

# Record

August 2002

Federal Election Commission

Volume 28, Number 8

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### Louisiana Primary Reporting

In AO 2000-29, the Commission determined that the last day to qualify for a position on the general election ballot in Louisiana—in this case August 23, 2002—must be considered the primary election date for Louisiana candidates. See 11 CFR 100.2(c)(4)(i). Thus, committees involved in the Louisiana elections must file a pre-primary report, which is due on August 11.<sup>1</sup> The prior notice for this report will be available on the FEC web site at <http://www.fec.gov/pages/refer.htm>.♦

—Amy Kort

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<sup>1</sup> August 11, 2002, is a Sunday. Filing dates are not extended for weekends or holidays. Paper filers must ensure that their reports are received by the Commission or the Secretary of the Senate, as appropriate, by Friday, August 9. Reports sent by registered or certified mail are considered filed on the date of the postmark. The registered/certified mailing date for the Louisiana pre-primary report is August 8.

## Election Administration

### Revised National Mail Voter Registration Form

On July 12, 2002, the Commission approved the Office of Election Administration's (OEA) proposed revisions to the National Mail Voter Registration Form. The revisions were made to comply with new standards set for federal programs by the Office of Management and Budget (OMB). The changes affect the list of categories that allow applicants to identify their race and ethnicity when registering to vote in states that seek this information. The new categories more closely match those used by the U.S. Bureau of Census, and OMB has instructed federal agencies to adopt the changes by January 1, 2003.

The OEA also announced numerous changes to the state-specific instructions accompanying the form.<sup>1</sup> These changes reflect

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<sup>1</sup> On August 8, 2000, the Commission approved a procedural change that allows the OEA to make any changes to the National Voter Registration Form that are required by changes in state law, and to notify the Commission of the revisions. The OEA must submit for a formal Commission vote those changes to the form that are not specific to a given state.

## Reports

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### North Carolina Primary Date Announced

The North Carolina legislature has announced that the state primary will be held on September 10, 2002. The legislature also decided that, given the late primary date, there will not be time to hold a run-off election. The primary was initially scheduled for May 7, but was delayed due to court challenges to legislative redistricting. See the May 2002 *Record*, page 6. The prior notice for this report will be available on the FEC web site at <http://www.fec.gov/pages/refer.htm>. ♦

—Amy Kort

### Election Administration

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revisions made to state law since the form was last revised in July 2000. One significant development is that most states now allow individuals to print the form from the FEC web

#### 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)

**David M. Mason**, Chairman  
**Karl J. Sandstrom**, Vice Chairman  
**Danny L. McDonald**,  
Commissioner  
**Bradley A. Smith**, Commissioner  
**Scott E. Thomas**, Commissioner  
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**Lawrence H. Norton**, General Counsel

Published by the Information Division

**Greg J. Scott**, Assistant Staff Director

**Amy Kort**, Editor

<http://www.fec.gov>

site (<http://www.fec.gov/voteregis/vr.htm>), complete the application, and mail it to their state election officer.<sup>2</sup>

The Commission, through the OEA, is responsible for the original development and continued update of the National Voter Registration Form under Section 9 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7). For more information, please call the FEC's Office of Election Administration at 800/424-9530 (press 4) or 202/694-1095. ♦

—Amy Kort

## Advisory Opinions

### Advisory Opinion Requests

#### AOR 2002-9

Disclaimer requirements for express advocacy communication printed as text message on cell phone screen (Target Wireless, May 28, 2002)

#### AOR 2002-10

Qualification as state committee of political party (Green Party of Michigan, June 25, 2002)

<sup>2</sup> *Residents of Illinois, Massachusetts, Missouri, New Mexico, Ohio and South Carolina may only use applications printed on specified heavy-weight card stock. These cards may be obtained from state election offices. In addition, states that as of August 1, 1994, had no voter registration or permitted same-day registration at the polling place are exempt from provisions of the National Voter Registration Act. Of these exempt states, only North Dakota and Wyoming do not accept the national form. New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form.*

#### AOR 2002-11

Affiliation of SSFs of national and state trade associations (Mortgage Bankers Association of America, June 28, 2002) ♦

## Court Cases

### FEC v. Freedom's Heritage Forum et al.

On March 28, 2002, the U.S. District Court for the Western District of Kentucky at Louisville granted the Commission's motions for:

- Dismissal of portions of the complaint affected by changes in FEC regulations;
- Summary judgment on claims that the Freedom's Heritage Forum (the Forum) and its treasurer failed to include the required disclaimers on express-advocacy communications; and
- Dismissal of the defendants' counterclaims charging, among other things, that the Commission selectively enforced the Federal Election Campaign Act (the Act) against the defendants, thus depriving them of their Fourteenth Amendment rights to equal protection.

### FEC Issues 2001 Annual Report

The FEC's *Annual Report 2001* is now available. The report, which describes the agency's actions during the last calendar year, can be downloaded from the Commission's web site at <http://www.fec.gov/pdf/ar01.pdf>. Free copies are available by mail—call the FEC's Information Division at 800/424-9530 or 202/694-1100 to request a copy.

The court denied the Commission's request for summary judgment that former congressional candidate Timothy Hardy knowingly received a prohibited corporate contribution because certain of the facts were contested by the parties.

### Background

The Forum is a political committee that promotes pro-life and other social issues. In response to an administrative complaint alleging that the Forum made coordinated expenditures on behalf of Mr. Hardy's 1994 Congressional campaign, the Commission found that the Forum violated the Act's contribution limits, reporting and disclosure requirements and disclaimer provisions. 2 U.S.C. §§441a(a)(1)(A), 434(b), and (c) and 441d(a)(3). The Commission also found that Mr. Hardy accepted excessive contributions. 2 U.S.C. §441a(f). After failing to reach a conciliation agreement with the defendants, the Commission filed a court complaint.

**Coordination.** The Commission alleged that the Forum's expenditures supporting Mr. Hardy, totaling \$23,515.81, were not independent expenditures but coordinated expenditures that resulted in excessive contributions to his campaign committee. 2 U.S.C. §441a(a)(1)(A).

**Disclaimers and Express Advocacy.** The Commission alleged that the Forum distributed seven flyers expressly advocating the election or defeat of a federal candidate and failed to include the required disclaimers. 2 U.S.C. §441d(a). In its September 29 decision, the court reviewed four flyers and found that one contained express advocacy and, thus, required a disclaimer. On April 28, 2000, the court ruled on three additional flyers, finding that two contained express advocacy. For a summary of these decisions, see the December 1999 *Record*, p. 6, and the June 2000 *Record*, page 8.

### Current Court Decision

**New Coordination Regulations.** The Commission asked the court to dismiss with prejudice several counts of its complaint because the FEC has promulgated new coordination regulations. Under the new regulations, the defendants' activities, as described in these counts, are not violations. The Commission also asked the court to dismiss the defendants' counterclaims, which asked the court to declare one of the old regulations unconstitutional and to enjoin the Commission from enforcing the old regulation against the defendants. The court found that the defendants were not in danger of a second lawsuit based on these counts because the regulation had been repealed, and that the defendants' counterclaims were moot for the same reason. The court granted the Commission's motions on these points.

**Disclaimers.** Under the Act, whenever a person makes an independent expenditure, the communication must disclose both the name of the person who paid for the communication and the fact that the communication was not authorized by any candidate or candidate's committee. 2 U.S.C. §441d(a). Since the court had previously found that three of the Forum's flyers contained express advocacy, and none of them stated whether they were authorized by a candidate, the court granted the Commission summary judgment on its claims that the Forum violated 2 U.S.C. §441d(a).<sup>1</sup> The court im-

posed a \$3,000 penalty—\$1,000 for each violation.

**Acceptance of Corporate Contributions.** The Commission also requested summary judgment on its claim that Mr. Hardy knowingly accepted corporate contributions in violation of 2 U.S.C. §441b(a). During Mr. Hardy's campaign, a member of his staff received permission from Toby Tours, Inc., to send campaign mailings using its bulk mail permit. By using the permit, the campaign saved \$4,077.26 in postage, which, according to the Commission, resulted in an prohibited contribution from Toby Tours, Inc.

The court determined that the campaign staff member had knowingly accepted the illegal contribution; however, it also found the Commission had not shown that the staff member acted on Mr. Hardy's behalf. The court denied the Commission's request for summary judgment because a question of material fact remained as to whether the staff member was acting as Mr. Hardy's agent, and a legal question remained about whether Mr. Hardy could be personally charged with the violation. This issue remains to be resolved by the court.

**Selective Enforcement of the Act.** In their counterclaims, the defendants alleged that the Commission's "unwarranted, selective, and lengthy proceedings" deprived them of their freedom of speech and associational rights under the First and Fourteenth amendments. The court granted the Commission's motion to dismiss this claim, agreeing that the claim was moot because the administrative proceedings in question had concluded.

The defendants also claimed that the Commission violated their rights to equal protection under the Fourteenth Amendment by selectively enforcing the Act against them because of their politically-

<sup>1</sup> The defendants had argued that the FEC was enjoined from enforcing the regulation defining express advocacy "against any . . . party in the United States of America." However, the Fourth Circuit court of appeals vacated this injunction, finding that the district court "abused its discretion by issuing a nationwide injunction . . ." *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4<sup>th</sup> Cir. 2001).

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## Court Cases

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conservative views. Under the Sixth Circuit's three-part test for evaluating a selective enforcement claim, the enforcement situation in question must:

1. Single out for prosecution a person belonging to an identifiable group (such as a group exercising constitutional rights) even though the enforcement official has in similar situations decided not to prosecute individuals not belonging to that group;
2. Be initiated with a discriminatory purpose; and
3. Have a discriminatory effect on the group to which the defendant belongs.

The defendants alleged, among other things, that the Commission did not prosecute any other group involved in the election, including a gay or lesbian organization that published an express advocacy communication for Mr. Hardy's opponent and did not include a disclaimer. The defendants also generally claimed that the Commission does not prosecute "liberal politicians and elected officials," and specifically pointed out that the Commission did not prosecute Toby Tours, Inc.

The court granted the Commission's motion to dismiss this counterclaim, finding that the defendants had not provided sufficient supporting facts. For example, the court found that even if the gay or lesbian organization had violated the Act, the situation was not similar to the defendants' because they could not show that the Commission knew about the violation or that a complaint was filed. Similarly, the Commission's failure to prosecute Toby Tours, Inc., did not meet the test's criteria because the corporation was not part of an identifiable group. Finally, the court found that the defendants' general claims of FEC bias were not specific enough

to withstand scrutiny under the selective enforcement test.

### Defendants' Motions

On April 10, 2002, the Forum and its treasurer filed a motion to alter or vacate the court's order and a motion to allow the filing of counter claims.

U.S. District Court for the Western District of Kentucky at Louisville, 3:98cv549-S.♦

—Amy Kort

### New Litigation

#### FEC v. Triad Management Services

On June 21, 2002, the Commission asked the U.S. District Court for the District of Columbia to find that Triad Management Services, Triad Management Services, Inc., (collectively Triad) and Carolyn Malenick violated the Federal Election Campaign Act (Act) during the 1996 federal election cycle. The Commission alleges that Ms. Malenick and Triad violated the Act by, among other things, failing to register and file as a political committee and accepting and making excessive and prohibited contributions. 2 U.S.C. §§433, 434, 441a(a)(1), 441a(f) and 441b.

*Background.* According to its 1996 promotional materials, Triad was a consulting firm devoted to keeping the Republican majority in Congress. From 1995 to 1996, Ms. Malenick operated Triad Management Services as a sole proprietorship, and she became the president, sole director and owner of Triad Management Services, Inc., when Triad incorporated in May 1996. The Commission began its investigation of Triad in response to a series of administrative complaints filed between 1996 and 1998. After failing to reach a conciliation agreement with the defendants, the Commission filed this court complaint.

*Court Complaint.* According to the Commission's court complaint,

before Triad incorporated it accepted \$790,215 in federal election contributions—including \$200,000 in 1995 and \$465,000 in 1996 from a single individual. Once Triad became a corporation, it accepted an additional \$746,971 in contributions, of which \$726,621 came from a single individual and \$10,000 came from other corporations. The Commission alleges that during the 1995-1996 election cycle, Triad also:

- Made federal election expenditures totaling approximately \$1.6 million;
- Solicited contributions for 1996 Congressional candidates;
- Collected and forwarded 230 contribution checks made out to federal candidates or campaign committees, totaling \$185,000; and
- Paid for the creation and distribution of publications that expressly advocated the election or defeat of federal candidates.

Ms. Malenick and Triad did not register or report this alleged activity to the Commission.

The Commission contends that once Triad exceeded \$1,000 in contributions or expenditures in a calendar year, it became a political committee under the Act and was required to register and file regular reports. 2 U.S.C. §§433 and 434. Under the Act, Triad was also required to file disclosure reports once it made independent expenditures in excess of \$250. 2 U.S.C. §434(c). The Commission alleges that Triad knowingly accepted prohibited corporate contributions and contributions in excess of the Act's limits, and also made excessive contributions and in-kind contributions to federal candidates. 2 U.S.C. §441a(a). Moreover, the Commission alleges that after Triad incorporated, it made prohibited corporate contributions to and expenditures for and against federal candidates.

Triad also allegedly organized a coalition of political committees that



regularly met and agreed to consult on targeted candidates and campaigns. The Commission contends that Triad solicited contributions for these political committees and collected and forwarded contributions to them.

According to the Commission's complaint, Triad was the sole source of funds for two committees, the American Free Enterprise PAC (AFE) and Citizens Allied for Free Enterprise (CAFE), which received \$81,235 from Triad that was used to contribute to candidates it recommended. Triad established, financed, maintained and controlled AFE and CAFE and was thus affiliated with them. Since affiliated committees share a single contribution limit, the Commission argues that the committees exceeded the contribution limits when they each contributed the maximum legal amount to the same federal candidates. 2 U.S.C. §441a(a) and 11 CFR 110.3(1). The Commission alleges that Triad directed and controlled contributions made by AFE and CAFE that resulted in excessive contributions.

*Relief.* The Commission asks the court to:

- Find that the defendants committed these violations of the Act;
- Enjoin them from engaging in further similar violations;
- Order Triad Management Services and Triad Management Services, Inc., to register as political committees with the Commission and to file disclosure reports dating back to 1995;
- Order the defendants to disgorge to the U.S. Treasury all excessive and prohibited contributions that they received during 1995 and 1996; and
- Assess appropriate civil penalties for each violation. See 2 U.S.C. §437g(a)(6)(B).

U.S. District Court for the District of Columbia, 02CV1237. ♦

—Amy Kort

## Compliance

### MUR 5041 Contribution in the Name of Another Made by Corporation

Wuesthoff Memorial Hospital (Wuesthoff) and several of its former employees have agreed to pay civil penalties for violations of the Federal Election Campaign Act's (the Act) prohibitions on corporate contributions and contributions in the name of another. 2 U.S.C. §§441b(a) and 441f.

The Act prohibits corporations from making contributions in connection with federal elections, and prohibits any person from making a contribution in the name of another person and from permitting his or her name to be used to make such a contribution. In addition, the Act prohibits any officer or director of a corporation from consenting to any contribution or expenditure by the corporation. 2 U.S.C. §§441b(a) and 441f. Finally, Commission regulations at 11 CFR 110.4(b)(1)(iii) make it unlawful for any person to knowingly help or assist another person in making a contribution in the name of another.

#### Background

During the 1980s, Robert Carman, who was then the President and Chief Executive Officer of Wuesthoff, determined that money otherwise paid to a trade association should be contributed directly to political candidates. Between approximately November 1991 and June 1998, Mr. Carman encouraged certain Wuesthoff employees to make political contributions and caused the reimbursement of at least \$22,175 in federal campaign contributions to himself and other employees. After December 1997, Mr. Carman also arranged for Wuesthoff to grant bonuses to some employees. Mr. Carman treated these bonuses as lines of credit,

against which he would ask employees to make political contributions.

Mr. Carman and other Wuesthoff employees helped organize a June 16, 1998, fundraiser for the Republican Party of Florida that took place at the home of a Wuesthoff board member. Mr. Carman solicited Wuesthoff employees for \$11,000 in contributions, then arranged for them to be reimbursed by authorizing bonus payments to cover their contributions.

One board member encouraged Wuesthoff employees to contribute to candidates and sometimes delivered their contribution checks. However, the reimbursement of political contributions was never expressly authorized, approved or ratified by Wuesthoff's Board of Directors. In 1999, the Board of Directors was formally apprised of the contribution reimbursements and notified the Commission. Wuesthoff also implemented a number of corrective measures, including hiring a full-time Chief Compliance Officer, transferring the control of executive payroll from the Chief Executive Officer to the Payroll Department, adding a compliance session to its employee orientation program and instituting a 24-hour anonymous hotline for employees to report compliance issues.

#### Civil Penalties

Based upon the information provided by Wuesthoff, the Commission found reason to believe that the respondents violated 2 U.S.C. §§441b(a) and 441f by making corporate contributions and contributions in the names of others. The Commission participated in informal methods of conciliation with each respondent, and each respondent entered into a separate conciliation agreement. The respondents, the penalties paid and the violations of the Act are listed below:

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## Compliance

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- Wuesthoff paid \$32,000 for making corporate contributions and contributions in the name of another.
- Robert Carman paid \$20,000 for knowingly and willfully consenting to Wuesthoff's corporate contributions, for allowing his name to be used in Wuesthoff's making of corporate contributions and for causing himself and other Wuesthoff employees to be reimbursed by Wuesthoff for federal campaign contributions.
- Terence Murphy, former Senior Vice President and Chief Operating Officer of Wuesthoff, paid \$8,500 for consenting to Wuesthoff's corporate contributions and for allowing his name to be used in Wuesthoff's making of corporate contributions.
- Rebecca Colker, former Chief Financial Officer of Wuesthoff, paid a civil penalty of \$2,000 for consenting to Wuesthoff's corporate contributions and for allowing her name to be used in Wuesthoff's making of corporate contributions. Ms. Colker's name appeared as the authorizing signature on most reimbursement checks to Wuesthoff employees.

Additionally, four political committees disgorged a total of \$13,525, representing contributions that they had received as a result of Wuesthoff's activities. ♦

—Jim Wilson

## Administrative Fines

### Committees Fined for Nonfiled and Late Reports

The Commission recently publicized its final action on nine new Administrative Fine cases, bringing the total number of cases released to the public to 422.

Civil money penalties for late reports are determined by the number of days the report was late, the amount of financial activity involved and any prior penalties for violations under the administrative fine regulations. Penalties for late reports—and for reports filed so late as to be considered nonfiled—are also determined by the financial activity for the reporting period and any prior violations. Election sensitive reports, which include reports and notices filed prior to an election (i.e., 12 Day pre-election, October quarterly and October monthly reports), receive higher penalties. The committees and the treasurers are assessed civil money penalties when the Commission makes its final determination. Unpaid civil money penalties are referred to the Department of the Treasury for collection.

The committees listed in the chart below, along with their treasurers, were assessed civil money penalties under the administrative fine regulations.

Closed Administrative Fine case files are available through the FEC Press Office, at 800/424-9530 (press 2), and the Public Records Office, at 800/424-9530 (press 3). ♦

—Amy Kort

## Statistics

### PAC Activity Continues to Rise in 2001-2002 Cycle

Political action committee (PAC) financial activity continued to rise during the first 15 months of the 2001-2002 election cycle. A total of 4,328 PACs reported receipts of \$397 million between January 1, 2001, and March 31, 2002, up 13.7 percent from the same period in 2000. PACs made disbursements of \$315.9 million, up 12 percent from the same period in the previous cycle.

PACs contributed \$131.4 million to federal candidates during the first 15 months of this cycle, a 5.6 percent increase over the 2000 levels. PAC contributions to candidates were almost evenly divided between the major parties, with Republican candidates receiving \$66.4 million and Democratic candidates receiving \$64.8 million. Incumbent candidates received 87.6 percent of these contributions, while challengers received 4.9 percent and open seat candidates received 7.4 percent.

Corporate PACs represented the largest group of committees, and

### Committees Fined and Penalties Assessed

1. Blockey 2000	\$1,800 <sup>1</sup>
2. Brad Carson for Congress Committee	\$11,000
3. California Voter Guide	— <sup>2</sup>
4. David E. Duke Congressional Campaign Fund	\$0 <sup>3</sup>
5. Dewayne Graham for Congress Committee	— <sup>2</sup>
6. Friends of Dylan Glenn	\$900 <sup>3,4</sup>
7. Georgia Federal Elections Committee	\$3,200
8. Loudoun County Republican Committee	\$775 <sup>4</sup>
9. McNary for Congress Committee	\$9,750 <sup>4</sup>

<sup>1</sup> Partial payment made.

<sup>2</sup> The Commission terminated the proceedings in this matter.

<sup>3</sup> This penalty was reduced due to the level of activity on the report.

<sup>4</sup> This civil money penalty has not been collected.

also took in the greatest total receipts. As in past election cycles, however, a small number of PACs accounted for the majority of PAC fundraising. During the first 15 months of this cycle, 69 committees—less than two percent of the total number of registered PACs—raised \$156 million, representing 39.3 percent of total PAC receipts for this period.

Additional details are available in a news release dated June 27, 2002. The news release, which provides summary information for PACs from 1990 through 2002, is available:

- On the FEC web site at <http://www.fec.gov>;
- From the Public Records Office (800/424-9530, press 3) and the Press Office (800/424-9530, press 5); and
- By fax (call the FEC Faxline at 202/501-3413 and request document 617).◆

—Amy Kort

### Semiannual PAC Count Shows Slight Decrease

According to the FEC’s semiannual political action committee (PAC) count, 3,865 PACs were registered with the Commission on July 1, 2002. This figure represents a 26-committee decrease from the January 1 count.

Corporate PACs remain the largest category, with 1,514 committees. Nonconnected PACs remain the second-largest group, with 1,006 committees. The chart above, at right, shows the complete mid-year and year-end PAC figures since 1995.

To see a complete listing of PAC statistics, visit the FEC’s web site (<http://www.fec.gov>) or request a copy of the agency’s July 15, 2002, press release (call 800/424-9530 and press 3 for the Public Records Office or press 2 for the Press Office).◆

—Amy Kort

### Mid-Year and Year-End PAC Count—1995-2002<sup>1</sup>

	Corporate	Labor	Trade/ Member/ Health	Coop- erative	Corp. w/o Capital Stock	Non- connected <sup>2</sup>	Total
Jul. 95	1,670	334	804	43	129	1,002	3,982
Dec. 95	1,674	334	815	44	129	1,020	4,016
Jul. 96	1,645	332	829	43	126	1,058	4,033
Dec. 96	1,642	332	838	41	123	1,103	4,079
Jul. 97	1,602	332	826	41	118	953	3,875
Dec. 97	1,597	332	825	42	117	931	3,844
Jul. 98	1,565	325	820	43	112	897	3,762
Dec. 98	1,567	321	821	39	115	935	3,798
Jul. 99	1,540	318	826	38	115	941	3,778
Jan. 00	1,548	318	844	38	115	972	3,835
Jul. 00	1,523	316	812	39	114	902	3,706
Jan. 01	1,545	317	860	41	118	1,026	3,907
Jul. 01	1,525	314	872	41	118	1,007	3,877
Jan. 02	1,508	316	891	41	116	1,019	3,891
Jul. 02	1,514	313	882	40	110	1,006	3,865

<sup>1</sup> Committees with no activity for the election cycle are not included in the mid-year and year-end PAC count.

<sup>2</sup> Nonconnected PACs must use their own funds to pay fundraising and administrative expenses, while the other categories of PACs have corporate or labor “connected organizations” that are permitted to pay those expenses for their PACs. On the other hand, nonconnected PACs may solicit contributions from the general public, while solicitations by corporate and labor PACs are restricted.

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