Record

September 2007 *Federal Election Commission* *Volume 33, Number 9*

Table of Contents

Regulations

Notice of Proposed Rulemaking on Use of Campaign Funds

On July 12, 2007, the Commission approved a Notice of Proposed Rulemaking (NPRM) seeking public comment regarding proposed rules to add two additional permissible uses of campaign funds to the regulations' current list of permissible uses of such funds. In 2005, Congress amended the provision of the Federal Election Campaign Act (the Act) governing permissible uses of campaign funds, and the NPRM proposes to conform the Commission's regulations to the Act.

Background

The Act broadly prohibits the personal use of campaign funds and sets forth six specific permissible uses of campaign funds by a federal candidate or officeholder:

- Expenditures in connection with the candidate's campaign for federal office;
- Ordinary and necessary expenses incurred by a federal officeholder;
- Donations to charity (organizations defined in 26 U.S.C. 170(c));
- Unlimited transfers to a national, state or local political party;
- Donations to nonfederal candidates as permitted by state law; and

(continued on page 3)

Court Cases

Davis v. FEC

On August 9, 2007, a three-judge panel of the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment in this case, and denied the plaintiff's motion for summary judgment. Jack Davis, a candidate for the House of Representatives in New York's 26th District, had asked the court to declare certain provisions of the Bipartisan Campaign Reform Act (BCRA) known as the "Millionaires' Amendment" 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. The court concluded that the Millionaires' Amendment posed no threat to self-financed candidates' First Amendment or Equal Protection rights.

Background

Under the Millionaires' Amendment, candidates who spend more than certain threshold amounts of their own personal funds on their

(continued on page 2)

Court Cases

(continued from page 1)

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. 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.

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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Greg J. Scott, Assistant Staff Director
Amy L. Kort, Deputy Assistant Staff Director

http://www.fec.gov

Complaint

On March 30, 2006, Mr. Davis announced his candidacy for the House seat in New York's 26th District. Mr. Davis 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, he filed a facial challenge to the provisions of the Millionaires' Amendment that apply to House candidates, and both the plaintiff and the defendant moved for summary judgment.

Court Decision

Mr. Davis's facial challenge to the Millionaires' Amendment had two prongs: he argued that it infringes upon his First Amendment right to free speech and his Fifth Amendment right to equal protection. The court found that Mr. Davis's First Amendment challenge failed at the outset because the Millionaires' Amendment does not "'burden [] the exercise of political speech.'" According to the 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. According to the court, "Davis himself has shown, whether a candidate incurs the burdens and benefits of the Amendment is entirely his option, and a statute whose application turns on such a choice does not impose an unconstitutional burden on First Amendment rights."

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 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.[1] The court found that Mr. Davis could not make this showing because 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 court granted the FEC's request for summary judgment in this case and denied Mr. Davis's request for summary judgment.

U.S. District Court for the District of Columbia, 06-01185 (TG)(GK)(HK).

—Amy Kort

[1] *See Cal. Med. Ass'n v. FEC, 453 U.S. 182, 200 (1981) (plurality opinion).*

Regulations

(continued from page 1)

- Any other lawful purpose. See 2 U.S.C. §439a(a)(1)-(6).

Congress amended §439a to add the final two permissible uses, donations to nonfederal candidates and "any other lawful purpose," in the Consolidated Appropriations Act of 2005.

Prior to the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Act permitted candidates and their committees to use their funds for "any other lawful purpose," as long as that purpose was not personal use of the campaign's funds by any person. In BCRA, Congress deleted the "any other lawful purpose" language, and the Commission amended its regulations to reflect the change. Now that Congress returned the "any other lawful purpose" language to the Act, the Commission seeks to amend its regulations to re-incorporate the language, as well as to add the rule allowing donations to nonfederal candidates.

Comments

The full text of this NPRM is available in the *Federal Register* (72 FR 39583) and on the FEC web site at http://www.fec.gov/pdf/nprm/useoffunds/notice_2007-15.pdf.

—Meredith Metzler

New E-Mail Service

Visitors to the FEC's web site can now sign-up to receive personalized e-mail updates on the latest Commission news and information. Subscribers can choose to receive messages regarding a specific topic, entire categories of information, multiple categories or all subscription items. To see the complete list of offerings, visit http://service.govdelivery.com/service/multi_subscribe.html?code=USFEC.

Hearing on Proposed Rules on Hybrid Ads

The Commission held a public hearing on July 11, 2007, to address proposed rules governing political party committees' attribution of payments for "hybrid communications." Individuals testified before the Commission in response to its Notice of Proposed Rulemaking (NPRM), published in the May 10, 2007, *Federal Register*, which defines hybrid communications as communications that refer to one or more clearly identified federal candidates and also generically reference other candidates of a political party (i.e., John Doe and our Democratic team). See the June 2007 *Record*, page 1.

Commenters[1] generally urged the Commission to create a clear rule that would allow party committees flexibility in how they spend their money to benefit their candidates. Most commenters agreed that the Commission should use a "time/space" attribution method to attribute the costs of a hybrid communication. Under the current Commission time/space rule, costs of an expenditure made on behalf of more than one clearly identified federal candidate are attributed to each such candidate "according to the benefit reasonably expected to be derived." 11 CFR 106.1(a). In the case of a publication or broadcast communication, the amount of the cost attributed to each candidate 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.

Stephen Hoersting spoke in favor of a time/space allocation method that would allow committees to be flexible in the selection of the text or content of communications they produced. He argued that if the Commission promulgates a rule on hybrid communications, it should amend its time/space rule at 11 CFR 106.1(a) to include hybrid communications so that the rule would allow hybrid communications to be attributed by means of a time/space ratio. Further, he noted that the Commission should evaluate attribution of such communications using objective criteria. He also stated that even if the Commission chose not to amend 106.1(a), existing regulations may already permit hybrid communications to be attributed in this manner.

Thomas Josefiak, Sean Cairncross and Donald McGahn also argued that the Commission did not need to create a new rule to address hybrid communications because the necessary regulation already exists in the Commission's time/space rule at 11 CFR 106.1(a). However, Mr. Josefiak and Mr. Cairncross agreed that if the Commission chose to adopt a new regulation, it should amend the current Commission rule at 11 CFR 106.8 for attributing the costs of phone banks to include *all* types of communications, including print and broadcast communications. The phone bank rule states that if a party committee's phone bank communication refers only to one clearly identified federal candidate and refers only generically to other

(continued on page 4)

[1] *Commenters at the public hearing included Stephen M. Hoersting, Center for Competitive Politics; Thomas J. Josefiak, Republican National Committee; Neil P. Reiff, Democratic National Committee; Sean Cairncross, National Republican Senatorial Committee; Marc E. Elias, Democratic Senatorial Campaign Committee; Donald F. McGahn, II, Illinois Republican Party and National Republican Congressional Committee; and Brian G. Svoboda, Democratic Congressional Campaign Committee.*

Regulations

(continued from page 3)

candidates of that candidate's political party, then 50 percent of the cost of the phone bank must be attributed to the clearly identified federal candidate. The remaining 50 percent of the cost should be attributed to the party committee. 11 CFR 106.8.

Mark Elias and Brian Svoboda also believed that the Commission should extend the rule regarding phone banks to cover all other types of communications. They stated in written comments submitted to the Commission that, "the revised rule should provide that 50 percent of the disbursements for a communication that refers to a clearly identified federal candidate, and that also refers generically to a party or to its candidates, are not attributable to any federal candidate."

Mr. McGahn urged the Commission not to adopt an arbitrary 50 percent rule, stating that there may be some instances where the party committee may benefit more from a hybrid communication than the candidate(s) who is clearly identified. He spoke in favor of using a time/space ratio to determine the benefit reasonably expected to be derived, rather than a fixed percentage. However, Mr. Josefiak and Mr. Cairncross were not opposed to the 50 percent attribution method set out in the Commission's phone bank rule at 11 CFR 106.8.

Neil Reiff stated that the Commission had established a workable baseline for hybrid communications in AO 2006-11 (Washington Democratic State Central Committee), which addressed the attribution of costs of a hybrid communication by means of a mass mailing. In that AO, the Commission determined that *no less than 50 percent* of the costs of a mass mailing containing a generic party reference and a reference to one or more clearly identified federal candidates were to be attributed to the clearly identified federal candidates. The percentage attributed to the candidate(s) could be greater than 50 percent based on a time/space analysis of the content of the mass mailing, but the percentage could not be less than 50 percent of the cost.

In addition, some commenters discussed the NPRM's characterization of a "generic party reference." For example, Mr. Reiff suggested that the term "generic party reference" should be defined as an actual reference to the name or nickname of a political party. He suggested that the Commission borrow from its current regulation defining "generic campaign activity" as a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified federal candidate or a nonfederal candidate. 11 CFR 100.25.

The full text of the NPRM, written comments in response to the NPRM and a transcript of the hearing are available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml#hybrid. Audio files of the public hearings are available at http://www.fec.gov/pdf/nprm/hybrid/071107_hearing_schedule.shtml.

—Myles Martin

Advisory Opinions

AO 2007-08
Encouraging Voluntary Performances by Professional Entertainers at Campaign Events

Michael King may make donations to charitable organizations and establish a 501(c)(3) charitable organization (the Foundation) in order to encourage voluntary performances by professional entertainers at federal campaign events. Mr. King and the Foundation may also promote these activities through their own web sites, and Mr. King may solicit the authorized committees of federal candidates for donations to his section 501(c)(3) organization.

Background

Mr. King intends to promote the public's knowledge of charitable organizations that provide assistance to families of military personnel and encourage greater volunteer participation in federal campaigns by musicians and other entertainers. Mr. King wishes to donate his personal funds to such charitable organizations to recognize voluntary performances by entertainers at campaign events of federal candidates or political party committees. In addition to making donations to already-established charities, Mr. King will also establish the Foundation to collect and distribute donations from other persons for the same purposes. Mr. King or his foundation will determine which charities will receive donations.

The performers who elect to perform at campaign events will do so as volunteers and will not receive any tax or other financial benefit by doing so. They will choose the events at which they perform. All costs associated with the performances will be paid by the federal candidate or party committee hosting the event.

Analysis

The Federal Election Campaign Act (the Act) defines "contribution" to include, among other things, "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. §431(8)(A)(ii); *see also* 11 CFR 100.54.

However, the Act allows individuals to volunteer without compensation on behalf of a candidate or political committee without making a contribution to that candidate or committee. 11 CFR 100.74. Since both Mr. King and the entertainers will offer their services without

compensation, and the candidate or party committee will pay for the costs of the event, neither Mr. King nor the performers would be making a contribution through their volunteer activities. Furthermore, the Commission concluded that Mr. King's charitable donations do not constitute contributions to the candidates or party committees.

The Act also defines "expenditure" to include, among other things, "any gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." 11 CFR 100.111(a). Since Mr. King's proposed charitable donations do not act as an incentive to any person to vote for or against a federal candidate, nor do they encourage a person to make contributions to or expenditures on behalf of a federal candidate, Mr. King's activities do not qualify as expenditures.

The Commission also concluded that Mr. King may solicit the authorized committee of federal candidates for donations to section 501(c)(3) organizations, described above. The Act and Commission regulations permit federal candidates to donate campaign funds to charitable organizations. 2 U.S.C. §439a(a) and 11 CFR 113.2(b).

Mr. King is also permitted to publicize his activities through his web site, since the Act permits individuals to engage in volunteer Internet activity without making a contribution or expenditure. 11 CFR 100.94 and 100.155. Specifically, Mr. King and the Foundation may engage in the following activities without making contributions or expenditures: listing the work done by the charity, naming the volunteers and committees for which they volunteered and listing the charitable donations made on those committees' behalf.

Date: July 12, 2007
Length: 12 pages

—Myles Martin

Advisory Opinion Requests

AOR 2007-13

Disaffiliation of labor union and professional membership organization (United American Nurses, AFL-CIO, July 23, 2007)

AOR 2007-14

Disaffiliation of labor union and professional membership organization (Associated Builders and Contractors, Inc., National Federation of Independent Business and National Restaurant Association, July 18, 2007)

AOR 2007-15

Administration of the separate segregated fund of an incorporated subsidiary by an LLC treated as a partnership (GMAC LLC, July 30, 2007)

800 Line

800 Line: Disclosing Multicandidate Committee Status

As defined by the Federal Election Campaign Act (the Act) and Commission regulations, a "multicandidate committee" is a political committee that has:

- Been registered with the Commission or the Secretary of the Senate for at least six months;
- Received contributions from more than 50 persons; and
- Made contributions to five or more federal candidates (a state party committee does not need to meet this third criteria). 2 U.S.C. §441a(a)(4) and 11 CFR 100.5(e)(3).

Knowing whether a political committee is a multicandidate committee is important because multicandidate committees have different contribution limits than non-multicandidate committees. A committee that does not have multicandidate status may give up to $2,300 per election to a candidate committee, $28,500 per year to a national party committee, $10,000 per year to state, district and local party committees (a single $10,000 limit is shared by all of a party's affiliated committees within a given state) and $5,000 per year to any other political committee. For non-multicandidate committees, the contribution limits for candidates and national party committees are indexed for inflation each election cycle. 11 CFR 110.1.

Multicandidate committees, on the other hand, may give up to $5,000 per election to a candidate committee, but may give only $15,000 per year to national party committees and $5,000 per year to other political committees, including state, district and local party committees (again, a single limit is shared by all of a party's committees within a given state). 11 CFR 110.2. Unlike contribution limits for non-multicandidate committees, these limits are not indexed for inflation.

Under FEC regulations, a political committee automatically becomes a multicandidate committee when it meets the three criteria described above, and must certify its status within 10 calendar days of having met the criteria by filing FEC Form 1M. 11 CFR 102.2(a)(3).[1] In addition, a political committee that becomes affiliated with a committee that already has multicandidate status automatically becomes a multicandidate committee itself, and must file FEC Form 1M and follow the contribution limits for a multicandidate committee. 11 CFR 110.2(a)(1). A political committee's failure to certify its multicandidate status by filing FEC Form 1M will result in a violation of the registration requirements at 2 U.S.C. §433(c). Failing to

(continued on page 6)

[1] *Committees that notified the Commission of their multicandidate status on Form 3X prior to January 1, 1994, do not have to file Form 1M.*

800 Line

(continued from page 5)

certify multicandidate status will not result in an excessive contribution so long as the amount is within the contribution limits for multicandidate committees.

When making contributions to candidates, a multicandidate committee must give the recipient candidate or campaign committee a written notification that it has qualified as a multicandidate committee. 11 CFR 110.2(a)(2). For convenience, the statement may be pre-printed on the committee's checks, letterhead or other appropriate materials.

—Amy Kort

Statistics

Number of PACs Declines Slightly in 2007

The number of federally registered political action committees (PACs) declined slightly during the first half of 2007, from 4,183 on January 1, 2007, to 4,168 by July 1, 2007. Corporate PACs remain the largest category, with 1,586 committees, followed by nonconnected PACs, with 1,247 committees. In addition, there were 926 trade/membership/health PACs, 273 labor PACs, 99 PACs for corporations without stock and 37 PACs for cooperatives. A small reduction in the number of existing trade/membership/health PACs and nonconnected PACs accounted for most of this decline. The chart at right details the number of PACs in existence since 2000.

—Amy Kort

Outreach

FEC Fall Regional Conferences

Each year the Federal Election Commission sponsors conferences where Commissioners and staff conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. The two conferences scheduled to be held this fall are for House and Senate campaigns, political party committees and corporations, labor organizations, trade associations, membership organizations and their respective PACs.

September Conference in Seattle

The Commission will hold a regional conference in Seattle, WA, on September 26-27, at the Red Lion Hotel on Fifth Avenue in downtown Seattle. For additional information, to view the conference agenda, or to register for the conference, please visit the FEC web site at http://www.fec.gov/info/conferences/2007/seattle07.shtml.

November Conference in St. Louis

The Commission will hold a regional conference in St. Louis, MO, on November 6-7, 2007, at the Hilton St. Louis at the Ballpark Hotel. For additional information, to view the conference agenda, or to register for the conference, please visit the FEC web site at http://www.fec.gov/info/conferences/2007/stlouis07.shtml.

Semiannual PAC Count 2000-Present

	Corporate	Labor	Trade/ Member/ Health	Coop-erative	Corp. w/o Capital Stock	Non-connected[1]	Total
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
Jul. 04	1,555	306	877	34	97	1,174	4,040
Jan. 05	1,622	306	900	34	99	1,223	4,184
Jul. 05[2]	1,646	302	936	37	103	1,267	4,291
Jan. 06	1,622	290	925	37	103	1,233	4,210
Jul. 06	1,621	283	935	40	105	1,233	4,217
Jan. 07	1,582	273	937	37	100	1,254	4,183
Jul. 07	1,586	273	926	37	99	1,247	4,168

[1] 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.

[2] During the second six months of 2005, 189 PACs were administratively terminated for inactivity.

Hotel Information. The Hilton St. Louis at the Ballpark Hotel is located at One South Broadway at Market Street in downtown St. Louis, near the Gateway Arch and local subway. A room rate of $119 (single or double) is available to conference attendees who make reservations on or before October 15. To make your hotel reservations, please call 1-877-845-7354 and indicate that you are attending the campaign finance laws conference. The FEC recommends that you wait to make your hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

Registration Information. The registration fee for this conference is $450, which covers the cost of the conference, a reception, materials and meals. A $25 late fee will be added to registrations received after October 12. Complete registration information is available online at http://www.fec.gov/info/conferences/2007/stlouis07.shtml.

Questions

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; e-mail: tonis@sylvestermanagement.com). For questions about the conference program, or to receive e-mail notification of upcoming conferences and workshops, call the FEC's Information Division at 1-800/424-9530 (press 6) (locally at 202/694-1100), or send an e-mail to Conferences@fec.gov.

—Dorothy Yeager

Index

The first number in each citation refers to the numeric month of the 2007 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 four.

(continued on page 8)

Index

(continued from page 7)

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