Record

October 2004 *Federal Election Commission* *Volume 30, Number 10*

Table of Contents

Court Cases

Wisconsin Right to Life, Inc. v. FEC

On September 14, 2004, the U.S. Supreme Court denied Wisconsin Right to Life, Inc's (WRTL) request for an injunction pending appeal. The U.S. Court of Appeals District of Columbia Circuit had previously denied WRTL's motion for an injunction pending appeal on September 1, 2004, and WRTL subsequently sought a similar injunction from the Supreme Court. The motion sought to allow WRTL to continue to broadcast specific advertisements that it asserted were exempt from the ban on corporate funding of electioneering communications.

Background

WRTL had filed suit in the U.S. District Court for the District of Columbia on July 26, 2004, asking the court to find the prohibition on the use of corporate funds to pay for electioneering communications unconstitutional as applied to certain grass-roots lobbying activities, including three specific advertisements referencing Wisconsin Senators Kohl and Feingold that were attached to WRTL's complaint. WRTL also asked the court to preliminarily and

(continued on page 2)

Reports

October Reporting Reminder

Committees should take note of the following due dates for October reports:

- Third Quarter reports for quarterly filers are due on October 15 (close of books, September 30);
- October monthly reports for monthly filers are due on October 20 (close of books, September 30); and
- Pre-general reports are due on October 21 (close of books, October 13). Candidate committees must file this report if their candidate is running in the general election. PACs and party committees that file quarterly must file this report if they make contributions or expenditures between the 1st and 13th of October in connection with a federal election. PACs and party committees that file on a monthly schedule **must** file a pre-general report in lieu of the scheduled November monthly report.

In addition to these reports, candidate committees may also have to file 48-hour notices of last-minute contributions, and PACs and party committees may need to file 24-hour notices to disclose any last-minute independent expenditures, depending upon the timing of their activities.

(continued on page 2)

Reports

(continued from page 1)

National party committees, PACs following a monthly filing schedule and state, district and local party committees that engage in reportable federal election activity must file a monthly report by October 20. (See the April 2003 *Record*, page 5, for more information on monthly filing for state, district and local party committees.)

Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations[1] who receive contributions or make expenditures in excess of $50,000 in a calendar year—or expect to do so—must file all reports and statements with the FEC electronically. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program will be considered nonfilers and may be subject to enforcement actions, including administrative fines. 11 CFR 104.18.

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial electronic copy of their reports with the Commission in order to speed disclosure.

The Commission's electronic filing software, FECFile 5, can be downloaded from the FEC's web site http://www.fec.gov/elecfil/electron.shtml. Filers may also use commercial or privately-developed software as long as the software meets the Commission's format specifications, which are available on the Commission's web site.

Filing by Mail or Overnight Delivery

Registered and Certified Mail. October quarterly and monthly reports sent by registered or certified mail must be postmarked by the October 15 and 20 filing dates, respectively, to be considered timely filed. The pre-general report, however, must have a registered or certified postmark on or before October 18 in order to be considered timely filed. A committee sending its reports via registered or certified mail should keep its mailing receipt with the U.S. Postal Service postmark as proof of filing. The U.S. Postal Service does not keep **complete** records of items sent by certified mail.

Overnight mail or delivery. Committees using overnight mail[2] to file reports may do so on the same terms as registered and certified mail. October quarterly and monthly reports filed via overnight mail will be considered timely filed if the report is received by the delivery service on the October 15 and 20 filing dates, respectively. The pre-general report, however, must be received by the delivery service on or before the October 18 mailing date to be considered timely filed.

For those filers who are not required to file their reports electronically, paper forms are available on the FEC's web site (http://www.fec.gov/info/forms.shtml) and from FEC Faxline, the agency's automated fax system (202/501-3413).

Additional Information

For more information on 2004 reporting dates:

- See the reporting tables in the January 2004 *Record*;
- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Fax the reporting tables to yourself using the FEC's Faxline (202/501-3413, document 586); or
- Visit the FEC's web page at http://www.fec.gov/info/report_dates.shtml to view the reporting tables online.

—Elizabeth Kurland

Court Cases

(continued from page 1)

permanently enjoin the Commission from enforcing this prohibition against it for any of these communications.

[1] *The regulation covers individuals and organizations required to file reports with the Commission, including any person making an independent expenditure. Disbursements made by individuals or unregistered entities for electioneering communications do not count toward the $50,000 threshold for mandatory electronic filing. See 11 CFR 104.18(a).*

[2] *Overnight mail means express or priority mail with a delivery confirmation or an overnight service with an on-line tracking system. If using overnight mail, the delivery service must receive the report by the mailing date to be considered timely filed.*

Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
202/694-1100
202/501-3413 (FEC Faxline)
202/219-3336 (TDD for the hearing impaired)

Bradley A. Smith, Chairman
Ellen L. Weintraub, Vice Chair
David M. Mason, Commissioner
Danny L. McDonald, Commissioner
Scott E. Thomas, Commissioner
Michael E. Toner, Commissioner

James A. Pehrkon, Staff Director
Lawrence H. Norton, General Counsel

Published by the Information Division
Greg J. Scott, Assistant Staff Director
Amy Kort, Editor
Meredith Trimble, Associate Editor

http://www.fec.gov

A three-judge court rejected WRTL's motion for a preliminary injunction, ordered all parties to file appropriate supplemental memoranda addressing the potential dismissal of the matter and denied WRTL's post-judgment request to enter an injunction while WRTL pursued an appeal. See the September issue of the *Record*, page 1.

Emergency Motion

Pending its appeal of the district court's decision, WRTL sought an emergency injunction to allow it to broadcast ads designed to influence the votes of Senators Kohl and Feingold on the expected filibuster of federal judicial nominees. While WRTL is a 501(c)(4) organization that does not qualify for any exemption permitting it to pay for ads from corporate funds, it asserted that a number of unique factors indicated that its proposed ads were authentic grass-roots lobbying and not electioneering communications. WRTL further asserted that it met the criteria necessary for an injunction to be granted.

Appeals Court Decision

The United States Court of Appeals District of Columbia Circuit granted the FEC's motion to dismiss WRTL's motion for injunction, citing a lack of jurisdiction. Only the Supreme Court has jurisdiction over such an appeal, and the law does not authorize the Court of Appeals to review the case.

Supreme Court Decision

On September 7, 2004, WRTL applied to the Supreme Court for an injunction pending appeal. The Supreme Court denied this request, finding that an "injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held that Act facially constitutional." According to the Court, WRTL "failed to establish that this extraordinary remedy is appropriate."

U.S. District Court, District of Columbia, 04-1260 (DBS, RWR, RJL); U.S. Supreme Court, 542 U.S. __ (2004).

—Meredith Trimble

John Hagelin, et al. v. FEC

On August 12, 2004, the U.S. District Court for the District of Columbia granted in part and denied in part the motion for summary judgment brought against the FEC by John Hagelin, Ralph Nader, Patrick Buchanan, Howard Phillips, Winona LaDuke, the Green Party of the United States and the Constitution Party and also granted in part and denied in part the FEC's cross-motion for summary judgment. The plaintiffs charged that the FEC erroneously dismissed their administrative complaint, which asserted that the Commission for Presidential Debates (CPD) was partisan and therefore could not lawfully sponsor Presidential debates. See also *Hagelin et al. v. FEC* in the June 2004 *Record*, page 11, and the August 2004 *Record*, page 9.

Background

Commission regulations permit nonprofit 501(c)(3) or (c)(4) organizations that do not endorse, support or oppose political candidates or parties to stage candidate debates. 11 CFR 110.13(a). Among other things, the organization must use pre-established objective criteria to select candidates to participate in the debate. The organization may use its own funds and may accept funds donated by corporations or labor organizations to defray costs incurred in staging the debate. 11 CFR 114.4(f)(1).

The plaintiffs alleged in their administrative complaint that the CPD was founded and is controlled by the Republican and Democratic Parties and their representatives and thus does not meet the eligibility criteria under 11 CFR 110.13. Consequently, the corporate monies it raised and expended in the 2000 Presidential election cycle were illegal contributions and expenditures. The plaintiffs further argued that CPD's conduct showed it to be a partisan organization, specifically pointing to evidence that CPD had a policy of excluding all third-party candidates from attending the 2000 Presidential debates as audience members, even if they had tickets. In March 2004, the FEC found no reason to believe that CPD violated FEC regulations and dismissed the administrative complaint.

Court Decision and Remand

The district court found the FEC's dismissal of the administrative complaint was contrary to law because the FEC ignored evidence that CPD's decision to exclude all third party candidates from the debates was unrelated to a subjective or objective concern of disruption, and was therefore partisan.

The court granted the plaintiffs' motion for summary judgment (and denied the FEC's cross-motion on this issue), reversing the FEC's "no reason to believe" finding.

The court granted the FEC's motion in part, and denied the plaintiffs' request for an order that would require the FEC to proceed directly to a probable cause determination within 30 days of the court's decision. The court maintained that it must remand the case and allow the FEC to follow the statutorily mandated procedures in dealing with administrative complaints. See *2* U.S.C. §437g(a).

Appeal

On August 31, 2004, the FEC appealed the decision to the United States Court of Appeals for the District of Columbia Circuit. The FEC also requested a stay of the District Court's order pending the appeal.

U.S. District Court for the District of Columbia, Civil Action No. 04-0731 (HHK).

—Meredith Trimble

(continued on page 4)

Court Cases

(continued from page 3)

Alliance for Democracy, et al. v. FEC

On September 2, 2004, the U.S. District Court for the District of Columbia dismissed a complaint filed by Alliance for Democracy, Hedy Epstein and Ben Kjelshus (collectively, Alliance). Alliance had asked the court to find that the Commission acted contrary to law by delaying action on an investigation of Ashcroft 2000, the Spirit of America PAC and Garrett Lott, treasurer of the committees.

Background

The Federal Election Campaign Act (the Act) authorizes the FEC to investigate possible violations of the Act. Title 2 U.S.C. §437g(a)(8) allows a party who has filed an administrative complaint with the Commission to seek judicial review should the Commission fail to act on a complaint within 120 days.

On March 8, 2001, Alliance filed an administrative complaint asserting that Ashcroft 2000, the Spirit of America PAC and Garrett Lott, as treasurer, violated the Act. After an investigation, the Commission determined probable cause and entered into conciliation negotiations with the respondents. On December 11, 2003, a final conciliation agreement was reached with all administrative respondents.

Court Order

The court found that because the Commission completed its final action, the case arguing failure or delay of action is moot. Additionally, the court lacks jurisdiction to grant Alliance declaratory relief, as the relief sought must be capable of redressing the alleged harm. In this case, the FEC has acted as requested in Alliance's administrative complaint. Finally, the court also determined that plaintiffs lack standing to sue because they did not show a "discreet injury flowing from" the alleged delay. (*Common Cause*, 108 F.3d at 418.) According to the memorandum of the court, the FEC has completed its obligations under the Act, there is no live controversy between the parties, and thus the action was dismissed.

U.S. District Court for the District of Columbia, Civil Action No. 02-0527 (EGS).

—Meredith Trimble

New Litigation

Bush-Cheney '04, Inc. v. FEC

On September 1, 2004, Bush-Cheney '04, Inc. (BC'04) asked the U.S. District Court for the District of Columbia to find that the Commission acted contrary to law when it failed to act on the plaintiff's administrative complaints dated March 10, 2004, and March 31, 2004. The administrative complaints alleged that America Coming Together (ACT), The Media Fund, America Votes and other organizations created under 26 U.S.C. §527 were raising and spending money to influence the 2004 Presidential election in violation of the Federal Election Campaign Act (the Act).

Background. The Act sets forth enforcement procedures governing the manner in which complaints must be handled. Among other provisions in 2 U.S.C. §437g, a complainant may file suit in federal district court seeking judicial review of "a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed[.]" 2 U.S.C. §437g(a)(8)(A). While enforcement investigations conducted by the FEC are confidential, the plaintiff asserts that no public action has been taken in response to the administrative complaints.

Administrative complaints. On March 10, 2004, BC '04 filed an administrative complaint with the FEC alleging that an organization created under 26 U.S.C. §527 called "The Media Fund" was illegally raising and spending money outside the prohibitions, limitations and disclosure requirements of the Act with the purpose of influencing the 2004 Presidential election. On March 31, 2004, BC '04 filed a second complaint alleging that ACT, The Media Fund, America Votes and other organizations were engaging in ongoing violations of the Act by raising and spending money outside of the prohibitions, limitations and disclosure requirements of the Act and illegally coordinating their activities with the Democratic Party and the Presidential campaign of John Kerry.

Court complaint and relief. According to the court complaint, the FEC did not act on the plaintiff's administrative complaints for more than 120 days from filing. BC '04 also filed a motion for a preliminary injunction, declaring that the FEC's failure to act on the aforementioned complaints is contrary to law. The plaintiff requested an expedited hearing on the motion, and asked the court to issue an injunction ordering the Commission to take action regarding the complaints within 30 days.

On September 15, 2004, the district court held a hearing on the plaintiff's motion for a preliminary injunction and denied the motion.

U.S. District Court for the District of Columbia, Civil Action No. 04-1501 (JR).

—Meredith Trimble

Advisory Opinions

AO 2004-19

Earmarked Contributions to Candidates via a Web Site

An incorporated web site operator may receive and forward earmarked contributions to federal candidates because it satisfies both the "commercial vendor" exception to the ban on corporate facilitation of

contributions at 11 CFR 114.2(f)(1), and the "commercial fundraising firm" exception to the definition of "conduit or intermediary" in 11 CFR 110.6(b)(2).

Background

DollarVote.org (DollarVote), a Virginia C corporation, proposed a two-part plan to accept and forward contributions from individuals to candidates in upcoming elections. Under the Plan, individuals are granted access to the DollarVote web site upon paying an annual subscription fee. The web site contains various position statements on political issues. The position statements are referred to as "DollarBills," and participating candidates may post "promises" on the site to support the statements of their choice. Individuals may then view the DollarBills and "vote" to contribute funds to the candidate(s) who have promised to support an issue. If no candidate has promised to support an issue at the time of an individual's vote, the contributed funds would go to the first future candidate who registers a promise in support of that DollarBill. The individual may stipulate additional criteria for the future recipient candidate, such as excluding particular candidates by name and including only candidates belonging to a certain political party, among other conditions. The contributor also selects a 501(c)(3) organization to be the recipient of the funds, should no candidate meet the individual's selected criteria. If multiple candidates promise on the same DollarBill, contributions will be distributed equally.

Along with the annual subscription fee, DollarVote will charge contributors a small processing fee for each transaction. Candidates will also be charged a fee for the ability to register promises on the site.[1] These monies will go into the corporation's general account, which will be separate from the merchant accounts established to hold earmarked contributions.

The Plan also contains screening and processing measures to prevent excessive contributions and contributions from prohibited sources under the Act.

Analysis

Commercial vendor exception. Corporations are prohibited from making any contribution or expenditure in connection with a federal election. 2 U.S.C. §441b(a). Corporations are further prohibited from facilitating the making of contributions to candidates or political committees. 11 CFR 114.2(f)(1). A corporation does not facilitate the making of a contribution to a candidate, however, if the corporation provides a service in the ordinary course of business as a commercial vendor. DollarVote would be operating permissibly as a commercial vendor under 11 CFR 114.2(f)(1), because:

1. Its services are rendered for the usual and normal charge paid by authorized candidate committees;
2. DollarVote forwards earmarked contributions to candidates through separate merchant accounts; and
3. DollarVote's web site incorporates adequate screening procedures to ensure it is not forwarding illegal contributions.

See also AO 2002-7.

Commercial fundraising firm exception. Commission regulations state that any person prohibited from making contributions or expenditures is also prohibited from acting as a conduit or intermediary for earmarked contributions. 11 CFR 110.6(b)(2)(ii). As a corporation, DollarVote must meet the regulatory exception to the definition of "conduit or intermediary" in order to conduct the activities in its Plan. Commission regulations at 11 CFR 110.6(b)(2)(i)(D) establish an exception for "a commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising." As a commercial vendor that is retained by candidates to assist in raising funds for their campaigns and exercises no discretion over the contributions, DollarVote meets this exception.

Date Issued: August 20, 2004; Length: 6 pages.

—Meredith Trimble

[1] *The fee, terms and conditions will be the same for all participating candidates, and the fee will be set so that DollarVote will receive the usual and normal charge for its services. DollarVote will not deny participation to any candidate who meets the payment and eligibility requirements.*

AO 2004-23
SSF's Solicitation of Subsidiaries' Restricted Classes

U.S. Oncology Inc. (USON) may solicit contributions to its separate segregated fund, U.S. Oncology, Inc. Good Government Committee (USON-GGC), from its stockholders and their families and the medical, executive and administrative personnel of the affiliated medical practices it manages.

Background

USON contracts with cancer care physician practices nationwide. USON creates subsidiaries that enter into exclusive long-term management services agreements with affiliated practices, generally with initial terms of 25-40 years. Under these agreements, USON, through its subsidiaries, manages the business aspects of the practices.

Under the services agreement, the subsidiary provides a practice with office space, equipment, furnishings and supplies and furnishes

(continued on page 6)

Advisory Opinions

(continued from page 5)

administrative staff necessary for the practice to operate. USON's representative in the subsidiary (the Business Manager) also administers the compensation and benefits for the practice's medical personnel. USON and the practices share a USON-administered benefits package, which is utilized by the practices and USON employees. Also, USON's network development staff plays a significant role in practice mergers and statewide practice development. For example, where new entities or locations must be established, USON assists with tasks such as applying for provider numbers, procuring and negotiating office space and undertaking similar formation-related tasks.

USON, through its subsidiaries, pays all office expenses and provides significant financing for a practice's medical equipment and other capital needs, on an ongoing basis. The practices reimburse USON for these funds, goods and services.

Also, the Business Manager and the practice jointly make certain decisions regarding management of the non-medical aspects of the practice through a Policy Board that is established under the services agreement. The Policy Board is responsible for developing and implementing management and administrative policies for the overall operation of the non-medical aspects of the Practice.[1] At present, two of the ten members of USON's board of directors are Practice physicians.

Analysis

Under the affiliation factors in 11 CFR 100.5 and 110.3, USON, through its subsidiaries, is affiliated with the practices.

The Federal Election Campaign Act (the Act) permits a corporation or its separate segregated fund to solicit its stockholders and executive or administrative personnel, and their families, for contributions to its SSF. 2 U.S.C. §441b(b)(4)(A)(i). A corporation or its separate segregated fund may also solicit the executive or administrative personnel of its subsidiaries, branches, divisions and affiliates and their families. 11 CFR 114.5(g)(1).

Commission regulations provide for an examination of certain circumstantial factors in the context of the overall relationship to determine whether one organization is an affiliate of another. 11 CFR 100.5(g)(4). The relationship between USON and the Practices indicates they are affiliated because USON:

- Provides funds or goods in a significant amount or on an ongoing basis to the practices, such as through direct or indirect payments for administrative, fundraising or other costs. 100.5(g)(4)(ii)(G);
- Causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the Practices. 100.5(g)(4)(ii)(H);
- Has the authority or ability to direct or participate in the governance of the practices through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 100.5(g)(4)(ii)(B);
- Has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decision making employees or members of the practices, and members, officers or employees who were members, officers or employees of the practices which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity. 100.5(g)(4)(ii)(C), (E)[2] and (F); and
- Had an active or significant role in the formation of the practices. 100.5(g)(4)(ii)(I).

Considering all these factors together in context of the overall relationship between USON and the practices, USON and the practices are affiliated for purpose of the Act and Commission regulations. Therefore, USON may solicit the practices' restricted class, comprising the practices' physicians, nurses and other salaried medical employees with policymaking, managerial, professional or supervisory responsibility, and their families.

Date Issued: August 12, 2004; Length: 8 pages.

—*Jim Wilson*

AO 2004-24

Use of Contributor Information

NGP Software, Inc. may not use information about contributors, other than political committees, obtained from FEC reports in its campaign software product. The Federal Election Campaign Act (the Act) and Commission regulations prohibit the use of contributor information obtained from FEC reports or statements for commercial purposes. 2 U.S.C. §438(a)(4); 11 CFR 104.15(a).

[1] *Despite the broad list of topics subject to the Policy Board's jurisdiction, the physician representatives of the Practice alone make decisions in certain areas. USON does not in any way control, direct or influence the practice of medicine by the affiliated Practices.*

[2] *Although there is no overlap of employees or personnel between USON and the Practice after the MSA is executed, many of the employees of the Practices are hired in the same capacity by the Business Manager. To the extent that former employees are retained by the Business Manager, this can be viewed as part of the ongoing relationship between USON and the Practice. The Practices also may exert influence over USON through the Practice physicians that serve on USON's Board of Directors.*

Background

NGP Software, Inc. (NGP), a for-profit corporation that provides campaign finance reporting software, would like to upgrade its existing software package to offer its clients the ability to access information about contributions that the client's donors may have made to other political committees. NGP would "obtain donor contribution histories from the Commission's online public records for individuals, political committees and other persons" and integrate this information into a personalized NGP system database to allow NGP clients to conduct fundraising more efficiently.

Analysis

Section 438(a)(4) of the Act provides that the Commission shall make reports and statements filed with it available to the public for inspection and copying within 48 hours after receipt. However, the Act also provides that no information copied from such reports or statements may be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, other than using the name and address of any political committee to solicit contributions from such committee. 2 U.S.C. §438(a)(4); 11 CFR 104.15(a).

Historically, the Commission has interpreted section 438(a)(4) to be a "broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed in FEC public records." See AOs 1998-4, 1995-5, 1991-16, 1989-19, 1986-25, 1981-38 and 1980-101. The purpose of restricting the sale or use of information obtained from Commission reports is to protect contributors from having their names sold or used for commercial purposes. Therefore, in keeping with previous advisory opinions, NGP's proposed sale or inclusion of information about contributors (other than information about political committees that are contributors) obtained from the Commission's public records in its software is "for a commercial purpose" and would be a prohibited use of contributor information obtained from the Commission's public records. This is true whether the information is sold by NGP as a separate service or as part of a software upgrade.

Where the contributors are political committees, however, the Act and Commission regulations do not restrict the sale or use of the name and address of the contributor for solicitation purposes. 2 U.S.C. §438(a)(4); 11 CFR 104.15(a). In AO 1989-10, the Commission allowed the commercial sale of unaltered copies of FEC report pages containing contributions from political committees. Similarly, in AO 1980-101, the Commission found that the commercial publication and sale of a directory of comprehensive information concerning political action committees did not violate the prohibition on commercial use. Thus, the proposed inclusion of contributor information about political committees as a feature of NGP's commercially available software package would not be prohibited under the Act and Commission regulations.

Date Issued: August 12, 2004; Length: 4 pages

—Amy Pike

AO 2004-25
Senator May Donate Personal Funds to Voter Registration Organizations

U.S. Senator and Democratic Senatorial Campaign Committee (DSCC) Chairman Jon Corzine may donate his personal funds to organizations engaging in voter registration activity, as defined at 11 CFR 100.24(a)(2),[1] without triggering the Federal Election Campaign Act's (the Act) provisions regulating the raising and spending of funds by officers of national party committees and federal candidates or officeholders.[2] Senator Corzine will make the donations solely at his own discretion, without authority from, or on behalf of, the DSCC. He will not donate to organizations that he has directly or indirectly established, financed, maintained or controlled, and he will not exercise any control of how his funds are used by any organization to which he donates.

Status as National Party Committee Officer

The Act bars officers and agents of a national party committee from raising or spending any nonfederal funds (i.e., funds not subject to the limitations, prohibitions and reporting requirements of the Act). 2 U.S.C. §441i(a); 11 CFR 300.2(k) and 300.10. It also restricts national party committees, their officers and agents from raising and spending funds for nonprofit organizations under 26 U.S.C. §501(c) that make expenditures and disbursements

(continued on page 8)

[1] As defined at 11 CFR 100.24(a)(2), "voter registration activity" means contacting registered voters by phone, in person or by other individualized means to assist them in registering to vote. This activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms and helping them to fill out these forms.

[2] These rules generally provide that a national party committee and a federal candidate/officeholder may only solicit, receive, direct, transfer or spend funds in connection with an election for federal office—including funds for "federal election activity"—if those funds are federal funds that are subject to the limits, prohibitions and reporting requirements of the Act. See 2 U.S.C. §§441i(a) and (e)(1)(A). See also 11 CFR 100.24.

Advisory Opinions

(continued from page 7)

in connection with an election for federal office (as well as restricting them from raising and spending funds for certain political organizations under 26 U.S.C. §527). 2 U.S.C. §441i(d); 11 CFR 300.11 and 300.50. The plain language of the Act and the Commission's regulations, however, specifically applies these restrictions to national party committee officers and agents only when such individuals are acting on behalf of the national party committee. See 2 U.S.C. §§441i(a) and (d); 11 CFR 300.10(c)(1), 300.11(b)(1) and 300.50(b)(1).[3]

Based on the request's representation that Senator Corzine's donation of personal funds[4] will be made solely at his own discretion, without express or implied authority from, or on behalf of, the DSCC, the Commission concluded that Senator Corzine would not be acting on behalf of the DSCC, and thus would not be restricted by the aforementioned provisions from donating unlimited personal funds to organizations that engage in voter registration activity, as defined in the federal election activity (FEA) provisions of Commission regulations. See 11 CFR 100.24(a)(2). If any of those organizations, however, qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

Status as Federal Candidate or Officeholder

The Act and Commission regulations similarly restrict federal candidates and officeholders in their ability to raise and spend funds in connection with an election for federal office. Specifically, the law and regulations stipulate that no federal candidate or officeholder shall solicit, receive, direct, transfer, spend or disburse funds in connection with an election for federal office, including funds for any FEA,[5] unless the funds consist of federal funds that are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A); 11 CFR 300.61.

Unlike the restrictions regarding national party committees, the Act and regulations do not explicitly limit application of the restrictions to when such an individual is acting in his or her official capacity. The language of section 441i, however, is not clear as to whether the restrictions on the use of funds extend to the personal funds of federal candidates or officeholders, and there is no legislative history suggesting that Congress intended them to extend in such a way. Moreover, the underlying anti-corruption purposes of the section 441i restrictions, and their accompanying regulations, are not furthered by restricting such individuals from spending their personal funds solely at their own discretion, as opposed to funds that are solicited or received from others at the behest of the federal candidate or officeholder.

Because the funds Senator Corzine plans to donate would not be solicited or received from others, he would not incur an obligation toward any other person that would raise concerns regarding corruption or the appearance thereof. Thus, Senator Corzine may donate his personal funds in amounts exceeding the Act's limits to organizations that engage in FEA, irrespective of his status as a federal candidate or officeholder. In reaching this conclusion, the Commission assumes that Senator Corzine's donations to each organization will not be in amounts that are so large or comprise such a substantial percentage of the organization's receipts that the organization would be considered to be "financed" by Senator Corzine. See 2 U.S.C. §441i(e)(1); 11 CFR 300.61. Again, however, if any of those organizations qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

Date Issued: August 20, 2004; Length: 5 pages.

—Dorothy Yeager

[3] *In* McConnell v. Federal Election Commission*, 540 U.S. __, 124 S.Ct. 619 at 658, 668, 679 (2003), the Supreme Court acknowledged that these provisions do not apply to officers acting in "their individual capacities."*

[4] *See 2 U.S.C. §431(26) and 11 CFR 300.33 for a definition of the term, "personal funds."*

[5] *Under the Act, the term "federal election activity" includes "voter registration activity" that occurs during the period beginning 120 days before the date of a regularly scheduled federal election and ending on the date of the election. 2 U.S.C. §431(20); See 11 CFR 100.24(a)(2) and(b)(1).*

AO 2004-26
Foreign National's Participation in Political Committee Activities

A foreign national may participate in campaign activities as an uncompensated volunteer, but may not participate in the decision-making process of political committees.

Background

Ms. Zury Rios Sosa, a foreign national and member of the Guatemalan legislature, is engaged to marry U.S. Representative Gerald C. Weller. Representative Weller maintains two affiliated campaign committees—Jerry Weller for Congress, Inc. and Gerald C. 'Jerry' Weller for Congress—and is the honorary chair of Reform PAC, a nonconnected, multicandidate committee (collectively, the Committees).

Given the ban on contributions by foreign nationals, Representative Weller and Ms. Rios Sosa asked

whether she could participate in the following activities:

1. Attending Committee events;
2. Speaking or soliciting funds and support at Committee events;
3. Participating in event planning and strategy sessions with Representative Weller and Committee personnel; and
4. Accompanying Representative Weller to other committees' fundraising and campaign events.

Analysis

Foreign national volunteer activity. The Act and Commission regulations prohibit foreign nationals, directly or indirectly, from making a "contribution or donation of money or other thing of value…in connection with a Federal, State, or local election." 2 U.S.C. §441e(a)(1)(A) and 11 CFR 110.20(b). The term "contribution," however, does not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. 2 U.S.C. §431(8)(B)(i) and 11 CFR 100.74. In AO 1987-25, the Commission concluded that a foreign student's work for a campaign without compensation would not result in a prohibited contribution because the value of volunteer services was specifically exempt from the Act's definition of contribution.[1] Similarly, the volunteer activities proposed by Ms. Rios Sosa would not result in the making of a prohibited contribution.

Foreign national participation in decision-making. Commission regulations prohibit foreign nationals from participating in the decisions of any person involving election-related activities. 11 CFR 110.20(i). This prohibition encompasses participation in the decision-making process of any person or committee concerning the making of contributions, donations, expenditures or disbursements in connection with elections, as well as involvement in decisions concerning the management of any political committee. Therefore, Ms. Rios Sosa must not participate in Congressman Weller's decisions regarding his campaign activities. She must also refrain from managing, or participating in the decisions of, the Committees.

With regard to the four types of activities specified above, Ms. Rio Sosa may, as an uncompensated volunteer, attend Committee events, solicit funds from permissible sources under the Act and give speeches at the events as long as she does not participate in the Committees' decision-making processes. Ms. Rios Sosa may also attend meetings regarding Committee events and strategy, but may not be involved in the management of the Committees. Finally, Ms. Rios Sosa may attend fundraising and campaign events of other political committees, provided she does not make a contribution of her personal funds in order to attend. Participation in such events is subject to the same restrictions detailed above.

Date Issued: August 20, 2004; Length: 4 pages.

—Meredith Trimble

[1] *Compare AO 1987-25 with AO 1981-51, which concluded that the Act prohibits an artist who is a foreign national from donating his uncompensated services to create an original art work for a political committee's use in fundraising.*

AO 2004-30
Documentary and Ads Do Not Qualify for Electioneering Communications Media Exception

Citizens United, an incorporated 501(c)(4) organization, may not pay to broadcast a documentary film or advertisements that fall within the definition of electioneering communications. Because Citizens United would not be acting as a media entity in connection with the documentary or with a book that it also intends to publicize, and because the advertisements for the documentary and for the book would not be appearing in a news story, commentary or editorial, the media exception to the definition of electioneering communication would not apply to these planned activities. 2 U.S.C. §434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). As a corporation, Citizens United is prohibited from making or financing electioneering communications. 2 U.S.C. §434(f); 2 U.S.C. §§441b(a) and (b)(2); 11 CFR 104.20; and 11 CFR 114.14(a) and (b).

Background

Citizens United was established "to promote social welfare through informing and educating the public on conservative ideas and positions on issues." According to its Mission Statement, it seeks to accomplish this goal "[t]hrough a combination of education, advocacy, and grass roots organization." Citizens United accepts donations from corporations and individuals, and it is not owned or controlled by any political party, political committee or candidate committee.

Citizens United plans to produce and market a documentary film that will focus on the lives and careers of Presidential candidate John Kerry and Vice-Presidential candidate John Edwards (the Film). The Film will include numerous visual images of Senators Kerry and Edwards and mention both candidates' names throughout. The Film may also include the images and names of other federal candidates but will not expressly advocate the election or defeat of any federal candidate. Citizens United plans to make the Film available to the public in a variety of ways, including by paying to broadcast it on television in certain markets.

Citizens United also plans to pay to produce and air advertisements

(continued on page 10)

Advisory Opinions

(continued from page 9)

for the Film in various television, cable, satellite and radio markets. Such ads would refer to Senators Kerry and Edwards, but would not expressly advocate the election or defeat of either candidate.

In addition, Citizens United's President, David N. Bossie, has written a book about Senator Kerry (the Book), which has been published and released for sale nationwide by a publisher not affiliated with Citizens United. Citizens United proposes to market the Book, even though it does not own any rights to the Book, has not entered into any contractual arrangements with Mr. Bossie or the publisher regarding the Book and receives no book royalties. Citizens United has, however, entered into an agreement with an on-line bookseller, under which Citizens United receives a small commission on sales of the Book if the purchaser accesses the bookseller's web site through a pop-up advertisement and hypertext link on the Citizens United web site. Citizens United does not receive a commission on any other sales of the Book. Citizens United would like to pay to produce and air television, cable, satellite and radio ads for the Book, and these ads would refer to Senator Kerry.

Analysis

Electioneering communications. Subject to certain exceptions, an electioneering communication is any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed for a fee within 60 days before a general or 30 days before a primary election for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29; see also AO 2004-15. For Presidential and Vice- Presidential candidates, "publicly distributed" means that the electioneering communication is disseminated for a fee through the facilities of a television station, radio station, cable television system or satellite system, and that it can be received:

- By 50,000 or more people in a state where a primary election or caucus is being held within 30 days; or
- By 50,000 or more people anywhere in the U.S. from 30 days before a Presidential nominating convention to the end of the convention; or
- Anywhere in the U.S. within 60 days before the general election. 2 U.S.C. §434(f)(3)(A)(i); 11 CFR 100.29(b)(3)(ii); and AO 2004-15 See also 2 U.S.C. §434(f)(3)(C).

The television broadcasts of the Film and the television and radio ads described above would fall within the definition of electioneering communication because they would:

- Refer to Senators Kerry and Edwards who are a clearly identified candidates for federal office (11 CFR 100.29(a)(1)); and
- Be publicly distributed for a fee via television and radio stations able to reach people in the U.S. within 60 days before the upcoming general election (11 CFR 100.29(a)(2) and (b)(3)(i)).

Media exception. The Act and Commission regulations provide for a number of exceptions to the definition of "electioneering communication," including a media exception which excludes from the term "electioneering communication" any communication "appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §434(f)(3)(B)(i) and 11 CFR 100.29(c)(2).

In this case, however, neither the proposed ads nor the Film would be entitled to the media exception. In regards to the proposed Book ads, Citizens United has no greater commercial interest in promoting the Book than does any other entity. Citizens United is not the Book's publisher, owner or distributor, and these facts distinguish its situation from those addressed in past court decisions and advisory opinions where the parties were in the business of either publishing or producing and distributing the products that they were promoting.[1] Thus, Citizens United's proposed ads for the Book would not qualify for the electioneering communication media exception for two reasons. First, the advertisements would not "appear in a news story, commentary, or editorial." 2 U.S.C. §434(f)(3)(B)(i). Second, because Citizens United is not acting as a media entity in connection with the Book, its advertising of the Book cannot be considered part of a "normal, legitimate [media] function. *Federal Election Commission v. Phillips Publishing*, *Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981).

Similarly, because Citizens United does not regularly produce documentaries or pay to broadcast them on television, the media exception would not apply to broadcasts of the Film itself.[2] In *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), the Supreme Court rejected the argument that corporate publications are automatically exempt from the prohibition on corporate expenditures in connection with federal elections under an exception for "any news story, commentary or editorial distributed through the facilities of any broadcasting sta-

[1] *See* Reader's Digest Association, Inc. v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981),* Federal Election Commission v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981) and AOs 2004-7 and 2003-34.*

[2] *Citizens United has produced only two documentaries since its founding in 1988, both of which it marketed primarily through direct mail and print advertising, and neither of which it paid to broadcast on television.*

tion, newspaper, magazine, or other periodical publication." 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.132. Instead, the *MCFL* Court analyzed a variety of factors to determine whether the exception should apply, including "considerations of form" such as how the publication was produced and to whom it was disseminated. *MCFL*, 479 U.S. at 251.

Applying the *MCFL* Court's analysis to Citizens United's proposed activities, the Commission concluded that the Film would not be entitled to the electioneering communication media exception. The Commission determined, among other things, that the very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the "considerations of form" that can help to distinguish an electioneering communication from exempted media activity.

Finally, the proposed ads for the Film would not qualify for the media exception for two reasons. First, they would not "appear in a news story, commentary, or editorial." 2 U.S.C. §434(f)(3)(B)(i). Second, because Citizens United would not be acting as a media entity in connection with the Film and the Film is not entitled to the media exception, its advertising of the Film cannot be considered part of a normal and legitimate media function.

Making and financing electioneering communications. Citizens United may not pay for the proposed broadcasts of the Film and television and radio ads because, as a corporation, it is barred from making or financing electioneering communications. 2 U.S.C. §434(f); 2 U.S.C. §§441b(a) and (b)(2); 11 CFR 104.20; and 11 CFR 114.14(a) and (b). Citizens United may, however, advertise the Book in print media, on the Internet and by direct mail. Citizens United may also produce a documentary on any subject and advertise and disseminate the documentary through direct mail, print advertising, videocassette and DVD sales, the Internet and in theaters, without being affected by the electioneering communication provisions.

Concurring Opinion

Commissioner Smith issued a concurring opinion on September 9, 2004.

Date Issued: September 10, 2004; Length: 8 pages.

—Amy Kort

AO 2004-31
Business Ads not Electioneering Communications

Russ Darrow Group, Inc. (RDG), a Wisconsin corporation, may run radio and television advertisements that include the name "Russ Darrow" because the ads do not refer to a clearly identified candidate under 11 CFR 100.29(b)(2) and are therefore not electioneering communications.[1]

Background

RDG owns and operates 22 car dealerships in Wisconsin, all of which include "Russ Darrow" as part of the dealership's name. In the past decade, RDG has focused on developing "Russ Darrow" as a brand name for its dealerships.

Russ Darrow, Jr. (the Candidate) is the founder, Chief Executive Officer and Chairman of the Board of RDG. He was also a candidate for the U.S. Senate. Had he prevailed in the primary election on September 14, 2004, he would have run as the Republican candidate for the U.S. Senate in the November 2 general election.

The Candidate's son, Russ Darrow III, is the President and Chief Operating Officer of RDG and has been the public face of the corporation for over a decade. RDG, under the leadership of Russ Darrow III, plans to continue advertising the business through television and radio spots during the remainder of 2004. The ads are not coordinated with the Candidate, his principal campaign committee or its agents, and no common media vendors are used. Addtionally, none of the ads reference the Candidate's campaign, and Russ Darrow, Jr. will not appear or speak in them.

Analysis

The Act, prohibits corporations from making or financing electioneering communications. 2 U.S.C. §441b(b)(2); 11 CFR 114.2(b)(2)(iii). An "electioneering communication" is any broadcast, cable or satellite communication that:

1. Refers to a clearly identified candidate;
2. Is publicly distributed for a fee within 30 days before a primary election or 60 days before a general election; and
3. Is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i); 11 CFR 100.29(a).

RDG acknowledges that the proposed advertisements meet the last two prongs of this test, leaving at issue the reference to a clearly identified federal candidate.

Russ Darrow III, the longstanding public face of the company, appears and speaks in the ads. The Candidate does not. Additionally, it

(continued on page 12)

[1] *During the electioneering communications rulemaking process, the Commission considered but declined to create an exemption for situations where a federal candidate shared a name with a business entity because it concluded that such communications could well be considered to promote or support the candidate. See* Explanation and Justification, Final Rules on Electioneering Communications*, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002). This does not, however, preclude the Commission from making determinations on specific cases such as this one.*

Advisory Opinions

(continued from page 11)

is clear from the content of the ads that any mention of "Russ Darrow" refers to the business entity and not the Candidate. Based on these facts, the Commission concluded that the proposed advertisements do not refer to a clearly identified candidate and therefore do not constitute electioneering communications.

Date Issued: September 10, 2004; Length: 10 pages.

—*Meredith Trimble*

AO 2004-33

Corporate-Sponsored Ad as Electioneering Communication and Coordinated Communication

The Ripon Society (Ripon), an incorporated 501(c)(4) organization, may not fund the production and dissemination of a televised ad featuring U.S. Representative Sue Kelly if the ad is aired in Representative Kelly's Congressional district during the 30 days before her primary election or the 60 days before the general election if she is a candidate in that election. Such an ad would be an electioneering communication, which may not be paid for with corporate funds. 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(2)(iii); see also 11 CFR 114.14(a).

Ripon may air the ad outside of Representative Kelly's district during this time period, but only if it does not coordinate its plans with any officials of the Republican Party. Because the ad mentions "Republicans in Congress," its coordination with the Republican Party would make the ad a coordinated communication resulting in a prohibited corporate in-kind contribution from Ripon to the Republican Party. 2 U.S.C. §441a(a)(7)(B) (ii); 11 CFR 109.21.

Background

Representative Kelly is a Congressional candidate in New York. She serves on Ripon's Advisory Board, which is an honorary board consisting of Members of Congress who participate in Ripon's policy forums, research, development and advocacy. Members of Congress on the Advisory Board do not engage in active governance or similar control over Ripon activities.

Ripon intends to produce and disseminate a cable television ad that Ripon asserts will address national security issues and promote a policy that Ripon believes is relevant to the current debate regarding homeland security. Representative Kelly will appear in and narrate the ad, but the ad will not contain any images of or references to any other federal candidate. Ripon would like to run the ad featuring Representative Kelly both within her Congressional district and nationwide through the November 2, 2004, general election. Ripon plans to coordinate its plans with Representative Kelly, other federal candidates and one or more federal political committees of the Republican Party.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from making expenditures in connection with any election for federal office. 2 U.S.C. §441b(a). Commission regulations specifically provide that corporations may not make expenditures in connection with a federal election "for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party." 11 CFR 114.2(b)(2)(ii). In this case, the proposed ad does not contain express advocacy, and Ripon may pay to produce and televise it as long as it complies with the restrictions on electioneering communications and coordinated communications described below.[1]

Electioneering communications. With certain exceptions, an "electioneering communication" is any broadcast, cable or satellite communication that:

- Refers to a clearly identified federal candidate;[2]
- Is publicly distributed for a fee within 60 days of a federal candidate's general election or within 30 days of his or her primary election;[3] and
- Is targeted to the relevant electorate.[4]

---

[1] *The Commission determined that Ripon is not an entity that is directly or indirectly established, financed, maintained or controlled by a federal candidate or officeholder and is not subject to the provisions of the Act and Commission regulations that govern the activities of such entities, such as their payment for communications that promote, attack, support or oppose a federal candidate or political party. See 2 U.S.C. §§441i(e)(1)(A) and (B); 2 U.S.C. §431(20)(A)(iii) and (21); 11 CFR 300.61 and 300.62; 11 CFR 100.24(b)(3), and 11 CFR 100.25. Thus, the Commission did not reach the question of whether the ad promotes, supports, attacks or opposes any candidate for federal office, or promotes or opposes a political party.*

[2] *"Refers to a clearly identified candidate" means that the candidate's name, nickname, photograph or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. 11 CFR 100.29(b)(2).*

[3] *"Publicly distributed" means "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system." 11 CFR 100.29(b)(3)(i).*

[4] *In the case of a candidate for Representative in Congress, "targeted to the relevant electorate" means the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. 2 U.S.C. §434(f)(3)(C); 11 CFR 100.29(b)(5)(i).*

2 U.S.C. §434(f)(3) and 11 CFR 100.29; see also AOs 2004-15 and 2003-12.

The Act prohibits corporations from making or financing electioneering communications. 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(2)(iii); see also 11 CFR 114.14(a).

Representative Kelly will be clearly identified in Ripon's ads because she will appear and speak on camera. Ripon plans to pay to have the ad televised in Representative Kelly's district in a manner that would allow it to be received by 50,000 or more people within that district. Moreover, Ripon plans to pay to disseminate the advertisement via cable television within 30 days of her primary election and within 60 days of the November 2, 2004, general election. No exemptions from the definition of "electioneering communication" apply to the proposed ad. See 2 U.S.C. §§434(f)(3)(B)(i) through (iv), and 11 CFR 100.29(c)(1) through (6). Thus, the proposed ad, when broadcast as described above, constitutes an electioneering communication, and Ripon is barred from using its general corporate treasury funds to televise the ad.

The ad would not, however, constitute an electioneering communication outside Representative Kelly's district even if it were televised within 30 days of a primary election or within 60 days of the general election. Although the ad refers to "Republicans in Congress," this language does not constitute an unambiguous reference to any specific federal candidate and thus does not meet the requirements of an electioneering communication.

Coordinated communications. The Act defines as an in-kind contribution any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or his or her authorized political committees, a political party committee or the agents of any of these. 2 U.S.C. §§441a(a)(7)(B)(i) and (ii). Commission regulations provide for a three-pronged test to determine whether a communication is a "coordinated communication" and, thus, results in an in-kind contribution. The test includes a payment prong, a content prong and a conduct prong. 11 CFR 109.21.

Ripon's proposed ad meets this three-pronged test for coordination with one or more political committees of the Republican Party. It meets the payment prong because it is paid for by a person other than a candidate, authorized committee or political party committee, and it will meet the conduct prong if Ripon discusses its distribution of the ad with agents of the Republican Party in a manner that would satisfy that prong. 11 CFR 109.21(a) and (d).

The ad also satisfies the content prong because it is a public communication that:

- Refers to a political party or a clearly identified federal candidate;
- Is publicly distributed or disseminated within 120 days of an election for federal office; and
- Is directed to voters within the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

11 CFR 109.21(c)(4).

First, the ad refers to "Republicans in Congress," and one portion of the content standard is satisfied if a communication "refers to a political party." 11 CFR 109.21(c)(4)(i). The use of "Democratic" or "Democrats," or "Republican," "Republicans" or "GOP," or other terms that are variations of the formal name of a political party, is inherently a reference to a political party, whether or not it also serves other purposes.

Second, the ad qualifies as a public communication and will be televised prior to the November 2, 2004, general election, which is within the applicable 120-day window. 11 CFR 100.26 and 109.21(c)(4)(ii). Finally, Ripon would direct its communication to voters in a jurisdiction in which one or more Republican candidates appear on the ballot. Because it is a Presidential election year, at least one Republican candidate will appear on the ballot in every district in the general election. 11 CFR 109.21(c)(4)(iii). Therefore, the proposed advertisement would constitute a coordinated communication, and Ripon must not pay for the communication if its interactions with any political committee of the Republican Party satisfy any of the conduct standards described at 11 CFR 109.21(d).

Ripon could, however, remove the phrase "Republicans in Congress" from the ad and disseminate it as planned outside Representative Kelly's Congressional District. In this case, the ad would not refer to a political party and thus would not constitute a coordinated communication. Ripon would still, however, be prohibited under the electioneering communication restrictions from using its general treasury funds to televise the communication within Representative Kelly's district during the time periods when the ad would constitute an electioneering communication, as described above.[5]

Date Issued: September 10, 2004; Length: 10 pages.

—Amy Kort

---

[5] The Commission did not reach the issue of whether Ripon, as a corporation, would be prohibited from paying for the advertisement as a communication that is coordinated with Representative Kelly because the Commission has already determined that the electioneering communications provisions bar Ripon from paying to televise the ad in her Congressional District during the time period in question. The Commission did conclude that the ad would not satisfy any of the four content standards with respect to any other federal candidate and thus would not be coordinated with any other federal candidate. See 11 CFR 109.21(C)(1)-(4).

Advisory Opinions

(continued from page 13)

Advisory Opinion Requests

AOR 2004-33

Application of electioneering communications, coordinated communications and corporate expenditure rules to 501(c)(4)'s television ads featuring federal candidate who is also on the organization's advisory board (The Ripon Society and U.S. Representative Sue Kelly, August 16, 2004) See summary, page 12.

AOR 2004-34

Political committee's status as state party committee (Libertarian Party of Virginia, September 8, 2004)

AOR 2004-35

Application of the Act's prohibitions, limitations and reporting requirements to funds raised and spent for possible recount (Senator John Kerry, Senator John Edwards, Kerry-Edwards 2004, Inc. and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund, September 7, 2004)

AOR 2004-36

Reporting in-kind contribution of office space shared by five candidates; 20-day expedited decision (Mark Risley for Congress, September 23, 2004)

Statistics

Semiannual PAC Count Shows Increase in 2004

The number of federally registered political action committees (PACs) increased from 3,868 on January 1, 2004, to 4,040 by July 1, 2004.

Corporate PACs remain the largest category, with 1,555 committees. Nonconnected PACs remain the second-largest group, with 1,174 committees. The chart at right shows the complete mid-year and year-end PAC figures since 2000.

A complete listing of PAC statistics since 1974 is available in the agency's September 1, 2004, press release. The press release is available:

- On the FEC web site at http://www.fec.gov;
- From the Public Disclosure office (800/424-9530, press 2) and the Press Office (800/424-9530, press 1); and
- By fax (call the FEC Faxline at 202/501-3413).

—Meredith Trimble

Fundraising Continues to Grow

In the 18 months of the 2003-2004 election cycle ending June 30, 2004, fundraising for Congressional campaigns increased over fundraising during recent comparable periods. Party fundraising in 2004 has maintained the strong pace begun in 2003, and PAC activity has increased.

National Party Committees

The 2004 election cycle is the first in which national parties have been prohibited from receiving "soft money" as a result of implementation of the Bipartisan Campaign Reform Act of 2002 (BCRA). Between January 1, 2003, and June 30, 2004, Republican party committees raised $464.7 million in federally permissible "hard money" while the Democratic committees raised $278.2 million. These fundraising levels represent a 64 percent increase in receipts for Republicans when compared to the same period in 2002, and a 112 percent increase for Democrats. When compared to the same period in 2000—the last Presidential campaign—Republicans registered a 96 percent increase in receipts, while the Democrats showed a 113 percent increase.

The BCRA increased contribution limits for individuals from $20,000 per person to $25,000 per person per

Semiannual PAC Count—2000-2004

	Corporate	Labor	Trade/ Member/ Health	Coop-erative	Corp. w/o Capital Stock	Non-connected[1]	Total
Jan. 00	1,548	318	844	38	115	972	3,835
Jul. 00	1,523	316	812	39	114	902	3,706
Jan. 01	1,545	317	860	41	118	1,026	3,907
Jul. 01	1,525	314	872	41	118	1,007	3,877
Jan. 02	1,508	316	891	41	116	1,019	3,891
Jul. 02	1,514	313	882	40	110	1,006	3,865
Jan. 03	1,528	320	975	39	110	1,055	4,027
Jul. 03	1,534	320	902	39	110	1,040	3,945
Jan. 04	1,538	310	884	35	102	999	3,868
Jul. 04	1,555	303	877	34	97	1,174	4,040

[*] Committees with no activity for the election cycle are not included in the mid-year and year-end PAC count.

[1] Nonconnected PACs must use their own funds to pay fundraising and administrative expenses, while the other categories of PACs have corporate or labor "connected organizations" that are permitted to pay those expenses for their PACs. On the other hand, nonconnected PACs may solicit contributions from the general public, while solicitations by corporate and labor PACs are restricted.

year to national party committees, and contributions from individuals continues to be the largest source of funds for all party committees. These individual contributions represent over 78 percent of all Democratic party funds and more than 93 percent of Republican party receipts.

The BCRA also introduced "Levin funds"—funds raised under federal and state law for purposes such as get-out-the-vote activities. As of June 30, 14 party committees reported raising $1.5 million and spending $235,102 in Levin funds.

Congressional Candidates

From January 1, 2003, to June 30, 2004, Congressional campaigns raised a total of $798.7 million, an increase of 32 percent from the comparable period in the 2001-2002 campaign. In the same period, the 1,908 Senate and House candidates spent $487.1 million and reported cash on hand of $482 million, up 36 percent and 29 percent, respectively.

This cycle's 34 Senate campaigns have contributed to the significant increases, reporting receipts of $337.9 million, disbursements of $209.1 million and cash balances of $181.6 million. These figures represent a 67 percent increase in fundraising, a 90 percent increase in spending and a 65 percent increase in cash on hand over 2002 levels.

House campaigns raised $460.8 million, an increase of 14.5 percent from 2002. The campaigns spent $278.1 million, a figure 12.2 percent above previous cycle totals, and reported a cash balance of $300.4 million as of June 30. Receipts by Republican candidates increased 28 percent, with large increases for challengers and incumbent candidates and a decline in overall receipts for open seats. Democratic candidates' receipts were 1 percent higher than in the last cycle, with increases for incumbent and challenger candidates offset by a large decline for open seats. The chart below shows the median receipts for Democratic and Republican House candidates through June 30 of the election year, 2004 to 1998.

Contributions from individuals continue to be the largest source of receipts for Congressional candidates, totaling $484.9 million and representing 60.7 percent of all fundraising as of June 30. Candidates themselves contributed or loaned a total of $97 million, representing 12 percent of receipts. When compared to the same time period in 2002, contributions by individuals increased 37 percent and contributions and loans from candidates themselves increased by 81 percent.

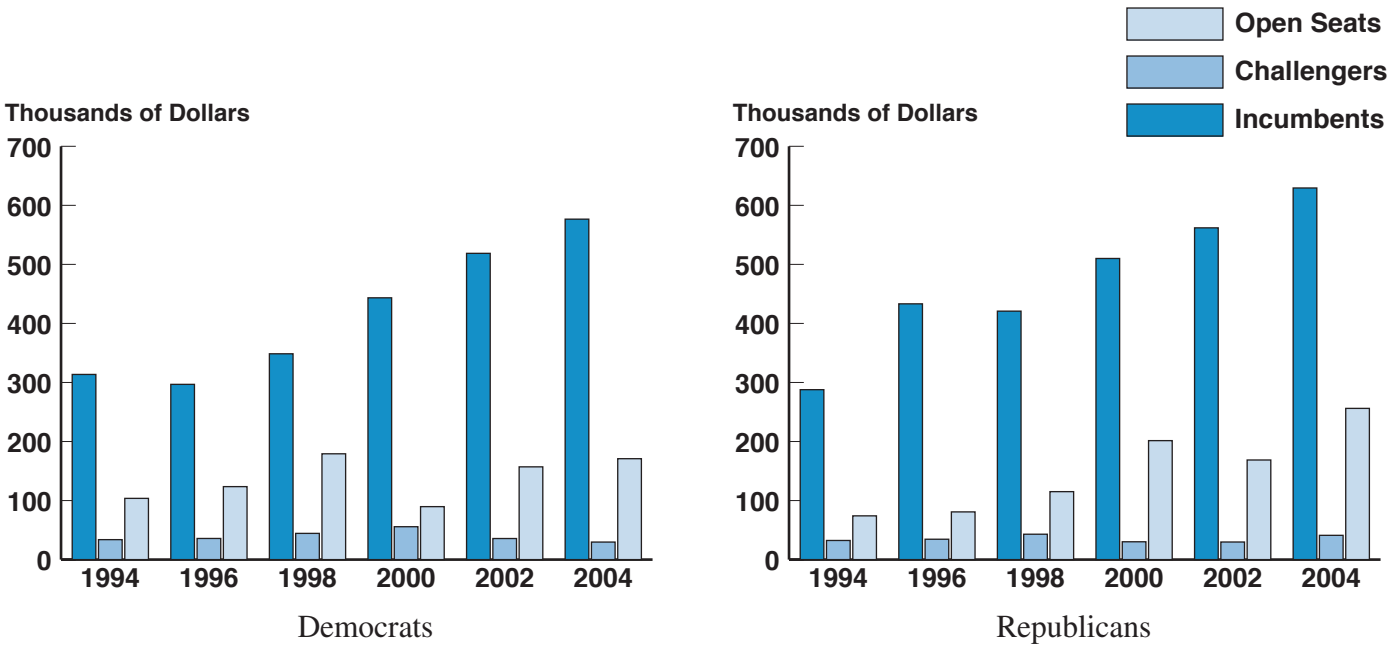
PAC Activity

Federal political action committees raised $629.3 million, spent $514.9 million and contributed $205.1 million to federal candidates from January 1, 2003 through June 30, 2004. This represented a 27 percent increase in receipts and a 24 percent increase in disbursements when compared with 2002. Contributions to candidates were 13 percent higher than at this point in the 2002 campaign. A total of 4,713 PACs reported $295.9 million in cash on hand, 28 percent more than was available at this point in 2002.

Overall, PAC contributions to House candidates increased by 21

(continued on page 16)

Median Receipts of House Candidates Through June 30 of Election Year—1994-2004



Statistics

(continued from page 15)

percent over 2002 levels. While comparisons of Senate contributions are difficult because of varying Senate election cycles in each state, PAC contributions to Senate candidates increased 20 percent during the first 18 months of the 2004 election cycle.

Additional Information

More information on campaign finance statistics for the 2003-2004 election cycle is available in press releases dated August 6 (party committees), August 21 (Congressional) and September 1 (PAC). The releases are available:

- On the FEC web site at http://www.fec.gov/press.shtml;
- From the Public Disclosure office (800/424-9530, press 2) and the Press Office (800/424-9530, press 1); and
- By fax (call the FEC Faxline at 202/501-3413 and request document numbers 618 and 619).

—Meredith Trimble

Public Funding

Commission Certifies Matching Funds for Presidential Candidates

On August 27, 2004, the Commission certified $325,479.23 in federal matching funds to four Presidential candidates. The U.S. Treasury Department made the payments on September 1, 2004. These certifications raise to $27,820,905.21 the total amount of federal funds certified thus far to eight Presidential candidates.

Presidential Matching Payment Account

Under the Presidential Primary Matching Payment Account Act, the federal government will match up to $250 of an individual's total contributions to an eligible Presidential primary candidate. A candidate must establish eligibility to receive matching payments by raising in excess of $5,000 in each of at least 20 states (i.e., over $100,000). Although an individual may contribute up to $2,000 to a primary candidate, only a maximum of $250 per individual applies toward the $5,000 threshold in each state. Candidates who receive matching payments must agree to limit their committee's spending, limit their personal spending for the campaign to $50,000 and submit to an audit by the Commission. 26 U.S.C. §§9033(a) and (b) and 9035; 11 CFR 9033.1, 9033.2, 9035.1(a)(2) and 9035.2(a)(1).

Candidates may submit requests for matching funds once each month. The Commission will certify an amount to be paid by the U.S. Treasury the following month. 26 CFR 702.9037-2. Only contributions from individuals in amounts of $250 or less are matchable.

The chart on below lists the amount most recently certified to each eligible candidate who has elected to participate in the matching fund program, along with the cumulative amount that each candidate has been certified to date.

—Amy Kort

Matching Funds for 2004 Presidential Candidates: August Certification

Candidate	Certification August 2004	Cumulative Certifications
Wesley K. Clark (D)[1]	$0	$7,615,360.39
John R. Edwards (D)[2]	$20,171.04	$6,624,940.44
Richard A. Gephardt (D)[3]	$0	$4,104,319.82
Dennis J. Kucinich (D)[4]	$108,883.00	$2,955,962.59
Lyndon H. LaRouche, Jr. (D)[5]	$47,026.00	$1,456,019.13
Joseph Lieberman (D)[6]	$0	$4,267,796.85
Ralph Nader (I)	$149,399.19	$696,505.99
Alfred C. Sharpton (D)	$0	$100,000.00[7]

[1] *General Clark publicly withdrew from the Presidential race on February 11, 2004.*

[2] *Senator Edwards publicly withdrew from the Presidential race on March 3, 2004.*

[3] *Congressman Gephardt publicly withdrew from the Presidential race on January 2, 2004.*

[4] *Congressman Kucinich became ineligible to receive matching funds on March 4, 2004.*

[5] *Mr. LaRouche became ineligible to receive matching funds on March 4, 2004.*

[6] *Senator Lieberman publicly withdrew from the Presidential race on February 3, 2004.*

[7] *On May 10, 2004, the Commission determined that Reverend Sharpton must repay this amount to the U.S. Treasury for matching funds he received in excess of his entitlement. See the July 2004* Record*, page 8.*

Public Funding for Bush-Cheney

On September 2, 2004, the Commission approved public funding for the general election campaign of President George W. Bush and Vice President Richard B. Cheney. The U.S. Treasury Department made the payment of $74.620 million shortly thereafter.[1]

Under the Presidential Election Campaign Fund Act, the Democratic and Republican nominees are each entitled to a grant of $20 million increased by a cost-of-living adjustment (COLA). In order to receive public funding, the Bush-Cheney campaign agreed to abide by the overall spending limit and other legal requirements, including a post-campaign audit. Additionally, as major party nominees, they agreed to limit campaign spending to the amount of the public funding grant and not to accept private contributions for the campaign. They also agreed not to spend more than $50,000 in the aggregate of their own personal funds. The campaign may, however, accept contributions designated for its general election legal and compliance (GELAC) fund. This fund is a special account maintained exclusively to pay for the expenses related to complying with the campaign finance law. Compliance expenses do not count against the expenditure limit. Contributions to the GELAC fund are, however, subject to the limits, prohibitions and reporting requirements of the federal campaign finance laws.

The Republican National Committee may spend an additional $16,249,699 for coordinated expenditures on behalf of the Bush-Cheney campaign. These funds are subject to the limits, prohibitions and disclosure requirements of the Federal Election Campaign Act.

—Meredith Trimble

[1] *The Commission certified an equal public funding grant to John Kerry and his Vice-Presidential running mate Senator John Edwards on July 30, 2004. See the September 2004* Record*, page 7.*

Compliance

MUR 5447: State Party Committee's Financial Discrepancies and Failure to Pay Allocable Expenses from Federal Account

The Commission recently entered into a conciliation agreement with the Missouri Republican State Committee–Federal Committee (the Committee) resulting in a $128,000 civil penalty. The conciliation agreement resolves violations of the Federal Election Campaign Act (the Act) stemming from the Committee's failure to pay allocable expenses from its federal allocation account, and its failure to accurately report receipts, disbursements and cash-on-hand balances. This matter arose from a Commission audit, which discovered the violations.

Background

The Act requires party committees to pay for shared federal and nonfederal activity either entirely from a committee's federal account (into which nonfederal funds may be transferred to cover the appropriate nonfederal portion) or by establishing a separate allocation account. All spending from these accounts must be disclosed on regular financial reports to the FEC.

The Act also requires that all political committees accurately report receipts, disbursements and cash-on-hand balances.

Conciliation

On August 31, 2004, the Commission entered into a conciliation agreement with the Committee. According to the agreement, the Committee paid $2,722,920 to six vendors directly from its federal account, and $6,137,541 to the same vendors, for the same generic campaign activities, from its nonfederal account. As a result, this $6.1 million in spending was not reported to the Commission. The agreement requires the Committee to pay for allocable expenditures from its federal account and to transfer funds from its nonfederal account as appropriate.

In addition, the Committee failed to report or misreported $1,558,281 in financial activity from January 1, 1999, through December 31, 2000.

The conciliation agreement notes that the Committee has taken substantial steps to improve its compliance, including hiring a certified public accountant and sending representatives to FEC training conferences.

For additional information on this case, please visit the Commission's Public Records Office or consult the Enforcement Query System on the FEC's web site and enter case number 5447.

—Meredith Trimble

Nonfilers

Congressional Committees Fail to File Reports

The following principal campaign committees failed to file required 12-Day Pre-Primary reports:

- Blair Mathies for Congress (NY/03);
- David Jerome Bennett for Congress (NV/02);
- Dr. Inam Rahman for Congress (NY/03);
- Friends of Chuck Barton (RI/02);
- Friends of Tilley for U.S. Senate (NV);
- Friends of Weiner (NY/09);
- Friends to Elect Jeff Miller (NY/24);
- Laba for Congress (NY/28);
- Meeks for Congress NY/06); and

(continued on page 18)

Nonfilers

(continued from page 17)

- Warren Redlich for Congress (NY/21).

Prior to the reporting deadlines, the Commission notified committees of their filing obligations. Committees that failed to file the required reports were subsequently notified that their reports had not been received and that their names would be published if they did not respond within four business days.

The Federal Election Campaign Act requires the Commission to publish the names of principal campaign committees if they fail to file 12 day pre-election reports or the quarterly report due before the candidate's election. 2 U.S.C. §437g(b). The agency may also pursue enforcement actions against nonfilers and late filers on a case-by-case basis.

—Meredith Trimble

Publications

New Campaign Guide Available

A revised version of the *Campaign Guide for Political Party Committees* is now available on the FEC web site at http://www.fec.gov. The new guide provides political party committees at all levels with clear explanations of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002, and Commission regulations and advisory opinions. The guide also provides clear reporting advice, along with examples of how to report common transactions.

A printed version of the *Campaign Guide for Political Party Committees* will be available later this fall. The availability of the printed version will be announced in a future issue of the *Record*.

—Meredith Trimble

www.fec.gov

New FEC Web Site Unveiled

FEC staff recently completed a significant upgrade of the Commission's web site, www.fec.gov. The redesigned site offers a wealth of information in a simple, clearly-organized format. Features include cascading menus that improve navigation and interactive pages that allow users to tailor content to their specific needs.

Noteworthy among the new features is a search engine. This tool allows visitors to immediately access all pages on the site that contain a desired word or phrase. Another new feature, the Commission Calendar, helps users keep track of reporting deadlines, upcoming conferences and workshops, Commission meetings, comment deadlines and more.

The site also offers a robust new enforcement section that includes the Enforcement Query System, information on closed MURs, the Alternative Dispute Resolution and Administrative Fines programs and—for the first time—access to final audit reports issued by the Commission.

The Commission encourages the regulated community and the public to make use of this dynamic and interactive site by visiting www.fec.gov, and welcomes feedback.

—Meredith Trimble

Index

The first number in each citation refers to the "number" (month) of the 2004 *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.

Compliance

Court Cases

Regulations

(continued on page 20)

Index

(continued from page 19)

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

Official Business
Penalty for Private Use, $300

PRESORTED STANDARD
U.S. POSTAGE
PAID
FEDERAL ELECTION COMMISSION