

# Record

March 2004

Federal Election Commission

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## Table of Contents

### Regulations

- 1 Federal Election Activity Periods
- 3 FCC Electioneering Communications Database
- 3 Federal Register
- 4 Petition for Rulemaking on Public Access to Materials from Closed Enforcement Matters

### Legislation

- 1 Administrative Fines Extended; Safe Harbor for Timely Filing

### Compliance

- 4 Proposed Statement of Policy Regarding Naming Treasurers in Enforcement Matters

### Court Cases

- 4 Cox for Senate v. FEC
- 7 New Litigation

## 10 Advisory Opinions

### Party Activities

- 15 2004 Coordinated Party Expenditure Limits

## 16 Nonfilers

### Public Funding

- 17 Presidential Primary Matching Funds

### Statistics

- 17 Semiannual PAC Count

### Outreach

- 18 Conferences in March and April
- 19 Roundtables

## 19 Index

## Regulations

### Federal Election Activity Periods

Under the Bipartisan Campaign Reform Act (BCRA), political party committees that conduct “federal election activity” (FEA) must pay for this activity with federally permissible funds or, in some cases, may allocate the costs between federal and Levin funds or pay for them entirely with Levin funds. In order to help committees determine whether their planned activities will constitute FEA, the FEC has placed on its web site ([http://www.fec.gov/pages/bcra/rulemakings/charts\\_fea\\_dates.htm](http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates.htm)) charts listing for each state:

- The 120-day windows for FEA voter registration activity (the first type of FEA listed below); and
- The ballot access deadlines for determining the start of the FEA periods for voter identification, generic campaign activities and get-out-the-vote activities (the second type of FEA listed below).

### Definition of FEA

As used in 11 CFR part 300, “federal election activity” means any of the following activities:

(continued on page 2)

## Legislation

### Congress Amends Act to Extend Administrative Fine Program and Expand Safe Harbor for Timely Filing

On January 23, 2004, President Bush signed legislation (the Consolidated Appropriations Act 2004, P.L. 108-199) that included amendments to the Federal Election Campaign Act (the Act) to:

- Allow the use of overnight delivery services with delivery confirmation or an on-line tracking system for timely filing purposes; and
- Extend the Administrative Fine program through December 31, 2005.

### Overnight Mail

Prior to this amendment to the Act, reports and statements sent by registered or certified mail were considered timely filed if post-marked by the filing date.<sup>1</sup> Reports sent by other means were required to be received by the filing date. See 2 U.S.C. §434(a) and 11 CFR

(continued on page 2)

<sup>1</sup> Twelve day pre-election reports sent by registered or certified mail must be mailed no later than the 15<sup>th</sup> day before any election.

## Legislation

(continued from page 1)

104.5(e). As of January 23, reports and statements sent via express or priority mail with a delivery confirmation, or via overnight delivery service with an on-line tracking system, will also be considered timely filed if received by the delivery service by the filing deadline. Reports sent by first-class mail, hand delivery or any other means must still be received by the Commission by the close of business on the filing deadline in order to be considered timely filed.

The Commission plans to amend its regulations at 11 CFR 100.19 and 104.5 to conform to the new statutory provisions. In the interim, filers may rely on the statutory language.

### Administrative Fine Program

The Commission has statutory authority to assess a civil money penalty for violations of the reporting requirements at 2 U.S.C.

**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)

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Director

**Amy Kort**, Editor

<http://www.fec.gov>

§434(a). See 2 U.S.C.

§437g(a)(4)(C). This authority terminated on December 31, 2003, and was not re-instated until the President signed the 2004 Appropriations Act, extending this statutory authority through 2005. On February 11, 2004, the Commission published in the *Federal Register* (69 FR 6525) a final rule amending section 11 CFR 111.30 to renew the applicability of the administrative fines regulations to include all violations relating to reports that cover the period between July 14, 2000, and December 31, 2005.

However, as a result of the lapse between the 2003 statutory provisions' expiration and the new law's enactment, there is a gap in the applicability of the Administrative Fine program from January 1, 2004, until February 10, 2004. Thus, all reports covering reporting periods that began and ended during the gap and are due before February 11, 2004, are not subject to the program. The reports not covered include certain 48-hour reports and pre-election reports. These reports are subject to the Commission's enforcement procedures at 11 CFR 111 subpart A.<sup>2</sup>

The full text of the *Final Rule Extending the Administrative Fine Regulations* is available on the FEC web site at <http://www.fec.gov/register.htm>. ♦

—Amy Kort

<sup>2</sup> *The Commission notes that Congress, in extending the Commission's Administrative Fine program authority, provided for continuous applicability of the program through December 31, 2005. Moreover, the program is procedural: the underlying substantive reporting requirements have remained in effect. Consequently, it is appropriate to apply the program to reports that are due after February 10, 2004, even though those reports may relate to reporting periods that include the gap.*

## Regulations

(continued from page 1)

1. Voter registration activity during the 120 days before a regularly scheduled federal election and ending on the day of that election;
2. Voter identification, generic campaign activities<sup>1</sup> and get-out-the-vote activities that are conducted in connection with an election in which one or more candidates for federal office appear on the ballot (regardless of whether state or local candidates also appear on the ballot);
3. A public communication that refers to a clearly identified federal candidate and that promotes, supports, attacks or opposes any federal candidate. (This definition applies regardless of whether a nonfederal candidate is also mentioned or identified in the communication and regardless of whether the communication expressly advocates a vote for or against a federal candidate.); and
4. Services provided by an employee of a state, district or local party committee who spends more than 25 percent of his or her compensated time during that month on activities in connection with a federal election. 11 CFR 100.24(b).

For the purposes of the definition of FEA, "in connection with an election in which a candidate for federal office appears on the ballot" means:

- In an even-numbered year, the period beginning on the day of the earliest filing deadline for primary election ballot access under state law—or on January 1 in states that

<sup>1</sup> "Generic campaign activity" means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified federal or nonfederal candidate. 11 CFR 100.25.

do not hold primaries—and ending on the day of the general election or the general election runoff if a runoff is held; or

- In an odd-numbered year, the period beginning on the day that the date is set for a special election in which a federal candidate appears on the ballot, and ending on the day of that election. 11 CFR 100.24(a).

### Paying for FEA

As a general rule, state, district and local party committees must use federal funds to make expenditures and disbursements for FEA.<sup>2</sup> 11 CFR 300.32(a)(2). However, as long as certain conditions are met, a state, district or local party committee may use Levin funds to pay for all or part of:

- Voter registration activity during the period that begins 120 days before the date of a regularly-scheduled federal election and ends on the day of that election; and
- Voter identification, get-out-the-vote or generic campaign activity conducted in connection with an election in which a federal candidate appears on the ballot (regardless of whether a state or local candidate also appears on the ballot).<sup>3</sup> 11 CFR 300.32(b).

Levin funds may *not* be used, however, to pay for any part of FEA if:

- The activity refers to a clearly-identified federal candidate; or
- Any portion of the funds will be

<sup>2</sup> Additionally, an association or similar group of state or local candidates or officeholders must use only federal funds to make expenditures or disbursements for federal election activity. 11 CFR 300.32(a)(1).

<sup>3</sup> Levin funds may also be used for any purpose that is not federal election activity as long as this use is lawful in the state in which the committee is organized. 11 CFR 300.32(b)(2).

used to pay for a television or radio communication, other than a communication that refers solely to a clearly identified state or local candidate. 11 CFR 300.32(c).

Levin funds may be used to pay for the entirety of permissible FEA disbursements only if the party committee's disbursements for allocable FEA do not exceed \$5,000 in the aggregate in a calendar year. Disbursements and expenditures that aggregate in excess of \$5,000 per year must be paid entirely with federal funds or allocated between federal funds and Levin funds, according to the minimum allocation percentages described at 11 CFR 300.33(b). See 11 CFR 300.33(a).

### Additional Information

For additional information on FEA, see the Commission's BCRA Campaign Guide Supplement, available on the FEC web site at <http://www.fec.gov/pdf/guidesup03.pdf>, or call the FEC's Information Division at 800/424-9530 or 202/694-1100. ♦

—Amy Kort

### FCC Electioneering Communications Database Now Available

On February 3, 2004, the Federal Communications Commission (FCC) launched an Electioneering Communications Database, which is available on the FCC web site at <http://gullfoss2.fcc.gov/ecd> or <http://svartifoss2.fcc.gov/ecd>. The Electioneering Communications Database allows users to determine whether a communication sent via broadcast station, cable system and/or satellite system can reach 50,000 or more people in a Congressional district or state. Such communications may qualify as "electioneering communications" if they mention a clearly identified federal candidate and are distributed within 30 days before a primary election or within

60 days before the general election. See 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29. The electioneering communication periods are available on the Federal Election Commission (FEC) web site at <http://www.fec.gov/pages/refer.htm>.

Any person who spends more than \$10,000 in the aggregate on electioneering communications during a calendar year must file a report with the FEC. 11 CFR 100.19(f) and 104.20(a)(1)(i). Corporations and labor organizations are prohibited from making or financing electioneering communications. 11 CFR 114.2(a)(2)(iii) and 114.14(a). See the November 2002 *Record*, page 3, and the January 2003 *Record*, page 14.

The information in the Electioneering Communications Database is current as of November 2003, and will remain unchanged through the end of the 2004 election cycle.

(continued on page 4)

## Federal Register

Federal Register notices are available from the FEC's Public Records Office, on the FEC web site at <http://www.fec.gov/register.htm> and from the FEC faxline, 202/501-3413.

### Notice 2004-2

Rulemaking Petition: Public Access to Materials Relating to Closed Enforcement Cases; Notice of Availability (69 FR 2083, January 14, 2004)

### Notice 2004-3

Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters (69 FR 4092, January 28, 2004)

### Notice 2004-5

Final Rules and Explanation and Justification on the Extension of Administrative Fines (69 FR 6525, February 11, 2004)

## Regulations

(continued from page 3)

Under FEC regulations, if the database “indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional District or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication.” 11 CFR 100.29(b)(6)(i).<sup>1</sup>

Individuals with questions about the database may contact the FCC by e-mail at [campaignlaw@fcc.gov](mailto:campaignlaw@fcc.gov). Questions about the rules governing electioneering communications should be directed to the FEC’s Information Division by phone at 800/424-9530 (press 1, then 3) or 202/694-1100, or by e-mail at [info@fec.gov](mailto:info@fec.gov). ♦

—Amy Kort

### Petition for Rulemaking on Public Access to Materials from Closed Enforcement Matters

On December 9, 2003, the Commission received a Petition for Rulemaking asking it to amend its rules to provide for the disclosure of materials relating to closed enforcement cases without unnecessarily burdening First Amendment inter-

<sup>1</sup> If information for a particular media outlet is not available in the database, then the person making the communication will have a complete defense against any charge that a communication can reach 50,000 or more persons if that person reasonably relies on written documentation obtained from the media outlet in question, demonstrates that the communication is not distributed in a metropolitan area in the specified Congressional district or state or reasonably believes that the communication cannot be received by 50,000 persons in the specified Congressional district or state. 11 CFR 100.29(b)(6)(ii).

ests.<sup>1</sup> The petition was submitted jointly by the Campaign Legal Center, the National Voting Rights Institute, the Center for Responsive Politics and Democracy 21. The Commission published a Notice of Availability in the January 14, 2004, *Federal Register* (69 FR 2083), seeking comments in response to this petition. The comment period ended on February 13. The Petition for Rulemaking and the Notice of Availability are available on the FEC web site at <http://www.fec.gov/register.htm>. ♦

—Amy Kort

## Compliance

### Proposed Statement of Policy On Naming Treasurers in Enforcement Matters

On January 28, 2004, the Commission published in the *Federal Register* (69 FR 4092) a draft statement of policy concerning the naming of treasurers as respondents in enforcement matters. The Commission is considering clarifying when a political committee treasurer is named as a respondent in an enforcement matter whether it intends to name the individual in his or her official capacity as treasurer or in his or her personal capacity. For most enforcement matters involving a political committee, the Commission may decide to name the treasurer in his or her official capacity. However, if a treasurer has apparently breached a personal

<sup>1</sup> On December 11, 2003, the Commission, as an interim measure, approved a Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files that identifies the categories of records that will be released to the public once enforcement matters are closed. See the January 2004 Record, page 6.

obligation imposed on treasurers by the Federal Election Campaign Act and Commission regulations or violated a prohibition that applies to individuals, the Commission may decide to name the treasurer in his or her personal capacity. The full text of the proposed policy is available on the FEC web site at <http://www.fec.gov/agenda/notice2004-3/fr69n018p04092.pdf>.

The Commission seeks comments on any aspect of the draft policy, including whether there are circumstances warranting flexibility in the policy’s application, whether it should consider a treasurer’s “best efforts” to comply with the law and whether it should apply this proposed policy in matters arising out of the Administrative Fine program. The deadline for public comments is February 27, 2004. Comments must be submitted, in either written or electronic form, to Peter G. Blumberg, Attorney, and may be sent by:

- E-mail to [treas2004@fec.gov](mailto:treas2004@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

## Court Cases

### Cox for U.S. Senate v. FEC

On January 21, 2004, the U.S. District Court for the Northern District of Illinois, Eastern Division, granted summary judgment in favor

## Enforcement Query System Now Available on FEC Web Site

The FEC recently launched 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, 2002. In addition to adding all cases closed subsequently, staff is working to add cases closed prior to 2002. All MURs closed in 2001 will be included in the system by July 2004, and cases closed in 2000 will be available by the end of 2004. Other FEC compliance actions (Alternative Dispute Resolution cases and Administrative Fines) will also be included in the system at a later date.

of the Commission in this case.<sup>1</sup> The Cox for U.S. Senate Committee (the Committee) and John H. Cox, its treasurer, filed suit against the Commission on May 30, 2003, appealing a civil money penalty assessed against them by the Commission under its administrative fines regulations for the Committee's failure to file two 48-hour reports documenting campaign contributions in excess of \$1,000. The plaintiffs argued that the Commission's determination that the Committee and its treasurer violated 2 U.S.C. §434(a) and the Commission's assessment of a \$22,150 civil money penalty were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. The plaintiffs also argued the Administrative Fines Schedule (the Schedule) imposes a form of criminal punishment and violates the substantive due process and equal protection clauses of the Fifth Amendment, as well as the "excessive fines" clause of the Eighth Amendment.

### Background

On February 11, 2002, the Commission sent a Primary Election Report Notice to the Committee, which explained that, under 2 U.S.C. §434(a)(6)(A), campaign contributions of \$1,000 or more (including personal loans) received by the Committee between February 28, 2002, and March 16, 2002, must be reported to the Commission

<sup>1</sup> *The granting of summary judgment by a court is appropriate where 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). Under the Administrative Procedure Act, a court can set aside an agency action it finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A); Smith v. Office of Civilian Health & Med. Program of the Uniformed Servs., 97 F.3d 950, 954 (7<sup>th</sup> Cir. 1996).*

within forty-eight hours of the committee's receipt of the same. Mr. Cox delegated responsibility for filing reports during the 48-hour reporting period to a Committee employee, Cheryl Warren.

The Committee received a \$75,000 loan from Mr. Cox in the form of a check on March 5, 2002. Although Ms. Warren received the check, she was uncertain as to whether the loan needed to be reported during the 48-hour period, did not take steps to determine whether reporting was required and failed to bring the issue to Mr. Cox's attention. Ms. Warren spent the better part of March 6, 2002, consoling a fellow Committee employee and helping him to find temporary lodging after his apartment had burned in a fire earlier that day. Neither she nor Mr. Cox filed a 48-hour report disclosing the \$75,000 loan. On March 12, Mr. Cox wired a \$144,507.47 loan directly to the Committee's bank account. Ms. Warren did not know about this second loan, and neither she nor Mr. Cox filed a 48-hour report disclosing it. Both loans, however, were subsequently reported by the Committee in its post-election April 2002 Quarterly Report, which is required by a separate reporting provision.

On September 18, 2002, the Commission found reason to believe that the Committee and Mr. Cox, as its treasurer, violated 2 U.S.C. §434(a)(6)(A) by failing to properly report three contributions of \$1,000 or more, totaling \$224,507.47, that were received during the 48-hour reporting period.<sup>2</sup> On September 19, 2002, the Commission notified the Committee of its finding and the \$22,750 civil money penalty, which

(continued on page 6)

<sup>2</sup> *Other than the amounts and dates of the contributions, no other information about the loans was available to the Commission when it made its reason-to-believe finding.*

## Court Cases

(continued from page 5)

had been calculated according to the Schedule.

The Committee submitted a response to the Commission's Office of Administrative Review (OAR) on October 25, 2002, in which it conceded that the two loans should have been reported within forty-eight hours of their receipt. The Committee argued, however, that:

- Mr. Cox had announced his intention to make the loans in campaign speeches prior to making the loans;
- The loans were subsequently disclosed in the Committee's post election Quarterly report;
- Both loans were from the candidate himself;
- The omissions were inadvertent; and
- A campaign staff member's apartment fire and the payment of the March 12, 2002, loan by wire transfer contributed to the oversights, although the committee admitted that the factual circumstances may not strictly constitute "extraordinary circumstances" that would excuse their violations.

The OAR issued its recommendation on March 27, 2003. After determining that a \$5,000 contribution from a political action committee (one of the three contributions originally at issue) was not made during the 48-hour reporting period, the OAR recommended reducing the amount of the civil money penalty from \$22,750 to \$22,150. However, the OAR rejected the remainder of the Committee's arguments, finding that:

- Ms. Warren had previously filed reports for candidate loans received during the 48-hour reporting period in Mr. Cox's prior Congressional races and was, therefore, aware that candidate loans must be reported;

- A fire in the apartment of the campaign staff member did not constitute "extraordinary circumstances" within the meaning of 11 CFR 111.35;
- Mr. Cox was also the Committee's treasurer, which made him personally responsible for reporting his own loans;
- Mr. Cox's public statement that he would contribute money to his own campaign did not override his duty to report the loans made during the 48-hour reporting period; and
- Reporting contributions in the post-election quarterly report was not a substitute for reporting contributions within forty-eight hours of their receipt.

The Committee responded to the recommendation with a number of new arguments, including constitutional challenges to the Schedule. The Commission made a final determination that the Committee violated 2 U.S.C. §434(a)(6)(A) and assessed a civil money penalty of \$22,150 and notified the Committee on April 30, 2003. The plaintiffs subsequently filed their complaint with the court on May 30, 2003.

### Court Decision

*Assessment of civil penalty.* The court found that the Commission's assessment of a civil money penalty was not arbitrary, capricious, irrational or an abuse of discretion and was in accordance with law. The court explained that:

- The record establishes that the Commission considered the Committee's mitigating factors before reaching its decision, and the Committee conceded that the "mitigating factors" do not qualify as "extraordinary circumstances" under Commission regulations.
- Campaign promises by Mr. Cox provide no guarantee that pledged contributions from Mr. Cox's personal assets would be made or even derived from the stated

funding sources, and, therefore, in failing to report loans, the Committee undermined the three "substantial governmental interests" that the disclosure requirements protect. *Buckley v. Valeo*, 424 U.S. 1 (1976).

*Penalty Schedule.* The court found that the Schedule does not impose a form of criminal punishment and determined the Schedule's penalties to be civil in construction, nature and application. The court explained that civil fines are not historically regarded as punishment and that the plaintiffs failed to establish that the Schedule's deterrent effect is penal in nature or how it might restrict their future behavior. Moreover, the Federal Election Campaign Act provides separate criminal penalties for knowing and willful violations, which suggests that the Schedule is directed towards civil behavior. 2 USC § 437g(d). An alternative purpose for the civil money penalty, other than a punitive purpose, is clearly assignable—namely the protection of "substantial governmental interests" related to the pre-election disclosure of campaign contributions—and not excessive.

The court also determined that the Schedule does not violate substantive due process or the Equal Protection Clause of the Fifth Amendment. The Committee argued that the sanctions imposed by the Schedule are "so severe that they transform the sanctions into criminal penalties," and this transformation renders the Schedule unconstitutional because the penalties set forth therein "constitute criminal punishment without the safeguards afforded an accused under the Fifth and Sixth Amendments."

The court, however, found that the Committee failed to explain how the money required to satisfy the civil penalty assessed by the Commission constituted or related in any way to an "underlying constitution-

ally protected property interest.” In addition, the court determined that the Committee failed to establish that the Schedule is not “narrowly tailored to serve a compelling state interest.” Although the plaintiffs were assessed a civil money penalty for failing to comply with 2 U.S.C. §434(a)(6)(A), their campaign activities and/or ability to run for public office were in no way limited. Furthermore, the disclosure requirements and accompanying Schedule serve to further “substantial governmental interests.”

The Committee also failed to establish to the satisfaction of the court that the Schedule creates classifications subject to equal protection analysis, or even how the disclosure requirements differ among campaign committees. In addition, the plaintiffs failed to establish that they have suffered “invidious discrimination” or disparate treatment, or that such treatment was purposeful.

The court also concluded that the Schedule is not grossly disproportionate to the conduct to which it applies and, thus, does not violate the Eighth Amendment’s excessive fines clause. Instead, the court found that the Committee subverted “substantial governmental interests” by failing to report the contributions received during the 48-hour reporting period, depriving the public of important pre-election information. Moreover, the court stated that campaign promises are not a substitute for formal and timely reporting. While the violations were inadvertent, the Committee was directly responsible for both violations—negligence is specifically excluded as an “extraordinary circumstance.” 11 CFR 111.35(b)(4). Finally, the court found that the Schedule is directly proportional to the amount of the unreported contributions and takes into account the existence of prior violations.

*Order.* The Court denied the Committee’s motion for summary

judgment, granted summary judgment in favor of the Commission and upheld the fine assessed against the Committee.

U.S. District Court for the Northern District of Illinois, Eastern Division, 03-3715. ♦

—Amy Pike

## New Litigation

### **Kean for Congress Committee v. FEC**

On January 5, 2004, the Kean for Congress Committee (the Committee) asked the U.S. District Court for the District of Columbia to find that the Commission acted contrary to law when it dismissed the plaintiff’s administrative complaint dated May 31, 2000, and subsequently failed to provide a Statement of Reasons. The administrative complaint alleged that a Virginia corporation known as the Council for Responsible Government and its so-called “Accountability Project” (collectively, CRG) funded mailings which attempted to influence a New Jersey Congressional Seventh District Republican primary, in violation of federal law. On November 4, 2003, the Commission dismissed the administrative complaint, splitting 3-3 on whether to find reason to believe the CRG violated the Federal Election Campaign Act (the Act).

*Background.* The Act prohibits corporations from making contributions or expenditures in connection with federal elections and requires that any communication advocating the election or defeat of a clearly identified candidate contain a disclaimer stating whether the communication was authorized by any candidate. The Act also requires that independent expenditures in support of, or in opposition to, a federal candidate and costing in excess of \$250 be publicly disclosed in a filing with the FEC. 11 CFR 109.2. Additionally, the Act requires any group of persons that

raises or spends more than \$1,000 and whose principal purpose is to influence federal elections to register with the FEC as a federal political committee and disclose its contributions and expenditures. 2 U.S.C. §431(4).

In 2000, Tom Kean ran in the New Jersey Congressional Seventh Republican primary against Mike Ferguson, among other candidates. The New Jersey primary election was held on June 6, 2000. Mike Ferguson won the election and presently holds the Congressional seat sought by Mr. Kean, who is currently a state Senator. The Kean for Congress Committee was Mr. Kean’s principal campaign committee in the 2000 election.

*Court complaint.* The Committee alleges that, on May 31, 2000, it filed an administrative complaint and supporting documents with the FEC alleging that the campaign mailings disseminated by the CRG violated numerous provisions of the Act. According to the Committee, in May 2000 the CRG disseminated numerous advertisements advocating the defeat of Tom Kean and the election of Mr. Ferguson. In addition, Gary Glenn, a CRG board member, was quoted in a newspaper as stating that, “[t]he very purpose of our group is to influence the outcome of elections...” The plaintiff asserted that the Committee, its candidate and supporters suffered direct political injury by the actions of the CRG which targeted Tom Kean’s campaign and palpably impaired his ability to compete on equal footing in the 2000 election. The CRG’s failure to include the required disclaimer under 2 U.S.C. §441d in its challenged campaign communications and its failure to publicly disclose its contributions and expenditures under 11 CFR 109.2 allegedly deprived the Committee of information to which it is entitled under the Act.

(continued on page 8)

## Court Cases

(continued from page 7)

By letter dated November 10, 2003, the FEC advised the Committee that the Commission was “equally divided” on whether to find reason to believe the CRG violated the Act, and closed the file on November 4, 2003. The plaintiff filed a court complaint on January 5, 2004, seeking to have the Commission’s dismissal of the administrative complaint declared contrary to law. The complaint also alleges that the FEC had failed to provide a Statement of Reasons setting forth a basis for its decision.<sup>1</sup>

*Relief.* The plaintiff asks the court to declare that the Commission’s dismissal of the Kean Committee’s administrative complaint and failure to provide a Statement of Reasons for its decision was based on an impermissible interpretation of the Act, was arbitrary and capricious, was an abuse of discretion and was otherwise contrary to law.

U.S. District Court for the District of Columbia,  
1:04CV00007. ♦

—Meredith Trimble

### Alliance for Democracy v. FEC

On January 26, 2004, the Alliance for Democracy, a non-profit, non-partisan advocacy group, Hedy Epstein and Ben Kjelshus (collectively the plaintiffs) filed a complaint in the U.S. District Court for the District of Columbia alleging that the Commission wrongfully dismissed the central allegations of

<sup>1</sup> 11 CFR 5.4(a)(4) requires that Commissioners’ opinions be placed on the public record no later than 30 days from the date on which respondents were notified that the Commission has voted to close an enforcement file. After the Committee filed its court complaint, the FEC issued and publicly released a Statement of Reasons for its decision to dismiss the Committee’s administrative complaint.

the plaintiffs’ administrative complaint against the Spirit of America PAC (SOA) and Ashcroft 2000.

*Background.* SOA was established in 1996 and John Ashcroft served as its chairman. In March 2001, the plaintiffs filed an administrative complaint with the Commission, designated MUR 5181, alleging that SOA unlawfully donated a fundraising list of approximately 100,000 donors to Ashcroft 2000, Mr. Ashcroft’s 2000 Senate campaign committee, and that the two committees failed to disclose the donation of the list or its value. According to the administrative complaint, the donation of the fundraising list constituted a contribution under the Federal Election Campaign Act (the Act) and exceeded the Act’s contribution limits. 2 U.S.C. §431(8). The administrative complaint further alleged that SOA and Ashcroft 2000 violated the Act by failing to report the contribution of the fundraising list in their FEC reports.<sup>1</sup> See 2 U.S.C. §§441a(a)(2)(a), 441a(f) and 434(b). On December 11, 2003, the FEC closed the investigation of the administrative complaint with a conciliation agreement that includes a \$37,000 civil penalty for violations stemming from the transfer of list rental income.<sup>2</sup> The plaintiffs’ new lawsuit claims that the FEC’s investigation of MUR 5181 revealed that SOA developed the fundraising list at a cost of over \$1.7 million and confirmed that the SOA illegally donated the list to Ashcroft 2000.

<sup>1</sup> The plaintiffs also filed a complaint with the court in March 2002, asking the court to find that the Commission acted contrary to law by failing to act on this administrative complaint. This case is still pending. See the May 2002 Record, page 3.

<sup>2</sup> The conciliation agreement and supporting documents are available through the FEC’s Enforcement Query System on the FEC web site at [www.fec.gov](http://www.fec.gov).

*Court complaint.* The complaint alleges that the Commission failed to find probable cause to believe that the transfer of the mailing list constituted an in-kind contribution, or that the value of the list had to be reported as a contribution. The Commission also did not find probable cause as to Ashcroft 2000’s use of the list or Ashcroft 2000’s receipt of list rental income from its own rental of the list. The plaintiffs also allege that the list’s value far exceeds the \$112,962 in excessive contributions found by the Commission.

The plaintiffs allege in their court complaint that the FEC’s “dismissal of the central allegations of the administrative complaint, and its approval of the transfer of the funding list from the Spirit of America PAC to Ashcroft 2000 and the non-reporting of the transfer, are arbitrary and capricious, contrary to law and a clear abuse of the agency’s discretion.” The plaintiffs also allege that the Commission’s failure to find excessive contributions and reporting violations based on the illegal donation of the fundraising list is based on an impermissible interpretation of the Act. See 2 U.S.C. §§431(8)(A)(i), 432(b), 434(b) 441a(a)(2)(A) and 441a(f). They assert that if the court enters a judgment finding that the FEC’s actions in this matter were contrary to law, the Commission will, upon remand, have the authority to:

- Ascertain the value of the mailing list;
- Require reporting and disclosure of the alleged contribution resulting from the list transaction; and
- Seek further penalties and/or injunctive or declaratory relief against SOA, Ashcroft 2000 and their principals.

The plaintiffs ask the court to:

- Declare that the FEC’s dismissal of key allegations of the administrative complaint were contrary to law;



- Remand the matter to the FEC with an order to conform to the court's declaration within 30 days; and
- Grant such other relief as may be appropriate.

U.S. District Court for the District of Columbia,  
1:04CV00127.◆

—Amy Kort

### FEC v Friends of Lane Evans

On January 30, 2004, the Commission filed a complaint in the U.S. District Court for the Central District of Illinois, Rock Island Division. The complaint alleges that, during the 1998 and 2000 elections, Congressman Lane Evans' campaign committee established a purportedly independent committee, the 17<sup>th</sup> District Victory Fund (the Victory Fund), that was in fact nothing more than an alter ego of the Congressman's campaign committee. According to the complaint, the Victory Fund accepted hundreds of thousands of dollars in prohibited corporate contributions and contributions which, if given to the principal campaign committee itself, would have exceeded the Federal Election Campaign Act's (the Act) contribution limits.

The complaint alleges that the Victory Fund spent these funds on get-out-the-vote activities to aid Congressman Evans and conducted its activities at the direction of, and in close coordination with, Eric Nelson, Congressman Evans' campaign manager. The complaint further alleges that a local party committee, the Democratic Party organization for Rock Island County, Illinois, made a number of expenditures in coordination with the campaign committee that exceeded the Act's limits on such in-kind contributions.

*The Act and Commission regulations.* Under the Act and Commission regulations, a political committee includes:

- Any "committee, club, association, or other group of persons" that receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year; and
- Any local committee of a political party that receives contributions aggregating in excess of \$5,000 or makes contributions or expenditures aggregating in excess of \$1,000 in a calendar year. 2 U.S.C. §431(4).

During the period in question, a candidate's principal campaign committee could accept up to \$1,000 per election from an individual, and the committees of a national party could accept up to \$20,000 per year in the aggregate from an individual. Any other political committee could accept \$5,000 per year from an individual. 2 U.S.C. §441a(a)(1). An expenditure made by any person in "cooperation, consultation or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" is considered a contribution to the candidate. 2 U.S.C. §441a(a)(7)(B)(i). Corporations and unions are barred from making contributions or expenditures in connection with any federal election. 2 U.S.C. §441b(a).

*Court Complaint.* The Commission alleges that Congressman Evans' principal campaign committee (the Evans Committee)—primarily through Mr. Nelson—established the Victory Fund, shared common consultants with it, arranged for its financing and directed its operations. The Victory Fund, which has no charter or bylaws, did not have members, hold regular meetings, maintain a permanent office in the 17<sup>th</sup> District or have a formal process for selecting its chairman or treasurer. Mr. Nelson selected and recruited the people who served in these two nominal officer positions. The Evans Committee and a consultant

who also worked for the Evans Committee solicited all donations to the Victory Fund. The Victory Fund established separate federal and nonfederal accounts, and, from 1997 through 2000, accepted approximately \$138,000 in contributions to its federal account and \$369,000 in donations to its nonfederal account, including substantial donations from labor unions. During this period, contributors to the Evans Committee made up more than 95 percent of the Victory Fund's federal contributors.

According to the complaint, the Victory fund hired vendors and contractors to provide political consulting and conduct voter identification and get-out-the-vote activities, including field operations, direct mail and telephone calls, in Congressman Evans' district. The Victory Fund made at least \$330,000 of these expenditures in cooperation and consultation with the Evans Committee, and paid for the expenditures with a mixture of federal and nonfederal funds. These coordinated expenditures constituted in-kind contributions by the Victory Fund to the Evans Committee that exceeded the applicable \$1,000 contribution limit. Since the expenditures were made exclusively in coordination with a federal candidate committee, the Victory Fund was required to pay for these expenditures entirely with federal funds. In addition, the Victory Fund allocated its fundraising expenses using an allocation method based on the composition of the ballot. Under Commission regulations at that time, this allocation method could only permissibly be used by party committees. See 11 CFR 106.5(f). As a non-party political committee, the Victory Fund was required to allocate its fundraising expenses using the ratio of total funds received to federal funds received. See 11 CFR 106.6(d).

In addition, the Commission alleges that in 1998 the Rock Island

(continued on page 10)

## Court Cases

(continued from page 9)

Democratic Central Committee (the Rock Island Committee) spent approximately \$18,000 on a radio ad, two direct mail pieces and a newspaper ad that expressly advocated the Congressman's re-election and were coordinated with the Evans Committee, primarily through Mr. Nelson. These coordinated expenditures exceeded the applicable \$1,000 contribution limit and the communications did not include the required disclaimer stating whether they were authorized by Congressman Evans or the Evans Committee. 2 U.S.C. §441d(a).

The Rock Island Committee failed to register as a political committee with the Commission and did not report its financial activity, even though it received several hundred thousand dollars during the 1998 and 2000 cycles after becoming a political committee. See 2 U.S.C. §433. Also, while it did not establish separate federal and nonfederal accounts, it accepted contributions outside the Act's limits and prohibitions.<sup>1</sup>

The Commission also contends that both the Evans Committee and the Victory Fund violated the Act's reporting requirements. See 2 U.S.C. §§433 and 434. The Evans Committee:

- Failed to report the receipt of in-kind contributions from the Victory Fund or the Rock Island committee; and
- Only listed two bank accounts in 1998 even though it maintained three accounts at that time.

The Victory Fund:

- Failed to register within 10 days of becoming a political committee;
- Falsely registered as a political party committee;
- Did not report any in-kind contributions to the Evans Committee;
- Reported the vast majority of its disbursements as administrative/voter drive expenses rather than as expenditures made on behalf of the Evans Committee; and
- Reported its fundraising expenses as the administrative/voter drive expenses of a political party, rather than as the fundraising expenses of a non-party committee.

*Relief.* The Commission asks the court to find that the Evans Committee, the Victory Fund, the Rock Island Committee and their respective treasurers violated these provisions of the Act and to permanently enjoin them from engaging in similar violations in the future. The Commission also asks the court to:

- Order these committees to file the appropriate reports and statements and amend all incorrect reports and statements previously filed with Commission; and
- Assess an appropriate civil penalty against each respondent for each violation found, not to exceed \$5,500 or the amount of the contributions or expenditures involved in each violation.

U.S. District Court for the Central District of Illinois, Rock Island Division; 04-CV-4003.♦

—Amy Kort

## Advisory Opinions

### AO 2003-39 Charitable Matching Plan Conducted by Collecting Agent of Trade Association PAC

The North Carolina Local Government Employees' Federal Credit Union (Local Government FCU), a member of the Credit Union National Association (CUNA), may match contributions to CUNA's SSF with contributions to a section 501(c)(3) charity of the contributor's choice.

#### Background

CUNA is an incorporated trade association, whose members consist of state and federal chartered credit unions and various credit union leagues nationwide. Local Government FCU is a member of CUNA and has given written prior approval to CUNA's SSF—the Credit Union Legislative Action Council (CULAC)—to solicit contributions from Local Government FCU's restricted class. Under the charitable matching plan, for each contribution made to CULAC, Local Government FCU will make a matching contribution to any public charity (incorporated under section 501(c)(3) of the Internal Revenue Code) of the contributor's choice. The individual contributors will not receive any tax benefits from the charitable donations made by Local Government FCU on their behalf and will not receive bonuses, expense accounts or other forms of direct or indirect compensation as a result of their participation in the plan.

#### Analysis

Federal law prohibits a corporation, including a federally chartered credit union, from making contributions or expenditures in connection

<sup>1</sup> In 1998 political committees—other than authorized committees—could establish two separate accounts, a federal and a nonfederal account. Funds from the nonfederal account could not be used to make contributions to federal candidates or expenditures to support or oppose federal candidates. See 11 CFR 102.5.

with a federal election. 2 U.S.C. §441b(a). However, costs paid by the corporation for the solicitation of contributions to an SSF are excluded from the definition of “contributions or expenditures.” 2 U.S.C. §441b(b)(2)(C). While a corporation may pay for the solicitation costs of its SSF, any exchange of treasury funds for contributions is prohibited and contributors may not be compensated in any way for making contributions to the SSF. 11 CFR 114.5(b).

As a member of CUNA, Local Government FCU may act as a collecting agent and may pay for the costs involved in soliciting, receiving and transmitting contributions for CULAC. 11 CFR 102.6(b)(1)(iii). In past advisory opinions, the Commission has determined that a charitable matching plan is a solicitation expense related to fundraising for an SSF. 11 CFR 114.5(b).

The Commission has not previously dealt with the question of whether charitable matching payments made by a collecting agent rather than the connected organization constitute solicitation costs. In addressing this question, the Commission notes that the regulations permitting a connected organization to pay the solicitation costs of its SSF are similar in language and intent to the regulations permitting collecting agents to pay for the cost of soliciting contributions for an SSF. 11CFR 114.5(b) and 102.6(c)(2)(i).

For this reason, the Commission determined that the costs involved in conducting a charitable matching plan should be considered solicitation costs that may be paid for by a collecting agent. The payment of such charitable matching donations by Local Government FCU is, therefore, permissible under federal law. ♦

Date Issued: January 28, 2004;  
Length: 5 pages.

— Gary Mullen

## AO 2003-40 Reporting Independent Expenditures

The U.S. Navy Veteran’s Good Government Fund (the Committee) must disclose within 48 hours its disbursements for independent expenditures that aggregate \$10,000 or more “with respect to a given election” at any time during the calendar year up to and including the 20<sup>th</sup> day before the election. Independent expenditure disbursements made during this period that do not aggregate in excess of this amount with respect to a single election must be reported on the committee’s next regularly scheduled report.

### Background

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), persons (including political committees) that make or contract to make independent expenditures aggregating \$10,000 or more at any time up to and including the 20<sup>th</sup> day before the date of an election must disclose this activity to the Commission within 48 hours. 2 U.S.C. §434(g)(2)(A). Commission regulations specify that a political committee must aggregate all independent expenditures “with respect to a given election” during the relevant time period to determine if it has reached the \$10,000 threshold for the 48-hour report requirement. 11 CFR 104.4(b)(2). All disbursements for independent expenditures and all enforceable contracts, either oral or written, obligating funds for independent expenditure disbursements during the calendar year must be aggregated when the independent expenditures are made with respect to the same election for federal office. 11 CFR 104.4(f). The requirement to calculate the committee’s aggregate independent expenditure disbursements—in order to determine whether a 48-hour report is required—is triggered each time an

independent expenditure is publicly distributed. 11 CFR 104.4(f).

During the 2004 calendar year, the Committee intends to make only the following nine independent expenditures:

1. \$9,000 on February 15 for Candidate X in connection with the November 2 general election for U.S. Senator from Alaska;
2. \$9,000 on February 17 for Candidate Y in connection with the November 2 general election for U.S. Representative from Florida;
3. \$9,000 on February 26 for Candidate Z in connection with the November 2 general election for U.S. Senator from Kentucky;
4. \$9,000 on February 1 for Candidate A in connection with the March 2 New York Democratic Presidential Primary;
5. \$9,000 on February 3 for Candidate A in connection with the March 2 California Democratic Presidential Primary;
6. \$9,000 on February 5 for Candidate A in connection with the June 8 New Jersey Democratic Presidential Primary;
7. \$4,000 on February 1 for Candidate B in connection with the March 2 California Democratic Presidential Primary;
8. \$9,000 on July 1 in Arizona for electors pledged to Candidate C in connection with the November 2 Presidential general election; and
9. \$9,000 on July 6 in Arkansas for electors pledged to Candidate C in connection with the November 2 Presidential general election.

### Filing 48-Hour Reports

*Congressional elections held on the same day.* The Committee would not have to file a 48-hour report for the first three independent expenditures listed above because a 48-hour

(continued on page 12)

## Advisory Opinions

(continued from page 11)

report is not required until the Committee's aggregate independent expenditures "with respect to a given election" reach \$10,000. All of these expenditures would be below that threshold. Moreover, the Committee would not be required to aggregate any of these expenditures because each office sought is the subject of a separate election, even though the general election for each U.S. House of Representatives seat and one-third of the Senate will be held on the same day, November 2, 2004.<sup>1</sup> Instead, the Committee would disclose these expenditures on its regularly scheduled reports. 11 CFR 104.4(b)(1).

*Presidential primary elections in different states.* Similarly, neither the fourth nor the sixth independent expenditure listed above would require a 48-hour report because the Committee's aggregate independent expenditures "with respect to a given election" would not equal or exceed \$10,000. The Committee would not be required to aggregate any of these expenditures because each state's Presidential primary is considered a separate election for the purposes of aggregating inde-

pendent expenditures.<sup>2</sup> Again, the Committee would disclose these expenditures on its next regularly scheduled report. 11 CFR 104.4(b)(1).

*Different candidates in the same election.* The February 1 independent expenditure described in scenario seven would not require the Committee to file a 48-hour report for reasons stated above. However, the February 3 independent expenditure described in scenario five would require the Committee to file a 48-hour report because it would be related to the same election as the \$4,000 expenditure described in scenario seven. Although this expenditure would be related to a different candidate than the expenditure in scenario seven, the Committee must aggregate the expenditures because they both are related to the same election. The Committee's 48-hour report must disclose the independent expenditures described in both scenarios five and seven.

*Elections relating to the general election for a single office.* The Committee would be required to file a 48-hour report after it makes the independent expenditure on July 6 described in scenario nine because the Committee must aggregate the expenditures in scenarios eight and nine. Both expenditures would relate to the general election for a single office, President of the United States. The 48-hour report must disclose both independent expenditures described in scenarios eight and nine.

Date Issued: February 6, 2004;  
Length: 5 pages. ♦

—Amy Kort

## AO 2004-1 Endorsement Ads Result in Contribution

Advertisements featuring President Bush and endorsing Congressional candidate Alice Forgy Kerr that are distributed within 120 days before the Kentucky Presidential primary election would be coordinated communications resulting in in-kind contributions to Bush-Cheney '04, Inc. (the Bush-Cheney Committee) if paid for entirely by Alice Forgy Kerr For Congress (the Kerr Committee). These proposed communications meet the three pronged test for coordinated communications under 11 CFR 109.21. However, advertisements that are distributed outside of this 120-day window would not be coordinated communications and, thus, would not constitute in-kind contributions to the Bush-Cheney Committee.

### Background

State Senator Kerr was a candidate for Congress in Kentucky's February 17, 2004, special election. President Bush will appear on the ballot for re-election in Kentucky's Presidential primary on May 18. The Kerr Committee intends to pay for one or more television ads for State Senator Kerr's election that include images of the President and/or audio of him speaking, which are intended to convey the President's support for Ms. Kerr's election. The President's agents will review the final script for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the "endorsement" message that the President wishes to convey.

The proposed ads do not mention the President's re-election candidacy or expressly advocate the election or defeat of any Presidential candidate. They do not include any material prepared by the President, the Bush-Cheney Committee or their agents, and they were not

<sup>1</sup> For purposes of this AO, the Commission accepts the Committee's representation that these independent expenditures would be in connection with the general election. No 48-hour reports would be required for these expenditures if they were in connection with the primary elections for the three offices, which will be held in Alaska on August 24, 2004, in Florida on August 31, 2004, and in Kentucky on August 18, 2004. Nor would 24-hour reports be required because the independent expenditures would not be made within 20 days of the election. 2 U.S.C. §434(g)(1)(A) and 11 CFR 104.4(c).

<sup>2</sup> See the Explanation and Justification for section 104.4, defining "publicly distributed." Bipartisan Campaign Reform Act of 2002 Reporting; Final Rules (68 FR 404,407, January 3, 2003). See also the Explanation and Justification for section 100.29(b)(3)(ii), discussing state Presidential primaries. Electioneering Communications; Final Rules (67 FR 65190, October 23, 2002) at 65194.

developed by, or at the request or suggestion of, the President or his campaign committee or agents. The ads will not solicit funds.

### Coordinated Communications

The Federal Election Campaign Act (the Act) has long defined as an in-kind contribution expenditures made by any person “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. §441a(a)(7)(B)(i).<sup>1</sup> In implementing the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission promulgated new regulations on coordinated communications that set forth a three-pronged coordination test. In order to qualify, a communication must:

- Be paid for by a person other than a federal candidate, a candidate’s authorized committee, a political party committee or an agent of any of these;
  - Satisfy one or more of six conduct standards (11 CFR 109.21(d)); and
  - Satisfy one or more of four content standards (11 CFR 109.21)).
- See 11 CFR 109.21(a).

A payment for a coordinated communication is made for the purpose of influencing a federal election. It is an in-kind contribution to the candidate or authorized committee with whom or which it is coordinated and must be reported as an expenditure by that candidate or authorized committee. 11 CFR 109.21(b)(1).

### Application to Proposed Ads

*Source of payment.* The proposed ads meet the first prong of the coordinated communication test if State Senator Kerr or the Kerr

<sup>1</sup> The BCRA expanded this definition to include expenditures made by any person “in cooperation, consultation, or concert with, or at the request or suggestion of” a political party committee or its agents. 11 CFR 109.21(a).

Committee pays for the ads. Although the Senator is herself a federal candidate, this does not exempt her from this section with respect to payments she makes for communications on behalf of a different federal candidate.<sup>2</sup>

*Conduct standard.* The ads would also meet one of the conduct standards and thus satisfy a second prong of the test. 11 CFR 109.21(d)(1) through (6). The “material involvement” standard is satisfied if, among other things, the federal candidate, his or her authorized committee or one of their agents conveys approval or disapproval of the other person’s plans. 11 CFR 109.21(d)(2)(i). The President’s agents’ review of the final script, as described above, would constitute material involvement.<sup>3</sup>

*Content standard: Ads publicly distributed after January 18, 2004.* The only content standard applicable to the proposed ads requires that the communication:

- Be a public communication under 11 CFR 100.26;
  - Refer to a clearly identified federal candidate;
  - Be publicly distributed within 120 days of an election for federal office; and
  - Be directed to voters within the jurisdiction of the clearly identified candidate.
- 11 CFR 109.21(c)(4).

The Kerr Committee ads distributed within 120 days of the Kentucky Presidential primary—in other words, after January 18—would meet each of these requirements

<sup>2</sup> See Coordinated and Independent Expenditures, Final Rules (68 FR 421, January 3, 2003) at 426.

<sup>3</sup> Consistent with this conclusion, the Commission recently determined that the appearance of a U.S. Senator in an ad endorsing a local candidate showed sufficient involvement by the Senator to satisfy the “materially involved” conduct standard. See AO 2003-25.

because they would be public communications that refer to President Bush and would be targeted to voters in President Bush’s jurisdiction. For Presidential primaries, the targeting concept is satisfied whenever a public communication is publicly distributed to voters in a state with a Presidential primary election within the next 120 days.

Having satisfied the three prongs of the “coordinated communication” definition, the Kerr Committee ads distributed after January 18 would be in-kind contributions to the Bush-Cheney Committee unless the Bush-Cheney Committee reimburses the Kerr Committee for its attributed portion of the coordinated communications. 2 U.S.C. §441a(a)(7)(B); 11 CFR 109.21(b)(1).

*Content standard: Ads publicly distributed before January 19, 2004.* Ads publicly distributed before January 19 do not meet any of the four content standards:

- They are not electioneering communications because they were expenditures by the Kerr Committee (see 11 CFR 100.29(c)(3));
  - They do not include any Bush-Cheney campaign material;
  - They do not expressly advocate President Bush’s election; and
  - They were not publicly distributed within 120 days of the Kentucky Presidential primary and, thus, do not meet the content standard that applies to ads distributed after the 18th.
- 11 CFR 109.21(c)(1)-(4).

As a result, these ads are not coordinated communications and are not in-kind contributions to the Bush-Cheney Committee if paid for by the Kerr Committee.

*Attribution.* Kerr Committee ads distributed after January 18, 2004, must be attributed to avoid an in-kind contribution. Expenditures, including in-kind contributions,

(continued on page 14)

## Advisory Opinions

(continued from page 13)

made on behalf of more than one clearly identified federal candidate are attributed to each candidate according to the benefit each is reasonably expected to derive. For broadcast communications, attribution is determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates. 11 CFR 106.1(a)(1). Thus, for ads distributed within 120 days of the Presidential primary, the Bush-Cheney Committee must reimburse the Kerr Committee for all production and distribution costs attributed to the Bush-Cheney Committee using the time and space method in order to avoid receiving an in-kind contribution from the Kerr Committee.<sup>4</sup>

Ads distributed prior to January 19 do not require the attribution of their production and distribution costs, and no in-kind contribution from the Kerr Committee will result from these ads.

**Disclaimers.** Under the Act, as amended by the BCRA, and Commission regulations, television ads authorized by a candidate must include either a full screen view of the candidate making a statement where the candidate identifies himself or herself and states his or her approval of the communication or a voice-over of a photograph of the candidate making the same statement. 11 CFR 110.11(c)(3)(ii). Any communications that would be subject to review by the President's agents must be considered communications authorized by the President, in addition to State Senator Kerr. Therefore, for all of the proposed ads the disclaimer requirements apply to both Ms. Kerr and President Bush. In this instance, for

example, the disclaimer for the ads distributed after January 18 could state "Paid for and Approved by Alice Forgy Kerr for Congress and Bush/Cheney '04." The disclaimer for ads distributed before January 19 could state "Paid for by Kerr for Congress and approved by Kerr and Bush/Cheney '04." Both disclaimers would be appropriate text for written disclaimers required under 11 CFR 110.11(c)(3)(iii).

Although it would also be permissible for the Bush and Kerr campaigns to structure dual approval statements in the ads, the Commission will not require such a statement for compliance with the Act. See 2 U.S.C. §441d(d)(1)(B) and 11 CFR 110.11(c)(3)(ii). In light of the fact that the Bush-Cheney Committee has in fact approved this ad, provided that the approval statement conveys that both candidates approved the ad, it can be made in the voice and with the image of only one of the candidates. For example, State Senator Kerr could appear on screen and state "My name is Alice Forgy Kerr. I am running for Congress, and President Bush and I approved this message."

### Concurring Opinion

Chairman Smith and Commissioners Mason and Toner issued a concurring opinion on February 2, 2004.

Date Issued: January 29, 2004; Length: 8 pages.◆

—Amy Kort

### Alternative Disposition of Advisory Opinion Request

#### AOR 2003-38

The Commission was unable to provide an advisory opinion by the required four vote majority on whether funds raised and spent by U.S. Representative Eliot Engel on behalf of a redistricting committee to defray legal expenses incurred in redistricting litigation are in connec-

tion with a federal or nonfederal election within the meaning of 2 U.S.C. §441i(e)(1)(A) or (B).◆

—Amy Kort

## Advisory Opinion Requests

### AOR 2004-2

Permissibility of political committees accepting contributions from testamentary trusts established by donors for the purpose of making annual contributions to political committees (National Committee for an Effective Congress, November 10, 2003)

### AOR 2004-3

Permissibility of principal campaign committee converting to non-authorized committee with multicandidate status (Dooley for the Valley, January 29, 2004)

### AOR 2004-4

Permissibility of abbreviated name of SSF (Air Transport Association of America PAC, January 23, 2004)

### AOR 2004-5

Voter mobilization and fundraising activities of nonconnected PAC with federal and nonfederal accounts (America Coming Together, February 2, 2004)

### AOR 2004-6

Permissibility of corporation's provision of free web-based services to federal candidates and political committees on same terms as to general public (Meetup, Inc., February 6, 2004)

### AOR 2004-7

Corporate funds expended for production and promotion of programming involving voter education, voter registration and a Presidential candidate endorsement as corporate contributions, expenditures or electioneering communications (MTV Networks, January 20, 2004)◆

<sup>4</sup>The Commission's determination in this advisory opinion regarding attribution applies only to two federal authorized committees spending entirely federal funds.

# Party Activities

## 2004 Coordinated Party Expenditure Limits

The 2004 coordinated party expenditure limits are now available. They are:

- \$16,249,699 for Presidential nominees;
- \$37,310 for House nominees;<sup>1</sup> and
- A range from \$74,620 to \$1,944,896 for Senate nominees, depending on each state's voting age population.

Party committees may make these special expenditures on behalf of their 2004 general election nominees. National party committees have a separate limit for each nominee, but they share their limits with their national senatorial and congressional committees. Each state party committee has a separate limit for each House and Senate nominee in its state. Local party committees do not have their own separate limit. One party committee may authorize another party committee to make an expenditure against its limit. Local committees may only make coordinated party expenditures with advance authorization from another committee.

Coordinated party expenditure limits are separate from the contribution limits; they also differ from contributions in that the party committee must spend the funds on behalf of the candidate rather than give the money directly to the campaign. Although these expenditures may be made in consultation with the candidate, only the party

(continued on page 16)

<sup>1</sup> In states that have only one U.S. House Representative, the coordinated party expenditure limit for the House nominee is \$74,620, the same amount as the Senate limit.

## Authority to Make Coordinated Party Expenditures on Behalf of House, Senate and Presidential Nominees

<b>National Party Committee</b>	May make expenditures on behalf of House, Senate and Presidential nominees. May authorize <sup>1</sup> other party committees to make expenditures against its own spending limits. Shares limits with national Congressional and Senatorial campaign committees.
<b>State Party Committee</b>	May make expenditures on behalf of House and Senate nominees seeking election in the committee's state. May authorize <sup>1</sup> other party committees to make expenditures against its own spending limits. May be authorized <sup>1</sup> by national committee to make expenditures on behalf of Presidential nominee that count against the national committee's limit.
<b>Local Party Committee</b>	May be authorized <sup>1</sup> by national or state party committee to make expenditures against its limits.

## Calculating 2004 Coordinated Party Expenditure Limits

	Amount	Formula
<b>Presidential Nominee</b>	\$16,249,699	2¢ x VAP <sup>2</sup> x COLA <sup>3</sup>
<b>Senate Nominee</b>	See table on page 16	The greater of: \$20,000 x COLA or 2¢ x state VAP x COLA
<b>House Nominee in States with Only One Representative</b>	\$74,620	\$20,000 x COLA
<b>House Nominee in Other States</b>	\$37,310	\$10,000 x COLA
<b>Nominee for Delegate or Resident Commissioner<sup>4</sup></b>	\$37,310	\$10,000 x COLA

<sup>1</sup> The authorizing committee must provide prior authorization specifying the amount the committee may spend.

<sup>2</sup> VAP means voting age population. VAP figures are not yet official.

<sup>3</sup> COLA means cost-of-living adjustment. The applicable COLA is 3.731.

<sup>4</sup> American Samoa, the District of Columbia, Guam and the Virgin Islands elect Delegates; Puerto Rico elects a Resident Commissioner.

## Party Activities

(continued from page 15)

committee making the expenditure—not the candidate committee—must report them. (Coordinated party expenditures are reported on FEC Form 3X, line 25, and are always itemized on Schedule F, regardless of amount.)

The accompanying tables on pages 15 and 16 include:

- Information on which party committees have the authority to make coordinated party expenditures;
- The formula used to calculate the coordinated party expenditure limits; and
- A listing of the state-by-state coordinated party expenditure limits. ♦

—Amy Kort

## Nonfilers

### Nonfilers

The Byron for Congress and McPeck for Congress committees failed to file 2003 Year End Reports.

On December 30, 2003, the Commission notified principal campaign committees that the Year End report was due on January 31, 2004. Committees that failed to file the report were notified on February 6, 2004, that their reports had not been received and that their names would be published if they did not respond within four business days.

The Federal Election Campaign Act requires the Commission to publish the names of principal campaign committees if they fail to file 12 day pre-election reports or the quarterly report due before the candidate's election. 2 U.S.C. §437g(b). The agency may also pursue enforcement actions against nonfilers and late filers on a case-by-case basis.

—Amy Kort

## Coordinated Party Expenditure Limits for 2004 Senate Nominees

State	Voting Age Population (in thousands)	Expenditure Limit
Alabama	3,393	\$253,186
Alaska*	460	\$74,620
Arizona	4,061	\$303,032
Arkansas	2,044	\$152,523
California	26,064	\$1,944,896
Colorado	3,398	\$253,559
Connecticut	2,648	\$197,594
Delaware*	619	\$74,620
Florida	13,095	\$977,149
Georgia	6,388	\$476,673
Hawaii	960	\$74,620
Idaho	994	\$74,620
Illinois	9,423	\$703,144
Indiana	4,592	\$342,655
Iowa	2,251	\$167,970
Kansas	2,028	\$151,329
Kentucky	3,124	\$233,113
Louisiana	3,319	\$247,664
Maine	1,019	\$76,038
Maryland	4,131	\$308,255
Massachusetts	4,946	\$369,071
Michigan	7,541	\$562,709
Minnesota	3,811	\$284,377
Mississippi	2,120	\$158,194
Missouri	4,297	\$320,642
Montana*	702	\$74,620
Nebraska	1,298	\$96,857
Nevada	1,660	\$123,869
New Hampshire	981	\$74,620
New Jersey	6,507	\$485,552
New Mexico	1,373	\$102,453
New York	14,657	\$1,093,705
North Carolina	6,320	\$471,598
North Dakota*	487	\$74,620
Ohio	8,621	\$643,299
Oklahoma	2,633	\$196,474
Oregon	2,710	\$202,220
Pennsylvania	9,535	\$711,502
Rhode Island	832	\$74,620
South Carolina	3,124	\$233,113
South Dakota*	569	\$74,620
Tennessee	4,447	\$331,835
Texas	15,878	\$1,184,816
Utah	1,609	\$120,064
Vermont*	482	\$74,620
Virginia	5,588	\$416,977
Washington	4,635	\$345,864
West Virginia	1,419	\$105,886
Wisconsin	4,139	\$308,852
Wyoming*	380	\$74,620

\* In these states, which have only one U.S. House Representative, the spending limit for the House nominee is \$74,620, the same amount as the Senate limit. In other states, the limit for each House nominee is \$37,310.



## Public Funding

### Commission Certifies Matching Funds for Presidential Candidates

On January 30, 2004, the Commission certified \$5,020,135.71 in federal matching funds to six Presidential candidates for the 2004 election.<sup>1</sup> The U.S. Treasury Department made the payments on February 2, 2004. Thus far, the six eligible candidates have been certified \$20,437,489.55. By comparison, in 2000 matching fund payments during a comparable period went to eight candidates, totalling \$39,633,318.37.

#### Shortfall

On February 2 the balance in the Presidential Election Campaign Fund (the Fund) was insufficient to

<sup>1</sup> Note that Howard Dean, John Kerry and President Bush have declined to participate in the Matching Fund program.

pay these certifications in full. Instead, candidates received payments of approximately 46 cents per dollar certified. Thus, only \$17,743,939.12 of the total amount certified to 2004 Presidential candidates has been paid to date, leaving \$2,693,550.43 unpaid. Reduced payments will continue until the Fund has been replenished by future \$3 checkoff designations on 2003 tax returns, at which time each campaign will receive the amount that it is due. For more information on the shortfall in the Fund, see the January 2004 *Record*, page 23.

#### Presidential Matching Payment Account

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

Candidates may submit requests for matching funds once each month. The Commission will certify an amount to be paid by the U.S. Treasury the following month. Only contributions from individuals in amounts of \$250 or less are matchable.

The chart below lists the amount certified to each candidate in January, along with the cumulative amount that each candidate has been certified to date.

The Commission has also certified \$14,592,000 to each of the two major political parties, for their 2004 Presidential Nominating Conventions. ♦

—Amy Kort

### Matching Funds for 2004 Presidential Candidates: January Certification

Candidate	Certification January 2004	Cumulative Certifications
Wesley K. Clark (D) <sup>1</sup>	\$1,414,638.38	\$5,147,992.85
John R. Edwards (D)	\$297,835.57	\$3,665,875.24
Richard A. Gephardt (D) <sup>2</sup>	\$567,353.84	\$3,699,141.94
Dennis J. Kucinich (D)	\$2,111,153.83	\$2,846,819.05
Lyndon H. LaRouche, Jr. (D)	\$244,750.90	\$1,083,599.24
Joseph Lieberman (D) <sup>3</sup>	\$384,403.19	\$3,994,061.23

<sup>1</sup> General Clark publicly withdrew from the Presidential race on February 11, 2004.

<sup>2</sup> Congressman Gephardt publicly withdrew from the Presidential race on January 2, 2004.

<sup>3</sup> Senator Lieberman publicly withdrew from the Presidential race on February 3, 2004.

## Statistics

### Semiannual PAC Count Shows Decrease in 2003

According to the FEC's semiannual political action committee (PAC) count, the number of federally registered PACs continued to decline in the second half of 2003, from 3,945 on July 1, 2003, to 3,868 on January 1, 2004. This figure represents a 77-committee decrease from the July 1 count and a 159-committee decrease from January 1, 2003.

Corporate PACs remain the largest category, with 1,538 committees. Nonconnected PACs remain the second-largest group,

(continued on page 18)

## Statistics

(continued from page 17)

with 999 committees. The chart at right shows the complete mid-year and year-end PAC figures since 1995.

A complete listing of PAC statistics is available in the agency's February 2, 2004, press release. The press release is available:

- On the FEC web site at [www.fec.gov/news.html](http://www.fec.gov/news.html);
- 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).♦

—Amy Kort

## Outreach

### Campaign Finance Law Training Conferences

#### House and Senate Campaigns and Party Committees

The FEC will hold a conference in Washington, DC, March 16-17, 2004, for House and Senate campaigns and political party committees. 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 Loews L'Enfant Plaza Hotel, located near the National Mall and Smithsonian museums in Washington, DC. The conference registration fee is \$360, which covers the cost of the conference, materials, meals and

### Semiannual PAC Count—1995-2004

	Corporate	Labor	Trade/ Member/ Health	Coop- erative	Corp. w/o Capital Stock	Non- connected <sup>1</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
Jan. 03	1,528	320	975	39	110	1,055	4,027
Jul. 03	1,534	320	902	39	110	1,040	3,945
Jan. 04	1,538	310	884	35	102	999	3,868

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

<sup>1</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.

a \$10 late fee that took effect February 21.

The Loews L'Enfant Plaza Hotel is located at 480 L'Enfant Plaza SW., Washington, DC. To make reservations, call toll free (800/635-5065) or locally (202/484-1000, ext. 5000) and state that you are attending the FEC conference. Parking is available at the hotel for a fee of \$15 per day and \$22 overnight. The hotel is located near the L'Enfant Plaza Metro and the Virginia Railway Express stations.

#### Corporations and their PACs

The FEC will hold a conference in Washington, DC, for corporations and their PACs April 22-23, 2004. Commissioners and experienced FEC staff will explain the campaign finance law's requirements for these

#### Conference Schedule for 2004

##### Conference for House and Senate Campaigns and Political Party Committees

March 16-17, 2004  
Washington, DC

##### Conference for Corporations and their PACs

April 22-23, 2004  
Washington, DC

##### Conference for Trade Associations, Membership Organizations and their PACs

May 25-26, 2004  
Boston, MA

groups, including regulations concerning fundraising methods, corporate communications, the use of corporate facilities and reporting. An IRS representative will be available to answer election-related tax questions.

The conference will be held at the Loews L'Enfant Plaza Hotel. The conference registration fee is \$350, which covers the cost of the conference, materials and meals. A late charge of \$10 will be added for registrations received on or after March 23.

A room rate of \$189 per night (single or double) is available for conference attendees who make reservations on or before March 22. To make reservations, call toll free (800/635-5065) or locally (202/484-1000, ext. 5000) and state that you are attending the FEC conference. Room rates for reservations made after March 22 are based on availability.

**Registration**

Complete conference program and registration information is available online. Conference registrations will be accepted on a first-come, first-served basis, and registrations are limited to two representatives per organization. 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

**Reporting Roundtables**

On April 7, 2004, the Commission will host two roundtable sessions on election year reporting, including new disclosure requirements under the Bipartisan Campaign Reform Act of 2002. See the chart below for details. Both sessions will be followed by a half-hour reception at which each attendee will have an opportunity to meet the campaign finance analyst who reviews his/her committee's reports. Representatives from the FEC's Electronic Filing Office will also be available to meet with attendees.

Attendance is limited to 30 people per session, and registration (\$25) will be accepted on a first-come, first-served basis. Please call the FEC before registering or sending money to ensure that openings remain. Prepayment is required. The registration form is

available on the FEC's web site at <http://www.fec.gov/pages/infosvc.htm> and from Faxline, the FEC's automated fax system (202/501-3413, request document 590). For more information, call 800/424-9530 (press 1, then 3) or 202/694-1100. ♦

—Jim Wilson

**Index**

The first number in each citation refers to the "number" (month) of the 2004 *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**

- 2003-28: Nonconnected PAC established by LLC composed entirely of corporations may become an SSF with LLC as its connected organization, 1:20
- 2003-29: Transfer of funds from a nonfederal PAC to a federal PAC of an incorporated membership organization, 1:21
- 2003-30: Retiring campaign debt and repaying candidate loans, 2:1
- 2003-31: Candidate's loans to campaign apply to Millionaires' Amendment threshold, 2:2
- 2003-32: Federal candidate's use of surplus funds from nonfederal campaign account, 2:4
- 2003-33: Charitable matching plan with prizes for donors, 2:5
- 2003-34: Reality television show to simulate Presidential campaign, 2:6
- 2003-35: Presidential candidate may withdraw from matching payment program, 2:7
- 2003-36: Fundraising by federal candidate/officeholder for section 527 organization, 2:8

**Roundtable Schedule**

<b>Date</b>	<b>Subject</b>	<b>Intended Audience</b>
April 7 9:30 - 11 a.m. Reception 11-11:30 a.m.	Election Year Reporting for PACs and Party Committees, plus "Meet Your Analyst" reception (Session number 0401A)	Individuals responsible for filing FEC reports for PACs and Parties (Up to 30 may attend)
April 7 1:30 - 3 p.m. Reception 3-3:30 p.m.	Election Year Reporting for Candidates and their Committees, plus "Meet Your Analyst" reception (Session number 0401B)	Individuals responsible for filing FEC reports for Candidate Committees (Up to 30 may attend)

(continued on page 20)

## Index

(continued from page 19)

2003-38: Funds raised and spent by federal candidate on behalf of redistricting committee to defray legal expenses incurred in redistricting litigation, 3:14

AO 2003-39: Charitable matching plan conducted by collecting agent of trade association, 3:10

AO 2003-40: Reporting independent expenditures, 3:11

AO 2004-1: Endorsement ads result in contribution if coordinated communications, 3:12

### Compliance

ADR program cases, 1:25

Administrative Fine program cases, 1:24

Enforcement Query System, disclosure policy for closed enforcement matters and press release

policy for closed MURs; “enforcement profile” examined, 1:6

MUR 5229: Collecting agent’s failure to transfer contributions, 1:7

MUR 5357: Corporation’s reimbursement of contributions, 2:1

Naming of treasurers in enforcement matters, proposed statement of policy, 3:4

Nonfilers, 3:16

### Court Cases

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

– Alliance for Democracy, 3:8

– Cox for Senate, 3:4

– Kean for Congress, 3:7

– McConnell v. FEC, 1:1

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

– Friends of Lane Evans, 3:9

### Regulations

Administrative Fine program extension, final rule, 3:1

Electioneering communications, FCC database, 3:3

Federal election activity periods, 3:1

Leadership PACs, final rules, 1: 18

Overnight delivery safe harbor, 3:1

Public access to materials from closed enforcement matters, Petition for Rulemaking, 3:4

Public financing of Presidential candidates and nominating conventions, correction and effective date, 1:19

Travel on behalf of candidates and political committees, final rules, 1:19

### Reports

Due in 2004, 1:9

Kentucky special election reporting, 1:9

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