Record

August 1996 *Federal Election Commission* *Volume 22, Number 8*

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Court Cases

FEC v. Colorado Republican Federal Campaign Committee

On June 26, 1996, the U.S. Supreme Court ruled that the coordinated party expenditure limits at 2 U.S.C. §441a(d) could not be constitutionally applied to a radio advertisement aired by the Colorado Republican Federal Campaign Committee (the committee) in connection with the 1986 U.S. Senate election. The Court found that the ad was not coordinated with any candidate; rather it was an independent expenditure that could not constitutionally be subject to the coordinated party expenditure limit.

The Court decided not to address a constitutional challenge to the §441a(d) coordinated limits brought by the committee. Instead, the Court chose to "defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion."

This decision vacated the 10th Circuit Court of Appeals' judgment (see the August 1995 *Record*, page 1). The case was remanded to the lower courts for further proceedings consistent with this decision.

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Regulations

New Regulations on Cable Television Debates and News Stories Take Effect

On June 21, 1996, the FEC's revised regulations governing candidate debates and news stories staged, produced or distributed by cable television organizations took effect (61 FR 31824, June 21, 1996). The rules were published in the Federal Register on April 24, 1996 (61 FR 18049).

The new regulations extend the news story exemption at 11 CFR 100.7(b)(2) and 100.8(b)(2) to cable television operators, programmers and producers acting in their capacities as press entities. Additionally, FEC rules exempt from the definitions of contribution and expenditure federal candidate debates staged by broadcasters and bona fide print media.

Copies of the Federal Register notices on the revised rules may be obtained by calling the FEC at 800/424-9530 or through the FEC's automated Flashfax system: dial 202/501-3413 and request document 229. ✦

800 Line

Bundling By Individuals

This article explains the rules governing bundling by individuals. "Bundling" is a term often used by the general public and the press to describe when a person collects and delivers contributions from other individuals earmarked for a specific candidate.

Please note that the focus of this article is on bundling by individuals. Political committees should consult the appendix on earmarking in the appropriate FEC Campaign Guide.

Definition of Earmarked Contribution

An earmarked contribution is one which the contributor directs (either orally or in writing) to a candidate or his or her authorized committee through an intermediary or conduit. 11 CFR 110.6(b)(1).

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Definition of Conduit or Intermediary

With certain exceptions discussed below, a conduit or intermediary (the terms are synonymous) is a person who receives and forwards (i.e., "bundles") an earmarked contribution to a candidate or authorized committee. 11 CFR 110.6(b)(2). A conduit may be an individual, a partnership or a federally registered political committee. (This article, however, explains the conduit requirements for individuals only.)

Who May Not Act as Conduit. Individuals who are prohibited from making contributions in connection with federal elections are not allowed to act as conduits for bundled contributions. 11 CFR 110.6(b)(2)(ii). Specifically:

- Foreign nationals (i.e., foreign citizens who do not have green cards lawfully admitting them for permanent residency in the U.S.) may not act as conduits;
- Nor may individuals under contract to the federal government or individual sole proprietors with federal government contracts. 11 CFR 110.4(a) and 115.5.

Moreover, an individual is not permitted to conduct bundling activity when acting as a representative of a prohibited entity (i.e., a corporation, labor organization, national bank,[1] foreign national or federal government contractor (such as a partnership with a federal contract)). 11 CFR 110.4(a); 110.6(b)(2)(i)(A) and (E); 114.2(a) and (b); and 115.2(a).

Who Is Not Considered a Conduit. Individuals who are employees or full-time volunteers for a campaign, or who are expressly authorized to engage in fundraising on behalf of the campaign and occupy significant positions in the campaign, are viewed as agents of the campaign rather than as conduits. 11 CFR 110.6(b)(2)(i)(A) and (E). These individuals are not subject to the earmarking requirements.

Use of Workplace for Bundling

Incidental Use Exception. Under the "incidental use" exception, employees of corporations and labor organizations[2] are permitted to spend up to one hour a week (four hours a month) during working hours for their personal volunteer activity, including bundling activity, as long as the individual reimburses the employer for any increased operating costs (e.g., long-distance calls). 11 CFR 114.9(a) and (b).

Advance Payment Exception. An employee of a corporation or labor organization may, in an effort to bundle contributions or otherwise raise funds for a candidate, make use of the organization's personnel,[3] food services (including outside catering obtained by the organization) and mailing lists in the activity if the organization receives advance payment from a permissible source (i.e., the employee, the campaign or the organization's SSF) at the fair market value for the goods or services. 11 CFR 114.2(f)(2)(i)(A), (C) and (E).

General Rule. Apart from the two exceptions discussed above, if an individual engages in personal volunteer activity while on the job,

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[1] *Foreign nationals and national banks are prohibited from making contributions in connection with any election: local, state or federal. 11 CFR 110.4(a) and 114.2(a).*

[2] *In Advisory Opinion (AO) 1979-22, the Commission noted that the regulations regarding the incidental use of corporate facilities for individual volunteer activity by employees applied to a partnership associate's use of firm facilities and staff.*

[3] *Employees of the organization may not be coerced, through the threat of job actions or financial reprisals, into engaging in fundraising activities or making a contribution. 11 CFR 114.2(f)(2)(iv).*

compensation paid by his or her employer for the time spent at work on bundling activity (or any activity to influence federal elections) may be considered a contribution from the employer to the candidate benefiting from the activity. 11 CFR 100.7(a)(3). Moreover, the use of the employer's facilities for bundling or other federal election activity results in an additional contribution from the employer unless the use is incidental, as described above, or the individual reimburses the employer the usual and normal charge for the use of the facilities within a commercially reasonable time. 11 CFR 100.7(a)(1)(iii) and (a)(4); 114.9. If the employer is a corporation or other prohibited source, the resulting contribution would be illegal. Even if the employer is permitted to make contributions, the value of the contribution must remain within the $1,000 per candidate, per election contribution limit. 11 CFR 100.7(a)(1)(iii) and 110.1(b)(1).

Bundling and the Contribution Limits

Solicitation Costs. Any costs an individual incurs when acting as a conduit—including payments made for the use of an employer's facilities and advance payments for the costs described above—are considered in-kind contributions to the candidates benefiting from the activity and are subject to the $1,000 per candidate, per election limit. 11 CFR 100.7(a)(1)(iii) and 110.1(b)(1); AO 1980-46.

Direction or Control. An earmarked contribution counts against the original contributor's limit for the recipient candidate. 11 CFR 110.6(a). The conduit's contribution limit is affected only if the conduit exercises direction or control over the choice of the recipient candidate. In that case, the earmarked contribution counts against the contribution limits of both the original contributor and the conduit. 11 CFR 110.6(d).

Handling of Contributions by Conduit

Ten-day Forwarding Rule. An individual acting as a conduit must forward both the earmarked contribution and certain information needed for the candidate's FEC report to the recipient committee within 10 calendar days after the conduit's receipt of the contribution. 11 CFR 102.8 and 110.6(c)(1)(iii).

No Commingling. Individuals are prohibited from commingling campaign funds with personal funds in a personal bank account. 11 CFR 102.15. Thus, an individual who bundles earmarked contributions should forward the original contribution checks to the campaign.

Reporting

An individual who bundles earmarked contributions must forward certain information to the recipient committee within 10 days after the conduit's receipt of the contribution. Moreover, the individual must also disclose information about the earmarked contributions in a letter to the FEC within 30 days after forwarding the earmarked contributions. 11 CFR 110.6(c)(1)(i)-(iii).

Contents of Report.[4] The conduit's reports to the recipient committee and to the FEC must contain the following information:

- Whether the contribution was transmitted to the candidate in the form of cash or the contributor's check. (Note that contributions bundled by an individual should not be transmitted in the form of the conduit's check, due to the prohibition on commingling campaign funds with personal funds.);
- The name and mailing address of the contributor, and if the contribution is from an individual and exceeds $200, the contributor's occupation and employer;
- The candidate for whom the contribution was earmarked;[5]
- The amount of the contribution;
- The date of receipt by the conduit;
- The date the contribution was forwarded to the candidate's campaign; and
- If the individual exercised direction or control over the choice of the recipient candidate, a statement that the earmarked contribution counts against the conduit's limit for the recipient candidate as well as the contributor's limit. 11 CFR 110.6(c)(1)(ii) and (d)(2).

The conduit should also inform the campaign of any costs incurred in soliciting the earmarked contributions, as the campaign must report those costs as an in-kind contribution. 11 CFR 104.3(a)(4). ❖

[4] *Campaigns should consult the* Campaign Guide for Congressional Committees *for guidance on reporting earmarked contributions.*

[5] *It is suggested that the conduit also include the election for which the contribution was designated (if any), the office sought by the candidate and the name and address of the recipient candidate committee.*

Compliance

Alabama Pre-Runoff Nonfiler

The Billy Joe Camp for Congress committee was the only candidate committee that failed to file a pre-election report for Alabama's June 25 runoff election. The committee is Billy Joe Camp's principal campaign committee for his bid for the U.S. House seat representing Alabama's 3rd district. See the FEC news release of June 21, 1996.

The FEC is required by law to publicize the names of nonfiling candidate committees. 2 U.S.C. §438(a)(7). The FEC pursues enforcement actions against nonfilers on a case-by-case basis. ❖

Court Cases

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Background

At 2 U.S.C. §441a(d), the Federal Election Campaign Act permits political party committees to make expenditures up to specified amounts "in connection with the general election campaign of candidates for Federal office." During the 1986 U.S. Senate race in Colorado, the committee made an expenditure of $15,000 for a radio advertisement titled Wirth Facts #1. The ad criticized then-Representative Tim Wirth, who was seeking the Democratic Senate nomination.[1]

The ad was broadcast throughout the state several months after Representative Wirth had registered as a candidate with the FEC, but before the Colorado primary election. At the time the ad was aired, three candidates were seeking the Republican nomination.

In its campaign finance reports, the committee characterized the ad as a generic voter education expense that was not subject to the §441a(d) limit. The FEC, however, acting in response to a complaint, viewed it as a coordinated party expenditure. After unsuccessful efforts to reach a negotiated settlement, the Commission filed suit against the committee for violating the Act's party expenditure limits and the corresponding reporting requirements.

The FEC alleged that Wirth Facts #1 was subject to the §441a(d) limits because it contained an "electioneering message" about a clearly identified candidate. AOs 1984-15 and 1985-14.

The committee argued that the ad did not contain express advocacy and was therefore not subject to the §441a(d) limits. Further, it counterclaimed with a First Amendment challenge to the constitutionality of the §441a(d) limits.

Lower Court Decisions

The U.S. District Court for the District of Colorado held that only communications containing express advocacy counted towards the §441a(d) spending limits. Since, in its view, Wirth Facts #1 did not contain express advocacy, it declined to address the constitutional question. 839 F.Supp. 1448 (D.Col. 1993). See the November 1993 *Record*, page 1.

The U.S. Court of Appeals for the 10th Circuit reversed. 59 F.3d 1015 (10th Cir. 1995). See the August 1995 *Record*, page 1. The 10th Circuit upheld the FEC's "electioneering message" standard as applied to Wirth Facts #1, as well as the constitutionality of these spending limits.

Supreme Court Decision

In the landmark 1976 case, *Buckley v. Valeo,* and successor cases, the Supreme Court distinguished between independent expenditures, which it held cannot be constitutionally limited,[2] and contributions, which can be limited.

The FEC had concluded that political parties, because of their special function, are incapable of making electoral expenditures that are "independent" of their own candidates, since the sole reason for a political party's existence is to elect its candidates to public office.

The Court disagreed, stating that, with reference to Wirth Facts #1, there was no evidence of coordination between the committee and the three candidates who were then seeking the Republican Senate nomination. Rather, Wirth Facts #1 "was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." The Court also found that the potential for, or appearance of, corruption, which the *Buckley* Court found sufficient to justify limiting contributions, was not present to the extent that would justify limiting such independent spending by political parties on behalf of their candidates. Accordingly, the Court concluded that the First Amendment precludes application of the §441a(d) limits to independent campaign expenditures by political parties.

Impact on Publicly Funded Presidential Campaigns

This decision pertained to party spending in connection with congressional races. The Court warned that this opinion does not "address issues that might grow out of the public funding of Presidential campaigns."

Concurring and Dissenting Opinions Accompanying This Judgment

Justice Breyer wrote the plurality opinion announcing the judgment of the Court. Although seven Justices concurred in the judgment, only Justices O'Connor and Souter joined Justice Breyer's plurality decision. There were also two separate concurring opinions and one dissent which the remaining Justices signed on to, as follows:

- Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in

[1] *As permitted by law, the committee had previously assigned its entire right to make coordinated expenditures under §441a(d) to the Republican National Senatorial Committeee.* FEC v. Democratic Senatorial Campaign Committee, *454 U.S. 27 (1981). Thus any coordinated expenditure it made in connection with the 1986 Senate election would have exceeded its §441a(d) spending limit.*

[2] Buckley *addressed independent expenditures made by individuals. A 1985 Supreme Court decision,* FEC v. National Conservative Political Action Committee, *applied the same reasoning to expenditures by independent political committees.*

part. This opinion reasoned that coordinated party expenditures cannot constitutionally be limited because this would impermissibly infringe upon the parties' First Amendment right to engage in political speech.

- Justice Thomas, joined in part by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in part. This opinion also reasoned that the §441a(d) limits are unconstitutional. Justice Thomas, writing for himself only, first explained that there is no constitutional difference between expenditures and contributions, and that neither can constitutionally be limited at all. For this reason, he would overrule *Buckley v. Valeo* and find unconstitutional all statutory limits on contributions and expenditures. Chief Justice Rehnquist and Justice Scalia did not join this part of Justice Thomas' opinion, but agreed with Justice Thomas' conclusion that, under *Buckley*, the party expenditure limits at §441a(d) are unconstitutional in their entirety because there is insufficient evidence that coordinated spending by political parties poses a substantial risk of corruption.
- Justice Stevens, joined by Justice Ginsberg, dissented. The dissenters agreed with the FEC's view that all campaign expenditures by political parties should be treated as coordinated with the party's candidates, and concluded that the limit on party expenditures at §441a(d) is constitutional because it serves compelling governmental interests in avoiding both actual corruption and the appearance of corruption, and in leveling the playing field in election campaigns.

U.S. Supreme Court (95-489); Court of Appeals for the 10th Circuit (93-1433 and 93-1434), D.C. No. 89-N-1159. ✥

New Litigation

FEC v. John J. Murray for Congress Committee

The FEC asks the court to find that the John J. Murray for Congress Committee violated the law by failing to file a 48-hour notice on a $100,000 contribution in the form of a loan from the candidate.

Within 48 hours of receiving a contribution of $1,000 or more after the 20th day but more than 48 hours before an election, a candidate committee must file a notice providing, among other information, the date of receipt of the contribution, its amount and the identity of the contributor. 2 U.S.C. §434(a)(6)(A). The FEC claims that the Committee failed to file such a notice within 48 hours of its receipt of a $100,000 loan from John J. Murray, a House candidate in Pennsylvania's May 1994 primary election.

In addition to seeking a declaration that the Committee violated the law, the FEC asks the court to assess an appropriate civil penalty against the Committee and to permanently enjoin it from further violations of §434(a)(6)(A).

U.S. District Court for the Eastern District of Pennsylvania, 96CV-4490, June 20, 1996. ✥

Reilly v. FEC

Clinton Reilly asks the court to quash the FEC's investigation of him because he believes the FEC has no jurisdiction over his slate mail operation, which distributes lists of federal, state and local candidates and advocates their election or defeat.

Mr. Reilly, doing business as the California Democratic Voter Checklist, a for-profit sole proprietorship, sold space to candidates and initiative committees who wished to appear on a slate card that he prepared and distributed to voters. He gave some candidates free space as a means of enhancing the appearance and value of the slate card.

Mr. Reilly asks the court to declare that the FEC has no jurisdiction over the Checklist because it is not a "political committee" under the Federal Election Campaign Act. The Checklist's major purpose, he claims, is to generate personal profit for himself rather than to support or oppose federal candidates. Alternatively, he asks the court to find that the Checklist has no reporting obligations under the Act other than the reporting of free or reduced space as independent expenditures.

U.S. District Court for the Northern District of California, C 96-2335 SC, June 26, 1996. ✥

Statistics

PACs Give $90.8 Million to Candidates in First 15 Months of '96 Election Cycle

PACs contributed a total of $90.8 million to all federal candidates during the first 15 months of the '96 election cycle. Of that total, $78 million went to congressional candidates seeking election in 1996, $10.5 million went to candidates seeking to retire debts or to raise money for elections held in other years, and $2.2 million went to 1996 Presidential candidates.

The FEC examined the financial activities of 4,294 PACs from January 1, 1995, through March 31, 1996, and found that they raised $248.6 million and spent $199.6 million during that time.

Republican congressional candidates received $44.8 million from PACs, while Democratic congressional candidates received $33.2 million. During the same period in 1994, Democratic candidates

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Statistics

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received $46 million from PACs and Republicans received $23.7 million.

Incumbents received $65.1 million during the first 15 months of the 1996 cycle, up from $61 million in 1994. PACs gave $13 million to nonincumbents by March 31, 1996, compared with $8.7 million 2 years earlier.

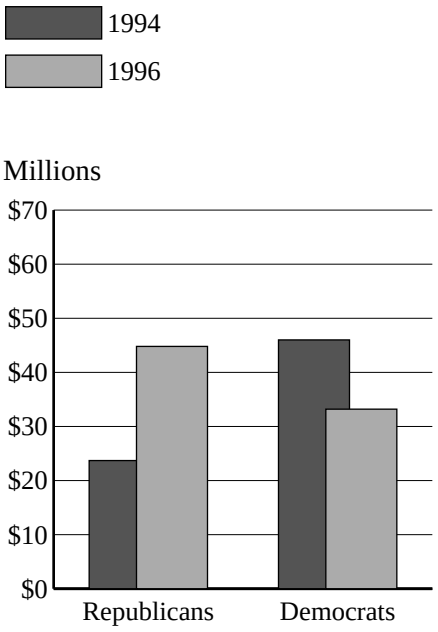
Corporate PACs gave the most to 1996 congressional candidates, with contributions totaling $30.7 million. The PACs of trade, membership and health organizations were the next biggest givers to 1996 congressional candidates with $21.5 million in contributions, followed by labor PACs with $15.6 million, nonconnected PACs with $7.2 million, the PACs of corporations without stock with $1.7 million, and cooperatives with $1.4 million.

An FEC news release of June 7, 1996, contains this and other data on PAC financial activity during the first 15 months of the '96 election cycle (including top 50 PAC lists for a variety of categories). A copy of this release may be ordered from the Public Records office: call 800/424-9530 and press 3 at the prompt. To receive faxed copies, call the 24-hour Flashfax service at 202/501-3413 and request document 532. The release is also available on the FEC's World Wide Web site: http://www.fec.gov (select "News Releases and Media Advisories"). For the latest FEC data, select "Financial Information for Candidates, Parties and PACs."

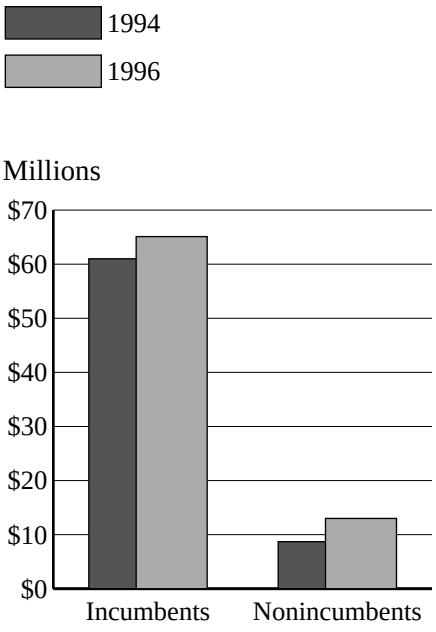
The accompanying graph is based on the data contained in the news release. ❖

PAC Contributions to Candidates: First 15 Months of Election Cycle

By Candidate's Party Affiliation



By Type of Candidate



Advisory Opinions

AO 1996-13
Property Owned by Limited Liability Company Used for Campaign Events

Townhouse Associates, L.L.C., (TA) may make space available for campaign events in the townhouse it owns. Campaign committees must pay the fair market value for the use of the space. Alternatively, TA may donate the space as an in-kind contribution to a campaign committee as long as the value of using the space does not exceed the limits at 2 U.S.C. §441a(a)(1).

TA is a limited liability company organized under the laws of the District of Columbia. Because the laws of the District of Columbia distinguish a limited liability company as an entity that is neither a corporation nor a partnership, TA is allowed to make contributions in connection with federal elections subject to the limits placed on individuals. AO 1995-11.

TA has a close relationship with an incorporated law firm, Williams & Jensen, P.C., raising the question of whether TA's contributions should be attributed to the law firm. TA is composed of 12 members, all of whom are partners of the law firm; the firm has only two partners who are not TA members. No member of TA may resign from TA unless he or she also resigns from the law firm. Both TA and the law firm share one address. Moreover, TA's stated purpose is to loan funds to the law firm from time to time and to pledge funds on behalf of the law firm.

Additionally, TA rents out some space in its townhouse to the Firm. The lease agreement between TA and the Firm states that TA may use other townhouse space (i.e., first floor space) for receptions and

events with the prior consent of the Firm.

Despite this close relationship and lease agreement, TA's in-kind contributions are not considered to have been made by the law firm. TA is the party contracting with the political committee and TA is the owner of the resources. Moreover, groups of individuals do business in different forms. They may be able to use funds from one form of business (e.g., a partnership) to make contributions while unable to use funds from another form of business (e.g., a corporation). Furthermore, there is no suggestion that the firm owns TA. TA is financed by the personal funds of its members, and not from the firm's funds. Moreover, it is TA that provides financial support to the firm, and not the other way around.

In addition to making space available to campaign committees, TA indicated that it intends to make space available to businesses and charitable and service organizations as well. Nonetheless, the Commission cautioned TA about becoming a political committee. It pointed out that an organization becomes a political committee when its major purpose is deemed to be campaign activity—that is, "making payments or donations to influence any election to public office"—and it has either raised or spent $1,000 in connection with federal elections.

Date Issued: June 10, 1996; Length: 6 pages. ❖

AO 1996-18 Conduit Accounts

Contributors to a conduit account established under Wisconsin law by an affiliate of the International Association of Fire Fighters (IAFF) (a labor organization) may direct their contributions to IAFF's federal PAC, FIREPAC. Directed contributions are contributions from the individual contributors only and not from the conduit account.

With respect to the conduit account, IAFF acts as a collecting agent under federal election law. As such, IAFF must: (1) transfer the conduit-account contributions directed to FIREPAC within established time frames and (2) provide FIREPAC with the required contributor information.

Wisconsin Law and the Proposed Conduit Account

Wisconsin State law permits organizations to establish conduit accounts to raise voluntary personal contributions to Wisconsin's nonfederal candidates. Under Wisconsin law, a conduit account may only disburse receipts in accordance with directions received from individual contributors, who may even request a refund of some or all of the funds. This is because the funds donated by the individual contributor into a conduit account are considered the contributor's funds. Therefore, a contribution received from the conduit is considered to be a contribution from the individual contributor, not the conduit.

Under IAFF's proposed activity, members of the IAFF affiliate who contributed to the conduit account would be asked to direct their conduit-account funds to FIREPAC.

The IAFF affiliate will comport with federal standards by voluntarily restricting its solicitations to the affiliate's membership and refusing contributions from those outside IAFF's retricted class.

Attribution of Contribution

The issue of control over the funds in the conduit account is relevant to determining whether the later contribution to FIREPAC is attributed in full to both the contributor and the conduit account or to just the contributor.

The funds in the account remain under the control of the individual donor who alone determines when and how much of those funds will be contributed to FIREPAC. Since neither IAFF nor FIREPAC controls the account's funds, the conduit account is not considered to be making or accepting contributions for the purposes of the Federal Election Campaign Act, and is therefore not required to report as a political committee. The account is instead viewed as an accounting process by which funds donated by individual IAFF members are set aside, awaiting future direction for disbursement.

Collecting Agent Obligations

Upon receiving directions from a contributor to disburse money to FIREPAC, the conduit must forward the amount it is directed to, as follows: contributions of $50 or less must be disbursed within 30 days of receiving direction; contributions of more than $50 must be disbursed within 10 days of receiving direction, and they must be forwarded with the contributor's name and address, and the date the direction was received. Additionally, contributions of more than $200 require that the conduit forward information on the contributor's occupation and employer as well. 11 CFR 102.6(c)(4) and (5), and 102.8(b)(1) and (2).

Date Issued: June 14, 1996; Length: 4 pages. ❖

(Advisory Opinions continued on page 8)

Federal Register

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

Notice 1996-12
11 CFR 110: Candidate Debates and News Stories (produced by cable television organizations); Announcement of Effective Date (61 FR 31824, June 21, 1996)

Notice 1996-13
Filing Dates for Kansas Special Election (61 FR 33508, June 27, 1996)

Advisory Opinions

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AO 1996-19
Use of Campaign Funds for Travel to Presidential Nominating Convention: Wife and Children

Congressman James T. Walsh may use campaign funds to pay for his wife's and children's (ages 12 and 16) travel and subsistence expenses in connection with the Republican National Convention. These expenses do not constitute a personal use of campaign funds.

Congressman Walsh plans to attend the Republican National Convention as a delegate pledged to Senator Robert Dole.[1] His family will generally support his activities by co-hosting and possibly sponsoring receptions for his constituents at the convention. Specifically, the Congressman plans to ask his children to act as his representatives at the Young Republicans' convention function.

Campaign funds may not be converted to the personal use of the candidate or of any other person. 11 CFR 113.1(g) and 113.2(d). Personal use is defined at 11 CFR 113.1(g) as any use of campaign funds for an expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder.

Congressman Walsh and his family will engage in activities that further his reelection campaign, including maintaining contacts and goodwill with persons who will assist him in his fundraising efforts and contribute to his campaign, and discussing his campaign with his constituents. Congressman Walsh considers his family's attendance at these events, whether alongside him or in his place, to be important to his reelection effort. Therefore, his wife's and children's attendance at the convention is campaign related, and campaign funds may be used to cover their travel expenses to and from the event. Relevant to this conclusion is the inherently political nature of the national nominating convention. The campaign should report the costs as operating expenditures.

The Congressman also presented the possibility of visiting a friend in Santa Barbara prior to the convention. When official and campaign travel is mixed with personal travel, that portion of the expenses relating solely to personal travel is considered a personal use of campaign funds unless the person benefiting from the use reimburses the campaign within 30 days. 11 CFR 113.1(g)(1)(ii). Since the Congressman affirmed that he would pay expenses associated with that visit (e.g., car rental, hotel and meals) out of his own personal funds, he avoids any impropriety with respect to the personal use rules.

Date Issued: June 10, 1996; Length: 4 pages. ✦

[1] *With respect to Congressman Walsh's own travel expenses, the FEC's regulations covering delegate activity indicate that such costs would be for the purpose of influencing a federal election and, hence, not a personal use. 11 CFR 110.14(c) and (e).*

AO 1996-20
Use of Campaign Funds for Travel to Presidential Nominating Convention: Chief of Staff

Congressman Frank D. Lucas, representing Oklahoma's 6th district, may use campaign funds to pay for his chief of staff's travel and subsistence expenses in connection with the Republican National Convention to be held in San Diego. These expenses do not constitute a personal use of campaign funds.

Congressman Lucas plans to attend the Republican National Convention as a delegate from Oklahoma.[1] His chief of staff will accompany him in order to: serve as the Congressman's liaison with his congressional office; make contact with top Republican contributors and meet with campaign vendors; and attend activities in connection with Congressman Lucas's role as National Co-Chairman of "Rural Americans for Dole."

Campaign funds may not be converted to the personal use of the candidate or of any other person. 11 CFR 113.1(g) and 113.2(d). Personal use is defined at 11 CFR 113.1(g) as any use of campaign funds for an expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder.

As described above, the chief of staff will engage in activities related to the Congressman's campaign and his duties as a federal officeholder. The Congressman's campaign committee may therefore pay for his chief of staff's travel and subsistence. Such activities will not constitute "personal use." The committee may either reimburse the chief of staff for these costs or pay the costs directly (see footnote 3 of the advisory opinion for guidance on reporting advances by the chief of staff).

Further, the fact that the Congressman and his chief of staff will perform functions related to the Dole Presidential campaign does not result in the making of an in-kind contribution to the Dole campaign. It is understood that a person who attends a national nominating convention as an officeholder and a delegate will participate in activities aimed at supporting the party's Presidential nominee. However, this advisory opinion assumes that the

[1] *With respect to Congressman Lucas's own travel expenses, the FEC's regulations covering delegate activity indicate that such costs would be for the purpose of influencing a federal election and, hence, not a personal use. 11 CFR 110.14(c) and (e).*

Dole campaign will pay for any incremental travel, subsistence or other expenses connected to the Congressman's and his chief of staff's involvement in Presidential campaign activities, such as being chairman of Rural Americans for Dole.

Date Issued: June 14, 1996; Length: 4 pages. ◆

AO 1996-21 Membership Organization Communications

The Business Council of Alabama (BCA) may send to its individual members and to the official representatives of its organizational members communications that endorse and/or oppose federal candidates or that solicit contributions on behalf of the favored candidates.

The Proposed Communications

BCA is an incorporated, nonprofit membership organization. Its members include individuals, firms, partnerships, organizations and corporations.

The proposed communications would be sent to BCA's individual members and to the individuals with whom BCA normally conducts business on behalf of its member firms, partnerships, organizations and corporations.

The expense of producing and distributing these communications would be paid by BCA. These materials would contain the views of BCA and would not be reproductions of literature originating from a candidate campaign or other entity.

The communication would provide information on how to make contributions to the favored candidates; for instance, campaign names and addresses would be provided. BCA, however, would not provide its members with the means to actually make the contribution; for instance, BCA would not provide envelopes addressed to candidates and would not receive or forward contributions to the candidates. It would, however, ask members to let it know the amounts and recipients of their contributions.

The Corporate Ban and Its Exceptions

Corporations are prohibited from providing anything of value to an entity involved in a federal election. 2 U.S.C. §441b. There are some exceptions to this general ban.

One exception allows corporations to send to their restricted class[1] communications that expressly advocate the election or defeat of a clearly identified candidate and that solicit contributions to be sent directly to the candidate. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.1(j) and 114.2(f)(4)(ii). However, such a corporate communication may not, in any way, facilitate the making of contributions. 11 CFR 114.2(f) and 114.3. Examples of illegal corporate facilitation include acting as a conduit for contributions and providing potential contributors with stamps and envelopes addressed to political committees other than the corporation's own PAC. Although the corporation may not provide addressed envelopes, it may provide contributors with the addresses of political committees.

BCA's proposed communications avoid facilitation problems and are otherwise consistent with the above-described legal guidelines. BCA must also ensure that contributions are made voluntarily, that no penalty would attach to a BCA member who did not make contributions, and that contributions are not made in the name of a BCA member by another entity.

The only issue remaining is determining the permissible audience for the proposed communications.

Determining Who May Receive the Communications

Communications that contain express advocacy or that solicit contributions on behalf of candidates may be sent to individual members of an incorporated membership organization.

Under 11 CFR 100.8(b)(4) and 114.1(e)(2), individuals and other entities are considered members of an incorporated membership organization only if they satisfy one of the following requirements: 1) They have some significant financial attachment to the organization; 2) They pay organization dues on a regular basis and are entitled to vote, either directly or through a chosen representative, for a member of the organization's highest governing body; or 3) They are entitled to vote directly for all of the members of the organization's highest governing body.

These voting-rights requirements—11 CFR 100.8(b)(iv)(B) and 114.1(e)(2)—were struck down by the U.S. Court of Appeals for the District of Columbia in *Chamber of Commerce vs. FEC*, on the basis that they were too restrictive. See the January 1996 *Record*, page 2. The FEC has not yet developed regulations incorporating the result in *Chamber*. Nonetheless, since all BCA members meet the more stringent and former definition of member (they pay annual dues and directly elect BCA's highest governing body), the Commission determined that BCA's individual members may be included in the audience for the proposed communications.

Further, BCA may also send the proposed communications to the individual representatives of its corporate members with whom BCA normally conducts business. While BCA does not qualify as a trade association under the Federal Election Campaign Act, its situation is analogous to the situation permit-

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[1] *Under 11 CFR 114.7(a), the restricted class of an incorporated membership organization includes its members, its executive and administrative personnel and the families of both groups.*

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ted at 11 CFR 114.8(h), which addresses trade association communications with its member corporations. The Commission notes that, based on the total number of corporate and noncorporate members, there are less than two representatives per member on average. The number of employees of BCA's corporate members who would receive the communications is therefore reasonable and consistent with the purposes of 11 CFR 114.8(h).

Date Issued: June 14, 1996; Length: 7 pages. ✥

AO 1996-22
Public Funding for Non-Major Party Candidates

If Ross Perot becomes the Reform Party's 1996 Presidential nominee, he would be eligible for pre-election public funding, provided he agrees to abide by the conditions imposed by the Presidential Election Campaign Fund Act and corresponding FEC regulations.

Background

Mr. Perot received nearly 19 percent of the popular vote in his 1992 bid for the U.S. Presidency. In the 1992 election, he ran as an independent in 43 states and as the candidate of non-major parties in seven states.

Mr. Perot has registered as a candidate for the 1996 Presidential election. He has named the Perot Reform Committee as his principal campaign committee.

According to Mr. Perot's counsel, the Reform Party will likely become a political party once its efforts to create state Reform Parties and gain ballot status succeed. Moreover, it is anticipated that most of the seven parties that supported Mr. Perot's candidacy in 1992 will become state affiliates of the Reform Party.

Application of Public Funding Provisions

Under 26 U.S.C. §9004(a)(2)(B), a Presidential candidate who received more than 5 percent but less than 25 percent of the popular vote in the previous Presidential general election may receive pre-election public funding. Since Mr. Perot received 19 percent of the popular vote in 1992, he would be eligible for pre-election funding in 1996 if he obtains the nomination of the Reform Party or any other non-major party and otherwise meets the eligibility requirements. The amount of public funding such a candidate would receive is based on the ratio of the votes he or she received previously compared to the average received by the major party candidates.

Under 11 CFR 9003.1, a candidate who wishes to receive public funding must submit to the FEC a signed letter stating that he or she agrees to abide by the conditions imposed by FEC laws and regulations. Candidates must submit this letter within 14 days of securing ballot access in at least 10 states. The Commission has the authority to extend this deadline, and in the case of Mr. Perot the Commission granted him until 14 days after the Reform Party convention to submit his letter.

Unanswered Questions

Questions on whether a Reform Party nominee other than Mr. Perot would also be eligible for pre-election public funding and whether the Reform Party could receive public funding for its convention were left unanswered. These questions hinge on whether the Reform Party qualifies as a minor party. Additionally, for convention funding, the Reform Party would also have to demonstrate that it qualifies as a national party committee under 26 U.S.C. §9008.

A minor party is defined under 26 U.S.C. §9002(7) as a political party whose Presidential nominee received between 5 percent and 25 percent of the popular vote in the last general Presidential election as the candidate of that party.

Since, at the time of this opinion, the Reform Party had not been formed, the questions of whether it qualified as a minor party or as a national committee were hypothetical and the Commission deemed it premature to address them.

Date Issued: June 14, 1996; Length: 4 pages. ✥

AO 1996-24
Use Of Campaign Funds For Certain Legal Expenses

U.S. Representative Wester S. Cooley may use campaign funds to pay for services rendered by a law firm in connection with refuting allegations of wrongdoing made by the press. Representative Cooley may also use campaign funds to pay for legal expenses in connection with establishing a legal expense trust fund to raise funds to defray his legal expenses. However, if a Department of Veterans Affairs (VA) inquiry results in an adverse finding, campaign funds may not be used to respond to such a finding.

Refuting Press Attacks

Representative Cooley has been the subject of a number of allegations of improper conduct. He has hired a law firm for the following functions: (a) to handle direct communications with the press, including responses to press inquiries concerning Representative Cooley's positions on the allegations made; (b) to conduct research, investigations and communications with government officials directed at refuting the allegations made; and (c) to do research on Oregon law relating to defamation and false statements made by the press, and subsequent demands for retractions of false statements. The need for these services exists because of the greater scrutiny Representative

Cooley received as a candidate and officeholder and his need to refute allegations made by the press against him. AOs 1995-23, 1995-21.

Under 2 U.S.C. §439a, excess campaign funds may be used for any lawful purpose that does not constitute personal use, which is defined under Commission regulations as the use of campaign funds to pay for any expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder. 11 CFR 113.1(g)(1). In this case the legal fees would not have existed had Representative Cooley not been a candidate or officeholder.

Responding to Legal Proceedings

One of the allegations against Representative Cooley concerned his spouse's receipt of Veterans benefits. Representative Cooley may use campaign funds to request a VA inquiry into the allegations as an attempt to confirm that he had complied with eligibility requirements for these benefits. However, if the VA inquiry finds that benefits were received improperly, he may not use campaign funds to pay for a legal response to this adverse determination. The need to respond to an adverse finding by the VA would not arise from press allegations of wrongdoing, but rather from the Cooleys' obligation to comply with VA requirements for eligibility for benefits. Because this obligation would exist irrespective of Representative Cooley's campaign or officeholder status, it would be considered personal use.

Similarly, if any of the other press allegations lead to legal proceedings that could have arisen irrespective of Representative Cooley's status as a candidate or officeholder, he may not use campaign funds to pay legal costs incurred in connection with any such proceedings.

Voter Pamphlets

One of the allegations concerns press allegations of false information in voter pamphlets produced with campaign funds. Representative Cooley may use campaign funds to pay for legal expenses in connection with any formal proceedings that might result from these allegations because the pamphlets were produced as part of his 1994 campaign for Congress.

Setting Up Legal Expense Trust

Representative Cooley is also permitted to use campaign funds to pay for expenses incurred in the research into and establishment of a legal expense trust fund to raise funds to defray his legal costs. Legal expense trust funds are a mechanism to allow candidates and federal officeholders to receive donations without having to treat these donations as contributions under the Federal Election Campaign Act. Setup costs for this trust fund would not exist were Representative Cooley not a candidate or federal officeholder.

Freedom of Information Act Expenses

Due to insufficient information provided by the requester, the Commission could not determine whether Representative Cooley could use campaign funds to pay for expenses incurred regarding the Freedom of Information Act and a newspaper effort to obtain confidential information about him.

Date Issued: June 27, 1996; Length: 7 pages. ✥

Advisory Opinion Requests

Advisory opinion requests are available for review and comment in the Public Records Office.

AOR 1996-27
Qualifying as state committee of national political party (Libertarian Party of Illinois; June 21, 1996; 2 pages)

AOR 1996-28
Assignment of court award to candidate by his terminating committee (Lehigh Valley Citizens for Don Ritter; June 25, 1996; 3 pages)

AOR 1996-29
Allocation of in-kind contribution of computer equipment over several election cycles (Chris Cannon for Congress; July 5, 1996; 2 pages plus 3-page attachment) ✥

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