Record

February 2007 *Federal Election Commission* *Volume 33, Number 2*

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Contribution Limits

Limits for 2007-2008

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), certain contribution limits are indexed for inflation every two years, based on the change in the cost of living since 2001, which is the base year for adjusting these limits.[1] The inflation-adjusted limits are:

- The limits on contributions made by persons to candidates and national party committees (2 U.S.C. §441a(a)(1)(A) and (B));
- The biennial aggregate contribution limits for individuals (2 U.S.C. §441a(a)(3)); and
- The limit on contributions made by certain political party committees (2 U.S.C. §441a(h)).

Please see the chart on page 2 for the contribution amount limits applicable for 2007-2008.

The inflation adjustments to these limits are made only in odd-numbered years, and—except for the biennial limit—the limits are in effect for the two-year election cycle beginning on the day after the general election and ending on the date of the next general election. The biennial

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[1] *The applicable cost of living adjustment amount is 13.9 percent.*

Court Cases

Wisconsin Right to Life v. FEC

On December 21, 2006, a three-judge panel of the United States District Court for the District of Columbia issued a 2-1 decision granting Wisconsin Right to Life's (WRTL's) motion for summary judgment, finding the electioneering communications (EC) provisions unconstitutional "as applied" to three broadcast ads WRTL had intended to run before the 2004 election. Based on the court's decision, the ads would not have been subject to the ban on the use of corporate treasury funds to finance ECs.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an EC is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. Corporations may not finance ECs using their general

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Contribution Limits for 2007-2008

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates	$2,300
Individuals/Non-multicandidate Committees to National Party Committees	$28,500
Biennial Limit for Individuals	$108,200[1]
National Party Committee to a Senate Candidate	$39,900[2]

[1] This amount is composed of a $42,700 limit for what may be contributed to all candidates and a $65,500 limit for what may be contributed to all PACs and party committees. Of the $65,500 portion that may contributed to PACs and parties, only $42,700 may be contributed to state and local party committees and PACs.

[2] This limit is shared by the national committee and the Senate campaign committee.

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Contribution Limits

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limit covers the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even-numbered year.

Please note, however, that these limits do not apply to contributions raised to retire debts from past elections. Contributions may not exceed the contribution limits in effect on the date of the election for which those debts were incurred. 11 CFR 110.1(b)(3)(iii).

The BCRA also introduced a rounding provision for all of the amounts that are increased by the indexing for inflation.[2] Under this provision, if the inflation-adjusted amount is not a multiple of $100, then the amount is rounded to the nearest $100.

—Meredith Metzler

[2] This provision also affects the indexing of coordinated party expenditure limits and Presidential expenditure limits. 2 U.S.C. §§441a(b) and 441a(d).

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treasury funds.[1] 2 U.S.C. §441b(a)-(b) and 11 CFR 114.2 and 114.14.

WRTL originally filed suit in the U.S. District Court for the District of Columbia on July 28, 2004, asking the court to find the ban on corporate treasury funding of ECs unconstitutional as applied to what it called "grassroots lobbying" communications planned for the period before the 2004 elections. After the district court denied WRTL's motion for a preliminary injunction and dismissed its complaint, WRTL appealed to the Supreme Court. On January 23, 2006, the Supreme Court vacated the judgment and remanded to the district court to reconsider the merits of WRTL's "as applied" challenge. The district court held a hearing on September 18, 2006, regarding motions for summary judgment as to WRTL's 2004 ads.

Court Decision

The three communications in question were two radio advertisements and one television advertisement WRTL had planned to run before the 2004 primary and general elections concerning anticipated filibusters of President Bush's federal judicial nominees. The ads encouraged Wisconsin listeners and viewers to contact their Senators (Senators Feingold and Kohl) to urge them to oppose the filibusters. Senator Feingold was up for reelection in 2004, but Senator Kohl was not.

The three-judge panel considered the "as applied" challenge to the EC provisions based on two main arguments: whether the ads contained

[1] Commission regulations provide an exception allowing "qualified nonprofit corporations" to pay for electioneering communications. 11 CFR 114.2(b)(2). However, WRTL believes that it does not meet the definition of a qualified nonprofit corporation. 11 CFR 114.10.

express advocacy for or against a federal candidate or the "functional equivalent" of express advocacy; and, if they did not, whether the government had demonstrated a compelling interest in regulating these ads.

Express advocacy. To determine whether WRTL's 2004 anti-filibuster ads contained express advocacy, or its functional equivalent, the court considered only the text and images of the ads and declined to consider contextual factors bearing on the ads' purpose or likely effect. The court's evaluation was based upon whether the ads: 1) described an issue that was or "likely" soon would be a "subject of legislative scrutiny"; 2) referred to the prior voting record or current position of the named candidate on the described issue; 3) exhorted the audience to do anything other than contact the candidate about the described issue; 4) promoted, attacked, supported or opposed the named candidate; and 5) referred to an upcoming election, candidacy or party of the candidate.

Considering those five factors, the court found that the anti-filibuster ads did not contain express advocacy or its functional equivalent and thus were not "intended to influence the voters' decisions." The court noted that the ads did not mention an election, a candidacy or the individual's "fitness for office." While the ads discussed the filibuster issue, the court stated that they did not reference the Senators' voting records, current or past, on this issue, and that they did not promote, attack, support or oppose either Senator. Additionally, the court noted that the ads asked the audience to contact both Senators, not just the Senator up for reelection.

Government interest in regulating issue ads. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court found that the compelling government interest in regulating the communications covered by the definition of electioneering communication was sufficient to uphold the statute on its face. However, the district court stated that by permitting "as applied" challenges to the provisions of the BCRA, the Supreme Court left open the question as to whether there is a compelling government interest in regulating "genuine issue ads" covered by the statute. In light of its finding that WRTL's anti-filibuster ads did not contain express advocacy, or its functional equivalent, the three-judge panel evaluated the government interest in regulating these ads. The court found no compelling government interest and rejected the argument that the need for a "bright line" test is a basis for regulating "genuine issue ads," noting that the "virtues of the bright line test cannot alone justify regulating constitutionally protected speech."

Notice of Appeal

On December 29, 2006, the Commission filed a Notice of Appeal to the Supreme Court.

U.S. District Court for the District of Columbia, CV04-1260 (DBS, RWR, RJL).

—Elizabeth Kurland

CREW v. FEC

On January 12, 2007, the U.S. Court of Appeals for the District of Columbia upheld the district court's summary judgment in favor of the FEC, finding that Citizens for Responsibility and Ethics in Washington (CREW) lacked standing to challenge the Commission's dismissal of its administrative complaint.

Background

According to the administrative complaint CREW filed during the 2004 campaign, Grover Norquist, head of Americans for Tax Reform, provided Kenneth Mehlman, campaign manager for Bush-Cheney '04, a master list of conservative activists. The administrative complaint did not seek as relief information about the precise dollar value of the list. On October 19, 2004, the Commission voted to take no further action in this matter and to close the file. Although the FEC found the master list to be an unreported, in-kind prohibited corporate contribution, it appeared to be "limited in size and impact." The Office of General Counsel recommended that the Commission "exercise its prosecutorial discretion and take no further action" in the matter.

Court Decision

On December 13, 2004, CREW filed suit to challenge the FEC's decision not to pursue further investigation. The FEC filed a motion for summary judgment on April 15, 2005, arguing that CREW lacked

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This issue of the *Record* and all other issues of the *Record* starting with January 1996 are available on the FEC web site as PDF files. Visit the FEC web site at http://www.fec.gov/pages/record.shtml to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1996. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

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Court Cases

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standing to pursue the action. The motion was granted by the district court on November 14, 2005.

In order to have standing, the plaintiff must satisfy three requirements: injury, redressability and causation. The injury standard is met when the plaintiff suffers an actual, not abstract, invasion of a concrete, legally protected interest. Redressability is proved when it is likely, not merely speculative, that a favorable court decision will redress the injury. Lastly, when the injury is fairly traceable to the defendant's action in question, the causation standard is satisfied.

CREW argued that the FEC should have required Bush-Cheney '04 to assign a precise monetary value to the master list and publicly disclose that figure to help CREW in its mission of "empowering citizens." In order to have standing, however, the plaintiff must prove it has suffered an injury in fact to its own interests, not simply assert that it would be unable to help others achieve abstract goals. CREW cannot vote, nor does it have any members who participate in the political process. As a result, the appeals court upheld the district court's conclusion that CREW could not have suffered from a lack of information in the voting process.

Like the district court, the court of appeals also found that CREW was unable to prove standing based on the standards of redressability and causation. CREW complained that the FEC's failure to require Bush-Cheney '04 to publicly disclose and report the monetary value of the master list was a violation of the Act. However, the court noted that while the Act requires the FEC to negotiate a conciliation agreement after a "reason to believe" determination and "probable cause," the Act does not require that disclosure of information be part of the conciliation agreement. Therefore, the Commission is not legally bound to requiring, or the court granting, the disclosure of the information to redress the situation.

To prove causation, the alleged harm must be fairly traceable to the defendant's action. The court inferred that the alleged harm suffered by CREW was based on the FEC's decision to dismiss the complaint in order to focus its resources on more pertinent matters. The court did not find that the FEC violated any legal principle when it dismissed the administrative complaint because the FEC retains prosecutorial discretion and is not expected to bring every administrative complaint to court.

In support of its ruling, the court cited *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997). Under circumstances similar to those in CREW's case, Common Cause was held not to have standing.

Appeal from the U.S. District Court for the District of Columbia, 04-2145.

—*Carrie Hoback*

Federal Register

Federal Register notices are available from the FEC's Public Records Office, on the web site at www.fec.gov/law/law_rulemakings.shtml and from the FEC Faxline, 202/501-3413.

Notice 2006-23
Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission (72 FR 887, January 9, 2007)

Notice 2007-1
Privacy Act of 1974; Systems of Records (72 FR 3141, January 24, 2007)

Unity '08 v. FEC

On January 10, 2007, Unity '08 and individual members of its Board of Directors (the plaintiffs) filed a complaint in the U.S. District Court for the District of Columbia, challenging the FEC's recent Advisory Opinion that concluded that the group's proposed activities would require it to register as a political committee. The plaintiffs ask the court to rule that this conclusion was "arbitrary" and in violation of the First Amendment. The plaintiffs also seek to enjoin the FEC from enforcing the Act's reporting provisions and contribution limitations against Unity '08.

Background

Unity '08 describes itself as a political movement of voters who seek to nominate candidates for a "Unity Ticket" in the 2008 Presidential election through an online nominating convention over the Internet. Unity '08 plans to organize a group of voters to support the candidates selected in this online convention. Currently, Unity '08 maintains a web site that focuses on issue content and describes its plans to nominate candidates via the online convention and to qualify for a place on the ballot in the November 2008 general election.

In Advisory Opinion (AO) 2006-20, the Commission concluded that the ballot access expenditures and activities that Unity '08 will conduct, combined with its stated goal of nominating and electing presidential and vice-presidential candidates, would cause it to qualify as a "political committee" under the Act. As such, it would be subject to the Act's contribution limitations and registration and reporting requirements. For more information, see the November 2006 *Record*, page 4.

Court Complaint

The plaintiffs contend that the FEC's conclusion in AO 2006-20 was:

- Arbitrary and not in accordance with law, because the Act regulates as expenditures only those expenses incurred in support or opposition to a clearly identified candidate for federal office, and support for a clearly identified candidate is required by the Supreme Court before the definitions of "expenditure" or "political committee" apply.
- An infringement on the group's First Amendment rights of speech and association and not narrowly tailored to prevent corruption, or the appearance of corruption, in the political process. Unity '08 contends that the registration requirements and contribution limits the Commission determined would apply to Unity '08 would hamper its ability to raise money and burden its ability to engage in core political speech, such as petitioning and other ballot access activities. The group further notes that it does not support or oppose a clearly identified candidate at this time.

As well as alleging a violation of the Administrative Procedure Act (APA), the plaintiffs also contend, among other things, that the Commission's determination was vague and overbroad, thus violating the First Amendment.

Relief

The plaintiffs ask the court to preliminarily and permanently enjoin the FEC from enforcing its ruling in AO 2006-20.

The plaintiffs also ask the court to:

- Declare that AO 2006-20 is unconstitutional on First Amendment grounds, as it applies to Unity '08;
- Declare that the FEC's determination that signature-gathering expenses to qualify Unity '08 for the ballot are "expenditures" is in violation of the APA;
- Declare that the FEC's classification of Unity '08 as a "political committee" is in violation of the APA; and
- Award costs and attorneys' fees.

U.S. District Court for the District of Columbia, 1:07CV00053.

—Dorothy Yeager

Compliance

Policy Statement on Reporting of "Purpose of Disbursement"

On December 14, 2006, the Commission approved a Statement of Policy designed to improve the descriptions of the purpose for each itemized disbursement that political committees and others disclose on their FEC reports. The policy was published in the January 9, 2007, *Federal Register*. 72 FR 887.

FEC regulations require that the "purpose of disbursement" entry for each disbursement be sufficiently specific, when considered with the identity of the recipient, to provide a clear reason for the payment. The regulations also provide examples of acceptable and unacceptable descriptions, but the lists are brief and not exhaustive. 11 CFR 104.3(b)(3) and (4).

The new policy statement includes non-exhaustive lists of acceptable and unacceptable "purpose of disbursement" descriptions intended to provide additional guidance to the regulated community and to foster consistency among filers. As a rule of thumb, the statement suggests that filers consider whether a person unaffiliated with the campaign/committee could discern why a payment was made by reading the description they have provided.

The Commission added one additional term, "Consulting-Political," to the non-exhaustive list of generally insufficient descriptions, based on public comments it received on the proposed policy. To the non-exhaustive list of generally acceptable descriptions, the Commission added "Consulting-Media," "Consulting-Fundraising," "Consulting-Polling," "Consulting-Legal" and "Consulting-Get-Out-The-Vote."

The policy statement is available on the Commission's web site at http://www.fec.gov/law/policy.shtml.

—Meredith Metzler

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Advisory Opinions

Advisory Opinion 2006-33: Association May Compensate State Affiliate Collecting Agents

The National Association of Realtors ("NAR"), may make payments from its corporate treasury fund to its state affiliates to increase their fundraising for the Realtors' Political Action Committee ("RPAC"), the SSF established and controlled by NAR. The Commission split on a rationale, with two commissioners concluding that the payments would be a permissible use of corporate treasury funds for the establishment, administration and solicitation costs of NAR's PAC, and with two other commissioners concluding that the payments would not be subject to the Act or Commission regulations. The payments would not be subject to the "one-third rule."

Background

NAR is an incorporated trade association engaged in activities intended to improve business conditions in the real estate industry. RPAC is its SSF. NAR has affiliated state associations in each state, and approximately 1,500 local affiliates. Together, NAR and its affiliates comprise a federation of trade associations. 11 CFR 114.8(g).

Each state association operates its own nonfederal political committee, and simultaneously solicits funds for both its nonfederal PAC and RPAC. By agreement, the state PAC receives 70% of the fundraising proceeds and RPAC receives 30%. As an incentive to increase the percentage of funds given to RPAC, NAR proposes to pay the state associations NAR corporate treasury funds in amounts comparable to the increased contributions to RPAC. The funds given to the state associations by NAR would be used in connection with state and local elections or other activities as permitted by state law. Individual contributors would not receive any portion of the funds from NAR, nor would they receive any benefit as a result of the payments. Solicitations would inform the contributors of the new percentage of funds to be sent to RPAC.

Analysis

As an exception to the general ban on corporate contributions and expenditures, the Act and Commission regulations permit a corporation, including an incorporated trade association, to pay for the establishment, solicitation and administrative costs of its separate segregated fund. 11 CFR 114.1(b). As part of that exception, a corporation may use its treasury funds to pay for "a raffle or other fundraising device which involves a prize" to raise funds for the corporation's separate segregated fund, so long as State law permits and the prize is not disproportionately valuable. When using raffles or entertainment to raise funds, a reasonable practice to follow is for the separate segregated fund to reimburse the corporation for costs that exceed one third of the money contributed to the separate segregated fund. 11 CFR 114.5(b)(2).

The Commission concluded that NAR's incentive payments to its state associations would not be subject to the one-third rule, because the payments would not be for a raffle or other fundraising device that involves a prize, or for entertainment.

Date: December 19, 2006
Length: 5 pages
—Gary Mullen

Advisory Opinion Requests

AOR 2006-38

Federal officeholder's use of funds raised for state campaign (Senator Bob Casey Jr. and the Casey State Committee, December 12, 2006)

AOR 2007-1

Federal officeholder's ability to raise nonfederal funds to retire state campaign's debt (Senator Claire McCaskill and McCaskill for Auditor, January 9, 2007)

AOR 2007-2

Whether the Arizona Libertarian Party, Inc., qualifies as a state party committee (Arizona Libertarian Party, Inc., January 9, 2007)

Staff

General Counsel and Deputy Resign

FEC General Counsel Lawrence H. Norton and Deputy General Counsel James A. Kahl will resign from the agency on February 16, 2007, to enter private practice with the law firm of Womble Carlyle Sandridge & Rice.

Mr. Norton has served as General Counsel since September 2001, after coming to the Commission from the Commodity Futures Trading Commission. Since Mr. Norton joined the Commission, the Office of General Counsel has made significant strides, closing cases more quickly with higher penalties than ever before.

"I am proud of the role of the Commission's staff in implementing and defending the most sweeping changes in campaign finance law in over a quarter century," said Mr. Norton. "As the Commission faces new challenges, I have no doubts that the Office of the General Counsel will continue to provide the highest quality of advice to the Commission and service to the public."

Mr. Kahl has been instrumental in revamping the operations and management practices of the Office of General Counsel and in recruiting strong legal talent to the Commission.

Thomasenia Duncan Designated Acting General Counsel

Following the February 2007 resignation of the FEC's General Counsel, Lawrence H. Norton, Thomasenia (Tommie) Duncan will serve as the agency's Acting General Counsel. Ms. Duncan will serve while the Commission conducts an open search to fill the General Counsel's position.

Ms. Duncan joined the staff of the FEC's Office of General Counsel in February 2004, and most recently served as the FEC's Associate General Counsel for General Law and Advice. Prior to joining the FEC, Ms. Duncan was the General Counsel for America's Promise—The Alliance for Youth. She has worked in government service as Senior Legal Advisor to the Administrator of the Federal Aviation Administration, General Counsel of the Corporation for National and Community Service and Acting Deputy Solicitor and Special Assistant to the Solicitor of the Department of Labor. She is a graduate of Brown University and received her Juris Doctor from the University of Pennsylvania Law School.

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Information

Reporting Notices Enter the Electronic Age

The year-end reporting reminders committees recently received will be the last sent on paper. The FEC will send all future courtesy materials to committees exclusively by electronic mail. Reporting reminders and mailings concerning changes in the law will no longer be sent by U.S. mail. As a result, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address.

Most committees registered with the FEC are already required to disclose an e-mail address on Form 1. Under 11 CFR 102.2(a)(1)(vii) and (viii), all mandatory electronic filers and the principal campaign committees of House and Senate candidates must provide an e-mail address.

The Commission's decision to switch from paper to electronic mail will obviously improve the timeliness of its communications with committees, but that is only one of the advantages. E-mail will also offer opportunities for new types of communications and will simplify the process of providing information tailored specifically to each committee's needs, all while saving tax dollars.

The Commission recognizes that disclosing a personal e-mail address on a public document may raise privacy concerns. For that reason, committees may wish to create a separate e-mail account intended solely for this purpose. As the agency begins to communicate with committees electronically, keeping that e-mail address current on the committee's Statement of Organization will be essential.

To disclose a new e-mail address, electronic filers must submit a complete electronic Form 1. Paper filers need only complete the committee identification section of the Form 1 and those portions that disclose a change. Copies of the Statement of Organization form are available from the Commission or on its web site at http://www.fec.gov/info/forms.shtml.

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