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CANDIDATE 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 candidate committees. It should be used in conjunction with the FEC's April 2008 *Campaign Guide for Congressional Candidates and Committees*, which provides more comprehensive information on compliance for candidate committees.

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Court Cases

Shays v. FEC (III)

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

Background

In response to the court decisions and judgment in *Shays I*, the

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

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

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

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

Appeals Court Decision

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

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

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

Firewall Safe Harbor. Contrary to the decision of the district court, the court of appeals approved the firewall safe harbor regulation to stand as written. The safe harbor is designed to protect vendors and organizations in which some employees are working on a candidate's campaign and others are working for outside organizations making

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independent expenditures. The appellate court held that, although the firewall provision states generally as to what the firewall should actually look like, the court deferred to the Commission's decision to allow organizations to create functional firewalls that are best adapted to the particular organizations' unique structures.

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

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

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

—*Meredith Metzler*

Davis v. FEC

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

Background

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

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

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

District Court Decision

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

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

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

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

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

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

Supreme Court Decision

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

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

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

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

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

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

—*Gary Mullen*

Commission

Commission Statement on Davis v. FEC

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

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

- The Commission will no longer enforce the Amendment and will initiate a rulemaking shortly to conform its rules to the Court's decision.
- As of June 26, 2008, any FEC disclosure requirements related solely to the Amendment need not be followed. There is no longer a need to file the Declaration of

[1] 2 U.S.C. § 441a-1.

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

Intent portion of the Statement of Candidacy (Lines 9A and 9B of Form 2), FEC Form 10, Form 11, Form 12, or Form 3Z-1.
- All other filing obligations unrelated to the Amendment remain the same. For example, contributions a candidate makes to his or her own campaign must still be reported.
- As of June 26, 2008, opponents of self-financed candidates who triggered the Amendment may not accept increased contributions.
- As of June 26, 2008, political parties may no longer make increased coordinated expenditures on behalf of opponents of self-financed candidates whose personal expenditures would have triggered the Amendment.

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

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

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

Regulations

Final Rules on Repeal of Millionaires' Amendment

On December 18, 2008, the Commission approved final rules that remove regulations on increased contribution limits and coordinated party expenditure limits for Senate and House of Representative candidates facing self-financed opponents. The rules implemented provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) known as the "Millionaires' Amendment." In *Davis v. Federal Election Commission (Davis)*, the Supreme Court held that the Millionaires' Amendment provisions relating to House of Representatives elections were unconstitutional. The Commission retained and revised certain other rules that were not affected by the *Davis* decision. The final rules were published in the December 30, 2008, *Federal Register* and took effect February 1, 2009.

Background

On June 26, 2008, the Supreme Court ruled in *Davis* that the Millionaires' Amendment provisions of BCRA relating to House of Representatives elections unconstitutionally burden the First Amendment rights of self-financed candidates. Under those provisions, Senate and House candidates facing opponents who spent personal funds above certain threshold amounts were eligible for increased contribution and coordinated party expenditure limits.

On July 25, 2008, the Commission issued a public statement announcing that the *Davis* decision precluded the enforcement of the House provisions and effectively precluded the enforcement of the Senate provisions. The statement noted that, as of June 26, 2008, the increased contribution limits and reporting requirements of the Millionaires' Amendment were no longer in effect, and political party committees were no longer permitted to make increased coordinated party expenditures under these provisions. See August 2008 *Record*, page 3. The Commission published a Notice of Proposed Rulemaking (NPRM) on October 20, 2008, seeking comment from the public on proposed rules implementing the *Davis* decision.

Removal of 11 CFR Part 400 — Increased Limits for Candidates Opposing Self-Financed Candidates

Part 400 of FEC regulations implemented the statutory provisions of the Millionaires' Amendment. The Supreme Court's decision in *Davis* invalidated the entire BCRA section 319 relating to House elections, including the increased limits in 319(a) and its companion disclosure requirements in 319(b). While the *Davis* decision struck down only the BCRA sections 319(a) and (b) governing House elections, the Commission concluded that the Supreme Court's analysis in *Davis* also precludes enforcement of the parallel provisions applicable to Senate elections. Therefore, the Commission decided to delete the regulations found at 11 CFR Part 400 in their entirety.

Amendments to Other Provisions

The deletion of the rules at 11 CFR Part 400 affects several other Commission regulations, as noted below.

Definition of File, Filed or Filing. Section 100.19 specifies when a document is considered timely filed. The Commission deleted paragraph (g), which had described the candidate's notification of expenditures of personal funds under 400.21 and 400.22.

Definition of Personal Funds. The Commission revised the definition of "personal funds" in 11 CFR 100.33 by deleting the cross-reference to section 400.2, which the Commission removed. The Commission retained the remaining language of section 100.33.

Candidate Designations. The Commission deleted the sentence in paragraph (a) of 11 CFR 101.1 that required Senate and House of Representatives candidates to state, on their Statements of Candidacy on FEC Form 2 (or, if the candidates are not required to file electronically, on their letters containing the same information), the amount by which the candidates intended to exceed the threshold amount as defined in 11 CFR 400.9. The *Davis* decision invalidated the statutory foundation for this requirement.

Statement of Organization. Section 102.2(a)(1)(viii) requires principal campaign committees of House and Senate candidates to provide an e-mail address and fax number on their Statement of Organization (FEC Form 1). This regulation was promulgated to aid with the expedited notifications required by the Millionaires' Amendment under Part 400. The Commission retained the requirement that these committees provide e-mail addresses because it facilitates the exchange of information between the Commission and committees for other purposes under the Act. However, the Commission deleted the requirement that committees provide their facsimile numbers because it does not routinely communicate with committees via facsimile machine.

Calculation of "Gross Receipts Advantage." Section 104.19 had required principal campaign committees of House and Senate candidates to report information necessary to calculate their "gross receipts advantage." This calculation was then used to determine the "opposition personal funds amount" under 400.10. With the Commission's deletion of Part 400, the reporting under section 104.19 is no longer required. Therefore, the Commission removed section 104.19.

Biennial Limit. The Commission deleted paragraph (b)(2) of section 110.5 because the statutory foundation for this provision was invalidated by the Supreme Court's decision in *Davis*. Paragraph (b)(2) stated the circumstances under which the biennial limits on contributions by individuals did not apply to contributions made under 11 CFR Part 400.

Retention of Certain Other Regulations

Repayment of candidates' personal loans. The BCRA added a new provision limiting to $250,000 the amount of contributions collected after the date of the election that can be used to repay loans made by the candidate to the campaign. When promulgating regulations to enforce this statutory provision, the Commission added new sections 116.11 and 116.12 to the regulations rather than including them in Part 400 with the other Millionaires' Amendment provisions. Unlike other aspects of the Millionaires' Amendment, this statutory provision applies equally to all federal candidates, including Presidential candidates. The personal loan repayment provision was not challenged in *Davis*, nor did the Supreme Court's decision address the validity of this provision. Therefore, the Commission retained sections 116.11 and 116.12.

Net debts outstanding calculation. Section 110.1(b)(1)(i) states that candidates and their committees cannot accept contributions after the election unless the candidate still has net debts outstanding from that election and only up to the amount of that net debts calculation. This rule was in place before BCRA added the loan repayment restriction. However, to conform with the fundraising constraints put in place with the BCRA by section 116.11, the Commission added language to 110.1(b)(3)(ii) to exclude the amount of personal loans that exceed $250,000 from the definition of net debts outstanding. For the same reasons stated above, the Commission retained paragraph (b)(3)(ii)(C).

Additional Information

The full text of the rules was published in the December 30, 2008, *Federal Register* and is available on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2008/notice_2008-14.pdf.

—*Isaac J. Baker*

Final Rules on Reporting Contributions Bundled by Lobbyists, Registrants and Their PACs

On December 18, 2008, the Commission approved final rules regarding disclosure of contributions bundled by lobbyists/registrants and their political action committees (PACs). These rules implement Section 204 of the Honest Leadership and Open Government Act of 2007 (HLOGA) by requiring "reporting committees" (authorized committees of federal candidates, Leadership PACs and political party committees) to disclose certain information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of the reporting threshold within a "covered period" of time. These requirements apply to both in-kind and monetary contributions. The reporting threshold for 2009 is $16,000 and is indexed annually for inflation.

Lobbyist/Registrants and Their PACs

The rules define a lobbyist/registrant as a current registrant (under section 4(a) of the Lobbying Disclosure Act of 1995 (the LDA)) or an individual listed on a current registration or report filed under sections 4(b)(6) or 5(b)(2)(C) of the LDA. 11 CFR 104.22(a)(2). A lobbyist/registrant PAC is any political committee that a lobbyist/registrant "established or controls." 11 CFR 100.5(e)(7) and 104.22(a)(3). For the purposes of these rules, a lobbyist/registrant "established or controls" a political committee if he or she is required to make a disclosure to that effect to the Secretary of the Senate or Clerk of the House of Representatives. 11 CFR 104.22(a)(4)(i). If the political committee is not able to obtain definitive guidance from the Senate or House regarding its status, then it must consult additional criteria in FEC regulations. Under these criteria, a political committee is considered a lobbyist/registrant PAC if:

- It is a separate segregated fund whose connected organization is a current registrant; (11 CFR 104.22(a)(4)(ii)(A)); or
- A lobbyist/registrant had a primary role in the establishment of the committee *or* directs the governance or operations of the committee. (Note that the mere provision of legal compliance services or advice by a lobbyist/registrant would not by itself meet these criteria.) (11 CFR 104.22(a)(4)(ii)(B)(1) and (2)).

Disclosure is triggered based on the activity of persons "reasonably known" by the reporting committee to be lobbyist/registrants or lobbyist/registrant PACs. In order for reporting committees to determine whether a person is reasonably known to be a lobbyist/registrant or lobbyist/registrant PAC, the rules require reporting committees to consult the Senate, House and FEC web sites. 11 CFR 104.22(b)(2)(i). The Senate and House web sites identify registered lobbyists and registrants, while the FEC web site identifies whether a political committee is a lobbyist/registrant PAC. A computer printout or screen capture showing the absence of the person's name on the Senate, House or FEC web sites on the date in question may be used as conclusive evidence demonstrating that the reporting committee consulted the required web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(ii). Nevertheless, the reporting committee is required to report bundled contributions if it has actual knowledge that the person in question is a lobbyist/registrant or lobbyist/registrant PAC even if the committee consulted the Senate, House and FEC web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(iii).

Covered Periods

An authorized committee, Leadership PAC[1] or party committee (collectively "reporting committees") must file new FEC Form 3L when it receives two or more bundled contributions aggregating in excess of $16,000 from a lobbyist/registrant or lobbyist/registrant PAC during a specified time period. That time period, called a "covered period," is defined in HLOGA as January 1 through June 30, July 1 through December 31 and any reporting period applicable under the Federal Election Campaign Act (the Act). 2 U.S.C. §434(i)(2); 11 CFR 104.22(a)(5). As a result, covered periods will typically coincide with a committee's regular FEC reporting periods, except that bundling reports filed in July and January will also cover the preceding six months. One exception, noted below, permits monthly filers to file Form 3L on a quarterly basis, if they choose.

Semi-annual Covered Period. All reporting committees with bundled contributions to disclose must file a report covering the semi-annual periods of January 1 through June 30 and July 1 through December 31. 11 CFR 104.22(a)(5)(i). Totals for the first six months of the year will appear on quarterly filers' July 15 report and on monthly filers' July 20 report.[2] All reporting committees will disclose totals for the second half of the year on their January 31 Year-End Report.

Quarterly Covered Period. The covered period for reporting committees that file campaign finance reports on a quarterly schedule in an election year includes the semi-annual periods above and also the calendar quarters beginning on January 1, April 1, July 1 and October 1, as well as the pre- and post-election reporting periods (including runoff or special elections), if applicable. 11 CFR 104.22(a)(5)(ii) and (v). Authorized committees of House and Senate candidates have the same quarterly covered period for a non-election year as in an election year. However, Leadership PACs or party committees that file quarterly in an election year file campaign finance reports semi-annually in a non-election year. Therefore, in a non-election year, these reporting committees must file lobbyist

[1] A Leadership PAC is defined as a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate or individual holding federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that Leadership PAC does not include a political committee of a political party. 11 CFR 100.5(e)(6).

[2] In a non-election year, committees that file only semi-annually will file Form 3L on July 31 and January 31.

bundling disclosure only for the semi-annual covered periods, and the pre- and post-special election reporting periods, if applicable. Some authorized committees of Presidential candidates may also file quarterly reports.

Monthly Covered Period. For reporting committees that file campaign reports on a monthly basis, the covered period includes the semi-annual periods above and each month in the calendar year, except that in election years they file for the pre- and post-general election reporting periods in lieu of the November and December reports. 11 CFR 104.22(a)(5)(iii). As noted above, reporting committees that file campaign finance reports monthly may elect to file their lobbyist bundling disclosure on a quarterly basis. 11 CFR 104.22(a)(5)(iv). Reporting committees wishing to change their lobbyist bundling disclosure from monthly to quarterly must first notify the Commission in writing. Electronic filers must file this request electronically. A reporting committee may change its filing frequency only once in a calendar year. 11 CFR 104.22(a)(5)(iv).

Bundled Contributions

The disclosure requirements apply to two distinct types of bundled contributions: those that are forwarded to the reporting committee by a lobbyist/registrant or lobbyist/registrant PAC and those that are received directly from the contributor and are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC.

A forwarded contribution is one that is delivered, either physically or electronically, to the reporting committee by the lobbyist/registrant or lobbyist/registrant PAC, or by any person that the reporting committee knows to be forwarding a contribution on behalf of a lobbyist/registrant or lobbyist/registrant PAC. These contributions count toward the bundling disclosure threshold regardless of whether the committee awards any credit to the lobbyist/registrant or lobbyist/registrant PAC.[3] 11 CFR 104.22(a)(6)(i).

Bundled contributions also include those received from the original contributor when the contributions are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC through records, designations or other means of recognizing that a certain amount of money has been raised by that lobbyist/registrant or lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(ii). The final rules outline ways that a reporting committee may be considered to "credit" a lobbyist/registrant or lobbyist/registrant PAC for raising contributions.

For example, a reporting committee may credit lobbyist/registrants or lobbyist/registrant PACs through records (written evidence, including writings, charts, computer files, tables, spreadsheets, databases or other data or data compilations stored in any medium from which information can be obtained). 11 CFR 104.22(a)(6)(ii)(A).

Designations or other means of recognizing that a lobbyist/registrant or lobbyist/registrant PAC has raised a certain amount of money include, but are not limited to:

- Titles given to persons based on their fundraising;
- Tracking identifiers assigned by the reporting committee and included on contributions or contribution-related material that may be used to maintain information about a person's fundraising;
- Access, for example through invitations to events, given to lobbyist/registrants or lobbyist/registrant PACs as a result of their fundraising levels; or
- Mementos given to persons who have raised a certain amount of contributions. 11 CFR 104.22(a)(6)(ii)(A)(1)-(4).

Note, however, that the rules exclude from the definition of "bundled contribution" any contribution made from the personal funds of the lobbyist/registrant or his or her spouse, or from the funds of the lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(iii).

Disclosure Requirements

As noted above, the Commission has created new FEC Form 3L, Report of Contributions Bundled by Lobbyists/Registrants and Lobbyist/Registrant PACs, to accommodate the new disclosure requirements. Reporting committees must use the form to disclose:

- Name of each lobbyist/registrant or lobbyist/registrant PAC;
- Address of each lobbyist/registrant or lobbyist/registrant PAC;
- Employer of each lobbyist (if an individual); and
- The aggregate amount of bundled contributions forwarded by or received and credited to each.

Electronic filers are required to file Form 3L electronically. A new release of FECFile will be available from the FEC.

Reporting committees must maintain records of any bundled contributions that aggregate in excess of the reporting threshold and are reported on Form 3L. Reporting committees must keep sufficient documentation of the information contained in the reports to check their accuracy and completeness and must keep those records for three years after filing FEC Form 3L. 11 CFR 104.22(f).

The Commission has additionally revised FEC Form 1, Statement of Organization, to allow political

[3] *These rules do not affect the existing recordkeeping and reporting provisions that require each person who receives and forwards contributions to a political committee to forward certain information identifying the original contributor and, for contributions received and forwarded to an authorized committee, the reporting and recordkeeping requirements by persons known as "conduits" or "intermediaries." See 11 CFR 102.8 and 110.6.*

committees to identify themselves as Leadership PACs or lobbyist/registrant PACs. As of March 29, 2009, political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC must identify themselves as such when filing FEC Form 1 with the Commission. Political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC that have already filed FEC Form 1 must amend their FEC Form 1 no later than March 29, 2009, to identify themselves as such.

Additional Information

The new rules will take effect on March 19, 2009, and recordkeeping requirements begin on this date. Reporting committees must also begin tracking their bundled contributions as of this date. Compliance with the reporting requirements for reporting committees is required after May 17, 2009. Reports filed in accordance with these rules need not include contributions bundled by lobbyist/registrants if the contributions are received before March 19. Contributions bundled by lobbyist/registrant PACs need not be reported if they are received by April 18.

The final rules and their Explanation and Justification were published in the *Federal Registe*r on February 17, 2009, and are available on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-03.pdf.

—*Elizabeth Kurland*

Contribution Limits

Contribution Limits for 2009-2010

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), certain contribution limits are indexed for inflation every two years, based on the change in the cost of living since 2001, which is the base year for adjusting these limits.[1] The inflation-adjusted limits are:

- The limits on contributions made by persons to candidates and national party committees (2 U.S.C. §441a(a)(1)(A) and (B));
- The biennial aggregate contribution limits for individuals (2 U.S.C. §441a(a)(3)); and
- The limit on contributions made by certain political party committees (2 U.S.C. §441a(h)).

Please see the chart on page 10 for the contribution amount limits applicable for 2009-2010. The inflation adjustments to these limits are made only in odd-numbered years, and—except for the biennial limit—the limits are in effect for the two-year election cycle beginning on the day after the general election and ending on the date of the next general election. The biennial limit covers the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even-numbered year.

Please note, however, that these limits do not apply to contributions raised to retire debts from past elections. Contributions may not exceed the contribution limits in effect on the date of the election for which those debts were incurred. 11 CFR 110.1(b)(3)(iii).

The BCRA also introduced a rounding provision for all of the amounts that are increased by the indexing for inflation.[2] Under this provision, if the inflation-adjusted amount is not a multiple of $100, then the amount is rounded to the nearest $100.

—*Elizabeth Kurland*

[1] *The applicable cost of living adjustment amount is 1.216.*

[2] *This provision also affects the indexing of coordinated party expenditure limits and Presidential expenditure limits in 2 U.S.C. §§441a(b) and 441a(d), as well as the disclosure threshold for lobbyist bundled contributions in 2 U.S.C. §434(i)(3)(A).*

FEC Web Site Offers Podcasts

In an effort to provide more information to the regulated community and the public, the Commission is making its open meetings and public hearings available as audio recordings through the FEC web site, as well as by podcasts. The audio files, and directions on how to subscribe to the podcasts are available under *Audio Recordings* through the *Commission Meetings* tab at http://www.fec.gov. The audio files are divided into tracks corresponding to each portion of the agenda for ease of use. To listen to the open meeting without subscribing to the podcasts, click the icon next to each agenda item. Although the service is free, anyone interested in listening to podcasts must download the appropriate software listed on the web site. Podcast subscribers will automatically receive the files as soon as they become available–typically a day or two after the meeting.

Contribution Limits for 2009-2010

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates	$2,400
Individuals/Non-multicandidate Committees to National Party Committees	$30,400
Biennial Limit for Individuals	$115,500[1]
National Party Committee to a Senate Candidate	$42,600[2]

[1] This amount is composed of a $45,600 limit for what may be contributed to all candidates and a $69,900 limit for what may be contributed to all PACs and party committees. Of the $69,900 portion that may contributed to PACs and parties, only $45,600 may be contributed to state and local party committees and PACs.

[2] This limit is shared by the national committee and the Senate campaign committee.

Advisory Opinions

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

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

Background

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

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

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

Analysis

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

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

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

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

Date Issued: July 29, 2008; Length: 4 pages.

—*Isaac J. Baker*

AO 2008-4 Publicly Funded Presidential Candidate May Redesignate General Election Contributions to Senate Election Within 60 Days

The authorized committee of a Presidential candidate receiving primary matching funds may issue refunds or obtain redesignations to his Senate campaign (the Senate Committee) for contributions made in connection with the general election. Additionally, the campaign may treat the costs associated with issuing the refunds or obtaining the redesignations as "winding down costs," which are qualified campaign expenses.

Background

Chris Dodd for President, Inc. (the Presidential Committee) is the principal campaign committee of Senator Chris Dodd, who was a candidate for the nomination of the Democratic Party for President of the United States. When Senator Dodd became a candidate for President, his Presidential Committee began accepting contributions for both the primary and general elections, which were kept in separate bank accounts. Senator Dodd applied for federal matching funds for the primary election and was certified by the Commission on November 27, 2007, as eligible to receive such matching funds.

On January 3, 2008, Senator Dodd withdrew from the Presidential race and later filed a Statement of Candidacy indicating his candidacy for U.S. Senate in the 2010 election. The Presidential Committee issued refunds to some contributors upon request and later sent requests via U.S. mail to remaining general election contributors (who had not received refunds) asking them to redesignate their contributions to Senator Dodd's Senate Committee. The Presidential Committee paid the costs associated with sending these redesignation requests with funds received for the Presidential primary election.

Analysis

A candidate may accept contributions for the general election prior to the primary election, or in the case of a Presidential candidate, before the candidate receives his or her party's nomination. 11 CFR 102.9(e)(1). The Commission has concluded that Presidential candidates do not waive their ability to participate in the general election public funding program by soliciting and raising general election funds before securing the party's nomination. See AO 2007-03. A Presidential candidate who accepted general election contributions before becoming the party's nominee may refund general election funds received from contributors, or under certain circumstances, request a redesignation for a different election. 11 CFR 110.1(b)(5) and 110.2.

Commission regulations generally limit the time period in which a committee may obtain a redesignation to 60 days and require that impermissible funds be refunded within 60 days. 110.1(b)(3)(i) and (b)(5). The Commission has previously concluded that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations… or refund the contributions." In this case, Senator Dodd withdrew from the Presidential race on January 3, 2008, which caused the 60-day period for obtaining redesignations and making refunds to run. On February 26, 2008, the Presidential committee filed an advisory opinion request, 54 days after Senator Dodd's withdrawal from the race. The Commission determined that Senator Dodd has six days (the balance of the 60-day period remaining after the advisory opinion request was filed) after the issuance of the advisory opinion to obtain redesignations and make refunds. Normally, the mere filing of an advisory opinion request does not toll any statutory or regulatory deadlines. Some Commissioners believe that the 60-day deadline for obtaining redesignations and making refunds should toll in Senator Dodd's case because he presented a novel legal question regarding two potentially conflicting regulations, as was the case in Advisory Opinion 1992-15. Other Commissioners believe that tolling is warranted here only because on January 1, 2008, and for approximately six months thereafter, a period during which Senator Dodd requested this advisory opinion and it remained pending, the Commission was unable to render any advisory opinions because it lacked a quorum of Commissioners.

Additionally, the Presidential Committee may pay costs associated with refunds and redesignations of contributions received for the general election with funds received for the primary election because such costs would qualify as "winding down costs," which are considered "qualified campaign expenses." 11 CFR 9034.11(a) and 9034.4(a). Winding down costs include costs associated with the termination of a Presidential candidate's efforts to obtain his or her party's nomination, such as the costs of complying with the post-election requirements of the Federal Election Campaign Act and the Matching Funds Act. 11 CFR 9043.11(a).

Date Issued: September 2, 2008; Length: 5 pages.

—*Myles Martin*

AO 2008-7
Use of Campaign Funds for Legal and Media Expenses

David Vitter for U.S. Senate, the principal campaign committee of Senator David Vitter (LA) may use campaign funds to pay for, and reimburse Senator Vitter for, legal services related to a third party criminal proceeding in which he was subpoenaed as a witness.

Background

In March of 2007, Deborah Palfrey was indicted by a federal grand jury on criminal charges, including money laundering and racketeering. Senator Vitter's telephone number appeared in Ms. Palfrey's telephone records. Senator Vitter retained counsel to monitor the criminal proceedings because of the perception that Ms. Palfrey had a "strategy of dragging public figures into her legal proceedings."

In July of 2007, Ms. Palfrey released her telephone records and posted them on the Internet. Senator Vitter issued a public statement concerning the presence of his phone number in Ms. Palfrey's records. Later that month, Citizens for Responsibility and Ethics in Washington (CREW) requested that the Senate Select Committee on Ethics (Senate Ethics Committee) investigate Senator Vitter for possible violation of the Senate Rules of Conduct by allegedly soliciting for prostitution. Senator Vitter retained separate counsel to defend himself against the Senate Ethics committee complaint.

In November of 2007, Ms. Palfrey subpoenaed Senator Vitter to testify at a pre-trial hearing. In March of 2008, Ms. Palfrey subpoenaed Senator Vitter as a trial witness. Counsel hired by the Senator consulted with government attorneys and appeared in court in an attempt to quash both subpoenas. In addition to monitoring the trial, attempting to quash the subpoenas and consulting with counsel assisting Senator Vitter in the matter before the Senate Ethics Committee, counsel also consulted with Senator Vitter and his public relations professional. Counsel billed approximately $85,322 in legal fees for work relating to quashing the subpoenas; $31,341.25 in legal fees for consultations, including with the Senator, the Ethics Counsel and a public relations professional; $75,212.75 in legal fees for monitoring the Palfrey criminal proceeding; and $15,301.50 for miscellaneous expenses such as transportation and photocopying.

Analysis

The Federal Election Campaign Act (the Act) identifies six permissible uses of federal campaign funds including campaign-related expenses; ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder; and any other lawful purpose that is not considered "personal use." 2 U.S.C. §439a(a) and 11 CFR 113.2.

Contributions accepted by the candidate's authorized campaign committee may not be converted to personal use by any person. "Personal use" is any use of campaign funds to fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign of officeholder duties. 2 U.S.C. §439a(b)(2) and 11 CFR 113.1(g).

The Commission has previously recognized that if a candidate can demonstrate that expenses resulted from campaign or official duties, the Commission will not consider the use to be personal. The Commission examines the use of campaign funds for legal fees and expenses on a case by case basis. Senator Vitter asked the Commission to use campaign funds to pay for legal expenses for "(1) monitoring and participating in Ms. Palfrey's trial and quashing the subpoenas issued to him; (2) assisting in the defense of a Senate Ethics Committee complaint; and (3) making informed decisions about how to manage the case and address it publicly."

Applicability of the Use of Funds Provision

The FEC determined that Senator Vitter's principal campaign committee may use campaign funds to pay some, but not all, legal fees and expenses rendered in connection with a legal proceeding against a third party. The Commission concluded that legal fees and expenses incurred in consultation with Senator Vitter's Ethics Counsel and in responding to press inquiries and news stories would not have existed irrespective of the Senator's campaign or duties as a federal officeholder and could be paid with campaign funds. The Commission further concluded that the Committee may pay miscellaneous expenses incurred in connection with assisting Ethics Counsel, and in connection with press relations, as described above, and reimburse Senator Vitter for that part of his personal payment of $70,000 to Subpoena Counsel representing legal fees and expenses that the Commission has determined the Committee could pay with campaign funds. The Committee must maintain appropriate documentation of any disbursements made to pay permissible legal expenses and report the recipient's full name, address and purpose of payment. The Commission could not reach a conclusion regarding the use of campaign funds for quashing subpoenas or monitoring the criminal proceeding.

Date Issued: August 21, 2008;
Length: 7 pages.

— *Michelle L. Ryan*

AO 2008-8 Earmarked Contribution Counts Against Current Spending Limits

An earmarked contribution sent by an individual through a nonconnected political action committee (PAC) is considered "made" when the contributor gives the money to the nonconnected PAC, not when the committee eventually forwards the contribution to the final recipient. Thus, a contribution earmarked through a nonconnected PAC in 2008 will be subject to the 2008 calendar-year contribution limit and count against the contributor's 2007-2008 biennial limit, even if the contribution is not forwarded to the intended recipient until a later election cycle.

Background

On June 25, 2008, Jonathan Zucker made an on-line credit card contribution through ActBlue, a nonconnected PAC. ActBlue solicits and accepts on-line credit card contributions for candidates and party committees and forwards them to the intended recipient via check. Mr. Zucker earmarked his contribution for the 2010 Democratic nominee for the U.S. Senate in Arizona or, in the event there is no such nominee, to the Democratic Senatorial Campaign Committee (DSCC).

Usually, a person who receives a contribution of any amount for an authorized political committee, or a contribution greater than $50 for a political committee that is not an authorized committee, must forward the contribution to the intended recipient no later than 10 days after receipt. 11 CFR 102.8(a) and (b)(1), and 110.6(c)(1)(iii) and (iv).

However, in AO 2006-30, the Commission determined that ActBlue could solicit and receive contributions earmarked for a prospective candidate and delay forwarding those contributions until no later than 10 days after the candidate had registered a campaign committee, rather than within 10 days after ActBlue's receipt of the contribution. The Commission also determined that ActBlue could forward the contribution to a named national party committee in the event the intended candidate did not register with the Commission. See also AO 2003-23.

Analysis

The Federal Election Campaign Act and Commission regulations place limits on the amount that any person can contribute to a national party committee, and this limit is indexed for inflation. For 2008, an individual can give no more than $28,500 to a national party committee. 11 CFR 110.1(c)(1). Individuals are additionally subject to a "biennial limit," which limits the total amount of contributions that any individual may make to all federal candidates, PACs and party committees during a two-year cycle. For the 2008 cycle, the overall biennial limit is $108,200, which is further broken down into separate limits for candidates and other committees. The biennial limit is also indexed for inflation every two years. 11 CFR 110.1(b)(1)(ii). Inflation adjustments beyond 2008 cannot be determined at this time. The date a contribution is "made" determines the election limit it counts against, and a contribution is considered "made" when the contributor relinquishes control over it. 11 CFR 110.1(b)(6). A credit card contribution is "made" when the credit card or number is presented because, at that point, the contributor is strictly obligated to make the payment. AO 1990-14.

In this case, Mr. Zucker's credit card has been charged for the contribution, and he is obligated to pay that amount to the credit card company. Thus, his contribution has been "made." Moreover, under Commission regulations a contribution to a candidate or committee with respect to a particular election, *including an earmarked contribution*, counts against the contribution limits in effect during the election cycle in which the contribution is actually made, regardless of the year in which the particular election is held. 11 CFR 110.5(c)(1). Accordingly, if his contribution is forwarded to a 2010 Senate nominee, it will still count against his 2007-2008 biennial limit. If there is no Democratic Senate nominee and his contribution is forwarded to the DSCC, the contribution will again count against his 2007-2008 biennial limit and against his calendar-year contribution limit to the DSCC for 2008.

The Commission further determined that, because Mr. Zucker may not know until 2010 whether his contribution was forwarded to a candidate or a political committee, the only way to ensure that he does not exceed any possible limit that may apply is to consider his contribution as if it were made to both the 2010 Democratic Senate nominee and the DSCC.

Date Issued: September 12, 2008; Length: 4 pages.

—*Isaac J. Baker*

AO 2008-9 Application of Loan Repayment Provision

A provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) dealing with the repayment of personal loans a candidate makes to his or her campaign committee is not affected by the Supreme Court's finding that the so-called "Millionaires' Amendment" is unconstitutional. Therefore, candidates who loan their campaign committees personal funds can still only be repaid up to $250,000 of the loan amount using contributions raised after the date of the election. 2 U.S.C. §441a(j) and 11 CFR 116.11 and 116.12.

Background

On June 26, 2008, the Supreme Court ruled that sections 319(a) and 319(b) of the BCRA, known as the "Millionaires' Amendment" (2 U.S.C. §441a-1), unconstitutionally burden the First Amendment rights of self-financed candidates for the House of Representatives. *Davis v. Federal Election Commission,* 554 U.S.__, 128 S. Ct. 2759 (2008). Section 304(a) of BCRA imposes analogous limitations on candidates for the Senate. In addition to the Millionaires' Amendment provisions, section 304(a) also includes a provision that limits to $250,000 the amount of a personal candidate loan that can be repaid by the candidate's committee with contributions made after the date of the election. 2 U.S.C. §441a(j); 11 CFR 116.11, 116.12. This loan repayment provision applies equally to all candidates, regardless of whether they or their opponents have triggered the increased campaign contribution limits.

New Jersey Senator Frank Lautenberg loaned his principal campaign committee, Lautenberg for Senate (the Committee), $1.65 million in connection with his June 3, 2008, primary election campaign. The Committee has not yet repaid those loans to Senator Lautenberg. The Committee asked whether the loan repayment provision would apply to Senator Lautenberg and the Committee in light of the Supreme Court's ruling in *Davis v FEC*.

Analysis

The Supreme Court did not address the constitutionality of the loan repayment provision. Under the BCRA, the invalidation of one BCRA provision, such as the Millionaires' Amendment, does not affect the validity of any other provisions. The Commission determined that the loan repayment provision of the BCRA is not inextricably tied to the Millionaires' Amendment and the increased contribution limits.

Therefore, the loan repayment provision applies to Senator Lautenberg and the Committee's proposal to repay his loans.

Date Issued: August, 22, 2008; Length: 3 pages.

— *Isaac J. Baker*

AO 2008-17 PAC May Pay Expenses Incurred by Senator's Co-Author

Expenses incurred by a Senator's co-author while preparing a manuscript of a book the two are writing may be paid for with funds from the Senator's leadership PAC. The Senator's principal campaign committee, however, may not use its funds to reimburse the co-author for the expenses.

Background

For three years, Missouri Senator Christopher "Kit" Bond has worked on a book about terrorist threats from the Far East. In December of 2005, Senator Bond and his co-author signed an agreement concerning liability, delivery of the manuscript, confidentiality responsibilities, how the advance of royalties would be split and other matters. Also in December of 2005, the Senator and co-author signed a contract with a company to publish the book, for which they received an advance of $60,000. The co-author received $43,333 of the advance and Senator Bond received $16,667. The Senator paid $15,000 of his $16,667 to the publishing agent who secured the original contract and paid the remaining amount to the co-author.

The original agreement required repayment of the advance if the publisher declined to publish the book and the authors secured a second publisher. The original publisher *did* decline to publish the book and Senator Bond and his co-author found a second publisher, who also agreed to pay them an advance. That advance will be used to reimburse the original publisher's advance. Senator Bond will not receive any profits from the book.

However, the requestor said no funds from the second advance will remain to fully compensate Senator Bond's co-author for the expenses, time and effort spent in preparing the manuscript for the second publisher. The requestor placed the fair market value of these services at $25,000.

Senator Bond asked the Commission whether Missourians for Kit Bond, the Senator's principal campaign committee (the Committee), or KITPAC, a nonconnected multicandidate committee associated with Senator Bond, could pay the book's co-author $25,000 for the expenses, time and effort spent in preparing the manuscript for the second publisher's approval.

Analysis

Missourians for Kit Bond may not reimburse the co-author for the $25,000, but KITPAC may pay these expenses.

Under the Federal Election Campaign Act (the Act) and Commission regulations, candidates and their committees have wide discretion in making expenditures to influence the candidate's election. 2 U.S.C. §439(a) and 11 CFR 113.2. However, a candidate or candidate committee may not convert contributions to personal use. Personal use occurs when a "contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2). Using this "irrespective test," the Commission concluded that the Committee's proposed payment to the co-author would amount to personal use.

While third parties are limited in what they may pay for on behalf of federal candidates, the "irrespective test" contained in the third party payment provision at 11 CFR 113.1(g)(6) differs slightly from the "irrespective test" contained in the general personal use prohibition at 11 CFR 113.1(g). This provision asks whether the third party would pay the expense even if the candidate was not running for federal office. If the answer is yes, then the payment does not constitute a contribution.

The requestor stated that Senator Bond "seeks to publish the book purely to advance the ideas and philosophies important to his campaign and leadership PAC, and not to benefit himself personally." The requestor also stated that KITPAC's interest in the book would exist even in the absence of the Senator's reelection or his campaign.

Because the book promotes KITPAC's goals and the PAC would pay for the book and the co-author's expenses irrespective of the Senator's campaign, the payment would not constitute a contribution under 11 CFR 113.1(g)(6). The Commission concluded that KITPAC may therefore make the proposed $25,000 payment to the book's co-author.

Date Issued: December 22, 2008; Length: 5 pages.

—Isaac J. Baker

AO 2008-19 Campaign Committee Employee May Serve as Leadership PAC's Treasurer

An employee of a candidate's principal campaign committee may also serve as the treasurer of a leadership PAC sponsored by the same candidate.

Background

Ms. O'Lene Stone is a paid staff member of Texans for Lamar Smith (the Committee), which is the principal campaign committee for Representative Lamar Smith. In her position as the Committee's office manager, she collects mail, supervises volunteers, occasionally acts as a contact person for fundraising firms and performs other day-to-day administrative tasks for the Committee. She is not involved in any fundraising or in preparing or filing any Commission reports for the Committee.

Ms. Stone is also the treasurer of the Longhorn Political Action Committee (Longhorn PAC), a leadership PAC sponsored by Representative Smith. In this position, she signs Longhorn PAC's FEC reports and has final approval of all disbursements. She does not prepare FEC reports for the PAC and does not sign checks or make deposits.

Ms. Stone maintains separation between her two roles. She performs all of her duties for Longhorn PAC on her own time, outside of her paid hours for the Committee. No Longhorn PAC resources or funds are used in the performance of Ms. Stone's Committee duties, and no Committee resources or funds are used in the performance of her Longhorn PAC duties.

Analysis

Neither the Federal Election Campaign Act nor any Commission regulation bars a person from serving as an employee of a principal campaign committee and as the treasurer of a leadership PAC sponsored by that candidate simultaneously. Therefore, Ms. Stone may continue to serve as the treasurer of Longhorn PAC while she is employed by the Committee.

Date Issued: January 16, 2009; Length: 3 pages.

—Isaac J. Baker

AO 2008-22 Senator's Committee May Repay Certain Personal Loans With Campaign Funds

A Senator's authorized committee may use money raised for the 2008 general election to repay loans made by the Senator to the committee (personal loans) of up to $250,000 for the 2008 primary campaign. Also, the Senator's authorized committee may use money raised for the 2008 and 2014 campaigns to repay the Senator's personal loans of any amount for his 2002 campaign.

Background

Lautenberg for Senate (the Committee) is New Jersey Senator Frank Lautenberg's principal campaign committee for the 2002 and 2008 Senate elections.

Between October 6 and 17, 2002, Senator Lautenberg made personal loans totaling $1.51 million to the Committee for the 2002 general election. Of that money, $1.09 million remains as outstanding debt. For the 2008 primary election, Senator Lautenberg also loaned the Committee a total of $1.65 million, of which $250,000 remains as outstanding debt and $1.4 million has been converted to contributions from the Senator himself.

Analysis

The Bipartisan Campaign Reform Act of 2002 (BCRA) limited the extent to which candidates' personal loans to their committees could be repaid after their elections. Under BCRA, a committee may only repay up to $250,000 of a candidate's loan to the campaign using contributions made after the date of the election. 2 U.S.C. §441a(j); 11 CFR 116.11(b)(2).

2008 Primary Election. The $250,000 limit on repayment of loans applies separately to the primary election and the general election. Therefore, the Committee may use general election contributions received after the 2008 primary election to repay the outstanding $250,000 in personal loans made by Senator Lautenberg for the primary election.

2002 Elections. The Committee may use contributions received for the 2008 election, or funds that will be received for the 2014 election, to repay the entire outstanding amount of Senator Lautenberg's personal loan to the Committee for the 2002 election. The $250,000 limit on repayment of personal loans imposed by BCRA does not apply to loans made before the effective date of the legislation, which was November 6, 2002. 2 U.S.C. §441a(j); Pub. L. 107-155, Sec. 402, Mar. 27, 2002. Because Senator Lautenberg made the loans for his 2002 election in October 2002, BCRA does not limit the amount of personal loans for that election that the Committee can repay using contributions received after the 2002 election.

The Commission has previously permitted candidates' authorized committees to use otherwise lawful campaign contributions to repay debts from previous elections. The Commission concluded in AO 1989-22 that Representative David R. Nagle's authorized committee could use contributions made with respect to the 1990 primary campaign to retire debt incurred by his 1988 campaign committee. In that case, the Commission determined the use of contributions "does not require that they be counted against the limits applicable to the previous election unless there are facts and circumstances indicating that the contributions were actually solicited to pay the debts remaining from the previous election, or that contributors gave to the current campaign with knowledge that the funds would be applied only to debt retirement."

Also, in AO 2003-30, the Commission concluded that Senator Peter Fitzgerald's principal campaign committee could use contributions for the 2004 primary election to repay loans made to the committee in connection with the 1998 election, including personal loans from Senator Fitzgerald.

As such, the Committee may use contributions made in connection with Senator Lautenberg's 2008 and 2014 elections to repay debts from the 2002 election, including the Senator's personal loans.

Date Issued: January 30, 2009; Length: 4 pages.

—Isaac J. Baker

AO 2009-02 Independent Expenditures by Single Member LLC

The True Patriot Network, LLC (TPN), a single natural person member limited liability company (LLC), may make independent expenditures subject to the limitations and disclosure requirements that apply to individuals.

Background

TPN is a limited liability company organized under the laws of the State of Washington. Nicolas Hanauer is the sole member and manager of TPN. As TPN's manager, he has the "sole and exclusive right" to manage TPN's affairs.

TPN plans to expand its activities to include communications that influence federal elections. Such communications would endorse and urge support for specific federal candidates and officeholders who share TPN's principles and ideals. In undertaking these activities, TPN states that it will not coordinate with federal candidates or party committees.

Analysis

TPN may make independent expenditures, subject to the limitations and disclosure requirements that apply to individuals. An LLC is treated as a person under the Federal Election Campaign Act (the Act). 2 U.S.C. §431(11). As such, LLCs are subject to the Act's provisions regarding contributions and expenditures made by persons. 2 U.S.C. §§431(8) and (9).

Commission regulations address LLCs in the context of the Act's contribution limitations and prohibitions. The Commission generally treats contributions by LLCs consistent with the tax treatment that the entities elect under the Internal Revenue Code. An LLC that is treated as a partnership under the Internal Revenue Code is subject to the contribution limits that apply to partnerships. Similarly, an LLC that elects to be treated as a corporation by the Internal Revenue Service (IRS) is subject to the Act's rules on corporate activity. 11 CFR 110.1(g)(3).

For federal income tax purposes, a single member LLC cannot elect to be classified as a partnership. It may either choose to be treated as a corporation or to be disregarded as an entity separate from its owner. 26 CFR 301.7701-3(a). Commission regulations provide that contributions by an LLC with only a single natural person member that does not elect to be treated as a corporation for federal income tax purposes "shall be attributable only to that single member." 11 CFR 110.1(g)(4).

Since TPN is a single natural person member LLC that has not elected corporate tax treatment, TPN is subject to the contribution limitations of Mr. Hanauer, its sole member. The Commission has not previously determined whether or not expenditures by a single member LLC, like contributions, are attributable solely to the LLC's single member. Under the circumstances presented here, the Commission concludes that they are.

As a result of the unity between Mr. Hanauer and TPN, any independent expenditures made by TPN shall be treated as if they were made by Mr. Hanauer. However, if circumstances change such that TPN could be construed as a "group of persons," TPN may need to consider whether it may also be a "political committee" under the Act and Commission regulations. 2 U.S.C. §431(4)(A) and 11 CFR 100.5(a).

Date Issued: April 17, 2009; Length: 4 pages.

—Myles Martin

AO 2009-04
Recount and Election Contest Funds

A national party committee may establish a recount fund subject to the Federal Election Campaign Act's (the Act) amount limits, source prohibitions and reporting requirements to pay expenses incurred in connection with recounts and election contests of federal elections.

Background

Al Franken was the Democratic candidate for the U.S. Senate for Minnesota in 2008, facing Republican Senator Norm Coleman. The close outcome of the general election led to a mandatory recount that gave a 225-vote lead to Mr. Franken. In January 2009, Mr. Coleman filed a lawsuit to contest the recount, which has resulted in a protracted legal battle with no final winner yet being determined or seated in the Senate.

The Democratic Senatorial Campaign Committee (DSCC), a national committee of the Democratic Party, wishes to establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, to pay expenses incurred in connection with the 2008 Senatorial recount and election contest in Minnesota. Donations to the proposed separate recount fund would be subject to the limits, prohibitions and reporting requirements of the Act.

In addition, Mr. Franken's principal campaign committee, Al Franken for U.S. Senate (the Committee), established a recount fund to pay for expenses incurred in connection with the recount, and has used the fund for expenses related to the election contest. The Committee wishes to establish a separate election contest fund that would be subject to the Act's limits, prohibitions and reporting requirements, but would have a limit separate from its recount fund on amounts received. This proposed fund would be used to pay expenses incurred only in connection with the election contest.

Analysis

In AO 2006-24, the Commission concluded that "because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act." The advice provided by AO 2006-24 applies to a national party committee as well. Thus, the DSCC may establish a recount fund subject to the Act's amount limits, source prohibitions and reporting requirements to be used for expenses incurred in connection with recounts and election contests of federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. The contribution limits for a national party committee for 2009 ($30,400 per calendar year from an individual and $15,000 per calendar year from a multicandidate political action committee) apply for any recounts and election contests during 2009. Donations to recount funds are not aggregated with contributions from those same individuals for purposes of the calendar-year and aggregate biennial contribution limits of 2 U.S.C. §§441a(a)(1)(B) and (a)(3).

The Commission could not approve a response by the required four affirmative votes with regard to whether Al Franken for U.S. Senate may establish an election contest fund, separate from its existing recount fund, and subject to a separate donation limit.

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