Record

January 2009 *Federal Election Commission* *Volume 35*

NONCONNECTED SUPPLEMENT

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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 nonconnected committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulations and advisory opinions that affect the activities of nonconnected committees. It should be used in conjunction with the FEC's October 2005 *Campaign Guide for Nonconnected Committees*, which provides more comprehensive information on compliance for nonconnected committees.

Legislation

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 independent expenditures. The ap-

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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pellate 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

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 2008-5 Organization's Status as a Partnership

An entity organized under state law as a limited liability partnership, but classified as a corporation for federal tax purposes, is treated as a partnership under the Federal Election Campaign Act (the Act). Accordingly, the partnership's federal political action committee (PAC) is not a separate segregated fund (SSF), but rather a nonconnected PAC. As such, all administrative support provided to the PAC by the partnership would constitute contributions, subject to the limitations and prohibitions of the Act.

Background

Holland & Knight LLP (the Firm) is a law firm that is classified as a limited liability partnership (LLP) under the laws of Florida. However, for purposes of federal taxation, the Firm is classified as a corporation. The Firm is taxed as a partnership in Massachusetts and Florida, but is taxed as a corporation in other states in which it operates.

The Firm administers the Holland & Knight Committee for Effective Government (the Committee), a nonconnected PAC.

Analysis

The Act's legislative history and Commission regulations rely on state law to determine if an organization is a partnership or a corporation. Since the Firm is organized as a limited liability partnership under Florida law, the Firm is treated as a partnership under the Act and Commission regulations.

The Act generally prohibits corporations from making contributions or expenditures in connection with a federal election. However, the Act exempts from the definition of "contribution or expenditure" a corporation's costs for establishing, administering or soliciting contributions to its SSF. 11 CFR 114.1(a)(2)(iii) and 114.2(b). These exemptions are generally not extended to partnerships. Since the Firm is a partnership and not a corporation, the contribution and expenditure exemptions do not apply, and the Firm may not treat the Committee as its SSF, nor may the Firm treat disbursements for the costs of administering the Committee or for soliciting contributions for the Committee as exempt from the definition of "contribution or expenditure" under the Act and Commission regulations.

Administrative and solicitation costs paid by the Firm on behalf of the Committee are contributions. Partnerships are treated as persons under the Act and Commission regulations and may contribute up to $5,000 per calendar year to a nonconnected committee. 11 CFR 100.10 and 110.1(d). Any contributions made to the Committee by the Firm are attributable both to the Firm and to its partners. 110.1(e)(1) and (2).

Date Issued: July 29, 2008;
Length: 5 pages.

—*Myles Martin*

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 2008-10 Online Advertising Vendor May Sell Political Advertising Services

A corporation that provides an Internet service that permits individuals and nonconnected political committees to post their own online political advertising content and permits individuals to purchase airtime for these ads or ads created by the corporation is considered to be a commercial vendor engaging in *bona fide* commercial activity. As a result, the corporation does not make prohibited contributions or expenditures under the Federal Election Campaign Act (the Act) by offering its service.

Background

WideOrbit, Inc. (the corporation) sells software packages to manage advertising. As part of its business, it has developed and operates an Internet service named VoterVoter.com (the web site) that allows individuals to purchase television airtime for ads posted on the web site that expressly advocate the election or defeat of federal candidates. Neither WideOrbit, Inc. nor VoterVoter.com is owned or controlled by a candidate, political party or political committee.

Specifically, the web site allows individuals to view ads created by the corporation and by individuals and nonconnected political committees (creators). Then, through the corporation, individuals may purchase TV airtime for the ads that they have either chosen or created. The corporation receives revenue by charging the airtime purchaser a licensing fee for the use of ads created by the company and by obtaining a commission from the TV stations on the airtime bought by each purchaser through the corporation.

If an individual purchases ads created by the corporation, then the corporation will charge that purchaser a licensing fee related to the corporation's production costs and will receive an airtime commission in an amount sufficient to make a profit on each transaction. When an individual chooses an ad created by a creator, the corporation charges no licensing fee because it incurs no expense to create the ad, and the corporation will be compensated by the commission on the airtime purchased by the individual.

Where purchasers desire a new, customized advertisement, the corporation will arrange with a media creation company for the creation of the ad, with the full costs passed on to the purchaser. As a result of these payment arrangements, the purchaser will pay the corporation the usual and normal charge.

Ads that are posted on the VoterVoter.com web site will not be posted for a fee. The corporation does not charge a fee for uploading

or hosting videos when individuals or committees create their own videos to post on the web site, and it requires the creators to affirm that they were not paid by anyone else to create or post their content. The ads created and posted on the web site by the creators and by the corporation expressly advocate the election of clearly identified federal candidates. The business model of the corporation and the web site involves ads that constitute independent expenditures, not coordinated communications. The VoterVoter.com web site will not display the creators' names. No contact between candidates and creators or purchasers is established or facilitated by the corporation. In addition (with the exception of informing a purchaser of the content of the disclaimer on a political committee-created ad that is being aired), the corporation will not provide any information to actual or prospective purchasers regarding the creator of a given ad, whether other purchasers have also bought airtime for the ad or the scheduling or airing of ads. Similarly, the corporation will not give an ad's creators any information about the ad's purchasers or the scheduling or airing of ads. Services are provided on a strictly nonpartisan basis and without regard to political affiliation.

Once a purchaser chooses an ad to run, the corporation advises the purchaser of the Act's prohibitions and also that the ad will include all required disclaimers. The corporation also offers assistance to purchasers in filling out and filing FEC Form 5 (the form used by individuals and groups to report independent expenditures), but the ultimate reporting responsibility lies with the purchasers.

Analysis

Corporation as commercial vendor engaging in bona fide *commercial activity.* Under the proposed business model, the ads created by the corporation and by the creators will be viewable by the general public. Although the Act prohibits contributions or expenditures by corporations under 2 U.S.C. §441b, the Commission has determined that the distribution of express advocacy messages to the general public is permissible as "*bona fide* commercial activity," and is not a contribution or expenditure, when undertaken by a corporation organized and maintained for commercial purposes only and the activities themselves are for purely commercial purposes. For example, in the context of the sale of political paraphernalia, the Commission looked at factors including whether:

- The activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election;
- The sales of any merchandise involve fundraising activity for candidates or solicitation of political contributions;
- The items are sold at the vendor's usual and normal charge; and
- The purchases are made by individuals for their personal use. AOs 1994-30 and 1989-21.

The Commission has also considered other factors, including whether the entity is owned, controlled or affiliated with a candidate or political committee; is "in the business" of conducting the type of activity involved; and follows industry standards and usual and normal business practices. Matters Under Review (MURs) 5474 and 5539.

The facts in this case indicate that the corporation will be acting as a commercial vendor for genuinely commercial purposes and not for the purpose of influencing any federal election. Moreover, the corporation is not owned or controlled by a party, candidate or political committee, and its business model does not involve fundraising for any political committee or candidate. The corporation sells airtime at the usual and normal charge and purchasers pay in advance of the corporation's purchase of the media time requested, and hence in advance of the airing of the ad. These practices are consistent with usual and normal industry practices. In the context of this request, it is also significant that the corporation accepts and posts ads on a nonpartisan basis and seeks to attract creators without regard to the candidates their ads support or oppose.

Costs incurred by creators. Costs incurred by an individual in creating an ad are exempt from the definition of "expenditure," as long as the creator is not also purchasing TV airtime for the ad he or she created. Under 11 CFR 100.94 and 100.155, an individual, or group of individuals, may engage in uncompensated Internet activities for the purpose of influencing a federal election without a contribution or expenditure resulting. Thus, the posting by uncompensated individuals of ads they create on the web site, where such ads are not posted for a fee, would not be a contribution or expenditure at the time of posting. See 11 CFR 100.94, 100.155 and 100.26. If an individual then pays to have the ad broadcast on television, the costs for creating the ad are no longer covered by the Internet volunteer activity exemption, and thus become part of the expenses for an independent expenditure. See 11 CFR 109.10.

In contrast, if a political committee posts an ad it creates, its costs constitute expenditures and are reportable as such (even if the ad is never televised), because the exemptions at 11 CFR 100.94 and 100.155 do not apply to political committees. If that ad is then aired on TV, the ad's disclaimers must contain the required information about both the ad's purchasers and the ad's creators.

11 CFR 110.11(b)(3) and (c) (4). See AO 2007-20.[1]

Political committee status not triggered. The Act defines a political committee as any group of persons that makes expenditures aggregating over $1,000 in a calendar year. This definition does not apply to the individuals who create and purchase ads from the corporation because there is no communication or pre-arrangement between the creator and purchaser, and the corporation has not conveyed any information between them. See 11 CFR 100.5(a). Moreover, purchasers may obtain airtime for an ad that was already purchased and aired by other purchasers, even after reviewing FEC filings by those purchasers. This activity would not by itself be sufficient to cause the purchasers to be considered "a group of persons," and thus a political committee. The Commission did not address whether any agreements or collaboration between a creator and a purchaser not involving the corporation would result in the formation of a "group of persons" that would be considered a political committee.

In-kind contributions not triggered. Here, given that there is no collaboration between purchasers and creators, the purchase of airtime to run an ad created by a nonconnected committee does not result in an in-kind contribution from the purchaser to the committee. See 11 CFR 100.52(d)(1).

The republication of a candidate's campaign materials does result in a contribution. However, if an individual independently creates and uses his or her own footage of a candidate's public appearance in a web site posting and the campaign does not have any ownership rights to the footage, then the footage does not constitute a candidate's campaign materials and use of it would not represent an in-kind contribution by either the creator or a subsequent purchaser of airtime for the ad. 11 CFR 109.23. The footage may include images of campaign materials (e.g., tee-shirts, buttons and signs customarily displayed at campaign events) without becoming a republication of campaign materials, unless the creator arranged for such materials to be held up, displayed or worn during the event.

Date Issued: October 24, 2008; Length: 12 pages.

—Dorothy Yeager

[1] *Disclaimers need not appear on ads created by political committees and only posted on the web site, because ads posted on VoterVoter.com are not placed for a fee and, thus, are not a "public communication." 11 CFR 100.26.*