Record

December 1994 *Federal Election Commission* *Volume 20, Number 12*

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Court Cases

Chamber of Commerce of the U.S.A., et al. v. FEC

On October 28, 1994, the U.S. District Court for the District of Columbia dismissed this case.

The Chamber of Commerce of the U.S.A., the American Medical Association (AMA) and a member of each organization had asked the court to declare void the FEC's rule defining "member of a membership association,"[1] to enjoin the FEC from enforcing those provisions and to certify certain constitutional questions to the U.S. Court of Appeals.

The rule challenged in this case defines a member as a person[2] who:

- Has some significant financial attachment to the membership organization;
- Pays a specific amount in dues on a regular basis and is entitled to vote for either at least one member who has full participatory and

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[1] *11 CFR 100.8(b)(4)(iv) and 114.1(e)(2), prescribed November 10, 1993.*

[2] *For purposes of federal election law, a person is defined as an individual, partnership or any group of persons, not including the federal government.*

800 Line

Candidate Committee Termination and Debt Settlement

This article, written for authorized committees of candidates, explains how to settle debts and terminate the committee. It is the second in a series of three articles on debt retirement, debt settlement and termination by candidate committees. The first article, "Retiring Campaign Debts," was published in the November issue. The third article on administrative termination will appear in a forthcoming issue.

If you have any questions after reading this article, call the Information Division at 800/424-9530 (press 1 if using a touch tone phone) or 202/219-3420.

Eligibility for Termination

An authorized committee may terminate its registration and reporting obligations by filing a termination report, provided that:

- It has ceased raising and spending funds (11 CFR 102.3(a)(1));
- It has extinguished all debts and, if the committee is a principal campaign committee, the debts of any other committees authorized by the candidate for the election

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voting rights on the organization's highest governing body, or those who select at least one member on the organization's highest governing body; or
- Votes directly for all of those on the organization's highest governing body.

Plaintiffs claimed that this rule improperly prohibits them from communicating with large segments of their members, with regard to endorsing federal candidates, in violation of the Federal Election Campaign Act[3] and the First and Fifth Amendments of the U.S. Constitution.

The Chamber argued that the rule prohibits it from communicating with almost all of its 220,000 members, who pay dues but do not enjoy voting privileges. Similarly, the AMA argued that the rule prohibits it from communicating with 44,500 of its members who do not enjoy voting privileges.

The defendants asked the court to:

- Issue a declaratory judgment that the final rule is contrary to the Federal Election Campaign Act;
- Issue a declaratory judgment that the same final rule violates the Chamber's, the AMA's and their members' rights under the First and Fifth Amendments;
- Enjoin the FEC from enforcing this final rule in a manner that prevents the Chamber and the AMA from communicating endorsements of federal candidates to their membership; and
- Immediately certify all constitutional questions alleged in their complaint to the D.C. Court of Appeals, *en banc*.

In dismissing the case, the court stated that because the plaintiffs had not suffered any harm by the rule, this matter was not ripe for review, and that the plaintiffs lacked standing to bring this action since the rule does not pose a threat to them. Additionally, the court held that the Commission's definition of "member" is entitled to deference and is a permissible construction of that term by the Commission.

The plaintiffs filed a notice of appeal on November 9, 1994.

This case was filed with the U.S. District Court for the District of Columbia, October 12, 1994 (No. 94-2184). ✦

[3] *2 U.S.C. §§ 441b(b)(4)(C) and 431(9)(B)(iii).*

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FEC v. LaRouche (94-658-A)

On September 28, 1994, the U.S. District Court for the Eastern District of Virginia issued an order stipulated by the parties holding Lyndon LaRouche and the LaRouche Democratic Campaign[1] jointly and severally liable for repayment of $146,464.44 in Presidential primary matching funds—plus accrued interest dating from October 22, 1992 (see the July 1994 *Record* for a summary of the case). The repayment is to be made to the U.S. Treasury.

Furthermore, the order stipulates that a $158,304.84 check (the security), given to the court by Democrats for Economic Recovery—LaRouche in '92,[2] will be deposited into an interest-bearing account and used for the repayment, if appropriate.

In the stipulation, the FEC agreed to refrain from all efforts to collect on the defendants' repayment obligation until after the Commission issues a final repayment determination with respect to the Presidential primary matching funds received by the LaRouche in '92 committee.

If the FEC's final repayment determination concludes that the LaRouche in '92 committee has at least $158,304.84 in excess campaign funds, then the court will release the security—plus interest—to the FEC as repayment of the defendants' repayment obligation. In this event, the FEC and the defendants will voluntarily dismiss all claims and counterclaims associated with this case.

If the FEC's final repayment determination for the LaRouche in '92 committee does not conclude that the committee has at least $158,304.84 in excess campaign funds, then the court will issue the

[1] *LaRouche Democratic Campaign is Lyndon LaRouche's 1988 Presidential primary campaign committee.*

[2] *Democrats for Economic Recovery—LaRouche in '92 is Lyndon LaRouche's 1992 authorized Presidential campaign committee.*

FEC a check for that portion of the security equal to the amount of the committee's excess campaign funds. That amount will represent a partial repayment of the defendants' repayment obligation. The balance of the security (including accrued interest) will be returned to the LaRouche in '92 committee. In this event, the FEC may use any available legal procedures to collect the remaining amount owed by the defendants.

The Commission reserves the right to conclude that the LaRouche in '92 committee's payment to the court is not a qualified campaign expenditure (for the 1992 campaign) and to contest the sufficiency of the security to pay the defendants' obligation. The defendants and the LaRouche in '92 committee reserve the right to contest any Commission finding. ✦

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Public Funding

Hearing on Wilder Repayment Determination

In an October 5, 1994, presentation regarding repayment issues, counsel for the Wilder for President Committee, Inc., urged the Commission to eliminate or reduce the amount of the committee's repayment obligation. The FEC's final audit report had set the figure at $31,058.

Counsel focused on three items in the FEC's final audit report:

- The characterization of severance payments as nonqualified campaign expenses;
- The characterization of salary payments made to members of then Virginia Governor Wilder's official staff as nonqualified campaign expenses; and
- The characterization of lease payments for computer equipment as capital assets.

A fourth item in the report went unchallenged—the determination that the committee incurred a nonqualified campaign expense when it reimbursed the Commonwealth of Virginia for costs associated with Governor Wilder's personal use of a state plane. Counsel informed the Commission that the committee does not dispute this finding and that Governor Wilder had agreed to reimburse the committee for the use of the plane.

Severance Payments

Counsel described Governor Wilder's withdrawal from the 1992 Presidential race on January 8, 1992, as "sudden and unexpected.... It caught his campaign committee by surprise." Counsel explained that committee staff members had reasonably expected to be employed through March 1992. Counsel stated that the committee—motivated by an oral commitment to pay its workers' salaries and a desire to treat them fairly, plus a need to maintain sufficient staff to handle wind-down activities—issued checks totaling more than $15,000 as compensation and salary to 12 of its campaign workers. Counsel added that five of these individuals continued working for the committee on a regular basis and the other seven provided services on an on-call basis.

In light of the foregoing, counsel contended that some, if not all, of these payments should be considered qualified campaign expenses.

Salary Payments

Ruth Jones and William Keough were employed by the Commonwealth of Virginia as members of Governor Wilder's staff during his 1992 Presidential bid. Mr. Keough took leave from his state job to work on the Wilder campaign while Ms. Jones remained at her state job and worked on the Wilder campaign as well.

Ms. Jones, as assistant treasurer for the campaign, drew a $10,000 check and a $5,000 check from the committee's coffers to pay herself and Mr. Keough, respectively, for services rendered. The FEC audit report treated these payments as bonus or severance payments, which are not considered qualified campaign expenses. The committee argued that these disbursements were salary payments and therefore qualified campaign expenses.

Lease Payments

The committee questioned the way the final audit report valued its computer assets. The FEC's final audit report had valued the computers at $15,452, comprising $6,938 in buy out payments and $8,513 in lease payments that the committee was required to make in connection with the buy out.

Counsel contended that the value of the computers should be based solely on the lease buy out amount. Counsel added that the committee had given the computers to campaign employees in lieu of salary payments. Counsel stated that the committee would not object to the Commission's proposed valuation provided that the value attached to the computers at the time they were given to employees was the same as the value attributed to the computers at the time they were acquired by the committee.

Commission Determination

After due consideration of the oral presentation and any additional documentation submitted by the committee within five days of the hearing, the Commission will issue a final repayment determination and a Statement of Reasons regarding the matters discussed above. ✦

800 Line

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cycle have also been extinguished (11 CFR 102.3(a)(1) and (b));
- It does not have any funds or assets available to pay debts owed by another committee authorized by the same candidate, regardless of the election cycle (11 CFR 116.2(c)(1)(ii)); and
- It is not involved in an ongoing FEC enforcement matter (MUR), audit or court case.

Termination Report

If a committee is eligible to terminate, it may file a termination report at any time.

When filing a termination report, the treasurer should check the "Termination Report" box on the Form 3 Summary Page (Line 4). The termination report for an authorized committee must include:

- The disclosure of all receipts and disbursements not previously reported;
- A statement explaining how any excess campaign funds will be used and, if applicable, whether the funds will be used for the individual's duties as a federal officeholder;[1] and
- A statement, signed by the treasurer, verifying that any remaining noncash assets will not be converted to personal use. 11 CFR 102.3(a).

After filing a termination report, however, the committee must continue to file regularly scheduled reports until it receives notice from the FEC that the termination report has been accepted.

Committees That Have Debts But Want to Terminate

A terminating committee—that is, a committee that raises contributions and makes expenditures only for the purpose of paying debts and winding-down costs—can eliminate its debts in one of two ways: It may assign its debts to another committee of the same candidate, or it may settle them for less than the amount owed. 11 CFR 116.1(a), 116.2(a) and 116.2(c)(3). These procedures are explained below.

Assigning Debts to Another Committee

To expedite termination, an authorized committee that qualifies as a terminating committee and has no cash on hand or assets available to pay its debts may assign them to another authorized committee of the same candidate, provided that:[2]

- The assignment is permitted under applicable state laws (e.g., laws on debts and creditors);
- The committee assigning the debts was organized for an election already held;
- No later than 30 days before the assignment takes effect, the assigning committee notifies each creditor in writing of the name and address of the committee assuming the debts; and
- The committee assuming the debts notifies the FEC in writing that it has assumed the obligation to pay and report the debts. (The committee uses separate schedules to report the debts and the contributions raised to retire them.)

Once the debts are assigned, the assigning committee may terminate. 11 CFR 116.2(c)(3).

Settling Debts

An authorized committee may extinguish its debts by settling them for less than the amount owed if:

- The committee qualifies as a terminating committee (that is, one that raises contributions and makes expenditures only for the purpose of paying debts and winding-down costs);
- The candidate does not have another authorized committee with enough funds to pay all or part of the debts; and
- The committee files a debt settlement plan (see below), which is subject to FEC review, and complies with the other rules governing debt settlement. 11 CFR 116.1(a), 116.2(a), 116.2(c)(1) and 116.7.

Note that a committee may not terminate until the debt settlement process is concluded.

Debts Subject to Settlement

The following debts may be settled for less than the amount owed in accordance with debt settlement procedures:

- Debts owed to commercial vendors;
- Salary owed to employees;
- Debts arising from advances by individuals (e.g., campaign staff) using personal funds or credit cards to pay campaign expenses; and
- Loans owed to political committees or individuals (including the candidate). 11 CFR 116.7(b).

Debts Owed to Commercial Vendors. A commercial vendor[3]

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[1] *Excess campaign funds may be: contributed to any charity qualified under 26 U.S.C. §170(c) of the Internal Revenue Code; transferred without limit to any national, state or local party committee; used to defray the recipient's federal officeholder expenses; or used for any lawful purpose except personal use. 11 CFR 113.2. In this context, federal officeholder means a Member of Congress, the President or the Vice President. 11 CFR 113.1(c). The Commission is in the process of revising its regulations on personal use of campaign funds.*

[2] *Special rules apply to Presidential candidate committees receiving public funds. See 11 CFR 116.2(c)(3).*

[3] *A commercial vendor is a business or an individual who provides goods or services to a candidate or political committee and whose usual business is the provision of those goods or services. 11 CFR 116.1(c).*

(incorporated or unincorporated) may settle a debt for less than the amount owed provided that:

- Credit was initially extended in the ordinary course of business (see 11 CFR 116.3);
- The committee undertook all reasonable efforts to pay the debt, such as raising funds, reducing overhead and liquidating assets; and
- The vendor pursued remedies to collect the debt as vigorously as those pursued to collect debts from nonpolitical debtors in similar circumstances. Remedies might include, for example, late fee charges, referral to a collection agency or litigation. 11 CFR 116.4(d). The creditor is not, however, required to pursue activities that are unlikely to result in the reduction of a debt.

Salary Owed to Staff. Unpaid salary owed to a committee employee may be settled for less than the amount owed or entirely forgiven, or alternatively it may be converted to volunteer work if the employee signs a statement agreeing to the arrangement. 11 CFR 116.6.

Advances Owed to Staff and Other Individuals. Advances owed to the committee may be settled for less than the amount owed or entirely forgiven. 11 CFR 116.5(d). For more information, order the staff advances handout, which is available through Flashfax (document 317). The Flashfax number is 202/501-3413.

Loans from Individuals and Political Committees. Loans (except bank loans—see below) may also be settled for less than the amount owed or entirely forgiven. 11 CFR 100.7(a)(1).

Creditor's Right

A commercial vendor or other creditor—including a committee employee—is not required to settle or forgive debts owed by a committee. 11 CFR 116.4(e), 116.5(d) and 116.6(b).

Debts Not Subject to Settlement

Two categories of debts may not be settled for less than the amount owed but must be disclosed in a debt settlement plan:

- Bank loans (including lines of credit);[4] and
- Repayment obligations of publicly funded campaigns. 11 CFR 116.7(c).

Debt Settlement Plans

Debt settlement plans are filed on FEC Form 8. Step-by-step instructions for completing Form 8 are on the back of the form. See also the example of a completed Form 8 in the *Campaign Guide for Congressional Candidates and Committees,* pages 56-58.

The Commission recommends that committees include as many settlement agreements as possible in one plan. 11 CFR 116.7(a).

A committee must postpone making actual payments to creditors until after the Commission has reviewed the debt settlement plan. Moreover, the committee must continue to report its debts until the Commission has completed its review. 11 CFR 116.7(a) and (d).

Once the Commission has reviewed the debt settlement plans, the committee may pay the creditors the agreed-upon amounts and then file a termination report.

Bankruptcy

If a candidate or committee is released from debts through a bankruptcy court decree pursuant to 11 U.S.C. Chapter 7, the committee must include in a debt settlement plan the court order and a list of the obligations from which the committee is released. 11 CFR 116.7(g).

Disputed Debts

A disputed debt is a disagreement between a creditor and a committee as to the existence of a debt or the amount owed. If something of value was provided, the committee must continue to report the following information on Schedule D until the dispute is resolved:

- The amount the committee admits is owed;
- The amount the creditor claims is owed; and
- Any amounts the committee has paid the creditor.

The committee may note in its report that disclosure of the disputed debt is not an admission of liability or a waiver of its claims against the creditor.

Note that, in a debt settlement plan, a terminating committee must describe any disputed debts and the committee's efforts to resolve them. 11 CFR 116.10.

Unpayable Debts

If a committee has an outstanding debt that is at least two years old and that cannot be paid because the creditor has gone out of business or cannot be located, the committee may request an FEC determination that the debt is unpayable. See 11 CFR 116.9 for further details.

Administrative Termination

An authorized committee that is inactive and wishes to terminate but cannot reach settlement agreements with its creditors may ask the FEC for administrative termination. See 11 CFR 102.4 for further details.

Administrative termination will be the subject of a future 800 Line article. ✦

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[4] *The Commission recognizes that, under extraordinary circumstances, such as the death or bankruptcy of the candidate, settlement of a bank loan may be appropriate. The Commission will consider specific situations on a case-by-case basis.*

Court Cases

(continued from page 3)

FEC v. Legi-Tech, Inc.

On October 12, 1994, the U.S. District Court for the District of Columbia granted the defendant's motion to dismiss this case (No. 91-0213) on the basis of the Court of Appeals' recent decision in *FEC v. NRA Political Victory Fund (NRA).*

The *NRA* decision stated that the presence of two Congressionally-appointed *ex officio* members on the Commission violated the Constitution's separation of powers. (For a summary of the appeals court decision, see the December 1993 *Record.*) The *NRA* decision has been appealed to the Supreme Court.

Following the *NRA* decision, the Commission excluded the *ex officio* members in order to reconstitute itself as a constitutionally structured agency. In its new form, the Commission ratified the actions of the former FEC. Among the actions ratified were the enforcement proceedings against Legi-Tech. The FEC had found reason to believe that Legi-Tech had violated 2 U.S.C. §438(a)(4) by using contributor information copied from FEC reports for commercial purposes. (For a summary of the FEC's suit, see the March 1991 *Record.*)

In the court's view, however, the enforcement proceeding against Legi-Tech, Inc., was initiated by an unconstitutional FEC. The court concluded that based on the rule set forth in *Harper v. Virginia Department of Taxation*—that a newly enunciated rule of law be given full retroactive effect to then-pending cases—the *NRA* decision requires that the court dismiss this case. ✦

New Litigation

John K. Addy, et al. v. FEC Common Cause v. FEC (94-02104)

Plaintiffs in these cases ask the court to declare the FEC's dismissal of their administrative complaints to be contrary to law under 2 U.S.C. §437g(a)(8)(C). They ask the court to direct the Commission to initiate, on an expedited basis, enforcement proceedings against the Montana Republican Party (MRP) and the National Republican Senatorial Committee (NRSC) for making and failing to report excessive contributions and expenditures in connection with Conrad Burns's 1988 U.S. Senate campaign in Montana. Plaintiffs also ask the court to find that Mr. Burns's campaign violated the Federal Election Campaign Act (the Act) by accepting and failing to report excessive contributions.

Plaintiffs each filed a complaint for declaratory and injunctive relief after the FEC failed to find "probable cause" with regard to the administrative complaints filed separately by Mr. Addy and Common Cause on July 13, 1990, and December 19, 1990, respectively (MUR 3204).

The original MUR complaints alleged that the NRSC had directed the MRP to undertake certain exempt party activities [1]—campaign materials distributed by volunteers and get-out-the-vote drives—and then transferred funds to the MRP to cover their costs, which exceeded the NRSC's contribution limits.

Expenditures made for these activities are not subject to the Act's expenditure limits as long as they comply with the rules at 100.8(b)(10), (16) and (18), including the requirement that the activities can not be funded by transfers from a national party committee (11 CFR 100.8(b)(16)(vii) and (18)(vii)).

Plaintiffs argue that the NRSC's alleged transfer of funds to the MRP to pay for these "volunteer materials" and "get-out-the vote" activities invalidated the "exempt" status of these expenditures. Consequently, state the plaintiffs, the payments in question constituted coordinated party expenditures under 2 U.S.C. §441a(d) (not exempt activities). Neither the MRP nor the NRSC reported them as such.

The original MUR complaints additionally alleged that the NRSC had paid for a poll and the development of a voter list—both of which benefited Senator Burns—but had failed to count or report the disbursements as coordinated party expenditures on behalf of Senator Burns. Finally, according to the complaints, the NRSC had failed to charge Senator Burns's campaign the full costs of a solicitation it had conducted on his behalf.

The MUR complaints alleged that, taken together, these activities caused the MRP, the NRSC and the Burns campaign to exceed the Act's established limits on contributions and expenditures.

The General Counsel recommended that the Commission find probable cause that the MRP and the NRSC had made excessive contributions and expenditures and had not reported them; and that Senator Burns's campaign had knowingly received excessive contributions and had failed to report them. The General Counsel also recommended that the Commission find that certain violations were "knowing and willful," justifying the imposition of severe sanctions as provided for by the Act. 2 U.S.C. §437g(a)(5)(B).

On August 2, 1984, the Commissioners considered these recommendations and, by a vote of 3-2 (Chairman Potter recused himself), found no "probable cause" to believe that the respondents had violated the law. The Commission then dismissed the MUR.

U.S. District Court for the District of Columbia Circuit, No. 94-02112 and No. 94-02104, September 30, 1994.

[1] *Exempt activities include slate cards and sample ballots, the distribution of campaign materials by volunteers, and voter drives. Expenditures made for these activities are exempt from the Act's limits. Only state and local party committees and organizations are entitled to this exemption.*

FEC v. Christian Action Network, Inc., et al.

The FEC asks the court to find that the Christian Action Network, Inc. (CAN) and its president, Martin Mawyer, violated provisions of the Federal Election Campaign Act (the Act) by:

- Making independent expenditures[1] with corporate funds to pay for ads expressly advocating the defeat of Bill Clinton;
- Failing to include the appropriate disclaimer on political ads; and
- Failing to fulfill the reporting obligations required by the Act with respect to the expenditures for the ads.

CAN used more than $60,000 of its general treasury funds to pay for television and newspaper ads that expressly advocated the defeat of the Democratic Party's 1992 Presidential nominee, Bill Clinton. These ads constituted independent expenditures and violated the provision of the Act which prohibits the use of corporate funds to influence a federal election. 2 U.S.C. §441b(a). Mr. Mawyer personally violated 2 U.S.C. §441b(a) by consenting to the use of corporate funds for these expenditures.

Furthermore, CAN did not include the proper disclaimer on the ads. Political communications that include express advocacy must include clear statements informing the public as to who paid for them and whether or not they were authorized by any candidate or candidate's committee. 2 U.S.C. §441d. Several of CAN's ads failed to state that they were not authorized by any candidate or candidate's committee.

Lastly, CAN did not fulfill its reporting obligations, as required by 2 U.S.C. §434(c). When an entity other than a political committee makes independent expenditures aggregating more than $250 in a calendar year, the Act requires the maker of the expenditure to file a statement with the FEC by the close of the next reporting period. Furthermore, when an independent expenditure of $1,000 or more is made within 2 to 20 days before an election, the expenditure must be reported to the FEC within 24 hours. Some of CAN's expenditures were made within the 2 to 20 day period. CAN did not file any of the required statements and notifications with respect to the ads in question.

The FEC asks the court to declare that the defendants committed the above violations and to:

- Assess civil penalties against CAN and Mr. Mawyer, for which both would be jointly and severally liable, amounting to the greater of $5,000 or an amount equal to the dollar amount involved, for each time an ad was aired and published;
- Assess civil penalties against CAN amounting to the greater of $5,000 or an amount equal to the dollar amount involved, for each violation of 2 U.S.C. §§441d and 434(c);
- Order CAN to file the statements and 24-hour notifications required by 2 U.S.C. §434(c); and
- Enjoin CAN from using corporate funds to expressly advocate the election or defeat of a federal candidate, from failing to include the required information on disclaimers accompanying political communications, and from failing to file required statements and notifications with respect to expenditures made in connection with a federal election.

U.S. District Court for the Western District of Virginia, No. 94-0082-L, October 18, 1994. ✦

[1] *An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office.*

Advisory Opinions

AO 1994-27
Solicitation of Employees Participating in Company Stock Ownership Plan

The separate segregated fund of the Consumers Power Company (the Company) proposed soliciting contributions from employees—including employees of the parent company, CMS Energy Corporation (CMS), and its subsidiaries—who are CMS stockholders by virtue of their enrollment in the Company's stock purchase plan (the Plan). Only certain participants in the Plan, however, have the "right to receive dividends," one of the requirements for stockholder status under FEC rules. In order to satisfy this requirement, an employee must have actually withdrawn CMS stock or must be able to make withdrawals without significant restrictions.

Background: The Plan

The Plan allows employees to make contributions from their salaries to three different investment funds, one of which invests in CMS common stock. Employees can make three different types of contributions:

- Elective contributions, which can only be withdrawn in cases of emergency or heavy financial need, such as medical expenses or purchase of a residence;
- Participant contributions, which are limited to partial withdrawals once a year; and
- Voluntary contributions, which may be withdrawn without penalty at any time.

The Company matches a certain percentage of employee contributions. These matching contributions are automatically invested in the CMS stock fund. An employee is

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Advisory Opinions

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fully vested in matching contribution "units" after seven years of Company employment and enrollment in the Plan. (Each dollar contributed is called a unit.) An employee may withdraw fully vested units that have been in the account for two years, but withdrawal causes an automatic suspension from the Plan and a forfeiture of nonvested units.

Definition of Stockholder Applied to Plan Participants

A corporation (or its SSF) may solicit its stockholders and their families as well as the stockholders and families of its parent and subsidiaries. 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). In order to be considered a solicitable stockholder, an individual must have (1) a vested beneficial interest in the stock, (2) the power to direct how the stock is voted and (3) the right to receive dividends. 11 CFR 114.1(h).

The first requirement would be met by employees who have made contributions to the CMS stock fund sufficient to purchase one share or who are fully vested in a share of stock purchased through matching contributions.

The second requirement would be met by all participants who have invested in CMS stock (through their own or matching contributions) since they have the right to give voting instructions to a trustee.

The third requirement—the right to receive dividends—would be met by employees who have actually withdrawn CMS stock from their accounts. With respect to those who have not withdrawn stock, employees who have made voluntary contributions to the CMS stock fund (and may make unrestricted withdrawals) and employees who have made participant contributions to the fund (and may make partial withdrawals once a year) have withdrawal rights sufficient to constitute "the right to receive dividends." See also AO 1988-36 and opinions cited therein.

By contrast, the restrictions on withdrawals by employees who invest in CMS stock solely through elective contributions or matching contributions are significant. Elective contributions may be withdrawn only in limited emergency situations, and withdrawal of matching contributions results in a suspension from the Plan and forfeiture of nonvested stock.

Only employees satisfying all three requirements are solicitable as stockholders. The solicitations must, of course, meet the requirements for a proper solicitation under the statute and regulations. 2 U.S.C. §441b(b)(3); 11 CFR 114.5(a).

Date Issued: October 4, 1994; Length: 5 pages. ✦

Federal Register

Federal Register notices are available from the FEC's Public Records Office.

1994-15
11 CFR Part 1: Privacy Act; Implementation (re: IG Records); Notice of Proposed Rulemaking (59 FR 53946, October 27, 1994)

1994-16
11 CFR Part 1: Privacy Act; Notice of Revised System of Records (IG)(59 FR 53977, October 27, 1994)

AO 1994-30
Commercial Ventures and Express Advocacy

Conservative Concepts, Inc. (CCI) may advertise t-shirts expressly advocating the election of candidates who espouse a conservative ideology, and may sell these t-shirts at campaign events, as long as these activities are merely commercial in nature and not conducted for the purpose of influencing federal elections.

CCI is an Indiana company whose principal business is the manufacture for sale of assorted paraphernalia that is generally decorated with a logo conveying a political message. These messages generally expressly advocate the election of candidates with a conservative ideology, regardless of their party affiliation.

CCI proposed two activities:

- Advertising the t-shirts on the Mike Pence Show, a radio talk show, purportedly nonpartisan, syndicated by Network Indiana and broadcast by 14 of its affiliates; and
- Selling the t-shirts at campaign events.

Radio Advertisements

The proposed radio ads do not appear to involve any arrangements with campaigns that would suggest an election influencing purpose, instead of one that is merely commercial. For example, CCI has no plans to:

- Lay out advertisement funds in coordination with a committee;
- Give a portion of the sales proceeds to a candidate committee; or
- Exchange information with a committee concerning campaign plans or CCI's sales plans.

Consequently, the proposed plans for radio ads do not appear to be contributions.

If CCI's proposed radio ads constitute independent expenditures, they would be prohibited because CCI is a corporation and as such is prohibited from making any contributions or expenditures to influence federal elections.[1] 2 U.S.C. §441b.

[1] *An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office.*

(If a sole proprietorship made the expenditure instead of CCI, as CCI suggests, then an independent expenditure could be made, and the appropriate reporting obligations would have to be fulfilled.)

Although CCI may not make independent expenditures, it may pay for uncoordinated ads that promote the t-shirts (which display messages that "expressly advocate" the election or defeat of candidates) if the ads are merely commercial in nature.

To qualify as merely commercial activities, the advertisement and sale of the t-shirts must be undertaken for the sake of turning a profit rather than for the purpose of influencing a federal election. Commercial activities, therefore, do not involve fundraising activity or solicitations for political contributions.[2]

CCI's practice of focusing primarily on candidates who espouse a conservative ideology does not in and of itself negate the merely commercial nature of the proposed activities. Companies often determine to direct their business activities toward one type of political orientation.

CCI asked whether the Commission's determination in this advisory opinion would change if CCI limited itself to shirts for certain candidates or only featured one candidate in a given advertisement spot. Doing so would not in and of itself negate the merely commercial nature of these activities. To determine whether or not these activities were merely commercial the Commission would need to examine CCI's normal business and advertising practices, as well as any deviation from them, and how such business and advertising were usually conducted by businesses not attached to a campaign.

One aspect of the proposed radio message would compromise the merely commercial nature of CCI's activities, causing them to become independent expenditures. Certain phrases proposed by CCI target a geographic area where a candidate's constituents reside and offer the purchaser a motive for buying the product. A merely commercial message would not concern itself with the motive of the purchaser.

For example, CCI's inclusion of phrasing such as "if you live in the [D.C. Metro] area and wish to support [Trevor Potter]...call [this telephone number] and you can buy..." a t-shirt expressly advocating Mr. Potter's election, would compromise the commercial nature of this activity.[3]

To avoid a message that invites support, the radio ad should merely state that the t-shirts are being offered for sale, state what is on the shirt or otherwise describe the shirt, and then explain how to purchase the shirt. The restatement of the message printed on the shirt would not, by itself, constitute express advocacy.

Seeking candidate approval to use his or her name on a t-shirt could compromise the "merely commercial" nature of the activity. If CCI sought approval on a basis related to the election of the candidate, outside the vendor-vendee arrangement, such action would entail "prior consent" by the candidate for activity that could affect his or her campaign. 11 CFR 109.1(a).

CCI may, however, communicate with a candidate's campaign for the purpose of avoiding trademark or other trade usage conflicts.

Packaging of the ad by the network would not result in its making a contribution or expenditure. Network Indiana would not make a contribution or expenditure as long as the sale of advertising time was made in the ordinary course of business and involved the usual and normal charges.

Sale of Merchandise

CCI may sell the t-shirts at campaign events (e.g., rallies, debates, joint appearances) provided that it does not coordinate with the campaign in deciding which events to appear at or where to set up its booth or stand. Doing so could result in an illegal corporate in-kind contribution. CCI may contact a candidate committee to secure a schedule of campaign events.

In conclusion, CCI may conduct its proposed activities provided that they are being undertaken for merely commercial purposes and not to influence any candidate's election or defeat. This advisory opinion does not comment on any contacts with candidates beyond those discussed above.

Date Issued: October 28, 1994; Length: 11 pages. ✦

AO 1994-32 Complainants and the Confidentiality Provisions

Kellie Gasink may freely share with the public the fact that she has filed an administrative complaint with the Commission, the allegations contained in the complaint, and any other information contained in or related to the subject matter of the complaint. Divulging this information does not violate the provisions safeguarding the confidentiality of a Matter Under Review (MUR). 2 U.S.C. §437g(a)(12)(A) and 11 CFR 111.21. These provisions protect the confidentiality of information connected with any Commission investigation of a MUR—for example, a notification of findings or an action taken by the

(continued on page 10)

[2] *Criteria used to determine the commercial nature of an activity are suggested in Advisory Opinion 1989-21: (1) Profits generated from the activity must stay with the business; (2) none of the proceeds from the sale of the merchandise may be given to the candidate; and (3) the vendor must sell the merchandise at the usual and normal charge.*

[3] *See advisory opinion 1994-30, pages 12-13.*

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FEC in connection with the case—but do not apply to the substance of the complaint.

Ms. Gasink wrote a letter, dated June 10, 1993, to the Manhattan District Attorney, making allegations against a past Presidential campaign for which she had worked as a volunteer. The letter was made public and became the subject of a press story. Subsequently, Ms. Gasink filed a complaint with the FEC, submitting her June 10 letter as part of her complaint and reiterating the allegations it contained.

Ms. Gasink asked the Commission whether she could legally divulge to a news reporter the fact that she had filed a complaint with the FEC, and whether she could provide the reporter further information about her allegations and her volunteer service for the campaign in question.

In the absence of prior advisory opinions dealing with the issue of MUR confidentiality, the Commission relied on precedents set in several previous MURs to formulate this advisory opinion.[1] The Commission did not find that the confidentiality provision was violated in any of these prior enforcement cases save one. In the excepted case, persons unknown had revealed to a newspaper that the Commission had decided to issue a subpoena in an open case. In the other MURs, when the substance of the allegations was revealed to the public without any mention of an investigation's proceedings, the Commission determined that no violation of the confidentiality provision had occurred. The timing of the public disclosure was not relevant to the Commission's determinations.

Ms. Gasink is therefore free to share her story with the press as long as she does not discuss any Commission notification of findings or any Commission action taken in the investigation until the case is closed or the respondent waives the right of confidentiality.

Date Issued: October 28, 1994; Length: 4 pages. ✦

Alternative Dispositions of Advisory Opinion Requests

AOR 1994-17

The Commission closed this AOR without issuing an opinion because necessary facts were not submitted. The request concerned the Barca for Congress Committee's transfer of a remaining balance in a recount fund. See Agenda Document #94-69. ✦

Compliance

MURs Released to the Public

Listed below are summaries of FEC enforcement cases (Matters Under Review or MURs) recently released for public review. This listing is based on the FEC press releases of October 7 and 18, but it does not include the 13 MURs in which the Commission took no action. Files on closed MURs are available for review in the Public Records Office.

MUR 3639
Respondents: California Republican Party, Michael Schroeder, treasurer
Complainant: Phil Angelides, former chairman, California Democratic Party
Subject: Improper allocation; corporate contributions; failure to disclose debts properly; illegal extensions of credit from corporate vendors
Disposition: No reason to believe (illegal extensions of credit from corporate vendors); reason to believe but took no further action (other allegations)

MUR 3650
Respondents (all in OH): (a) Mary Rose Oakar; (b) Mary Rose Oakar for Congress Committee, Patrick J. O'Donnell, treasurer; (c) Helen and Philip Demio
Complainant: Cuyahoga County Republican Organization
Subject: Excessive contributions
Disposition: (a) $8,000 penalty; (b) $8,000 penalty; (c) reason to believe but took no further action

MUR 3814
Respondents: Caulfield for Congress, Burton J. Wilner, treasurer (MO)
Complainant: FEC initiated
Subject: Failure to file 48-hour notice
Disposition: $500 penalty

MUR 3891
Respondents (all in CA): (a) David Packard; (b) San Francisco Republican County Central Committee, John Sidline, treasurer; (c) Santa Clara County Republican League, Carey Heckman, treasurer; et al. (d)–(f))
Complainant: Center for Responsive Politics (DC)
Subject: $25,000 annual limit; excessive contributions; depositing nonfederal funds in federal account
Disposition: (a) $25,000 penalty; (b)–(c) reason to believe but took no further action; (d)–(f) no reason to believe

MUR 4004
Respondents: Fields for Congress, Inc., Gerald G. Hall, treasurer (LA)
Complainant: FEC initiated
Subject: Failure to file 48-hour notices
Disposition: $3,000 penalty

[1] *See MURs 3573, 3170, 3169, 3168, 1244 and 298.*

MUR 4009
Respondents: (a) Watkins Associated Industries, Inc., Employees for Good Government Committee (Watkins-PAC), T.R. Wade, treasurer (GA); (b) William A. Freeman (GA); (c) Bill Watkins (GA); (d) Kimberly Martin Watkins (GA); (e) W.B. Watkins, IV (FL); (f) George Watkins (FL); (g) John F. Watkins (FL)
Complainant: FEC initiated
Subject: Excessive contributions
Disposition: (a) $21,500 penalty; (b)–(g) $1,000 penalties

MUR 4025
Respondents: Human Rights Campaign Fund Political Action Committee, Timothy McFeeley, treasurer (DC)
Complainant: FEC initiated
Subject: Failure to file report on time
Disposition: $650 penalty ✦

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The first number in each citation refers to the "number" (month) of the 1994 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, "1:4" means that the article is in the January issue on page 4.

Nonfilers Published

The candidate committees listed below failed to file required campaign finance reports. The list is based on the FEC press releases of October 28 and November 4. The Commission is required by law to publicize the names of nonfiling authorized committees. 2 U.S.C. §438(a)(7). The agency pursues enforcement action against nonfilers on a case-by-case basis. ✦

Candidate	Office Sought	Report Not Filed
Auer, Bill	House, NJ/05	Oct. Quarterly Pre-General
Barton, Mary C.	Senate/IN	Pre-General
Breshgold, Michael S.	House, MI/11	Pre-General
Bryant, Leearl A.	House, TX/26	Pre-General [1]
Butler, Tyrone G.	House, NY/13	Pre-General
Elkowitz, Dr. Edward B.	House, NY/05	Pre-General
Frazer, Victor	House, VI	Oct. Quarterly
Frisa, Dan	House, NY/04	Pre-General
Hemeon, Keith J.	House, MA/10	Pre-General
Kelly, Patrick D.	House, MO/02	Pre-General
Larney, George E.	House, IL/09	Oct. Quarterly Pre-General
Lobato, Francesco	Senate/NM	Pre-General
Manfre, James	House, NY/02	Pre-General
Mathews, Peter	House, CA/38	Pre-General
Olson, Robert A.	House, MN/03	Oct. Quarterly
Peglow, Edward P.	House, PA/04	Oct. Quarterly Pre-General
Podolak, Jurij A.	House, PA/11	Pre-General
Valtierra, Steven	House, IL/04	Pre-General

[1] *The Bryant committee's pre-general election report was received after the 5 p.m., November 3 deadline for publication.*

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