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CANDIDATE GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to candidate committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of candidate committees. It should be used in conjunction with the FEC's April 2008 *Campaign Guide for Congressional Candidates and Committees*, which provides more comprehensive information on compliance for candidate committees.

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Court Cases

Shays v. FEC (III)

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

Background

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

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

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

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

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

Appeals Court Decision

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

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

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

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

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

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

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

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

—Meredith Metzler

Davis v. FEC

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

Background

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

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

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

District Court Decision

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

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

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

The court also rejected the second prong of Mr. Davis's facial challenge, regarding the Equal

Protection provision of the Fifth Amendment. In order to argue that a statute violates the Equal Protection Clause of the Fifth Amendment, a plaintiff must show that the statute treats similarly situated entities differently.

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

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

Supreme Court Decision

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

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

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

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

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

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

—*Gary Mullen*

Commission

Commission Statement on Davis v. FEC

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

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

- The Commission will no longer enforce the Amendment and will

[1] *2 U.S.C. § 441a-1.*

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

initiate a rulemaking shortly to conform its rules to the Court's decision.
- As of June 26, 2008, any FEC disclosure requirements related solely to the Amendment need not be followed. There is no longer a need to file the Declaration of Intent portion of the Statement of Candidacy (Lines 9A and 9B of Form 2), FEC Form 10, Form 11, Form 12, or Form 3Z-1.
- All other filing obligations unrelated to the Amendment remain the same. For example, contributions a candidate makes to his or her own campaign must still be reported.
- As of June 26, 2008, opponents of self-financed candidates who triggered the Amendment may not accept increased contributions.
- As of June 26, 2008, political parties may no longer make increased coordinated expenditures on behalf of opponents of self-financed candidates whose personal expenditures would have triggered the Amendment.

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

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

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

Advisory Opinions

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

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

Background

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

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

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

Analysis

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

Likewise, in AO 2002-09, the Commission determined that certain candidate-sponsored text messages were eligible for the "small items"

exception from the disclaimer requirements. Under this exception, bumper stickers, pins and other small items are not required to carry a printed disclaimer because their size would make doing so impracticable. 11 CFR 110.11(f)(l)(i).

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

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

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

—Isaac J. Baker

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

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

Background

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

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

Analysis

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

Commission regulations generally limit the time period in which a committee may obtain a redesignation to 60 days and require that impermissible funds be refunded within 60 days. 110.1(b)(3)(i) and (b)(5). The Commission has previously concluded that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations… or refund the contributions."
In this case, Senator Dodd withdrew from the Presidential race on January 3, 2008, which caused the 60-day period for obtaining redesignations and making refunds to run. On February 26, 2008, the Presidential committee filed an advisory opinion request, 54 days after Senator Dodd's withdrawal from the race. The Commission determined that Senator Dodd has six days (the balance of the 60-day period remaining after the advisory opinion request was filed) after the issuance of the advisory opinion to obtain redesignations and make refunds. Normally, the mere filing of an advisory opinion request does not toll any

statutory or regulatory deadlines. Some Commissioners believe that the 60-day deadline for obtaining redesignations and making refunds should toll in Senator Dodd's case because he presented a novel legal question regarding two potentially conflicting regulations, as was the case in Advisory Opinion 1992-15. Other Commissioners believe that tolling is warranted here only because on January 1, 2008, and for approximately six months thereafter, a period during which Senator Dodd requested this advisory opinion and it remained pending, the Commission was unable to render any advisory opinions because it lacked a quorum of Commissioners.

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

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

—Myles Martin

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

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

Background

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

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

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

Analysis

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

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

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

Applicability of the Use of Funds Provision

The FEC determined that Senator Vitter's principal campaign committee may use campaign funds to pay some, but not all, legal fees and expenses rendered in connection with a legal proceeding against a third party. The Commission concluded that legal fees and expenses incurred

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

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

— *Michelle L. Ryan*

AO 2008-8 Earmarked Contribution Counts Against Current Spending Limits

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

Background

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

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

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

Analysis

The Federal Election Campaign Act and Commission regulations place limits on the amount that any person can contribute to a national party committee, and this limit is indexed for inflation. For 2008, an individual can give no more than $28,500 to a national party committee. 11 CFR 110.1(c)(1). Individuals are additionally subject to a "biennial limit," which limits the total amount of contributions that any individual may make to all federal candidates, PACs and party committees during a two-year cycle. For the 2008 cycle, the overall biennial limit is $108,200, which is further broken down into separate limits for candidates and other committees. The biennial limit is also indexed for inflation every two years. 11 CFR 110.1(b)(1)(ii). Inflation adjustments beyond 2008 cannot be determined at this time.

The date a contribution is "made" determines the election limit it counts against, and a contribution is considered "made" when the contributor relinquishes control over it. 11 CFR 110.1(b)(6). A credit card contribution is "made" when the credit card or number is presented because, at that point, the contributor is strictly obligated to make the payment. AO 1990-14.

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

The Commission further determined that, because Mr. Zucker may not know until 2010 whether his contribution was forwarded to a candidate or a political committee, the only way to ensure that he does not exceed any possible limit that may

apply is to consider his contribution as if it were made to both the 2010 Democratic Senate nominee and the DSCC.

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

—Isaac J. Baker

AO 2008-9 Application of Loan Repayment Provision

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

Background

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

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

Analysis

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

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

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— Isaac J. Baker