records, current or past, on this issue, and that they did not promote, attack, support or oppose either Senator. Additionally, the court noted the ads asked the audience to contact both Senators, not just the Senator up for reelection.

Government interest in regulating issue ads. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme

[1] *Commission regulations provide an exception allowing "qualified nonprofit corporations" to pay for electioneering communications. 11 CFR 114.2(b)(2). However, WRTL alleges that it does not meet the definition of a qualified nonprofit corporation. 11 CFR 114.10.*

Court found that the compelling government interest in regulating the communications covered by the definition of electioneering communication was sufficient to uphold the statute on its face. However, the district court stated that by permitting "as applied" challenges to the provisions of the BCRA, the Supreme Court left open the question as to whether there is a compelling government interest in regulating "genuine issue ads" covered by the statute. In light of its finding that WRTL's anti-filibuster ads did not contain express advocacy, or its functional equivalent, the three-judge panel evaluated the government interest in regulating these ads. The court found no compelling government interest and rejected the argument that the need for a "bright line" test is a basis for regulating "genuine issue ads," noting that the "virtues of the bright line test cannot alone justify regulating constitutionally protected speech."

On December 29, 2006, the Commission filed a Notice of Appeal to the Supreme Court.

Supreme Court Decision

On June 25, 2007, the Supreme Court issued a decision upholding the District Court ruling that the EC financing restrictions of the Bipartisan Campaign Reform Act were unconstitutional as applied to WRTL's ads. The Supreme Court also rejected the FEC's argument that the case was moot.

Mootness. The FEC argued that the cases involving WRTL's ads were moot because the 2004 election has passed and WRTL has no continuing interest in running its ads. The Court rejected this argument, noting that the case fits within the established exception to mootness for actions "capable of repetition, yet evading review." The Court noted that WRTL could not have obtained complete judicial review of its claims in time to air its ads in the period prior to the 2004 election and that WRTL had credibly claimed that it intended to run materially similar ads during future EC periods.

Electioneering communication financing restrictions unconstitutional "as applied" to WRTL ads. The Court rejected the FEC's argument that WRTL has the burden of demonstrating that the EC provisions are unconstitutional as applied to its ads. The Court reasoned that the EC provisions burden political speech and, as such, are subject to strict scrutiny. Therefore, the government must prove that applying the EC provisions to WRTL's ads "furthers a compelling governmental interest and is narrowly tailored to achieve that interest." The Court stated that while in *McConnell v. FEC* the EC provisions had satisfied the standard of strict scrutiny for the regulation of express advocacy and its functional equivalent, the Court in *McConnell* did not formulate a test for future as-applied challenges. The Court rejected the use of an intent-and-effect test for determining when an ad is the functional equivalent of express advocacy and instead explained that the inquiry should focus on the substance of the communication.

The Court found that WRTL's ads may reasonably be interpreted as something other than an appeal to vote for or against a specific federal candidate and, as such, did not constitute the functional equivalent of express advocacy. The Court noted that the content of the ads was consistent with that of a "genuine issue ad" focused on a specific legislative issue and urging the public to take action regarding that issue. Also, the Court noted, the ads' content lacked "indicia of express advocacy" because they made no mention of "an election, candidacy, political party, or challenger . . . and [took no] position on a candidate's character, qualifications, or fitness for office."

In the decision, the Court cited its long recognition of the governmental interest in preventing corruption and the appearance of corruption in elections. The Court acknowledged that *McConnell* had upheld the EC financing restrictions on their face, but the Court determined that that anti-corruption interest did not justify application of the restrictions to the advertisements proposed by WRTL.

The Court concluded that because WRTL's ads are not express advocacy or its functional equivalent, and because the Court found no compelling governmental interest to justify the burden on WRTL's speech, the EC financing restrictions are unconstitutional as applied to these ads. The Court also noted that this case does not present the occasion to revisit *McConnell's* facial upholding of the EC financing restrictions.

—*Gary Mullen*

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

Advisory Opinions

AO 2007-10 Campaign May Not Use Corporate Names, Trademarks or Service Marks at Golf Fundraiser

A candidate's committee may not recognize the corporate employers of individual contributors at a golf tournament fundraiser because the use of the corporation's name, trademark or service mark would result in the corporate facilitation of contributions, which is prohibited by the Federal Election Campaign Act (the Act).

Background

Congressman Silvestre Reyes and his authorized committee (the Reyes Committee) plan to host a golf-tournament fundraiser for the committee. Individuals or political action committees (PACs) will sponsor each of the 18 holes for the golf tournament and each hole will feature a sign that recognizes the particular sponsor of that hole. The Reyes Committee also wishes to increase participation in the fundraiser by displaying the name, trademark or service mark of the corporation that employs each individual who sponsors a hole at the tournament. Each individual would pay for the sponsorship, and the contribution would apply to that individual's contribution limit to the Reyes Committee.

Analysis

Corporations are prohibited from using corporate resources to facilitate the making of contributions to federal political committees other than the corporation's separate segregated fund (SSF). 11 CFR 114.2(f)(1) and (f)(4)(ii).

The names, trademarks and service marks of corporations are considered to be corporate resources. Neither a corporation nor its agents are permitted to use corporate resources to facilitate the making of a contribution to any political committee, nor may a political committee knowingly accept or receive prohibited contributions. 11 CFR 114.2(d).

In this case, the Reyes Committee's stated reason for including the corporate name, trademark or service mark is to encourage contributions to the fundraiser. A corporation would be using its resources to facilitate such contributions if it allowed the Reyes Committee to use its resources in this way. In addition, an individual employee of a corporation would act as the corporation's agent if he or she approved or accepted the Reyes Committee's use of the corporation's resources. Accordingly, if agents of a corporation were to allow the Reyes Committee to use the corporation's resources at the tournament, the corporation would be impermissibly facilitating the making of a contribution. Such corporate facilitation is prohibited, and the Reyes Committee may not accept facilitated contributions. Therefore, the Reyes Committee may not recognize the corporate employers of individual contributors at its fundraiser.

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Length: 3 pages.

—Myles Martin

AO 2007-12 Disaffiliation of SSFs After Corporate Spin-Off

Tyco US PAC, the separate segregated fund (SSF) of Tyco International Management Company (Tyco), is disaffiliated from the SSFs of Covidien U.S. and Tyco Electronics Corporation, which are subsidiaries of parent corporations spun-off from Tyco International Ltd. as of the close of business on June 29, 2007.

Background

Tyco US is a wholly owned U.S. subsidiary of Tyco International Ltd. (Tyco International). On June 29, 2007, Tyco International separated into three publicly traded corporations: Covidien Ltd. (Covidien), Tyco Electronics Ltd. (Tyco Electronics) and Tyco International Ltd. At the time of the spin-off, Covidien and Tyco Electronics each had wholly owned U.S. subsidiaries, now identified as Covidien (U.S.) and Tyco Electronics Corporation, respectively.

In the spin-off, Tyco International distributed all of its shares of common stock in Covidien and Tyco Electronics to the shareholders of Tyco International's common stock. Upon completion of the spin-off, the shareholders of Tyco International owned almost 100 percent of Covidien and Tyco Electronics, and none of the three companies owned any shares in either of the other companies. The three companies also executed a Separation and Distribution Agreement to effect the separation and provide a framework for the relationship among the companies after the spin-off.

Tyco US PAC has been registered as a political committee since 1979. Covidien US PAC and TELPAC are, respectively, the SSFs of Covidien (U.S.) and Tyco Electronics Corporation. Both SSFs were created in anticipation of the spin-off and filed their Statements of Organization with the Commission when Tyco US was still the connected organization for all three SSFs.[1] Tyco US PAC asked the Commission whether Tyco International, Covidien and Tyco Electronics are disaffiliated from each other under the Federal Election Campaign Act (the Act) and Commission regulations as of June 29, 2007, so that the SSFs of their respective U.S. subsidiaries are no longer affiliated with each other as of that date.

Legal Analysis and Conclusions

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. See 11 CFR 100.5(g)(2); 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, hence, whether, the respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). The Commission considered eight of these circumstantial factors, plus the issue of common shareholders after the spin-offs, in determining that Tyco US PAC, Covidien US PAC and TELPAC are not affiliated.

Organization owns a controlling interest in voting stock or securities. One affiliation factor considers whether a sponsoring organization owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A). None of the three companies owns any stock in the other two companies. Before the spin-off, Tyco US PAC, Covidien US PAC and TELPAC were *per se* affiliated because Covidien and Tyco Electronics were wholly owned by Tyco International, and hence the SSFs' respective connected organizations were also wholly owned by Tyco International. Immediately after the spin-off, Covidien and Tyco Electronics, and their wholly owned U.S. subsidiaries, were owned by Tyco International's shareholders, not by Tyco International. This lack of ownership interest by one company in another points toward disaffiliation.

Authority or ability to direct or participate in governance or to control officers. The law also considers the authority or ability of one corporate sponsor to participate in the governance of another corporate sponsor or to hire, appoint, demote or otherwise control the officers, or other decision-making employees, of another sponsoring organization . 11 CFR 100.5(g)(4)(ii)(B); 110.3(a)(3)(ii)(B); 100.5(g)(4)(ii)(C); 110.3(a)(3)(ii)(C).

The bylaws of Covidien and Tyco Electronics do not contain provisions granting authority to Tyco International over operations of Covidien and Tyco Electronics. Before the spin-off, Tyco International, as the lone shareholder, selected the current boards of directors of Covidien and Tyco Electronics. The governing documents of Covidien and Tyco Electronics contain certain anti-takeover provisions that would tend to preserve these board members' positions, but also lack other significant provisions of this type. The Commission concluded that the effect on Covidien and Tyco Electronics of the pre-spin-off selection of the boards was outweighed by the minimal nature of director, officer and employee overlap, the background of the board members selected and vigorous trading of the shares in the companies resulting in a diversification in the groups of persons holding shares in the three companies. The Commission also considered the provisions of the spin-off agreement that make Tyco International the managing party for all legal matters related to Tyco International, contingent on other corporate liabilities assumed by Covidien and Tyco Electronics, and the companies may decide on an annual basis to change the managing party. The Commission noted that this arrangement would be a natural part of a separation arrangement in view of the fact that the involvement of Covidien and Tyco Electronics in such legal affairs would stem from activities before the spin-off or from the separation itself.

Common or overlapping officers or employees indicating a formal or ongoing relationship or the creation of a successor entity. The affiliation factors also address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization indicating a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(E); 110.3(a)(3)(ii)(E). An additional factor asks whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F); 110.3(a)(3)(ii)(F). The eleven-member boards of each of the companies have been independent of each other since the

[1] *Tyco US PAC, Covidien US PAC and TELPAC will comply with the prohibitions placed on foreign national participation in the funding and the decision-making processes of the SSFs by the Federal Election Campaign Act, Commission regulations and advisory opinions. 2 U.S.C. §441e; 11 CFR 110.20. AOs 2006-15, 2004-42 and 2000-17.*

spin-off. In addition, since the spin-off, there has been only a minimal personnel overlap between the parent companies. One individual serves on both Tyco Electronics' and Tyco International's boards of directors, and Tyco International's Chief Financial Officer serves on Covidien's board of directors. Since the spin-off, these two individuals represent the only overlap between the group of directors, officers and employees of one company and its subsidiaries and the corresponding group of either of the other two companies and their subsidiaries.

In addition, only two of the eleven Covidien directors in place since the spin-off and only three of the eleven Tyco Electronics directors in place since the spin-off previously served as directors or officers of any pre-spin-off Tyco International entities. Moreover, there are no plans for any future transfer of officers or employees from one company or its subsidiaries to another company or its subsidiaries. The Commission also noted that, after the spin-off occurred, amended statements of organization were filed indicating no overlap among Tyco US PAC, Covidien US PAC and TELPAC with respect to officers or to other SSF personnel.

Providing funds or goods in a significant amount or on an ongoing basis. The affiliation factors also address whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Tyco International ceased providing either Covidien or Tyco Electronics with funds to finance their working capital or other cash requirements once the spin-off occurred. After the spin-off, the three parent corporations will, in accordance with percentages agreed to in the Separation Agreement, share responsibility for Tyco International's contingent liabilities regarding securities litigation and actions brought by third parties as to the separation or stock distribution, but not with regard to any liabilities related to any one of the three companies. However, if any one of the companies defaults on its payments, each of the other companies will be required to pay equally the amounts in default.

Separation agreements after corporate spin-offs often entail restrictions on the activities of the companies involved and provide for some continuing transactions between the companies. The Commission concluded in past advisory opinions that such continuing transactions were outweighed by other facts or were merely aimed at sorting out the companies' post-spin-off obligations that existed as an outgrowth of the previous relationship and were not aimed at continuing one company's control over another. AOs 1996-42 and 1993-23. Similarly, any transfers between the companies provided for in the Separation and other agreements would be part of the normal separation process and the contingent liabilities would relate to activities occurring before the spin-off or to the separation itself.

Having an active or significant role in the formation of another sponsoring organization or committee. The factors also address whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I); 110.3(a)(3)(ii)(I). Although Covidien and Tyco Electronics were once part of Tyco International, they are now subject to agreements separating them into separate publicly traded corporations. The previous relationship between sponsoring organizations is part of the context for assessing the overall relationship between such organizations. 11 CFR 100.5(g)(4)(ii); 110.3(a)(3)(ii); see also AO 1996-23. The Commission noted that a sponsoring organization's involvement in the formation of a spun-off sponsoring organization does not require a finding of continued affiliation when significant changes in the relevant relationships have occurred, such as arrangements separating the operations of the companies and apportioning their assets and obligations, and the nearly complete separation of corporate leadership and personnel.

Common Shareholder Base. Commission regulations provide for *per se* affiliation between committees established by "the same person or group of persons." 11 CFR 100.5(g)(3)(v); 110.3(a)(2)(v). In past advisory opinions, the Commission has recognized that a sizeable break in the common identity of persons owning shares in two companies supported a conclusion that two companies were no longer affiliated after a spin-off, when vigorous public trading was anticipated. AOs 1996-42 and 1993-23; see also AO 1997-25.

Upon completion of the spin-off, Tyco International shareholders owned almost all of the shares of Covidien and Tyco Electronics, and there was almost a complete overlap among the shareholders of the three companies. However, this situation involves a spin-off by a large publicly traded company of subsidiaries, resulting in three large, separately listed, publicly traded companies with very specific plans for operations that are separate from each other and that involve differing business sectors. Given that, in general, each of the shareholders of these companies will buy and sell shares in accordance with such shareholder's own financial interests, it would be very difficult for one group of shareholders to maintain purposefully a large common ownership in more than one publicly traded company.

The usual consequence of such spin-offs is vigorous public trading by shareholders attempting to maximize their own profit, resulting in a sizeable diversification between the identity of the shareholders of the former parent and each of the spun off companies.

The Commission determined that, in this case, there is ample evidence to show that significant shareholder diversification will result from the spin-off. The post-spin-off active trading indicates that the large, but ever diminishing, overlap still existing in the first few weeks after the spin-off date should not delay disaffiliation past that date. It confirms that a large common identity of shareholders in two large publicly traded corporations does not, by itself, indicate common control of the corporations**.** This common identity does not reflect any effort by such a large group of shareholders to control the stocks of the corporations and dissipates rapidly because of the shareholders' independent interests.

Conclusion

The Commission noted that, in some important respects, the case for the current disaffiliation of the three companies compares favorably with past advisory opinions where the Commission found organizations to be disaffiliated. AOs 2003-21, 2002-12 and 1996-23. In this case, based on the application of the affiliation factors described above, the Commission concluded that Tyco US PAC, Covidien US PAC and TELPAC are disaffiliated as of the completion of the spin-off at the close of business on June 29, 2007.

Date Issued: September 12, 2007; Length: 11 pages.

—*Gary Mullen*

AO 2007-13
Union and Association SSFs Not Affiliated

The United American Nurses, AFL-CIO (the Union) and the American Nurses Association (the Association) are not affiliated under the Federal Election Campaign Act and Commission regulations. Thus, a separate segregated fund (SSF) established by the Union would not be affiliated with the Association's SSF.

Background

The Association. The Association is a national professional organization dedicated to advancing the standing and interests of registered nurses (RNs). It is composed of 75 disparate nursing-related organizations," including the Association's 54 constituent member associations (state nursing associations), the Union, the Center for American Nurses, 16 national nursing organizations and three related entities. In addition, 1,182 individuals who are not otherwise members of a state nursing association are members of the Association.

The Association's governmental structure consists of a House of Delegates with 675 delegates, including 600 who are elected by the state nursing associations, fifteen Association directors and officers and 60 delegates from other Association affiliates, including only one delegate from the Union (the Union president). Of the 675 delegates, approximately 630 have voting rights. The Association's Board of Directors, elected by the delegates, handles the Association's day-to-day operations.

While the Association itself has never made union representation of RNs a significant focus, 27 of its state nursing association members are considered "labor organizations" under the National Labor Relations Act. 29 U.S.C. §152(5). These 27 state nursing associations engage in collective bargaining on behalf of their eligible RN members.

In 1999, the RNs represented for collective bargaining by the state nursing associations created the Union as an independent organization within the Association to serve as the national union for the state nursing associations that engaged in collective bargaining. The Association granted the Union autonomy in all things required by law to be addressed by a labor union.

The Union. The Union is an unincorporated national labor organization. Its highest governing body is its National Labor Assembly, comprising delegates elected by individual RNs represented in collective bargaining by the state nursing associations and the national bargaining councils. The National Labor Assembly has the authority, among other things, to develop labor policies for Union members, collect Union dues and develop the Union's strategic plan. The National Labor Assembly also elects, from among the Union-represented RNs, the Union's Executive Council, which sets Union priorities, policies and procedures and determine membership status within the Union.

Originally, the Association's Executive Director had the authority to "manage" the Union, including implementing National Labor Assembly and Executive Council policies and appointing the Union's Program Director. The Association also provided the Union with staff and financial support.

In 2001 the AFL-CIO granted a charter to the Union as a direct affiliate. This charter was granted only to the Union, and not to the Association.[1] In 2002 the Union and the Association negotiated a new relationship in which the Union became

[1] *The AFL-CIO charters only labor organizations whose principal function is collective bargaining representation. The Association, a professional organization, was and is ineligible for a charter.*

a wholly autonomous organization with its own finances, governance, staff and direction. The Association created new bylaws following the agreement, and the Union drafted its own constitution, which now excludes the Association from any participation in the Union's governance.

Analysis

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In some cases, organizations are considered to be *per se* affiliated under Commission regulations. For example, a national or international union is considered *per se* affiliated with its local or subordinate organizations, and a membership organization is considered *per se* affiliated with its state or local subordinate organizations. 11 CFR 100.5(g)(3)(ii), (iv) and (v); 110.3(a)(2)(ii), (iv) and (v).

In this case, the Association is not a "labor organization" and therefore is not a local union or subordinate organization of the Union. 11 CFR 100.134(b). Similarly, while the Association might qualify as a membership organization, the Union is not a related state or local subordinate organization. 11 CFR 100.134(e). Thus, the Union and the Association are not *per se* affiliated.

When entities do not meet any definition of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, thus, whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J) and 110.3(a)(3)(ii) and (ii)(A)-(J). The most relevant affiliation factors in this case are discussed below.

Directing or participating in governance. One affiliation factor addresses whether a sponsoring organization has the authority or ability to direct or participate in the governance of the other through provisions of their rules or by laws, or through their formal or informal practices. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B). Under the Union's constitution and the Association's bylaws, the Association cannot participate in the governance of the Union, and the Union can only minimally participate in the governance of the Association. The Union President has an *ex officio* seat on the Association's Board of Directors and, in this capacity, may vote on certain matters before the Association's House of Delegates, representing 0.16 percent of the votes cast by delegates. The Union President may not vote in the election of the Association's officers and directors.

The Union President is also one of the Association's 17 Directors on the Board. The Association President may exclude the Union President from business or confidential matters. Apart from the Union President's participation on the Board, no Union representative may direct or participate in the governance of the Association's SSF. The Union's current Vice President was elected to the Association's Board of Directors in her individual capacity and does not represent the Union on the Association's Board. The Union Vice President, like the Union President, is described as being excluded from discussions regarding the Union. Overall, each organization has, at best, a minimal ability to participate in the governance of the other, giving neither organization direction over, or control of, the governance of the other organization.

Common or overlapping membership. Another significant affiliation factor in this case is whether a sponsoring organization has common or overlapping membership with another sponsoring organization, which indicates a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(D) and 110.3(a)(3)(ii)(D).

The only Union members who are eligible to join the Association directly are those who are not also members of a state nursing association—fewer than 500 of the Union's 97,000 members are currently described as falling into this category. Thus, assuming that each eligible Union member becomes an individual member of the Association, only 0.5 percent of the Union's membership would directly overlap with the Association's membership.

There is also some indirect overlap between the individual members in the Union and individual members in the state nursing associations that are, themselves, members of the Association. Approximately 97,000 individual members of the Union are members of the 27 state nursing associations that engage in collective bargaining. There are approximately 157,000 individual members in the 54 state nursing association members of the Association, creating a maximum possible indirect overlap of about 62 percent.

In this case, the Commission determined that any direct or indirect overlap in membership between the Union and the Association results from the negotiated agreement separating the two organizations. The Union's Constitution provides that any RN who is a member of the Association's state nursing associations that engage in collective bargaining will be eligible for Union membership. The RN is then described as being free to join or not to join the Union as an individual member, and is free to maintain or terminate his or her membership in the Association through the state nursing association. Thus, even if there is significant overlap in membership, the overlap alone is not sufficient evidence that one organization currently finances, maintains or controls the other. See AO 2004-41.

Overlapping officers and employees. Two additional affiliation factors address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization, which indicates a formal or ongoing relationship, and whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(E) and (F) and 110.3(a)(3)(ii)(E) and (F).

Initially, the Association's staff performed all of the staff functions for the Union. However, the organizations stopped sharing staff after their relationship was re-negotiated. Now the Union and the Association have only one official overlapping decision-maker, the Union President, and one unofficial overlapping officer, the Union Vice-President. Any Union member who runs for one of the 15 elected seats on the Association's Board of Directors at the House of Delegates meeting is described as serving in an individual capacity, not as a Union representative. Moreover, only three of the Union's twenty-four staff members were formerly employed by the Association.

Provision of goods and funds. The affiliation factors also address whether a sponsoring organization provides goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Although the two organizations share office space and the Association performs some administrative tasks for the Union, the Union pays the Association for the space and services, and these payments do not represent a significant portion of the Association's receipts. These payments do not suggest affiliation.

The Association also agreed to make a one-time grant of $740,000 in working capital and transitional support to the Union upon the restructuring of the two organizations. The Commission has in past advisory opinions recognized that these types of transactions can be part of the transition to independence for one organization, rather than a sign of affiliation. See AO 2000-28. Here, the one-time grant is part of the process of establishing the Union's independence and separation from the Association.

Role in the formation of another organization. Finally, an affiliation factor considers whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I). In past advisory opinions, the Commission has recognized that one organization's creation of another does not, in and of itself, make the two organizations permanent affiliates. See AOs 2004-41 and 2000-36. Considering the steps taken in this case to sever operational and financial ties, this factor alone does not indicate current affiliation.

Conclusion

The Association and the Union are not affiliated under the factors discussed above, including the separation of the staffs, treasuries and functions of the two organizations, the minimal overlap in governance and the minimal direct overlap in membership. Accordingly, if the Union were to establish an SSF, that political committee would not be affiliated with the Association's SSF.

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—*Amy Kort*

AO 2007-14 Trade Associations' Sponsorship of Joint Telephone Conferences to Restricted Classes

The Associated Builders and Contractors, the National Federation of Independent Business and the National Restaurant Association (the Trade Associations) may pay for a series of jointly sponsored telephone conferences featuring Presidential candidates, which will be made available simultaneously to the three Trade Associations' restricted classes. The Trade Associations must split the costs of the conferences on a pro rata basis determined by restricted class participation (or by another reasonable method if it is not possible to track participation) to ensure that no trade association pays the costs of candidate appearances to a restricted class other than its own.

Background

The Trade Associations plan to host telephone conferences open to the restricted class members of each association. The three restricted classes will have access to the conferences either by dialing in and providing a password or by receiving a phone call connecting them to the conference. The Trade Associations will invite several Presidential candidates to participate, and the candidates will be free to solicit contributions and campaign volunteers by asking conference participants to visit a web site or call a phone number. The Trade Associations will split the costs of the conferences, and may be able to track restricted class participation in order to split costs based on the number of restricted class members from each trade association participating in the conferences.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from using their general treasury funds to make contributions and expenditures in connection with a federal election, including giving "anything of value" to a campaign. 2 U.S.C. §441b(a); 11 CFR 114.2(b). Under an exception to this general prohibition, an incorporated trade association may sponsor candidate campaign appearances, but only if:

- The audience is limited to the trade association's restricted class and to employees who are necessary to administer the meeting; or
- The audience is limited to the trade association's employees and their families.

Other guests of the corporation who are being honored or speaking or participating in the event, and representatives of the news media, may also attend. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(c)(2) and 11 CFR 114.4(b)(1).

In this case, each trade association would use its general treasury funds to sponsor candidate appearances to its own restricted class. Because the Trade Associations would sponsor the same candidate to address their restricted classes simultaneously, each trade association must pay only the portion of the costs of the conferences incurred because of its restricted class's participation. So long as the Trade Associations split the costs of the conferences on a pro rata basis according to the participation of each trade association's restricted class, or on another reasonable method calculated to closely approximate the pro rata participation, the proposed conferences will come within the exemptions from the definitions of "contribution" and "expenditure" for corporate-sponsored candidate campaign appearances to the restricted class.[1]

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—Amy Kort

[1] *The situation presented here is similar to that considered by the Commission in AO 1984-13, where the Commission concluded that a corporation could host candidates as speakers at a conference for its restricted class and jointly sponsor the conference with another entity.*

AO 2007-15 Payment for Administration of SSF by LLC Treated as Partnership; Name and Abbreviation of SSF

A subsidiary corporation of a partnership may establish a separate segregated fund (SSF) and use the name of the corporation in the title of the SSF. An acceptable abbreviation may also be used in the name of the SSF.

Background

GMAC is a financial services corporation that has elected partnership status with the Internal Revenue Service (IRS). It is owned 49 percent by General Motors, Inc. and 51 percent by FIM Holdings LLC. FIM Holdings LLC is an investment consortium led by Cerberus FIM Investors, LLC, which is its sole managing member, and several corporate principals. GMAC owns a number of subsidiaries, one of which is GMAC Insurance Holdings, Inc., which intends to establish an SSF.

Analysis

The Commission considered, but did not reach a conclusion by the required four votes, whether GMAC could pay the expenses associated with administering the SSF of its corporate subsidiary.[1]

The SSF may include the name "GMAC LLC" in its official name and may use "GMAC PAC" as its abbreviation. Commission regulations require that the name of an SSF must include the full name of its connected organization. 11 CFR 102.14(c). Although the name of the connected organization is GMAC Insurance Holdings, Inc., Commission regulations do not require that an SSF established by a subsidiary include the name of its parent or another subsidiary.

Commission regulations also permit an SSF to use a clearly recognizable abbreviation or acronym by which the connected organization is known. In previous advisory opinions, the Commission has examined whether the abbreviations or acronyms give adequate notice to the public as to the identity and sponsorship of the SSF. The Commission concluded that the name "GMAC PAC" is permissible because it reflects the name of the SSF's connected organization and the parent of the connected organization.

Date Issued: October 19, 2007; Length: 4 pages

—Myles Martin

[1] *Partnerships and LLCs that are treated as partnerships are generally prohibited from serving as the connected organization of an SSF, with the exception of partnerships that are owned entirely by corporations. The tax status of Cerberus was not made available by the requestor and, accordingly, some Commissioners concluded that they did not have sufficient information to determine whether GMAC is "owned entirely by corporations." Some Commissioners, however, concluded that the exception described above for partnerships owned entirely by corporations did not necessarily provide the appropriate analysis under the facts presented in this advisory opinion.*

AO 2007-16 Affiliation of Membership Organizations

The American Kennel Club (AKC) and its voting clubs and accredited clubs are membership organizations under the Federal Election Campaign Act (the Act) and Commission regulations, and both the voting clubs and the accredited clubs are affiliated with the AKC. Therefore, any SSF the AKC establishes may solicit contributions from the individual members of its affiliated voting clubs and accredited clubs.

Background

The AKC is composed of about 600 voting clubs and 4,000 accredited clubs. Voting clubs have the right to designate a delegate to vote on the club's behalf at AKC meetings and are required to pay modest annual dues. Accredited clubs do not have voting representation and are not obligated to pay dues.

The AKC is governed by a board of 13 directors elected by the delegates at large. Only delegates are eligible to serve as directors on the board, and the board appoints two of its members to serve as its principal officers—the Chairperson and the Vice Chairperson. The board oversees the AKC's property and assets, reviews proposed amendments to its Charter and has final authority on issues related to dog shows. The board can adjudicate charges that any club or person has violated AKC rules and can impose penalties.

Clubs applying for membership must enclose a copy of their constitutions, bylaws and membership lists for AKC review. If the board approves the applicant club for membership, then the question is submitted to the delegates at large for voting. The AKC acknowledges its acceptance of membership by sending the new voting club a letter and publishing its name in the AKC's publication. Voting clubs have a continuing duty to submit proposed changes to their governing documents to the AKC's board for approval and to apprise the AKC's Executive Secretary of any changes in their officers. The AKC Charter also prescribes criteria for determining eligibility for the position of delegate, and its board has the authority to approve or disapprove a voting club's designation of a delegate. If the board disapproves the designation, the delegates at large vote on the issue.

The delegates of the voting clubs make and modify the rules for AKC-approved dog shows, which provide for comprehensive supervision of every aspect of a show. Both voting and accredited clubs must apply to the AKC for permission to hold a dog show and must adhere to the dog show rules.

Both voting and accredited clubs have their own constitutions and bylaws. The bylaws of the various clubs display similar structure and content because the clubs substantially follow sample bylaws provided by the AKC in designing their own. Each voting club's bylaws provide that its delegate to the AKC is also a member of its own board of directors and an officer of the club. Both kinds of bylaws have provisions for the types of memberships and the governance of the club, announce that a purpose is to conduct AKC-sanctioned dog shows, define dues for most levels of membership and provide that any member whose AKC privileges are suspended are equally suspended from the privileges of the voting or accredited club. The AKC board must approve any amendments to a voting club's constitution or bylaws. Although not technically required, virtually all accredited clubs submit their constitutional amendments for prior AKC approval.

Membership Organizations

A corporation without capital stock qualifies as a membership organization if it meets six requirements detailed in FEC regulations and is composed of persons who qualify as members under the regulations. 11 CFR 114.1(e)(1) and (2). See also 11 CFR 100.134(e) and (f).

The AKC and the vast majority of its voting and accredited clubs are non-profit corporations without capital stock, and the AKC meets the six enumerated requirements:

- It is composed partly of voting clubs vested with the power and authority to operate or administer the organization pursuant to the AKC Charter;
- The AKC Charter expressly states the requirements and qualifications for membership;
- The AKC Charter and bylaws are available to its members on its web site and upon request;
- The AKC expressly solicits membership by advertising the benefits of AKC registration on its web site and providing guidance on how to form a new club;
- The AKC acknowledges acceptance of membership by sending a letter to the voting club and publishing the names of new voting clubs;
- The AKC Charter shows that it is not organized primarily for the purpose of influencing federal elections, but instead for the purpose of ensuring the purity of specific breeds of dogs and of promoting the fitness of the dogs. 11 CFR 114.1(e)(1)(i)-(vi).

In addition, the AKC is composed of persons that are "members" under Commission regulations. 11 CFR 114.1(e)(2). The voting clubs are members because they satisfy the membership requirements set forth in the AKC Charter, affirmatively accept invitations to become members and pay annual dues of a predetermined amount.[1] 11 CFR 114.1(e)(2)(ii).

Both the voting clubs and the accredited clubs also meet all six

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[1] Accredited clubs, in contrast, are not "members" of the AKC under Commission regulations.

requirements for being a membership organization and are composed of persons who are "members" under Commission regulations, as described above.

Solicitation and Affiliation

A membership organization or its SSF may solicit its individual members for contributions to the SSF. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.7(a). When a membership organization has several levels, such as national, regional, state and/or local affiliates, then a member of any entity or affiliate within the multi-level structure automatically qualifies as a member of all affiliates. 11 CFR 114.1(e)(5). In addition, a membership organization or its SSF may solicit the individual members of the membership organization's affiliates. AO 2005-03.

Per se affiliation. Under Commission regulations, organizations that are established, financed, maintained or controlled by a single corporation and/or its subsidiaries, or by the same person or group of persons, are *per se* affiliated. 11 CFR 100.5(g)(3)(i) and (v). In this case, neither the AKC, nor the voting clubs and accredited clubs, owns any portion of the others, and thus no organization is a subsidiary of either of the others. Moreover, the AKC and the voting and accredited clubs are not established, financed, maintained or controlled by the same person or group of persons.

Under Commission regulations, organizations established by a membership organization, including related state and local entities of the organization, are also *per se* affiliated. 11 CFR 100.5(g)(3)(iv). The AKC and its voting clubs and accredited clubs, however, are not *per se* affiliated under this provision because the voting and accredited clubs are not state or local chapters or entities within the AKC.

Affiliation factors. In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J). These ten circumstantial factors do not constitute an exhaustive list, and other factors may be considered. Three of these factors are relevant in this case.

The first factor considers whether a sponsoring organization has the authority or ability to direct or participate in the governance of another sponsoring organization through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 11 CFR 100.5(g)(4)(ii)(B). The AKC and the voting clubs exercise reciprocal rights of participation in each other's governance. The voting clubs participate in the AKC's governance through the delegates they appoint to represent them, and the AKC participates in the governance of the voting clubs by reviewing and approving the voting club's organizational documents. Moreover, the AKC can discipline voting clubs and their individual members, and the AKC Board can approve or disapprove a voting club's designation of a delegate. Finally, through the dog show rules, the AKC governs all aspects of voting clubs' dog shows.

Although the accredited clubs are not "members" of the AKC under the Commission's regulations, individuals who are members of the accredited club need not have rights and obligations with respect to the AKC in order for the accredited club to be affiliated with the AKC. AO 1999-40. Moreover, the AKC participates in the governance and operations of the accredited clubs because it can discipline them and governs all aspects of their dog shows.

Further, the AKC furnishes both voting and accredited clubs with prototype constitutions and bylaws that the clubs follow substantially. Finally, the voting club must submit its organizational documents and its membership list to the AKC before it is accepted for membership. The AKC reviews and approves the organizational documents and membership lists of both voting and accredited clubs to determine whether the clubs are eligible for membership or accreditation. Once a club's organizational documents are approved, the AKC has effective veto power over any proposed amendments. Together, these facts suggest affiliation between the AKC and the voting and accredited clubs.

The second relevant factor addresses whether a sponsoring organization has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decision-making employees or members of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(C). The AKC and the voting clubs each exercise some authority over each other's officers or other decision-making employees. The voting clubs' delegates appoint members of the AKC Board of Directors from their own ranks. The Board then appoints the AKC's officers. Furthermore, the AKC reviews the membership lists submitted by clubs applying for membership. The AKC has the authority to strip any person of the privileges of association with the AKC. Thus, this factor also suggests affiliation between the AKC and the voting and accredited clubs.

The third factor considers whether a sponsoring organization or its agent had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I). The AKC takes an active role in the formation of voting and accredited clubs by establishing the requirements a club must satisfy to attain club status. Both voting and accredited clubs substantially follow prototype constitutions and bylaws provided by the AKC. In addition, the AKC reviews the organizational documents and membership lists of both voting and accredited clubs to determine whether the clubs are eligible for membership or accreditation.

Intent of individual members of voting and accredited clubs to join the AKC. In determining affiliation, the Commission also considers the intent of the people who join an organization.[2] Groups become voting or accredited clubs of the AKC because this allows them to conduct AKC-approved dog shows. Without AKC sponsorship, they would lose substantial revenue from exhibitors. Thus, clubs are motivated to subordinate practically all aspects of their dog shows to the direction of the AKC. In this sense, the individual's primary purpose in joining voting or accredited clubs is to be associated with the AKC as a whole.

Conclusion

The AKC and the voting clubs are affiliated because they exercise reciprocal rights of participation in each other's governance. The AKC also assumes a significant role in the formation of the voting clubs, and an individual's primary purpose in joining a voting club is to be associated with the AKC. With regard to the accredited clubs, the fact that the AKC participates in the governance of the accredited clubs and has a significant role in their formation, coupled with the fact that the individual's primary purpose in joining an accredited club is to be associated with AKC, outweighs the absence of influence or control over the AKC through voting rights. AO 1995-12. Thus, because the voting and accredited clubs are affiliates of the AKC, the AKC or any SSF it forms may solicit all of the individual members of its voting and accredited clubs for contributions to its SSF.

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—*Amy Kort*

AO 2007-19 Renaissance Health Service Corporation

A non-profit 501(c)(4) corporation qualifies as a membership organization and individuals selected to be members of that organization qualify as "members" for purposes of the Federal Election Campaign Act (the Act). Accordingly, the organization may solicit those individuals for contributions to a separate segregated fund (SSF) established by the organization.

Background

Renaissance Health Service Corporation is a non-profit corporation that is exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Renaissance primarily serves as a holding company for Delta Dental Plan of Michigan (DDPMI) and Delta Dental of Tennessee (DDTN) and other companies it directly or indirectly owns or controls. It also supports programs to promote dental science and access to dental care. Currently, Renaissance has 75 members, all of whom are individuals.

Renaissance is the sole corporate member of both DDPMI and DDTN and therefore "controls" them. Renaissance has entered into an "Affiliation Agreement" with both companies, whereby DDPMI would select no more than 68 of the 75 members of Renaissance and DDTN would select no fewer than seven members. The members serve three-year terms and may be re-appointed to further terms. Under the Bylaws of Renaissance, these 75 individuals elect the organization's board of directors at the annual membership meetings. The board of directors exercises Renaissance's corporate powers. The term of a director is three years, and directors may be re-elected twice. Individuals who were not Renaissance members become members of Renaissance upon their election to the board.

The Bylaws permit a member to be removed during his or her membership appointment if the member refuses to comply with the conditions of the voting agreement, which requires members to vote so that no more than 17 of the 19 directors represent DDPMI and no fewer than two represent DDTN.[1]

Legal Analysis

As an exception to the prohibition on corporate contributions and expenditures, the Act and Commission regulations provide that an incorporated membership organization, cooperative or corporation without capital stock, or an SSF established by such an entity, may solicit at any time voluntary contributions to that SSF from the entity's members and their families, as well as the entity's executive and administrative personnel and their families. 11 CFR 114.1(a)(2)(iii) and 114.7(a).

Application of Criteria for Membership Organization. Under the Act and Commission regulations, a "membership organization" is defined as a trade association, cooperative or corporation without capital stock that meets the criteria listed below. To be considered a membership organization, an entity must satisfy all six of the criteria. A membership organization:

- Is composed of members, some or all of whom are vested with the

[2] *The Commission noted in its Explanation and Justification for its final rules regarding the Definition of "Member" of a Membership Organization that "a person who joins one tier of a multi-tiered organization clearly demonstrates an intention to associate with the entire organization." 64 FR 41266, 41271 (July 30, 1999).*

[1] *A nominating committee composed of directors selects the potential directors to be voted on by the members, and, although two of the nominees must be acceptable to DDTN, a member may comply with the voting agreement by voting for individuals who are among the DDTN-appointed members of Renaissance for the board seats associated with DDTN.*

power and authority to operate or administer the organization;
- Expressly states the qualifications and requirements for membership in its articles, bylaws or constitution;
- Makes its articles, bylaws or constitution available to its members upon request;
- Expressly solicits persons to become members;
- Expressly acknowledges the acceptance of membership; and
- Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to federal office. 11 CFR 114.1(e)(1)(i)-(vi) and 100.134(e)(1)-(6).

As to the first criterion, the 75 members elect the board of directors and the directors are a subset of the Renaissance members. Thus it can be argued that at least some of the individual members are vested with the power and authority to operate or administer Renaissance through their board membership, or all 75 members of Renaissance are vested with such authority by their ability to elect members of the board. The fact that a member can be removed during his or her membership appointment for refusing to comply with the voting agreement, and that DDPMI and DDTN can decide not to re-appoint members to additional terms, indicates some limits on the discretion exercised by directors and other members. However, the directors exercise Renaissance's corporate powers, and even if DDPMI and DDTN do not want to re-select a director as a Renaissance director, the member can serve out his or her term. Hence, at least some of the members are vested with the power and authority to operate or administer Renaissance during their three-year terms as director.

Renaissance also meets each of the second through fifth criteria listed above. Renaissance's Articles of Incorporation and Bylaws are made available to any member upon request, Renaissance expressly invites individuals to be members upon their selection by DDPMI or DDTN, and Renaissance expressly acknowledges the acceptance of membership.

Additionally, Renaissance was not organized for the purpose of influencing any nomination for election, or election, of any individual for federal office, and has not changed its purpose. The membership consists of retired employees of DDPMI, dentists participating in DDPMI and DDTN networks, subscribers to those plans, retired dentists and others. Thus, the membership is made up of a small group of individuals intended to represent constituencies of providers and users of dental services and has historically served Renaissance's purposes of promoting access to dental care and the advancement of dentistry, and not the purpose of influencing federal elections.

Application of Criteria for "Member." Commission regulations provide that the term "member" includes all persons who 1) currently satisfy the requirements for membership, 2) affirmatively accept the membership organization's invitation to become a member and 3) have a significant financial attachment to the organization, pay membership dues at least annually or have a significant organizational attachment to the membership organization which includes affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. 11 CFR 114.1(e)(2)(i)-(iii) and 100.134(f)(1)-(3).

The 75 individuals satisfy the requirements for membership as described by Renaissance's Bylaws, affirmatively accept Renaissance's invitation to be a member and affirm membership on an annual basis. With respect to the exercise of participatory rights, the members vote in the election of board members and have other voting powers that are not subject to the voting agreement. Despite the voting agreement and the selection powers exercised by DDPMI and DDTN, the 75 individuals have some limited discretion in the important function of electing directors and greater discretion in voting on other specific matters. Thus the directors have sufficient direct participatory rights during their three-year member terms to meet Commission regulations' definition of member.

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—Myles Martin

AO 2007-27 Nonconnected Committee Solicitations for SSF Contributions

ActBlue, a registered nonconnected committee, may not independently solicit contributions from the general public on behalf of separate segregated funds (SSFs). However, ActBlue may work directly with SSFs to solicit the restricted class of those SSFs' connected organizations for contributions designated for the SSFs.

Background

ActBlue is a nonconnected political committee registered with the Commission that primarily serves as a conduit for contributions earmarked for Democratic candidates and political party committees. ActBlue wishes to expand its fundraising activities by providing contributors the choice to contribute to political committees (including SSFs) that support political principles similar to those promoted by Democratic candidates and party committees.

ActBlue proposes two different fundraising programs to solicit and receive contributions designated for a number of different SSFs. Under Program 1, ActBlue would solicit the general public for contributions designated for SSFs via its web site (including its blog and fundraising pages) and through e-mail to its own list. ActBlue would not have any contact with the SSFs or their connected organizations regarding the solicitations, and ActBlue would not be paid for its fundraising. Solicitations would inform potential contributors of applicable contribution limitations.

Under Program 2, ActBlue would solicit only the restricted classes of the SSFs' connected organizations, and would work directly with the SSFs in making the solicitations. (A connected organization's restricted class generally includes its executive and administrative personnel, stockholders and the families of both groups.) Solicitations made under Program 2 would be through a password-protected webpage of ActBlue's web site. Each SSF would choose the password for that password-protected page and distribute the password to members of its connected organization's restricted class only.

ActBlue would pay all costs associated with the solicitations in both Programs 1 and 2. Within ten days of receipt of a contribution designated for an SSF, ActBlue would forward each contribution to the intended SSF recipient along with a report containing all required information, which would include the contributor's name and the amount of the contribution.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations allow an SSF and its connected organization to solicit at any time contributions to the SSF from the connected organization's "restricted class," which includes the connected organization's executive and administrative personnel, its stockholders and the families of both groups. 11 CFR 114.1(c) and 114.5(g). Solicitations by an SSF or its connected organization beyond the restricted class are generally prohibited.[1] An entity acting on behalf of an SSF or its connected organization is bound by the same restrictions as the SSF.

Under Program 1, ActBlue would be acting on behalf of the recipient SSFs and their connected organizations when soliciting contributions designated for the SSFs. ActBlue would represent to the public that contributing to an SSF through ActBlue is the functional equivalent of contributing directly to the SSF. An SSF that continually accepts earmarked contributions and contributor information from ActBlue would not be able to claim that it was unaware that ActBlue is soliciting contributions on its behalf. Thus ActBlue is not permitted to solicit contributions from beyond the restricted classes of the SSFs' connected organizations under Program 1.

ActBlue may, however, work directly with the recipient SSFs and their connected organizations under Program 2 to solicit contributions from members of the restricted class only. Any costs associated with soliciting the restricted class that are paid by ActBlue must be treated as in-kind contributions to the recipient SSFs. 11 CFR 100.52(a) and (d). Such costs include a portion of staff salaries and expenses for web site development and maintenance. If ActBlue receives a contribution designated for an SSF, ActBlue must forward the name, address and receipt date to the treasurer of the SSF no later than ten days after receipt if that contribution is in excess of $50. If the contribution exceeds $200, ActBlue must also forward information about the contributor's employer and occupation. 11 CFR 102.8(b)(2). Contributions of $50 or less must be forwarded within 30 days. 11 CFR 102.8(b)(1).

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—*Myles Martin*

[1] A connected organization or its SSF may, however, make two written solicitations per year to non-executive employees, subject to certain restrictions. 11 CFR 114.6.

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.

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—*Isaac J. Baker*

AO 2008-5 Organization's Status as a Partnership

An entity organized under state law as a limited liability partnership, but classified as a corporation for federal tax purposes, is treated as a partnership under the Federal Election Campaign Act (the Act). Accordingly, the partnership's federal political action committee (PAC) is not a separate segregated fund (SSF), but rather a nonconnected PAC. As such, all administrative support provided to the PAC by the partnership would constitute contributions, subject to the limitations and prohibitions of the Act.

Background

Holland & Knight LLP (the Firm) is a law firm that is classified as a limited liability partnership (LLP) under the laws of Florida. However, for purposes of federal taxation, the Firm is classified as a corporation. The Firm is taxed as a partnership in Massachusetts and Florida, but is taxed as a corporation in other states in which it operates.

The Firm administers the Holland & Knight Committee for Effective Government (the Committee), a nonconnected PAC.

Analysis

The Act's legislative history and Commission regulations rely on state law to determine if an organization is a partnership or a corporation. Since the Firm is organized as a limited liability partnership under Florida law, the Firm is treated as a partnership under the Act and Commission regulations.

The Act generally prohibits corporations from making contributions or expenditures in connection with a federal election. However, the Act exempts from the definition of "contribution or expenditure" a corporation's costs for establishing, administering or soliciting contributions to its SSF. 11 CFR 114.1(a)(2)(iii) and 114.2(b). These exemptions are generally not extended to partnerships. Since the Firm is a partnership and not a corporation, the contribution and expenditure exemptions do not apply, and the Firm may not treat the Committee as its SSF, nor may the Firm treat disbursements for the costs of administering the Committee or for soliciting contributions for the Committee as exempt from the definition of "contribution or expenditure" under the Act and Commission regulations.

Administrative and solicitation costs paid by the Firm on behalf of the Committee are contributions. Partnerships are treated as persons under the Act and Commission regulations and may contribute up to $5,000 per calendar year to a nonconnected committee. 11 CFR 100.10 and 110.1(d). Any contributions made to the Committee by the Firm are attributable both to the Firm and to its partners. 110.1(e)(1) and (2).

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—*Myles Martin*