

# Record

July 2007

Federal Election Commission

Volume 33, Number 7

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## Compliance

### Policy Statement on Treasurer's Best Efforts

On May 31, 2007, the Commission approved a Policy Statement clarifying its enforcement policy regarding political committees and treasurers' compliance with the Federal Election Campaign Act's (the Act) recordkeeping and reporting requirements.

The Act provides that a committee's reports and records will be deemed in compliance with campaign finance laws if the treasurer demonstrates that best efforts were used to obtain, maintain and submit the information required under the Act. 2 U.S.C. §432(i). In the past, the Commission has interpreted this provision as applying only to a treasurer's efforts to obtain required information from contributors, and not to maintaining information or submitting reports. 11 CFR 104.7.

However, the U.S. District Court for the District of Massachusetts determined in *Lovely v. FEC* that the Commission should also consider whether a treasurer used best efforts when trying to file a timely report. The Commission's policy statement makes clear that the Commission intends to apply the best efforts provision to obtaining, maintaining and submitting all information and

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## Reports

### July Reporting Reminder

The following reports are due in July:<sup>1</sup>

- All principal campaign committees of House and Senate candidates must file a quarterly report by July 15. The report covers financial activity from April 1 (or the day after the closing date of the last report) through June 30.
- Principal campaign committees of Presidential candidates must file a report by July 15, if they are quarterly filers (the report covers financial activity from April 1 through June 30), or by July 20, if they are monthly filers (the report covers activity for the month of June).
- National party committees, political action committees (PACs) following a monthly filing schedule and state, district and local party

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<sup>1</sup> Note that committees that file special election reports in connection with special elections in Georgia and California may not be required to file their July Quarterly or 2007 Mid-Year Report, as appropriate. For additional information, including filing dates for candidates and committees involved in the Georgia and California special elections, see the May 2007 Record, page 10, and the June 2007 Record, page 7, respectively.

## Reports

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committees that engage in reportable federal election activity must file a monthly report by July 20. This report covers activity for the month of June.

- All other filers must submit a mid-year report by July 31, covering financial activity from January 1 (or the day after the closing date of the last report) through June 30.

Note that July 15 falls on a weekend. Reporting deadlines are not extended for non-working days. Reports sent via first class mail or courier must be received by the Commission before close of business on Friday, July 13.

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

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

**Robert D. Lenhard**, Chairman  
**David M. Mason**, Vice Chairman  
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**Greg J. Scott**, Assistant Staff  
Director

**Amy L. Kort**, Deputy Assistant  
Staff Director

<http://www.fec.gov>

## House and Senate Principal Campaign Committees Must File FEC Form 3Z-1

Principal campaign committees of House and Senate candidates running in 2008 must file FEC Form 3Z-1 as part of their 2007 July Quarterly and Year-End reports. 11 CFR 104.19. The information provided on Form 3Z-1 allows opposing candidates to compute their “gross receipts advantage,” which is used to determine whether a candidate is entitled to increased contribution and coordinated party expenditure limits under the “Millionaires’ Amendment.” 2 U.S.C. §§441a(i) and 441a-1. Form 3Z-1 is included in the FEC Form 3 package, and need only be filed with the July 15 quarterly report and Year-End report for the year preceding the general election for the office the candidate seeks.

## Notification of Filing Deadlines

In addition to publishing this article, the Commission notifies committees of filing deadlines on its web site, via its automated Faxline and through reporting reminders called prior notices. Since January 1, 2007, prior notices have been distributed exclusively by electronic mail. They are no longer sent to committees using U.S. mail. See December 2006 *Record*, page 1. For that reason, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address.

## Treasurer’s Responsibilities

The Commission provides reminders of upcoming filing dates as a courtesy to help committees comply with the filing deadlines set forth in the Act and Commission regulations. Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline.

Please note that filing deadlines are not extended in cases where the filing date falls on a weekend or

federal holiday. Accordingly, reports filed by methods other than Registered, Certified, or Overnight Mail, or electronically filed reports, must be received by the Commission’s (or the Secretary of the Senate’s) close of business on the last business day before the deadline.

## Filing Electronically

Under the Commission’s mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures,<sup>2</sup> in excess of \$50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC electronically. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission’s validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines. Reports filed electronically must be received and validated by 11:59 p.m. Eastern Time on the applicable filing deadline.

The Commission’s electronic filing software, FECFile 5, can be downloaded from the FEC’s web site at <http://www.fec.gov/electfil/electron.shtml>. Filers may also use commercial or privately developed software as long as the software meets the Commission’s format specifications, which are available on the Commission’s web site.

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules.

<sup>2</sup>The regulation covers individuals and organizations required to file reports of contributions and/or expenditures with the Commission, including any person making an independent expenditure. Disbursements for “electioneering communications” do not count toward the \$50,000 threshold for mandatory electronic filing. 11 CFR 104.18(a).

### Timely Filing for Paper Filers

#### *Registered and Certified Mail.*

Reports sent by registered or certified mail must be postmarked on or before the mailing deadline to be considered timely. A committee sending its reports by certified mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. A committee sending its reports by registered mail should keep its proof of mailing.

*Overnight Mail.* Reports filed by Express or Priority Mail with delivery confirmation will be considered timely if they are deposited with the USPS on or before the mailing deadline. Reports filed by an overnight delivery service with an on-line tracking system and scheduled for next day delivery will be timely if they are deposited with the service on or before the mailing deadline. A committee sending its report by either of these methods should keep its proof of mailing or other means of transmittal of its report.

Please note that a Certificate of Mailing from the USPS is not sufficient to prove that a report is timely using Registered, Certified or Overnight Mail.

*Other Means of Filing.* Reports sent by other means—including first class mail and courier—must be received by the FEC (or the Secretary of the Senate for Senate committees and political committees supporting only Senate candidates) before the Commission's (or the Secretary of the Senate's) close of business on the filing deadline. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e). Paper forms are available at the FEC's web site (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413). The 2007 Reporting Schedule is also available on the FEC's web site ([http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml)), and from Faxline. For more informa-

tion on reporting, call the FEC at 800/424-9530 or 202/694-1100.

### Filing Frequency for Party Committees

National committees of political parties must file on a monthly schedule in all years and may no longer choose to change their filing schedule in non-election years. 2 U.S.C. §434(a)(4)(B).

A state, district or local party committee that filed monthly in 2006 due to its federal election activity must notify the Commission in writing if it wishes to file semiannually in 2007. 11 CFR 104.5(b)(2). Electronic filers must file this request electronically. After filing a notice of change in filing frequency with the Commission, all future reports must follow the new filing schedule.

### Political Action Committees

PACs (separate segregated funds and nonconnected committees) may file on either a semiannual or monthly basis in non-election years. A committee may change its filing frequency only once a year. After giving notice of change in filing frequency to the Commission, all future reports must follow the new filing frequency. 11 CFR 104.5(c).

### Additional Information

For more information on 2007 reporting dates:

- See the reporting tables in the January 2007 *Record*;
- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Fax the reporting tables to yourself using the FEC's Faxline (202/501-3413, document 586); or
- Visit the FEC's web page at [http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml) to view the reporting tables online.

—Elizabeth Kurland

### Reporting Update

With monthly, quarterly and semi-annual reports all due this month, July is the perfect time to review some common reporting issues and to provide new information concerning both the method and content of certain filings. The material that follows addresses:

- How electronic filers should file amendments to FEC Form 1, and why all filers should disclose a current e-mail address;
- New filing methods for Senate candidates filing FEC Form 10 with the Secretary of the Senate;
- FEC rules for disclosing a joint fundraising representative; and
- An updated list of "purpose of disbursement" descriptions that will be deemed inadequate by the Commission.

### Filing FEC Form 1

Electronic filers must file all statements and reports, including amendments to statements and reports, electronically. When filing an amendment electronically, the complete version of the report or statement must be submitted, rather than just the portion being amended. 11 CFR 104.18(f). Thus, the FEC will not accept amendments to FEC Form 1 submitted by electronic filers via letter or paper reporting form.<sup>1</sup>

The FEC also reminds all filers to amend FEC Form 1 if a correct e-mail address has not previously been disclosed or if the disclosed address is outdated. Since January 2007, all reporting reminders have been sent via e-mail to the address provided on Form 1, rather than through first-class mail. Only committees with a current e-mail address on Form 1

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<sup>1</sup> Paper filers who amend Form 1 need only include the committee's name, address, identification number and the changed or corrected information.

## Reports

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receive these notices.<sup>2</sup> (See related article on page 13.)

### Fax and Email Filing of Form 10 for Senate Candidates

Under the Millionaires' Amendment, a Senate candidate whose personal spending exceeds certain threshold amounts must file FEC Form 10, "24-Hour Notice of Expenditure from Candidate's Personal Funds." 11 CFR 400.21. Senate candidates must file Form 10 with the Secretary of the Senate's Office of Public Records, and must simultaneously fax or e-mail identical copies to the FEC and all opposing candidates. Now, for ease of filing with the Senate, Senate candidates may file Form 10 with the Senate via fax, at 202/224-1851, or by email, at [FECForm10@sec.senate.gov](mailto:FECForm10@sec.senate.gov).

Senate candidates must still file copies of Form 10 with the FEC by fax at 202/219-0174 or by e-mail at 2022190174@fec.gov, and they must send copies to all opposing candidates via fax or e-mail as well. Candidates can find their opposing candidates' fax numbers and e-mail addresses on the most recent FEC Form 1, "Statement of Organization," filed by each candidate's principal campaign committee.<sup>3</sup>

### Disclosing Joint Fundraising Representatives

Joint fundraising is fundraising conducted jointly by a political committee and one or more other political committees or unregistered organizations. Joint fundraising

<sup>2</sup> Please do not provide more than one e-mail address per committee. Disclosing multiple addresses on a single Form 1 will prevent the committee from receiving FEC messages.

<sup>3</sup> House candidates should consult the instructions for Form 10 for reporting requirements and where to file.

participants must either establish a new political committee or, in some cases, may select a participating political committee to act as the fundraising representative responsible for collecting and depositing contributions, paying expenses, allocating proceeds and expenses to each participant, keeping records and reporting overall joint fundraising activity. See 11 CFR 102.17(a)(1)(i), (b)(1) and (b)(2).

If a federal candidate participates in a joint fundraiser, then the participating committees must establish a new political committee to act as the joint fundraising representative and may not designate one of the participating committees to act as the representative. The new political committee established for the joint fundraiser must register with the FEC using FEC Form 1, Statement of Organization, and must include the name of each participating federal candidate in the new committee's name. 11 CFR 102.14. Thus, for example, a joint fundraising committee established to raise funds for a candidate and a party could not be called "Victory '08," but might be called the "John Doe Victory '08" committee.

Each participant in the joint fundraiser (other than the joint fundraising representative) must amend its FEC Form 1, Statement of Organization, to provide the name and address of the joint fundraising representative—identified as the "JFR"—and to state the name and address of the depository institution holding the joint fundraising account, if that account is different from the depository named on its current FEC Form 1. In addition, each federal candidate participating in the fundraiser must designate the fundraising representative as an authorized candidate committee on FEC Form 2, Statement of Candidacy. 11 CFR 102.17(a)(1)(i), (b)(1) and (b)(2). See also *Campaign Guide for Congressional Candidates and Committees*, Appendix C.

## Enforcement Query System Available on FEC Web Site

The FEC continues to update and expand its Enforcement Query System (EQS), a web-based search tool that allows users to find and examine public documents regarding closed Commission enforcement matters. Using current scanning, optical character recognition and text search technologies, the system permits intuitive and flexible searches of case documents and other materials.

Users of the system can search for specific words or phrases from the text of all public case documents. They can also identify single matters under review (MURs) or groups of cases by searching additional identifying information about cases prepared as part of the Case Management System. Included among these criteria are case names and numbers, complainants and respondents, timeframes, dispositions, legal issues and penalty amounts. The Enforcement Query System may be accessed on the Commission's web site at [www.fec.gov](http://www.fec.gov).

Currently, the EQS contains complete public case files for all MURs closed since January 1, 1999. In addition to adding all cases closed subsequently, staff is working to add cases closed prior to 1999. Within the past year, Alternative Dispute Resolution (ADR) cases were added to the system. All cases closed since the ADR program's October 2000 inception can be accessed through the system.

## Updated Purposes of Disbursement Descriptions

When a committee reports a disbursement on Schedule B of Form 3, Form 3X or Form 3P, it must identify the purpose of the disbursement. See 11 CFR 104.3(b)(3) and (4). Commission regulations require that the purpose of disbursement entry for each disbursement be sufficiently specific, when considered within the context of the identity of the recipient, to provide a clear reason for the payment.

In December 2006, the Commission published a Policy Statement designed to improve purpose of disbursement descriptions. See the February 2007 *Record*, page 5. The policy statement included non-exhaustive lists of acceptable and unacceptable descriptions of disbursements. The lists are intended to provide additional guidance to the regulated community and to foster consistency among filers.

The Commission recently approved an updated list of inadequate

“purposes of disbursement.” The updated list, still a non-exhaustive list, is available on the Commission’s web site at [http://www.fec.gov/law/policy/purposeofdisbursement/inadequate\\_purpose\\_list\\_3507.pdf](http://www.fec.gov/law/policy/purposeofdisbursement/inadequate_purpose_list_3507.pdf).

—Meredith Metzler

## Compliance

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records to the Commission, consistent with the court’s decision in *Lovely v. FEC*.

## Background

In previous enforcement actions, the Commission has interpreted the “best efforts” defense as limited to a treasurer’s attempts to obtain, maintain and disclose the name, address, occupation and employer of donors who contribute more than \$200 per year. 11 CFR 104.7(b). This interpretation grew out of an example contained in the provision’s legislative history that explained how the test would be applied to a committee’s attempts to report a contributor’s occupation and name of employer.

*Lovely v. FEC* involved a political committee’s challenge to an administrative fine the Commission assessed for late filing. The committee argued that it had made “best efforts” to file the report on time and that this constituted a valid and complete defense against the fine. The court concluded that the statutory language at 2 U.S.C. §432(i) requires the Commission to entertain a “best efforts” defense in the administrative fines context.<sup>1</sup> In reaching this decision, the court drew on other aspects of the provision’s legislative history, and specifically noted the

1979 amendments to the Act that made the best efforts defense applicable to the entire statute.

## Policy Statement

Although the court decision in *Lovely v. FEC* only concerned permissible defenses within the Administrative Fine Program, the Commission has decided to adopt the court’s interpretation of the best efforts defense with regard to other enforcement matters. Thus, this Policy Statement notifies the public and the regulated community that the Commission will now apply the best efforts defense to efforts made to obtain and maintain all information required by the Act and to submit the required information in disclosure reports. 2 U.S.C. §432(i) and 11 CFR 104.7.<sup>2</sup> The best efforts defense is an affirmative defense, and the burden rests with the political committee and its treasurer to present evidence sufficient to demonstrate that best efforts were made. The Commission does not intend to consider the best efforts defense unless a respondent asserts the facts that form the basis of that defense.

Under the new policy, the Commission will generally conclude that, when a committee fails to obtain, maintain or submit information or reports, it can show “best efforts” if it establishes that:

- At the time of its failure, the committee took relevant precautions, such as double checking recordkeeping entries, regular reconciliation of committee records with bank statements and regular

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## Federal Register

Federal Register notices are available from the FEC’s Public Records Office, on the web site at [www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml) and from the FEC Faxline, 202/501-3413.

### Notice 2007-13

Statement of Policy Regarding Treasurers’ Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act, Statement of Policy (72 FR 31438, June 7, 2007)

### Notice 2007-14

Federal Election Activity and Non-Federal Elections, Notice of Proposed Rulemaking (72 FR 31473, June 7, 2007)

<sup>1</sup> The court remanded the case to the Commission for further proceedings. On remand, the Commission determined that the committee had failed to show best efforts, and left the administrative fine in place. See the May 2004 *Record*, page 4.

<sup>2</sup> The Policy Statement applies only to matters in the FEC’s traditional enforcement, audit and Alternative Dispute Resolution programs and does not affect the Administrative Fine Program. The Commission recently amended its administrative fines regulations to address the *Lovely* court’s decision. See the May 2007 *Record*, page 1.

## Compliance

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- backup of all electronic files;
- The committee trained staff responsible for obtaining, maintaining and submitting campaign finance information in the Act's requirements and in the committee's procedures and recordkeeping and filing systems;
- The failure was a result of reasonably unforeseen circumstances beyond the committee's control, such as the failure of FEC computers or FEC-provided software, severe weather or other disaster-related incidents, a widespread Internet disruption that was not caused by any failure of the committee's computer systems or Internet service provider or delivery failures caused by mail/courier services, such as

### 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.

the U.S. Postal Service or Federal Express; and

- Upon discovering the failure, the committee promptly took all reasonable additional steps to expeditiously file any unfiled reports and correct any inaccurate reports.

In contrast, the Commission will generally conclude that a committee has not met the best efforts standard if the committee's failure to obtain, maintain or submit information or reports is due to:

- Unavailability, inexperience, illness, negligence or error of the committee's staff, agents, counsel or connected organization;
- The failure of the committee's computer system;
- Delays caused by the committee's vendors or contractors;
- Failure to know or understand the Act's requirements; or
- Failure to use filing software properly.

The Policy Statement took effect on June 7, 2007, and was published in the June 7, 2007, *Federal Register* (72 FR 31438). The complete text is available on the FEC web site at [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-13.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-13.pdf).

—Amy Kort

## Regulations

### Notice of Proposed Rulemaking on FEA and Nonfederal Elections

On May 31, 2007, the Commission approved a Notice of Proposed Rulemaking (NPRM) requesting comments on a proposal to exclude from the definition of federal election activity (FEA) certain voter identification and get-out-the vote activities that are conducted exclusively for nonfederal elections. The proposed rule would make permanent, with certain minor revisions, an Interim Final Rule published in

March 2006. The interim rule will expire on September 1, 2007.

### Background

The Bipartisan Campaign Reform Act of 2002 (BCRA) requires state, district and local party committees to pay for certain activities—FEA—entirely with federal funds, or with a combination of federal and Levin funds. The FEA requirements apply to all state, district and local party committees, regardless of whether they are registered with the FEC. Voter identification, get-out-the-vote activity (GOTV activity) and generic campaign activity (collectively, “Type II FEA”) constitute FEA only when they are conducted “in connection with an election in which a candidate for Federal office appears on the ballot.” Under Commission regulations, such activities are considered to be in connection with an election in which a federal candidate appears on the ballot when they are undertaken during the period of time beginning on the earliest filing deadline for primary ballot access in each particular state and ending on the date of the general election, up to and including any runoff date. 2 U.S.C. §431(20)(A)(ii) and 11 CFR 100.24(a)(1)(i). For states that do not hold primaries, the period begins on January 1 of each even-numbered year, and for special elections the period begins on the date the special election is set and ends on the date of the election. 11 CFR 100.24(a)(1)(ii).

### Proposed Rule

Because Type II FEA is limited to activities in connection with an election in which a federal candidate is on the ballot, the Commission does not interpret the FEA restrictions as applying to voter identification and GOTV activities that are exclusively in connection with nonfederal elections. Thus, the Commission published an Interim Final Rule last year to exempt from the definition of FEA certain voter identification and GOTV activities and communica-

tions conducted exclusively in connection with a nonfederal election held on a date separate from the date of any federal election.

The rule proposed in the NPRM would make the Interim Final rule's exemption permanent with some minor changes. The proposed rule exempts voter identification or GOTV activity that is:

- Solely in connection with a nonfederal election held on a date separate from any federal election; and
- Involves a communication that refers *exclusively* to nonfederal candidates (who are not also federal candidates) participating in the nonfederal election, ballot referenda or initiatives included in the nonfederal election, or the date, hours or polling locations of the nonfederal election.

The Commission seeks public comment on whether nonfederal candidates and state, district or local party committees conducted voter identification and GOTV activities under the Interim Rule's exemption and invites commenters to suggest modifications of the proposed rule based on their experience, if any, with the Interim Final Rule.

The Commission also specifically seeks comments on the exemption's two requirements. With regard to requirement that the nonfederal election be held on a wholly separate date from any federal election, the Commission seeks comments, especially in the form of empirical data, on whether voter identification and GOTV activities in connection with a nonfederal election have a measurable effect on voter turnout in a subsequent federal election, or otherwise benefit federal candidates. Should the exemption take into account the proximity of the next federal election? Are there conditions under which an activity in connection with a nonfederal election held on the same date as a federal election should also be exempted

from the Type II FEA periods? With respect to the second requirement, the Commission seeks comments on whether these requirements are described clearly in the proposed rule and whether the list of permissible subjects should be narrowed or expanded.

The proposed rule does not exempt generic campaign activity. The Commission notes that some generic campaign activity could be presumed to be in connection with both federal and nonfederal elections and asks whether and how it should include generic campaign activity in the final rule. The Commission also seeks comments on its approach to the treatment of voter lists under these exemptions. While voter identification is included in the proposed rule, the initial purchase or acquisition of voter lists generally would not meet the proposed exemption's requirements. The Commission seeks comments on this approach.

Finally, the NPRM notes that even under the proposed rule, the use of nonfederal funds would be limited for activities that fall within this exemption, but also qualify as allocable voter drive activity. The Commission additionally seeks comments on this application of the allocation rules.

### Comments

The full text of the NPRM was published in the June 7, 2007, *Federal Register* and is available on the FEC web site at [http://www.fec.gov/pdf/nprm/fea\\_definition/2007/notice\\_2007-14.pdf](http://www.fec.gov/pdf/nprm/fea_definition/2007/notice_2007-14.pdf). Comments on this proposal must be received on or before July 9. Comments must be submitted in writing via email, fax or paper copy form and addressed to Mr. Ron Katwan, Assistant General Counsel. Commenters are strongly encouraged to submit comments by email or fax to ensure timely receipt and consideration. Email comments should be sent to [fea\\_nonfederal@fec.gov](mailto:fea_nonfederal@fec.gov). Faxed comments should be sent to 202-219-3923, with a paper copy follow-up.

Paper copy comments should be sent to the Federal Election Commission, 999 E St. NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter. The Commission will post comments on its web site after the comment period ends.

—Amy Kort

## Advisory Opinions

### AO 2007-4

### Credit Card Processing Services Provided to Political Committees

Atlatl, Inc., may offer its Simply Easier Payments credit card processing services to political committees without making impermissible corporate contributions because it would be acting as a commercial vendor in providing these services in the ordinary course of business and at the usual and normal charge. Any processing fees paid by contributors would constitute contributions to the respective political committees and must comply with the limits of the Federal Election Campaign Act (the Act).

### Background

Atlatl, Inc. and Simply Easier Payments (collectively "the Corporation") is a corporation that sells processing services for online credit card transactions, but is not itself a financial service provider or a credit card company. The Corporation plans to offer its services to political committees to process online credit card contributions. Under its plan, participating political committees' web sites would contain links to the Corporation's web site, where individuals could contribute online. A page on the Corporation's site would show the amount that the individual intended to contribute to

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## Advisory Opinions

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the political committee, along with a separate “convenience fee” to be paid by the individual to the Corporation. The individual would have to agree to pay the “convenience fee” to make the contribution. This fee would cover the costs of the financial institutions involved in the credit card transaction and provide a profit to the Corporation. The contributor would also be required to provide information that must be reported by political committees and to attest to various facts to show compliance with the limits and prohibitions of the Act.

### Corporate Contributions

The Act and Commission regulations prohibit corporations from making contributions in connection with a federal election. 2 U.S.C. §441b(a) and 11 CFR 114.2(b)(1). A contribution includes, among other things, providing goods or services without charge or at less than the usual and normal charge.<sup>1</sup> 11 CFR 100.52(d)(1) and (2). Commission regulations permit a commercial vendor to provide goods or services to political committees in the ordinary course of business and at the usual and normal charge. 11 CFR 114.2(f)(1). A “commercial vendor” is any person “providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.” 11 CFR 116.1(c).

In past advisory opinions, the Commission determined that corporations could collect and forward

online contributions to candidates as commercial vendors. See AOs 2004-19 and 2002-7. The Commission determined that these corporations qualified as “commercial vendors” because:

- Their services were rendered in the ordinary course of business for the usual and normal charge;
- They forwarded earmarked contributions to candidates through separate merchant accounts; and
- Their web sites incorporated adequate screening procedures to ensure that they were not forwarding illegal contributions.

In this case, the Corporation will also be acting permissibly as a commercial vendor. First, the agreements between the Corporation and the political committees would be commercially reasonable because the Corporation would be acting in the ordinary course of its business by providing secure credit card processing services. The “convenience fee” would constitute the usual and normal charge because it would compensate the Corporation for its costs and provide a reasonable profit. Second, the funds intended for the political committees would transfer from the issuing bank to an account held by the card processor for the sole purpose of holding funds intended for political contributions. The funds would then transfer from the card processor account to the designated political committees. Thus, funds received by the political committees would be from individual contributors and not the Corporation’s funds. Finally, the Corporation’s planned screening and verification procedures for online payments meet the standards approved in previous advisory opinions. Thus, the Corporation’s plan to process online credit card contributions for political committees would not result in impermissible corporate contributions by the Corporation.

### Processing Fees

Typically, a financial service provider that processes credit card contributions for a political committee deducts the processing fees from the amount of the contribution authorized by the contributor and thus transmits to the committee an amount smaller than the one authorized by the contributor. In past advisory opinions, the Commission has determined that, for purposes of the Act’s limits and reporting requirements, the contribution includes the entire amount authorized by the contributor, including any processing fees deducted by the financial service provider. AOs 1999-8, 1995-34, 1995-9, 1994-33 and 1991-1.

Here, the Corporation proposes processing contributions made to political committees for a “convenience fee,” which will be negotiated between the Corporation and the political committees. The “convenience fee” will cover the costs that a political committee, like any other organization that accept credit card payments, would have to pay for processing services. However, instead of deducting the processing fees from the amount of the contribution, the Corporation would transmit to the political committee the entire amount authorized by the contributor and have the contributor pay the processing fees directly to the Corporation in a separate transaction.

For the purposes of the Act, there is no distinction between a contributor paying processing fees as a portion of the contribution amount and paying such fees in a separate transaction. Both are contributions because contributors assume a cost that would otherwise be paid by the political committee, thereby providing something of value to the

<sup>1</sup> In addition to this general prohibition on corporate contributions, corporations are prohibited from facilitating the making of contributions to candidates or political committees. Facilitation means using corporate resources to engage in fundraising activities in connection with any federal election. 11 CFR 114.2(f)(1).



committee.<sup>2</sup> Thus, these fees would be contributions under the Act and subject to the contributor's limits.<sup>3</sup>

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Length: 6 pages.

—Amy Kort

<sup>2</sup> *The situation presented here differs materially from that in AO 2006-8, where the corporation planned to provide services to contributors that went well beyond the mere processing of contributions. These services were to be provided at the request and for the benefit of the contributors, not of the recipient political committees. By paying for these services, the contributors would not, as they would here, relieve the recipient political committees of a financial burden they would otherwise have had to pay.*

<sup>3</sup> *The Commission further determined that recipient political committees would have to report contributors' payments of "convenience fees" as operating expenditures. AOs 1999-8, 1995-34 and 1991-1.*

## FEC Accepts Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Visa and MasterCard. While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment.

Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since prepayment is required, using a credit card or funds placed on deposit can speed the process and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 or 202/694-1120.

## AO 2007-07 Candidate's Loans Initially Misreported as Contributions

James W. Craig's campaign committee, Craig for U.S. Congress, may amend its disclosure reports to disclose as loans funds that it received from Mr. Craig and erroneously reported as contributions. The committee may then accept contributions to repay these loans. An affidavit from Mr. Craig and a statement from the campaign's bookkeeper indicate that Mr. Craig intended the funds to be treated as loans.

### Background

As a House candidate in the 2006 primary elections, Mr. Craig provided personal funds to his campaign committee totaling \$37,000, and the committee reported these funds as contributions. However, Mr. Craig has submitted an affidavit and a statement from his committee's bookkeeper indicating that he intended for the funds to be treated as loans to the campaign, rather than as contributions. He additionally submitted a statement from the committee's outside compliance consultant, who was in charge of preparing and filing the committee's reports, indicating that the bookkeeper was unaware of the candidate's intent to treat the funds as loans.

### Legal Analysis

Under the Federal Election Campaign Act (the Act), a campaign committee cannot convert campaign funds to personal use by any person. "Personal use" occurs when a contribution is used to pay an expense that would exist irrespective of the candidate's election campaign, or the individual's duties as an officeholder. 2 U.S.C. §§439a(b)(1) and (b)(2). Campaign funds may be used to repay a loan from a candidate, the proceeds of which were used in connection with his or her campaign, because the repayment is an authorized campaign expenditure. 2

U.S.C. §439a(a)(1) and AO 2003-30. A campaign committee may only repay up to \$250,000 in candidate loans with proceeds from contributions received after the date of the election in which the candidate was running. 2 U.S.C. §441a(j) and 11 CFR 104.11(a).

When determining the nature of a transaction between a candidate and a campaign committee, the Commission has in past advisory opinions considered not only how the transaction was reported, but also affidavits showing the intent of the parties involved. See AOs 2006-37 and 1997-21. In this case, Mr. Craig's affidavit and the statement of the committee's bookkeeper indicate that the candidate and his committee intended for the funds he provided to be considered loans. The statement of the committee's outside compliance consultant presents no contrary information. Thus, the Commission concluded that the funds Mr. Craig provided were loans to his committee that were mistakenly reported as contributions.

Because the funds were initially misreported, Craig for U.S. Congress must, within 30 days, amend all relevant reports to reflect the debts owed to the candidate. Furthermore, the committee must continue to report the obligations until they are repaid or, if appropriate, report the candidate's forgiveness of the loans.

In addition, the committee may now accept contributions for the 2006 primary election to repay the candidate's loans. 2 U.S.C. §441a(j) and 11 CFR 110.1(b)(3)(iii) and 116.12(a). Contributions attributed to the 2006 primary may only be raised to retire debts for this election. Contributions from individuals must be aggregated with any previous contributions for this election and are subject to the contribution limits in effect for the 2006 election cycle.

Date Issued: June 1, 2007;  
Length: 4 pages.

—Amy Kort

## Statistics

### Parties Have Raised Over \$120 Million This Year

During the first four months of 2007, national Republican party committees raised \$61.2 million, while their Democratic counterparts raised \$59.4 million. When compared to the same period in 2005, these fundraising totals represent a 25 percent decline in receipts for Republicans and a 26 percent increase for Democrats. When compared to the same period in 2003—the last Presidential cycle—Republicans show a 21 percent decrease in federal receipts, while the Democrats show a 126 percent increase.

The largest growth in fundraising came from the Democratic Congressional Campaign Committee (DCCC), which raised 45 percent more than it did during the same period in 2005. Fundraising for the Democratic Senatorial Campaign Committee grew by 38 percent, while receipts of the Democratic

National Committee declined by 6 percent compared with the first four months of 2005. Each of the individual Republican committee—the Republican National Committee, the National Republican Senatorial Committee and the National Republican Congressional Committee (NRCC)—experienced fundraising declines, ranging from 23 percent for the Congressional Committee to 26 percent for the National Committee and 33 percent for the Senatorial Committee. The charts below show the Democratic and Republican national committees' fundraising totals over this period for the last three election cycles.

Contributions from individuals constituted the bulk of the receipts for both parties. Democrats reported \$46.7 million from individuals and \$7.1 million from PACs. Republicans reported \$50.3 million from individuals and \$8.8 million from PACs. At the end of April, Democrats had \$27.5 million cash on hand and debts of \$13.7 million, while Republicans had cash on hand of

\$19.3 million and debts of \$7.3 million.

Additional information, including summary data for the financial activities of the RNC and DNC for the first four months of 2007 and for the same period in the previous two election cycles, is available in a press release dated May 22, 2007. Visit the FEC web site at <http://www.fec.gov/press/press2007/20070522party/20070522party.shtml>.

—Amy Kort

## Audit

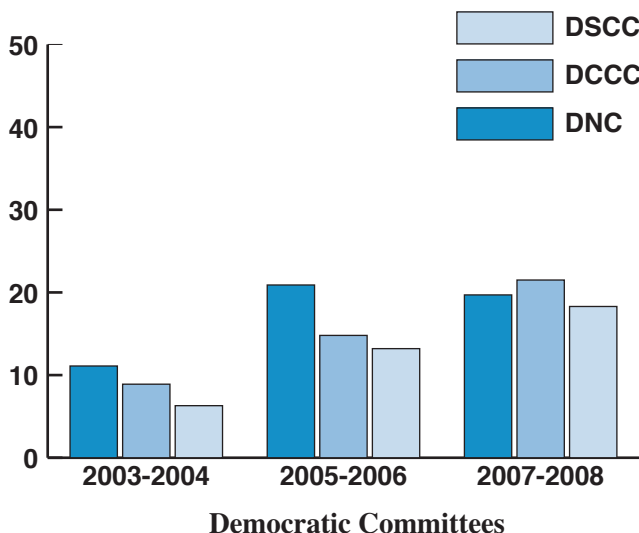
### Kerry-Edwards Audit

On May 31, 2007, the Commission approved the final audit reports of Kerry-Edwards 2004, Inc. (General Committee) and Kerry-Edwards 2004, Inc. General Election Legal and Accounting Compliance Fund (Compliance Committee).

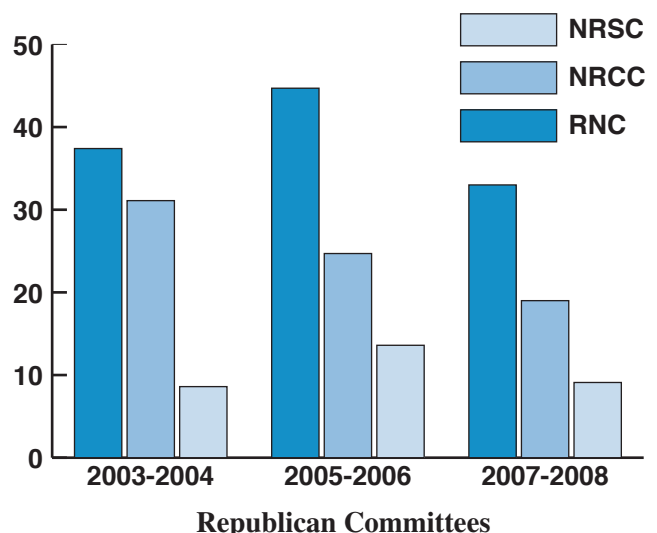
The Federal Election Campaign Act (the Act) requires the Commis-

### National Party Committee Financial Activity, January 1—April 30 of Non-election Year

Millions of Dollars



Millions of Dollars



sion to audit political committees that receive public funding in order to ensure that those funds were spent in accordance with Commission rules and that accurate reports were filed by those committees. If a committee received funds in excess of its entitlement, incurred non-qualified campaign expenses, had surplus funds or committed an apparent violation of the law, the committee must repay public funds to the U.S. Treasury, as determined by the Commission.

Kerry-Edwards 2004, Inc. was the principal campaign committee of Senator John Kerry, the Democratic Party's nominee for the office of President in 2004. The Kerry-Edwards 2004 Inc. General Election Legal and Compliance Fund was established to accept contributions solely for legal and accounting services to ensure compliance with federal campaign finance laws.

#### **Kerry-Edwards 2004 General Committee**

The General Committee's audit included five findings and recommendations, three of which resulted in payments owed to the U.S. Treasury totaling \$1,293,158. The audit found that the committee:

- Invested public funds and used the interest earned on those investments for media expenses;
- Incurred expenditures in excess of the limitations specified by the Act and Commission regulations; and
- Has outstanding stale-dated checks.

*Interest Earned.* Commission regulations permit investment of public funds, provided that an amount equal to all income earned from those investments be paid to the U.S. Treasury. 11 CFR 9004.5. The General Committee's media vendor invested public funds on the committee's behalf and earned interest on those investments totaling \$41,277. The Committee must therefore make a repayment to the U.S. Treasury for that amount.

#### *Expenditure Limits Exceeded.*

The expenditure limit for publicly funded Presidential candidates in 2004 was \$74,620,000. 2 U.S.C. §§441a(b)(1)(B) and (c). The Commission's review of financial activity of the General Committee indicated that the Committee exceeded these expenditure limits and the Commission determined that \$1,202,547 is repayable to the U.S. Treasury.

*Stale-Dated Checks.* The Commission identified 104 stale-dated checks from the General Committee totaling \$50,334. Stale-dated checks are checks that were disbursed by the Committee that the payees (either creditors or contributors) have not cashed. The Commission therefore determined that the Committee must make a repayment of this amount to the U.S. Treasury, in accordance with Commission regulations. 11 CFR 9007.6.

#### **Kerry-Edwards 2004 Inc. Compliance Fund**

The Compliance Fund audit report contained two findings, both of which resulted in payments owed to the U.S. Treasury. The audit report concluded that the committee:

- Received impermissible contributions; and
- Had outstanding stale-dated checks.

*Receipt of Impermissible Contributions.* The Commission determined that the Compliance Fund had failed to provide evidence that 160 excessive contributions totaling \$177,556 received by Senator Kerry's Primary Committee had been properly redesignated to the Compliance Fund. The Compliance Fund provided documentation that \$167,006 had been properly redesignated. The Compliance Fund could not locate the remaining excessive contributors, and the Commission determined that the remaining \$10,550 is repayable to the U.S. Treasury.

*Stale-Dated Checks.* The Commission identified 14 stale-dated

checks of the Compliance Fund totaling \$14,800. The Compliance Fund agreed to repay the U.S. Treasury any checks that had not been voided. The Commission recommended that all \$14,800 be repaid.

#### **Additional Issues**

*Hybrid Ads.* The audit considered the treatment of several "hybrid ads" run by the General Committee. These ads referred to Senator Kerry and contained a generic reference to Democrats, or they referred to President Bush and contained a generic reference to Republicans. The General Committee paid 50 percent of the cost of these ads while the Democratic National Committee (DNC) paid the remaining 50 percent. The Commission considered

(continued on page 12)

### **Commission Calendar Always Up-to-Date**

Between issues of the *Record*, you can stay up-to-date on the latest FEC activity by visiting the Commission Calendar on our web site at [http://www.fec.gov/Fec\\_calendar/maincal.cfm](http://www.fec.gov/Fec_calendar/maincal.cfm). The Calendar lists Commission meetings, reporting deadlines, conferences and outreach events, advisory opinion and rulemaking comment periods and other useful information. Each calendar entry links directly to the relevant documents, so you can quickly access detailed information on the subjects that interest you.

While you're visiting [www.fec.gov](http://www.fec.gov), be sure to explore the rest of our site to review the latest campaign finance reports and data, research enforcement actions and litigation, read press releases and get help complying with the law. Visit today and add our site to your favorites.

## Audit

(continued from page 11)

whether a 50 percent allocation was permissible or consistent with Commission regulations.

No determination was made during the audit on whether or not this allocation was appropriate, but the Commission approved a Notice of Proposed Rulemaking (NPRM) regarding hybrid ads during its open meeting of April 19, 2007. The Commission will consider this rulemaking at a public hearing on July 11, 2007. A copy of the NPRM may be found on the FEC's web site at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml). See the June 2007 *Record*, page 1.

### Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1996 are available on the FEC web site as PDF files. Visit the FEC web site at <http://www.fec.gov/pages/record.shtml> to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1996. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

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

#### *Sale of an E-mail Address List.*

The General Committee sold a database of e-mail addresses to Friends of John Kerry, Inc., Senator Kerry's authorized committee for his 2008 Senate re-election campaign, for approximately \$2 million. The Commission considered but did not make a determination on whether the General Committee received income or a contribution from this sale.

*Non-Qualified Campaign Expense for Candidate Biographical Film.* The General Committee, the Democratic National Campaign Committee (DNCC) and the Democratic National Committee (DNC) spent approximately \$207,000 on a biographical film of Senator Kerry. The cost was split between the three committees at 29 percent to the DNC, 29 percent to the General Committee and 42 percent to the DNCC. The Commission concluded that the cost of the film had been reasonably allocated. As such, the film was not considered a non-qualified campaign expense as defined at 11 CFR 9002.11(a).

Copies of the audit reports are available on the FEC's web site at [http://www.fec.gov/audits/audit\\_reports\\_pres.shtml](http://www.fec.gov/audits/audit_reports_pres.shtml).

—Myles Martin

## Court Cases

### FEC v. Reform Party of USA

On March 5, 2007, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit affirmed the district court decision requiring the Reform Party of the United States (the Reform Party) to repay \$333,558 in public funds to the U.S. Treasury. The court also ruled that all challenges to FEC repayment determinations must occur in the U.S. Court of Appeals for the District of Columbia. The repayment stems from an FEC audit of the Reform Party's 2000 Presidential nominating convention committee where the Commission found that

the Reform Party impermissibly spent a portion of its public funding on non-convention related expenditures.

### Background

The Reform Party received \$2,522,690.00 in public funds for its 2000 Presidential nominating convention. Based on the results of a mandatory post-convention audit, the Commission determined that the Reform Party must repay \$333,558 to the U.S. Treasury as a result of impermissible expenditures. See 26 U.S.C. § 9008(c) and 11 CFR 9008.7(a). The Reform Party repeatedly asked both the Commission and the courts to review its repayment obligation, but most of its requests were not filed within statutory and regulatory deadlines, and all were denied. The Commission filed suit in the Northern District of Florida to enforce the repayment obligation.

On November 22, 2005, the district court held that because the U.S. Court of Appeals for the District of Columbia is the only venue in which repayment determinations made by the Commission may be challenged, the Reform Party could not raise defenses that it failed to properly bring to the DC Circuit. The court granted the FEC's motion for summary judgment and ordered the Reform Party to repay the total plus interest calculated in accordance with 11 CFR 9007.2(d)(3). The court also enjoined the Reform Party from diverting any of its assets to any other expenditures, other than payment of federal taxes, until it completes its repayment obligation.

### Appeals Court Decision

The defendant appealed the district court decision, arguing that summary judgment was improperly granted because:

- The district court erroneously found it did not have jurisdiction to hear the Reform Party's defenses

and claims against the Commission;

- The Reform Party was denied discovery; and
- The injunction violates the Reform Party's first amendment right to free speech.

On March 1, 2007, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit affirmed the district court's decision. The appeals court agreed that the district court lacked jurisdiction to review the repayment obligation because the Act clearly designates the DC Circuit as the forum for judicial review of any certification, determination or other action by the Commission. The appeals court also found no procedural irregularity in the grant of summary judgment because the Reform Party failed to demonstrate how discovery would have assisted it in rebutting the Commission's showing that there were no genuine issues of fact concerning the final and conclusive repayment determination. Finally, the appeals court did not consider whether the injunction violates the first amendment because the argument was raised for the first time on appeal.

District Court docket No. 04-00079-CV-MP-AK

—Amy Pike

### Need FEC Material in a Hurry?

Use FEC Faxline to obtain FEC material fast. It operates 24 hours a day, 7 days a week. Hundreds of FEC documents—reporting forms, brochures, FEC regulations—can be faxed almost immediately.

Use a touch tone phone to dial 202/501-3413 and follow the instructions. To order a complete menu of Faxline documents, enter document number 411 at the prompt.

## Information

### Reporting Notices Enter the Electronic Age

The FEC has begun to send all courtesy materials to committees exclusively by electronic mail. Reporting reminders and mailings concerning changes in the law are no longer being sent by U.S. mail. As a result, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address.

Most committees registered with the FEC are already required to disclose an e-mail address on Form 1. Under 11 CFR 102.2(a)(1)(vii) and (viii), all mandatory electronic filers and the principal campaign committees of House and Senate candidates must provide an e-mail address.

The Commission's decision to switch from paper to electronic mail will obviously improve the timeliness of its communications with committees, but that is only one of the advantages. E-mail will also offer opportunities for new types of communications and will simplify the process of providing information tailored specifically to each committee's needs, all while saving tax dollars.

The Commission recognizes that disclosing a personal e-mail address on a public document may raise privacy concerns. For that reason, committees may wish to create a separate e-mail account intended solely for this purpose. As the agency begins to communicate with committees electronically, keeping that e-mail address current on the committee's Statement of Organization will be essential.

To disclose a new e-mail address, electronic filers must submit a complete electronic Form 1. Paper filers need only complete the committee identification section of the Form 1 and those portions that disclose

a change. Copies of the Statement of Organization form are available from the Commission or on its web site at <http://www.fec.gov/info/forms.shtml>.

—Meredith Metzler

## Publication

### FEC Annual Report 2006 Available Online

The Commission's *Annual Report 2006* is now available online at <http://www.fec.gov/pages/anreport.shtml>. The report details the Commission's efforts in the last calendar year to enforce and defend the campaign finance law, monitor and disclose campaign finance activity and encourage voluntary compliance with the law through policy guidance and educational outreach programs.

Printed copies of the report will also be available in the coming months—the availability of printed reports will be announced in a future issue of the *Record*.

—Amy Kort

## Outreach

### State Outreach to Atlanta

Throughout the summer, Public Affairs Specialists from the Commission's Information Division have visited several cities to provide education for committees and staff. These informal state outreach trips provide political action committees (PACs), party committees and candidate committees with information on areas of the law specific to their needs.

The FEC has one remaining state outreach program planned for the summer of 2007, and will be visiting

(continued on page 13)

## Outreach

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Atlanta, Georgia, July 16-17. Representatives from campaigns, parties and PACs are invited to attend.

Additional information about this program is available on the FEC web site at <http://www.fec.gov/info/outreach.shtml#state>. For questions about this outreach program, or to register for the remaining session, please call the FEC's Information Division at 800/424-9530 (or locally at 202/694-1100) or send an e-mail to [Conferences@fec.gov](mailto:Conferences@fec.gov) with your contact information (name, organization, phone number, fax number and e-mail address).

—Amy Kort

## FEC Schedules Two Regional Conferences for Fall 2007

As part of its outreach program, the Federal Election Commission will sponsor two regional conferences for the regulated community this fall. The first conference will be held in Seattle, Washington, at the Red Lion Hotel on Fifth Avenue. The hotel room rate for this conference will be \$169 per night, single or double occupancy. The second conference will be held in St. Louis,

Missouri, at the Hilton St. Louis at the Ballpark. Both conferences are designed for representatives of political campaigns, party committees and the political action committees (PACs) of corporations, labor unions and trade associations.

At each conference, Commissioners and experienced staff conduct a variety of technical workshops on the federal campaign finance laws. Workshops are designed for those seeking an introduction to the basic provisions of the law, as well as for those more experienced in federal campaign finance law.

Additional information on conference registration will be made available online at <http://www.fec.gov/info/outreach.shtml#conferences> and in future issues of the *Record*.

Please direct all questions about conference registration and fees to Sylvester Management Corporation by:

- Phone at 1-800/246-7277; or
- E-mail at [tonis@sylvestermanagement.com](mailto:tonis@sylvestermanagement.com).

For questions about the conference program, or to receive e-mail notification when registration begins, send an e-mail to [Conferences@fec.gov](mailto:Conferences@fec.gov).

—Dorothy Yeager

## Fall Conference Schedule

**Conference for Campaigns, Party Committees and Corporate/Labor/Trade PACs**  
September 26-27, 2007  
Red Lion Hotel on Fifth Avenue  
Seattle, WA

**Conference for Campaigns, Party Committees and Corporate/Labor/Trade PACs**  
November 6-7, 2007  
Hilton St. Louis at the Ballpark  
St. Louis, MO

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### New Campaign Guide Available

The 2007 *Campaign Guide for Corporations and Labor Organizations* is now available on the Commission web site at <http://www.fec.gov/info/publications.shtml>. Paper copies are also available.

For each type of committee, a Campaign Guide explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

Please contact the Information Division at 800/424-9530 to order paper copies.

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