

# Record

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## Table of Contents

### Regulations

- 1 Petition for Rulemaking on Trade Association Use of Payroll Deduction
- 4 Commission Receives Comments on Proposed Changes to Regulations

### 1 Advisory Opinions

#### Reports

- 5 Reporting Reminder: FEC State Filing Waiver Program

#### Outreach

- 5 Campaign Finance Law Training Conference in Tampa, FL

#### Administrative Fines

- 6 Committees Fined for Late and Nonfiled Reports

#### Court Cases

- 7 Judicial Watch and Peter F. Paul v. FEC
- 8 Clark A. Wilkinson v. FEC

#### Public Funding

- 9 Estimated Presidential Spending Limitations
- 10 Commission Certifies LaRouche for Primary Matching Payments

### 10 Index

## Regulations

### Petition for Rulemaking on Trade Association Use of Payroll Deduction

On September 3, 2003, the Commission received a Petition for Rulemaking asking it to amend its rules to allow corporate members of trade associations to use payroll deduction to facilitate voluntary contributions to the association's separate segregated fund (SSF). See 11 CFR 114.8(e)(3). The Commission published a Notice of Availability in the October 24, 2003, *Federal Register* seeking comments on whether to initiate a rulemaking in response to this petition. The deadline for comments is November 24.

Under the current rules, a trade association may use any method to solicit voluntary contributions or facilitate the making of voluntary contributions to its SSF, except that a member corporation may not use a payroll deduction or check-off system for executive and administrative personnel contributing to the association's SSF. 11 CFR 114.8(e)(3). Thus, corporate members may manually facilitate contributions to the trade association's

## Advisory Opinions

### AO 2003-21

### Disaffiliation of Corporations' PACs

Following a separation in ownership between Lehman Brothers Holdings, Inc. and its subsidiaries (Lehman) and Peabody Energy Corporation (Peabody), Lehman's PAC, the Action Fund of Lehman Brothers Holding Inc. (Lehman PAC), is no longer affiliated with Peabody's PAC, the Peabody Energy Corporation Political Action Committee (Peabody PAC). As a result, the two PACs no longer share limits on the receipt and making of contributions, and Peabody and Lehman may not solicit each other's solicitable class.

### Background

In May 1998 Lehman purchased 87.5 percent of Peabody's voting stock in a leveraged buyout solely for investment purposes. However, since that time Lehman has reduced its holdings of Peabody voting stock to approximately 19 percent. The remaining Peabody shares of voting stock are publicly held. With its current holdings, Lehman may not

(continued on page 4)

(continued on page 2)

## Advisory Opinions

(continued from page 1)

act unilaterally with regard to Peabody's corporate activities.

Under the Federal Election Campaign Act (the Act) and Commission regulations, committees are affiliated when they are established, financed, maintained or controlled by the same corporation, person or group of persons, including any parent, subsidiary, branch, division, department, or local unit. 2 U.S.C. §441a(a)(5) and 11 CFR 100.5(g)(2) and 110.3(a)(1). Contributions made to or by affiliated committees are considered to have been made to or by a single committee. 11 CFR 110.3(a)(1).

Committees established, financed, maintained or controlled by a corporation and/or its subsidiaries are affiliated *per se*. 11 CFR 110.3(a)(2)(i). Lehman's current 19 percent voting stock interest does not create a parent/subsidiary relationship for the purposes of the

Act, and Lehman PAC and Peabody PAC are, therefore, not *per se* affiliated.

When companies do not have a relationship that makes them automatically affiliated, Commission regulations provide for an examination of certain circumstantial factors in the context of the overall relationship to determine whether one company is an affiliate of another and, thus, whether their respective PACs are affiliated. A non-exhaustive list of 10 such factors is set out at 11 CFR 110.3(a)(3)(ii).

### Affiliation Factors

*Controlling interest in voting stocks or securities.* One factor to be examined in determining whether committees are affiliated addresses whether one PAC's sponsoring organization owns a controlling interest in the voting stock or securities of another PAC's sponsoring organization. 11 CFR 110.3(a)(3)(ii)(A). At present, Lehman's ownership of Peabody voting shares has dropped to approximately 19 percent, and Lehman does not have any agreement with other Peabody shareholders that affects its voting or governance powers in Peabody's affairs. Under Peabody's bylaws, nearly all proposed actions submitted to stockholders are decided by a majority of a quorum, except that elections for candidates for the board of directors are won by the candidate who receives the most shareholder votes, even if he or she does not win the majority of votes. Thus, Lehman is unlikely to be able to control most shareholder decisions. Further, cumulative voting cannot be used to enhance Lehman's voting power. However, several important Peabody decisions are made on the basis of a 75 percent supermajority vote, which Lehman could in some circumstances block with its 19 percent voting stock ownership.

Lehman's voting stock interest in Peabody will likely represent a diminishing percentage of Peabody's outstanding voting shares over time as Peabody employees exercise stock options. Also, there appears to be no overlap of shareholders owning more than five percent of both Peabody and Lehman, or any other shareholder overlap. Thus, a significant separation has taken place between the two companies, which appears to be widening as stock options are exercised, diluting Lehman's stake. As a result, Lehman no longer has a controlling interest in Peabody, although in some limited circumstances where a supermajority affirmative vote is required Lehman could defeat such a vote. In past advisory opinions, the Commission determined that a separation in ownership, control and personnel can lead to a finding of disaffiliation. See AO 2002-12.

*Participation in governance of another sponsoring organization.* Another affiliation factor addresses whether one PAC's sponsoring organization has the authority or ability to direct or participate in the governance of another sponsoring organization or PAC through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 11 CFR 110.3(a)(3)(ii)(B). Although Lehman's voting stock interest in Peabody gives it the ability to participate in Peabody's governance, that interest is not sufficient under Peabody's articles of incorporation and bylaws to give Lehman either direction over or control of Peabody's governance. Instead, Lehman has the ability of a 19 percent minority shareholder to participate in Peabody's governance. Furthermore, neither Lehman nor Lehman PAC participate in the governance of Peabody PAC.

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*Authority to control officers and employees; overlapping personnel; creation of successor entity.* Three affiliation factors are interrelated in the circumstances addressed here. These three factors address whether a sponsoring organization or committee has:

- The authority or ability to hire, appoint, demote or otherwise control the officers or other decision-making employees or members of another sponsoring organization or committee;
  - Common or overlapping officers or employees with another sponsoring organization or committee that indicates a formal or ongoing relationship between the sponsoring organizations or committees; and
  - Any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship or the creation of a successor entity.
- 11 CFR 110.3(a)(3)(ii)(C), (E) and (F).

Lehman PAC and Peabody PAC have no overlapping officers, directors or personnel, and Lehman does not have any authority or control over Peabody PAC's officers or directors. Lehman does not have the authority to hire, appoint, demote or otherwise control Peabody's officers or other decision-making employees. Moreover, the number of common or overlapping officers between the two companies is not sufficient to indicate a formal or ongoing relationship. Although one individual is currently a director of both Lehman and Peabody and three other Peabody directors have ties to Lehman, these individuals constitute

a minority of Peabody's eleven-person board of directors.<sup>1</sup>

*Provision of goods or funds.* Two additional affiliation factors address whether a sponsoring organization or committee directly or indirectly provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee, or arranges for funds to be provided. 11 CFR 110.3(a)(3)(ii)(G) and (H).

In this case, Lehman does not provide funds or goods to Peabody in a significant amount or on an ongoing basis. However, Lehman and its affiliates do provide financial advisory and investment banking services to Peabody. While these transactions appear to be commercially reasonable transactions made on terms similar to those Lehman offers to other parties, they nonetheless suggest significant ongoing business activities between Lehman and Peabody where Lehman arranges financing for Peabody.<sup>2</sup> Lehman's investment banking relationship with Peabody is qualitatively different from an ordinary customer-supplier relationship because it, combined with Lehman's status as the majority owner of Peabody voting stock from May 1998 to April 2002, provides Lehman with nonpublic knowledge regarding Peabody that far exceeds that available to any other investor. Nevertheless, as part of the overall

(continued on page 4)

<sup>1</sup> In AO 1996-23, three previously affiliated PACs were deemed no longer affiliated after a corporate reorganization, despite the fact that there was an overlap of three members on one company's eight-person board of directors, and an overlap of four members on another company's eleven-person board.

<sup>2</sup> Past advisory opinions have found that disaffiliated companies may maintain some customer-supplier relationships. See AO 1996-42.

## BCRA on the FEC's Web Site

The Commission has added a section to its web site ([www.fec.gov](http://www.fec.gov)) devoted to the Bipartisan Campaign Reform Act of 2002 (BCRA).

The page provides links to:

- The Federal Election Campaign Act, as amended by the BCRA;
- Summaries of major BCRA-related changes to the federal campaign finance law;
- Summaries of current litigation involving challenges to the new law;
- *Federal Register* notices announcing new and revised Commission regulations that implement the BCRA;
- BCRA-related advisory opinions; and
- Information on educational outreach offered by the Commission, including upcoming Roundtable sessions and the Commission's 2004 conference schedule.

The section also allows individuals to view the Commission's calendar for rulemakings, including dates for the Notices of Proposed Rulemaking, public hearings, final rules and effective dates for regulations concerning:

- Soft money;
- Electioneering Communications;
- Contribution Limitations and Prohibitions;
- Coordinated and Independent Expenditures;
- The Millionaires' Amendment;
- Consolidated Reporting rules; and
- Other provisions of the BCRA.

The BCRA section of the web site will be continuously updated. Visit [www.fec.gov](http://www.fec.gov) and click on the BCRA icon.

## Advisory Opinions

(continued from page 3)

circumstances here, this consideration is not decisive in determining whether the two companies are affiliated.

*Other considerations.* The final two affiliation factors address whether:

- A sponsoring organization, a committee or an agent of either had an active or significant role in the formation of another sponsoring organization or committee; and
- Two PACs have similar patterns of contributions or contributors, indicating a formal or ongoing relationship between the two PACs or their sponsoring organizations. 11 CFR 110.3(a)(3)(ii)(I) and (J).

Lehman had no role in the formation of Peabody or Peabody PAC, and the two PACs do not have a formal or ongoing relationship. Beyond the fact that the two PACs do not conduct joint fundraising or transfer funds to one another, the two companies are in different businesses and make contributions to a wide variety of candidates who support issues of concern to each company. Each SSF only solicits contributions from its own respective executive and administrative personnel, and the two PACs only coordinate their contributions in as much as they track contributions for the purpose of complying with the Act's contribution limits.

### Conclusion

Based on this analysis, Peabody PAC and Lehman PAC are no longer affiliated for the purposes of the Act. Thus, the two PACs no longer share limits on the receipt and making of contributions, and neither Lehman nor Peabody may solicit the other's solicitable class for contributions.

Date Issued: September 26, 2003; Length: 7 pages. ♦

—Amy Kort

## Advisory Opinion Requests

### AOR 2003-25

Permissibility of television ads featuring endorsement of local candidate by federal candidate/officeholder (Jonathan Weinzapfel and the Weinzapfel for Mayor Committee, August 8, 2003)

### AOR 2003-26

Federal candidate's use of campaign funds to refund impermissible donations received by his now defunct former state campaign committee (Voinovich for Senate, September 17, 2003)

### AOR 2003-27

Qualification as state committee of political party (Missouri Green Party, Inc., September 15, 2003) ♦

## Regulations

(continued from page 1)

SSF by collecting and forwarding checks from their restricted classes, but cannot use the corporation's payroll deduction system.

The rulemaking petition was submitted by America's Community Bankers (ACB), a trade association representing community banks, and its SSF, COMPAC. ACB and COMPAC assert that their proposed change to the regulations would "more accurately reflect the FECA's intent for permissible corporate activities, make it easier and more efficient for trade associations to raise fully-regulated federal funds" and also reflect changes in employee payment systems that have occurred since the rules were originally promulgated in 1976.

The full text of the notice is available on the FEC web site at <http://www.fec.gov/register.htm> and from the FEC faxline, 202/501-3413 (request document number 255).

The Commission requests comments on whether the proposal represents a permissible interpretation of the Federal Election Campaign Act and what policy and factual consider-

ations support or oppose the proposal. Public comments must be submitted, in either written or electronic form, to John Vergelli, Acting Assistant General Counsel. Comments may be sent by:

- E-mail to [payrollded03@fec.gov](mailto:payrollded03@fec.gov) (e-mailed comments must include the commenter's full name, e-mail address and postal address);
- Fax to 202/219-3923 (send a printed copy follow-up to ensure legibility); or
- Overnight mail to the Federal Election Commission, 999 E Street NW, Washington, DC 20436. ♦

—Amy Kort

## Commission Receives Comments on Proposed Changes to Regulations

On October 1, 2003, the Commission held a public hearing to receive comments on recent Notices of Proposed Rulemaking (NRPMs) concerning:

- [Multicandidate committees and biennial contribution limits](#);
- [Candidate travel](#); and
- [Political committees' mailing lists](#).

Sixteen individuals and organizations submitted written comments on these proposed rulemakings, and seven individuals testified at the hearing.<sup>1</sup> Much of the testimony addressed the proposed rules for when and how political committees may sell, rent or exchange their mailing lists without a contribution resulting from the transaction, with several commenters suggesting that there is currently no need for a rulemaking on this matter. Commenters also considered how a party committee that sells or leases a mailing list developed using both federal and nonfederal funds may

<sup>1</sup> The Commission also received a written comment on proposed rules concerning [party committee phone banks](#).

allocate the proceeds from the transaction between the committee's federal and nonfederal accounts. A number of commenters further addressed whether a candidate's leadership PAC could ever engage in an "arm's length transaction" with the candidate's principal campaign committee and whether an arm's length transaction should be a necessary condition for the sale, rental or exchange of a mailing list under the new rules.

The Commission also received comments on the proposed rules concerning the rate candidates should be required to pay for air travel on non-commercial flights. All those who testified agreed that a simple, comprehensive rule was needed, and several suggested that the Commission should allow candidates more opportunities to pay the first class rate, or in some cases the commercial coach rate, rather than the charter rate.

The Commission also received comments on the possible effective date for any changes in the way individuals' contributions to candidates are attributed to their biennial contribution limits and whether multicandidate status should be optional or mandatory.

All written comments and a full transcript of the hearing are available on the FEC web site at <http://www.fec.gov/register.htm>, along with the full texts of the NPRMs. ♦

—Amy Kort

## Reports

### Reporting Reminder: FEC State Filing Waiver Program

Presidential, U.S. Senate and U.S. House of Representatives campaign committees, PACs and party committees are exempt, under the Commission's State Filing Waiver Program, from filing paper copies of their federal campaign

finance reports with the state election offices of 49 states and 2 territories.<sup>1</sup> Paper copies of the federal reports are still required to be filed with the appropriate offices in Guam, Montana and Puerto Rico.

This exemption applies only to the filing of federal campaign finance disclosure reports required under the Federal Election Campaign Act. It does not apply to state filing requirements for the disclosure of state or local campaign finances. Contact state officials for further information on specific state campaign finance laws and reporting obligations. Telephone numbers and addresses are found in the *Combined Federal/State Disclosure and Election Directory*, available from the Commission's Public Records Office and online at [www.fec.gov](http://www.fec.gov).

The 51 offices participating in the State Filing Waiver Program provide the public with electronic access to federal campaign finance reports via an Internet connection to the Commission's web site. For more information, call the Public Disclosure Division at 800/424-9530 (press 3) or 202/694-1120. ♦

—FEC Public Disclosure Division

<sup>1</sup> The Commission has certified that the following states and territories qualify for filing waivers: Alabama, Alaska, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, U.S. Virgin Islands, Washington, West Virginia, Wisconsin and Wyoming.

## Outreach

### Campaign Finance Law Training Conference in Tampa, Florida

The FEC will hold a conference February 11-12, 2004, for House and Senate campaigns, political party committees and corporations, labor organizations, trade associations, membership organizations and their respective PACs. The conference will consist of a series of workshops conducted by Commissioners and experienced FEC staff who will explain how the federal campaign finance law, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), applies to each of these groups. Workshops will specifically address rules for fundraising and reporting, and will explain the new provisions of the BCRA. A representative from the IRS will also be available to answer election-related tax questions.

The conference will be held at the Wyndham Harbour Island Hotel in Tampa, Florida. Complete conference registration information for this conference will be available online in November. Conference registrations will be accepted on a first-come, first-served basis. FEC conferences are selling out quickly, so please register early. For registration information concerning any FEC conference:

- Call Sylvester Management Corporation at 800/246-7277;
- Visit the FEC web site at <http://www.fec.gov/pages/infosvc.htm#Conferences>; or
- Send an e-mail to [lauren@sylvestermanagement.com](mailto:lauren@sylvestermanagement.com). ♦

—Amy Kort

## Administrative Fines

### Committees Fined for Nonfiled and Late Reports

The Commission recently publicized its final action on 61 new Administrative Fine cases, bringing the total number of cases released to the public to 701, with \$936,754 in fines collected.

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 fines 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. Penalties for 48-hour notices that are filed late or not at all are determined by the amount of the contribution(s) not timely reported and any prior violations.

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 at right, along with their treasurers, were assessed civil money penalties under the administrative fines 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

### Committees Fined and Penalties Assessed

1. Akram for Congress, Inc.	\$3,500 <sup>1</sup>
2. American Financial Services Ass'n PAC (Formerly National Consumer Finance Ass'n PAC)	\$1,000
3. American Forest & Paper Association PAC August Monthly 2002	_____ <sup>2</sup>
4. American Forest & Paper Association PAC September Monthly 2002	_____ <sup>2</sup>
5. Appraisal Institute PAC	\$1,000
6. Briggs for Congress	\$900 <sup>1</sup>
7. BUSPAC—PAC of the American Bus Association	\$1,000
8. Calfee Halter/Green Fund for Good Government	\$1,000
9. Committee to Elect Cathy Rinehart July Quarterly 2002	_____ <sup>3</sup>
10. Committee to Elect Cathy Rinehart 12 Day Pre-Primary 2002	_____ <sup>3</sup>
11. Committee to Elect Madeleine Z. Bordallo 2002	\$2,000
12. District Council 37 AFSCME Public Employees Organized for Pol & Leg Equality	\$3,000
13. Donna 2002 Congressional Campaign Committee	\$1,250
14. Dub Maines for Congress	\$2,700 <sup>1</sup>
15. EDS PAC	\$1,000
16. Energy PAC of the TXU Corp.	\$1,000
17. E*Trade Group, Inc. PAC	\$750
18. First National of Nebraska PAC	\$1,000
19. Friends of Joe Scarborough	\$1,031 <sup>1</sup>
20. Friends of Margaret Workman	\$9,000 <sup>1</sup>
21. Friends of Sam Martinez	_____ <sup>3</sup>
22. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel P. A. PAC	\$1,000
23. Hornberger for Senate	\$1,000
24. Independent Insurance Agents of America PAC (INSURPAC)	\$3,000
25. IUPAT Member and Family Fundraising PC Account	\$650
26. Jim Sullivan for Congress	\$2,700 <sup>1</sup>
27. Joe Finley for Congress	\$975
28. Kendrick Meek for Congress	\$900
29. Larry King for Congress	\$1,400 <sup>1</sup>
30. Lawrence R. Wiesner for Congress Committee	\$300
31. Leadership in the New Century (LINC PAC)	\$1,000
32. Level 3 Communications, Inc. PAC	\$375
33. Local 401 Ironworkers Political Action Fund	\$1,000
34. Mark Baisley for Congress July Quarterly	\$5,500 <sup>1</sup>
35. Mark Baisley for Congress October Quarterly	\$900 <sup>1,4</sup>

<sup>1</sup>This penalty has not been collected.

<sup>2</sup>The Commission waived the \$900 civil money penalty because the respondents have demonstrated the existence of extraordinary circumstances that were beyond their control and that were for a duration of at least 48 hours.

<sup>3</sup>The Commission took no further action in this case.

<sup>4</sup>This penalty was reduced due to the level of activity on the report.

## Committees Fined and Penalties Assessed, cont.

36. Massachusetts Green Party Federal Election Fund	\$550
37. Medtronic, Inc. Medical Technology Fund	\$1,000
38. Meeks for Congress	\$1,500
39. Mike Greene for Congress Committee	\$4,500 <sup>1</sup>
40. National Italian American PAC	\$3,500 <sup>1</sup>
41. National Pest Control Association PAC	\$1,250
42. National Propane Gas Association PAC—PROPANEPAC	\$2,000 <sup>1</sup>
43. Nationwide Political Participation Committee	\$1,000
44. NCR Corporation Citizenship Fund	\$1,000
45. Northwest Airlines PAC	\$2,000
46. Oldcastle Materials, Inc. PAC	\$1,000
47. Operating Engineers Local #649 PAC	\$2,000
48. Philadelphia Suburban Corporation H20 PAC	\$1,000
49. Republicans for Phil Bradley	\$2,700 <sup>1</sup>
50. Rhode Island Republican State Central Committee	\$1,250 <sup>4</sup>
51. Rogers Group, Inc. PAC	\$1,050
52. Ross for Congress	\$6,875 <sup>1</sup>
53. Skorski for Congress	\$1,800 <sup>1</sup>
54. Syed Mahmood for Congress	\$325 <sup>1</sup>
55. TECO Energy, Inc. Employees' PAC	\$1,100
56. Tenet Healthcare Corporation PAC	\$3,000
57. T- Mobile PAC	\$1,000
58. VENTUREPAC	\$6,000
59. The Williams Companies, Inc. PAC	\$1,250
60. XCEL Energy Employee PAC	\$1,000
61. 3M Company	\$1,000

<sup>1</sup>This penalty has not been collected.

<sup>4</sup>This penalty was reduced due to the level of activity on the report.

## Court Cases

### Judicial Watch and Peter F. Paul v. FEC

On August 30, 2003, the U.S. Court for the District of Columbia granted the Commission's motion for summary judgment in this case.<sup>1</sup> The court found that the plaintiff,

<sup>1</sup> *The court may grant summary judgment when there is "no genuine dispute of material fact" and "the moving party is entitled to judgment as a matter of law."* Fed. R. Civ. P. 56(c).

Peter F. Paul, lacked standing to seek judicial relief in this instance because he had suffered no injury and that Judicial Watch, Inc., was precluded from bringing suit against the Commission because it was not a party to the administrative complaint underlying the court complaint.

#### Background

On December 7, 2001, Judicial Watch, a non-profit, public interest organization, and Mr. Paul, an alleged donor to Hillary Rodham Clinton's Senatorial campaign committee (the Committee), asked

the court to find that the Commission acted contrary to law when it failed to respond to an administrative complaint filed by Mr. Paul, who was represented by Judicial Watch. The administrative complaint, filed July 16, 2001, alleged that the Committee violated the Federal Election Campaign Act's (the Act) contribution limits by accepting cash and in-kind contributions from Mr. Paul totaling nearly \$2 million. 2 U.S.C. 441a and 11 CFR 110.1 and 110.9. The administrative complaint further alleged that the Committee failed to report the contributions. 2 U.S.C. §434(b) and 11 CFR 104.3. Before the court, Mr. Paul and Judicial Watch claimed that the Commission failed to act on the complaint within 120 days, as required by the Act, and that this failure caused them "informational injury" because they were deprived of information they sought when the administrative complaint was filed. See 2 U.S.C. §437g(a)(8)(A). See the March 2002 *Record*, page 3.

#### Court Decision

*Parties to the complaint.* Under the Act, a party that files an administrative complaint with the Commission may file a petition with the court if the Commission dismisses or fails to act on an administrative complaint. 2 U.S.C. §437g(a)(8)(A). Thus, while the Act provides for some judicial review of Commission administrative actions, the plain language of the statute also makes clear that this relief is only available to parties to the administrative complaint.

In this case, Mr. Paul was the only person listed as a party to the administrative complaint filed with the Commission. The complaint was printed on Judicial Watch letterhead, but Judicial Watch identified Mr. Paul as its "client" and did not mention that it was also a party to the complaint. Mr. Paul was the

(continued on page 8)

## Court Cases

(continued from page 7)

only party who signed the complaint. The court determined that Judicial Watch only acted as counsel to Mr. Paul and not as a party to the administrative complaint. As a result, Judicial Watch is barred from seeking judicial relief in this case.

*Standing.* In order to have standing to bring a case in federal court, the plaintiff must satisfy a three-part test. The plaintiff must:

1. Suffer an “injury in fact”—that is, an invasion of an interest that is concrete and particularized and also actual or imminent rather than just hypothetical;
2. Show that the injury is fairly traceable to the defendant’s allegedly unlawful conduct; and
3. Show that the injury is likely to be redressed by the relief that the plaintiff requests.

Mr. Paul argued that he suffered injury in fact because:

- He was deprived of information regarding Senator Clinton’s alleged campaign finance reporting violations as they pertained to his contributions;
- He may be a future defendant in any possible FEC investigation of these alleged violations and has been deprived of information that might help him in his defense; and
- The Commission’s delay in acting on his administrative complaint is in itself an injury.

The court found that Mr. Paul did not, as a result of being denied this information, suffer an injury that granted him standing to bring suit against the Commission. The court determined that because Mr. Paul was already aware of the facts underlying his own alleged contributions to the campaign, he was really seeking a legal determination by the Commission that Senator Clinton violated the Act. In a previous court case, the D.C. Circuit

Court determined that a plaintiff does not satisfy the standing requirement if the information withheld is only the fact that a violation of the Act has occurred. See *Common Cause v. FEC*, 108 F.3d 418.

Moreover, the court disagreed with Mr. Paul’s claim that he suffered an informational injury because he is unable to use information from an FEC investigation to amass his defense against a possible future enforcement action. The court found that this purported injury was merely speculative, and Mr. Paul had “not suffered an injury in fact by being deprived of information that *may* assist his defense in a *possible* FEC investigation.” Finally, the court found that Mr. Paul had suffered only a procedural injury as a result of the Commission’s failure to meet the 120-day deadline.<sup>2</sup>

*Order.* Having concluded that Judicial Watch was not a party to this case and that Mr. Paul did not have standing to bring suit in this matter, the court granted the Commission’s motion for summary judgment and dismissed the plaintiff’s case with prejudice.

U.S. Court for the District of Columbia, 1:01-cv-02527. ♦

—Amy Kort

## New Litigation

### Clark A. Wilkinson v. FEC

On August 25, 2003, Clark A. Wilkinson petitioned the U.S. District Court for the Central Division in the District of Utah to set aside the Commission’s final determination that, as treasurer of

the Friends of Bob Gross Committee (the Committee), he failed to file the Committee’s July and October 2002 quarterly reports. Mr. Wilkinson also asked the court to set aside the Commission’s assessment of \$5,400 in civil money penalties under its administrative fines regulations. 11 CFR 111.30-111.45.

*Background.* On October 29, 2002, the Commission found reason to believe (RTB) that the Committee and Mr. Wilkinson failed to file the July quarterly report, and on December 23 the Commission found RTB that they failed to file the October quarterly report. The Commission calculated a \$2,700 penalty for each report based on the FEC’s schedule of administrative fine penalties. Mr. Wilkinson challenged the RTB findings under the administrative process provided for in Commission regulations. 11 CFR 111.35-111.37. After reviewing the RTB findings and Mr. Wilkinson’s written responses, the FEC Reviewing Officer recommended that the Commission make a final determination that the Committee and Mr. Wilkinson violated 2 U.S.C. §434(a) and assess \$5,400 in civil penalties, based on the two reports. On July 8, 2003, the Commission adopted the Reviewing Officer’s recommendations and made final determinations.

*Court Complaint.* In his court complaint, Mr. Wilkinson asserts that he resigned as treasurer of the Committee on May 11, 2002, and sent the Committee written notice to that effect on May 13, 2002. Mr. Wilkinson argues that, because he resigned as treasurer prior to the two reporting dates, it was not his responsibility to file the July and October 2002 quarterly reports, and, therefore, the Commission’s final determination and assessment of a civil money penalty against him is in error.

Mr. Wilkinson asks that the court set aside the Commission’s final

<sup>2</sup> Having found that Mr. Paul lacked standing because he did not suffer an injury in fact, the court did not address the Commission’s argument that Mr. Paul was precluded from bringing suit under the fugitive disentitlement doctrine because he is a fugitive from justice from charges pending in federal court in New York.



determination and assessment of the civil penalties against him.

U.S. District Court for the District of Utah, Central Division, 2:03-CV-00734. ♦

—Gary Mullen

## Public Funding

### Estimated Presidential Spending Limitations

Under the Presidential Election Campaign Fund Act (the Fund Act) and the Presidential Primary Matching Payment Account Act (the Matching Act), Presidential candidates who accept public funding agree, among other things, to abide by overall spending limits as well as by state-by-state spending limits.<sup>1</sup> These limits are calculated using the cost of living adjustment (COLA) since 1974 and the voting age populations (VAPs) of each state for the year in which the election is held. However, in order to help Presidential campaigns estimate their spending limits for the upcoming elections, the Commission releases spending limit figures for the year preceding the Presidential election year.

If the Presidential election were held in 2003, the Commission calculates that each primary contender would be able to spend nearly \$50 million seeking his or her party's nomination. Party nominees would be able to spend more than \$74 million in the general election. These figures merely provide an estimate of what the actual spending limits will be. Official spending limits for the 2004 Presidential elections, which must be updated for

(continued on page 10)

<sup>1</sup> These limits apply only to those campaigns choosing to accept federal matching funds. Campaigns which opt to forego federal funding may spend unlimited amounts of money.

### Estimated State-By-State Expenditure Limits for 2004 Presidential Primary Candidates

State	Voting Age Population (in thousands)	Expenditure Limit
Alabama	3,379	\$1,972,255
Alaska*	451	\$729,600
Arizona	3,980	\$2,323,046
Arkansas	2,033	\$1,186,621
California	25,664	\$14,979,564
Colorado	3,355	\$1,958,246
Connecticut	2,588	\$1,510,564
Delaware*	618	\$729,600
DC*	459	729,600
Florida	12,831	\$7,489,198
Georgia	6,292	\$3,672,515
Hawaii*	949	\$729,600
Idaho*	971	\$729,600
Illinois	9,346	\$5,455,073
Indiana	4,564	\$2,663,916
Iowa	2,239	\$1,306,860
Kansas	2,019	\$1,178,450
Kentucky	3,161	\$1,845,012
Louisiana	3,297	\$1,924,393
Maine*	1,015	\$729,600
Maryland	4,078	\$2,380,247
Massachusetts	4,964	\$2,897,388
Michigan	7,480	\$4,365,926
Minnesota	3,768	\$2,199,306
Mississippi	2,111	\$1,232,148
Missouri	4,275	\$2,495,232
Montana*	693	\$729,600
Nebraska	1,290	\$752,947
Nevada	1,601	\$934,472
New Hampshire*	967	\$729,600
New Jersey	6,463	\$3,772,324
New Mexico	1,355	\$790,886
New York	14,544	\$8,489,042
North Carolina	6,251	\$3,648,584
North Dakota*	487	\$729,600
Ohio	8,541	\$4,985,211
Oklahoma	2,620	\$1,529,242
Oregon	2,666	\$1,556,091
Pennsylvania	9,472	\$5,528,617
Rhode Island*	830	\$729,600
South Carolina	3,128	\$1,825,751
South Dakota*	565	\$729,600
Tennessee	4,393	\$2,564,106
Texas	15,678	\$9,150,935
Utah	1,603	\$935,639
Vermont*	477	\$729,600
Virginia	5,514	\$3,218,412
Washington	4,556	\$2,659,246
West Virginia	1,413	\$824,740
Wisconsin	4,103	\$2,394,839
Wyoming*	376	\$729,600

\* In these states, the limit is the minimum \$200,000 plus the COLA, resulting in a \$729,600 spending limit. This limit also applies to the U.S. Territories.

## Public Funding

(continued from page 9)

changes in state VAPs and the COLA, will not be available until early 2004.

The overall “base” spending limit for Presidential primary campaigns is \$10 million, adjusted for the cost of living. For 2003, the inflation-adjusted overall spending limit is \$36,480,000. The state-by-state limits are keyed to the VAP of each state, with a minimum of at least \$200,000, plus a COLA for those states with a low VAP. The formula for setting state limits is 16¢ multiplied by the VAP + COLA. A less populated state, such as New Hampshire, would have a limit of \$200,000, plus COLA, or \$729,600. A larger state, such as California, would have a limit of 16¢ x 4,106,240 (VAP), plus COLA, or \$14,979,564.

Commission regulations exempt certain expenses from the overall spending limits. For example, an exemption for 20 percent of a campaign’s fundraising expenses effectively raises the total amount primary contenders may spend in the pre-convention period to \$43,776,000. Campaigns may also spend up to an additional 15 percent of the overall spending limit on legal and accounting expenses. Thus, the maximum amount that a primary committee could spend—taking both of these exemptions into account—is \$49,248,000.

While these exemptions are derived from the overall spending limit, they also affect state spending limits. The Commission provides guidance on how campaigns must allocate expenses to particular state primaries. A campaign may consider 50 percent of all expenses that are allocable to a given state to be “exempt fundraising” and need not count these expenses toward the

spending limit for that state.<sup>2</sup> Thus, a campaign may use its available fundraising exemption selectively to assure that the 20 percent overall exemption is not exhausted before particular primaries where the state spending limitation is of greatest concern. A campaign availing itself of the maximum fundraising exemption in New Hampshire, for example, might permissibly spend as much as \$1.46 million on the New Hampshire primary, even though the calculated spending limit is \$729,600.

In the general election, major party nominees who choose to accept public funding will receive at least \$74.4 million each to finance their campaigns (\$20 million, plus COLA over 1974). The nominees must spend only those funds and not supplement the public funds with any private contributions for the campaign. The nominees may, however, raise private funds to cover certain legal and accounting costs, which are not subject to the spending limit. Additionally, the two major parties will be able to spend at least \$15,720,980 million on their respective Presidential nominees in coordinated expenditures. ♦

—Amy Kort

### Commission Certifies LaRouche for Primary Matching Payments

On October 8, 2003, the Commission certified that Lyndon LaRouche’s Presidential primary committee, LaRouche in 2004, is eligible to receive Presidential primary matching payments. 26

<sup>2</sup> Direct mail expenses for mailings occurring more than 28 days before the primary election may be considered 100 percent exempt fundraising. Direct mailings sent within 28 days before the election may only be considered 50 percent exempt fundraising.

U.S.C. §9033(a) and (b); 11 CFR 9033.1 and 9033.3.

Under the Presidential Primary Matching Payment Account Act, the federal government will match up to \$250 of an individual’s total contributions to an eligible Presidential primary candidate. A candidate must establish eligibility to receive matching payments by raising in excess of \$5,000 in each of at least 20 states (i.e., over \$100,000). Although an individual may contribute up to \$2,000 to a primary candidate, only a maximum of \$250 per individual applies toward the \$5,000 threshold in each state. Candidates who receive matching payments must agree to limit their spending and submit to an audit by the Commission.

No payments may be made from the Matching Payment Account before January 1 of the Presidential election year. In December 2003, the Secretary of the Treasury will certify eligible candidates’ full entitlements based on a review of the matching payment submissions through December 1, 2003. ♦

—Amy Kort

## Index

The first number in each citation refers to the “number” (month) of the 2003 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, “1:4” means that the article is in the January issue on page 4.

### Advisory Opinions

- 2002-12: Disaffiliation of corporations and their PACs, 2:8
- 2002-14: National party committee’s lease of mailing list and sale of ad space and trademark license, 3:5
- 2002-15: Affiliation of trade associations, 4:8

2003-1: Nonconnected committee's allocation of administrative expenses, 4:9

2003-2: Socialist Workers Party disclosure exemption, 5:1

2003-3: Solicitation of funds for nonfederal candidates by federal candidates and officeholders, 6:1

2003-4: Corporation's matching charitable contribution plan, 6:3

2003-5: Federal candidate's or officeholder's participation in membership organization fundraising events, 8:1

2003-6: Transfer of payroll deduction authority, 7:4

2003-7: State leadership PAC's refund of nonfederal funds, 7:5

2003-10: Solicitation of nonfederal funds by relative of federal candidate, 8:6

2003-11: State party committee's payment of employee benefits, 10:7

2003-12: Federal candidate/officeholder's support of ballot initiative, 9:7

2003-13: Qualification of "Members-in-Training" as members of membership organization, 8:7

2003-14: Distribution of apron pins bearing PAC name, 8:8

2003-15: Donations to legal expense trust fund, 10:8

2003-16: Affinity credit card program between national bank and national party committee, 10:16

2003-17: Use of campaign funds to pay for criminal defense, 9:10

2003-18: Impermissibility of transfer of general election funds to charitable organization, 9:10

2003-19: National party committee's sale of office equipment, 10:11

2003-20: Officeholder solicitation for scholarship fund, 10:11

2003-21: Disaffiliation of corporations' PACs, 11:1

2003-22: Contributions collected and forwarded to trade association SSF by executives of member corporations, 10:12

## Compliance

ADR program cases, 2:11; 3:3; 5:10; 7:10; 8:11; 9:13; 10:15

Deposition transcripts in nonpublic investigations, policy statement, 10:3

Letter notification procedures, 3:2

Administrative Fine program cases, 1:25; 2:13; 3:4; 5:7; 7:6; 8:11; 9:12; 11:6

MUR 4931: Corporate contributions and contributions in the name of another, 10:1

MUR 5187: Corporate reimbursements of contributions, 1:22

MUR 5208: Facilitation by national bank, 2:1

MUR 5270: Failure to accurately report disbursements and cash-on-hand, 6:7

Public hearing on enforcement procedures, 6:7; 7:7

## Court Cases

\_\_\_\_\_ v. FEC

- AFC-CIO and DNC Services Corp./DNC, 8:1
- Cannon, 10:13
- Cox, 8:3
- Cunningham, 1:19
- Greenwood for Congress, 4:4; 10:13
- Hawaii Right to Life, Inc., 1:20
- Judicial Watch and Peter F. Paul, 11:7
- Lovely, 3:4
- Luis M. Correa, 5:5
- McConnell et al., 6:1
- Stevens, 8:3
- Wilkinson, 11:8

FEC v. \_\_\_\_\_

- Beaumont, 1:20; 7:1
- California Democratic Party, 5:5
- Dear for Congress, 8:4
- Fulani, 2:8
- Freedom's Heritage Forum, 2:8; 5:5; 10:13
- Toledano, 1:20

## Regulations

Administrative fines, final rules, 4:1

BCRA reporting, final rules, 1:14

BCRA technical amendments, 2:6

Biennial limit, clarification, 2:1

Brokerage loans and credit lines, 2:4

Candidate travel, Notice of Proposed Rulemaking, 9:4; public comments, 11:4

Contribution limits increase, 1:6

Contribution limits and prohibitions; delay of effective date, 2:6

Coordinated and independent expenditures, final rules, 1:10

Disclaimers, fraudulent solicitation, civil penalties and personal use of campaign funds, final rules, 1:8

Leadership PACs, NPRM, 2:4

Millionaires' Amendment, interim final rules, 2:2

Multicandidate committees and biennial contribution limits, Notice of Proposed Rulemaking, 9:3; public comments, 11:4

Party committee phone banks, Notice of Proposed Rulemaking, 10:4; public comments, 11:4

Political committee mailing lists, Notice of Proposed Rulemaking, 10:5; public comments, 11:4

Public Presidential funding and conventions, NPRM, 5:1; postponement of hearing date, 6:9; public hearing, 7:8; final rules, 9:1

Trade Associations' use of payroll deduction, Petition for Rulemaking, 11:1

## Reports

April reporting reminder, 4:1

Draft forms and e-filing formats available for public comment, 1:2

Filing form 3Z-1, 7:2

July reporting reminder, 7:1

New forms available, 3:1

October reporting reminder, 10:1

Puerto Rico primary election reporting, 10:18

Reports due in 2003, 1:3

State Filing Waiver Program, reminder, 11:5

Statements of Candidacy/Organization for authorized committees, 3:2

Texas special election reporting, 4:4

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