

# Record

August 2011

Federal Election Commission

Volume 37, Number 8

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## From the Editor: Record Transition

This is the last issue of the *FEC Record* in its current format. In an effort to provide more timely and user-friendly information, we are converting the *Record* from a print-based online publication to a wholly web-based format that better utilizes the medium. We're excited to improve this already useful resource in a way that will help our readers keep up with FEC-related news better than ever.

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## Reports

### New York Special Election Reporting: 9<sup>th</sup> District

New York will hold a Special Election to fill the U.S. House seat in New York's 9<sup>th</sup> Congressional District vacated by Representative Anthony Weiner. The Special General will be held September 13, 2011.

Candidate committees involved in these elections must follow the reporting schedule on page 5. Please note that the reporting period for the Post-General election report spans two election cycles. For this report only, authorized committees must use the Post-Election Detailed Summary Page rather than the normal Detailed Summary Page.

PACs and party committees that file on a semi-annual schedule and participate in this election must also follow the schedule above. PACs and party committees that file monthly must continue to file according to their regular filing schedule.

### Filing Electronically

Reports filed electronically must be received and validated by the Commission by 11:59 p.m. Eastern Time on the applicable filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the

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## Advisory Opinions

### AO 2011-11

### Costs of Independent Expenditures Fall Within Press Exemption When Aired During TV Show

Stephen Colbert, host of *The Colbert Report* (the Show), may establish and operate an independent expenditure-only committee (the Committee) which may solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations (but not foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress). Costs incurred by Viacom (the Show's owner, producer and distributor) to cover the Committee on the Show and to produce and air independent expenditure advertisements during that coverage fall under the "press exemption" of the Federal Election Campaign Act (the Act) and do not need to be reported by the Committee as in-kind contributions. However, if independent expenditure ads were provided to the Committee to be distributed outside of the Show, the associated costs would not be covered under the press exemption and would thus constitute reportable in-kind contri-

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## Advisory Opinions

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butions from Viacom to the Committee. Similarly, if Viacom were to pay administrative costs associated with running the Committee, these costs would also be considered in-kind contributions from Viacom to the Committee.

### Background

Mr. Colbert hosts *The Colbert Report*, which is a half-hour program that is owned, distributed and produced by Viacom. Viacom is

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neither owned nor controlled by any political party, political committee or candidate. Mr. Colbert has discussed on the Show the idea of creating his own political committee. The idea of this Committee had been a vehicle for Mr. Colbert to discuss campaign finance rules and new developments in politics. Now, Mr. Colbert plans to establish the Committee, the activities of which will be covered on the Show and used by Mr. Colbert as an on-air premise for discussing campaign finance rules and other aspects of American politics.

Mr. Colbert states that the proposed committee will file with the Commission as a nonconnected committee, will make only independent expenditures,<sup>1</sup> and will not make monetary or in-kind contributions to any candidate or political committee, and will not coordinate its efforts with any candidate or political party. The Committee plans to solicit and accept unlimited contributions from individuals, political committees, corporations and labor organizations. It will also comply with all disclaimer and reporting requirements.

The Committee will pay for its own website, as well as the Committee's solicitation costs and some of its other expenses, including the cost of Mr. Colbert's Committee-related travel. However, Viacom would like to incur much of the cost of operating the Committee—including costs to produce some of its independent expenditure ads and prepare and file the Committee's FEC reports—ei-

ther directly or indirectly, through payments to its vendors.

During the Show, Mr. Colbert plans to refer to the Committee's website and air independent expenditure ads, which will be part of the Show's coverage of the Committee. Some of the independent expenditure ads may be provided to the Committee to air as paid ads on other shows and other networks. The Show's production resources and staff may also prepare and file the Committee's reports with the Commission.

### Analysis

*Establishing the Committee.* Political committees that make only independent expenditures may solicit and accept unlimited contributions from individuals, corporations, labor organizations and other political committees (but not foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress). See AO 2010-11 (Commonsense Ten). Such committees must register with the Commission and comply with all applicable reporting requirements of the Act. See also *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) and *SpeechNow.org v. FEC*, 599 F. 3d 686 (D.C. Cir. 2010).

Mr. Colbert may establish the Committee, which may accept unlimited contributions from individuals, corporations and labor organizations (but not foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress).

*Press Exemption.* The Act and Commission regulations exempt from the terms "contribution" and "expenditure" any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or

<sup>1</sup> The Act and Commission regulations define an "independent expenditure" as an expenditure by any person for a communication expressly advocating the election or defeat of a clearly identified federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized committee, or their agents, or a political party committee or its agents. 2 U.S.C. §431(17) and 11 CFR 100.16.

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## Advisory Opinions

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controlled by any political party, political committee, or candidate.” 2 U.S.C. §431(9)(B)(i); 11 CFR 100.73 and 100.132. These exclusions are known as the “press exemption.”

In determining whether the press exemption applies to an entity, the Commission has conducted a two-step analysis. First, the Commission asks whether the entity engaging in the activity is a press entity. See, e.g., AOs 2005-16 (Fired Up) and 1996-16 (Bloomberg). Second, the Commission applies the two-part analysis in *Readers’ Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y., 1981), which requires it to determine: 1) Whether the entity is owned or controlled by a political party, political committee or candidate, and 2) whether the entity is acting as a press entity in conducting the activity at issue (i.e., whether the press entity is acting in its “legitimate press function”).

The Commission has previously determined through the advisory opinion process that Viacom is a press entity and that Viacom is not owned or controlled by a political party, political committee or candidate. See AO 2004-07 (MTV).

To determine whether a press entity is acting in its legitimate press function, the Commission considers two factors: 1) whether the press entity’s materials are available to the general public, and 2) whether the materials are comparable in form to those ordinarily issued by the press entity. See AOs 2005-16 (Fired UP) and 2000-13 (OPHTHPAC). In examining these two factors, the Commission is mindful that a press entity’s press function is “distinguishable from active participation in core campaign or electioneering functions.” AO 2008-14 (Melothe, Inc.).

*Costs to Cover the Committee on the Show.* The Commission concluded that Viacom’s coverage of the Committee on the Show, which includes producing and airing segments of the Show that discuss the Committee’s operations, the Committee’s support for or opposition to federal candidates, the Committee’s website, audience participation opportunities and the Committee’s independent expenditure ads, would be part of Viacom’s legitimate press function. Segments of the Show featuring discussions of the Committee and the Committee’s independent expenditure ads are comparable in form to previously produced segments appearing on the Show. Furthermore, the staff that produces these segments will be the same staff that produces other segments of the Show, and the segments will be distributed on the same cable television channel, Comedy Central. Since Viacom will be acting within its legitimate press function, the press exemption applies to costs of covering the Committee on the Show and such costs incurred by Viacom will not be in-kind contributions from Viacom to the Committee.

*Costs to Distribute Independent Expenditures Outside of the Show.* The Commission concluded that Viacom would not be acting within its legitimate press function by providing independent expenditure ads to the Show and also providing the independent expenditure ads to the Committee, or providing independent expenditure ads produced directly for the Committee to distribute outside of the Show (including airing as paid ads on other shows and networks or as content for its website). Thus, costs incurred by Viacom for this activity would need to be reported by the Committee as in-kind contributions from Viacom to the Committee.

*Committee’s Administration Costs.* The Commission concluded that the administration of the Committee by Viacom would similarly

constitute “active participation [by Viacom] in core campaign or electioneering functions,” which would fall outside of the scope of the press exemption. Accordingly, any costs incurred by Viacom associated with administering the Committee would need to be reported by the Committee as in-kind contributions by Viacom.

*Contributions from the general public.* The Commission concluded that even if the Committee were to receive in-kind contributions from Viacom, it could also solicit and accept contributions in unlimited amounts from individuals, political committees, corporations and labor organizations. It cannot solicit contributions from foreign nationals, federal contractors, national banks or corporations organized by authority of any law of Congress.

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—Myles Martin

## AO 2011-12

### Fundraising by Candidates, Officeholders and Party Officials for Independent Expenditure-Only Political Committees

Federal candidates, officeholders and national party officers may solicit only those contributions that are subject to the Federal Election Campaign Act’s (the Act’s) amount limitations and source prohibitions when they solicit contributions on behalf of independent expenditure-only political committees (IEOPCs). Moreover, federal candidates, officeholders and officers of national party committees are limited to soliciting funds up to \$5,000 for independent expenditure-only committees where those funds are from individuals and other sources not barred from making contributions.

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## Advisory Opinions

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### Background

On January 21, 2010, the U.S. Supreme Court held in *Citizens United* that corporations may make unlimited independent expenditures and electioneering communications using corporate treasury funds. *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010). Shortly after the *Citizens United* decision, the U.S. Court of Appeals for the District of Columbia Circuit held that the Act's contribution limits are unconstitutional as applied to individuals' contributions to political committees that make only independent expenditures. *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Consistent with the *Citizens United* and *SpeechNow* opinions, the Commission concluded in Advisory Opinion 2010-11 (Commonsense Ten) that IEOPCs may solicit and accept unlimited contributions from corporations, labor organizations, political committees and individuals, but must follow the Act's registration and reporting requirements.

In accordance with AO 2010-11 (Commonsense Ten), Majority PAC, formerly known as Commonsense Ten, and House Majority PAC (the Committees) registered with the Commission as IEOPCs.

The Committees asked the Commission whether federal officeholders, candidates and officers of national party committees may solicit unlimited contributions from individuals, corporations and labor organizations on the Committees' behalf. The Committees also asked if federal officeholders and candidates, and officers of national party committees, may participate in fundraisers at which unlimited individual, corporate and labor organization contributions will be solicited.

### Analysis

The Commission found that federal officeholders, candidates and officers of national party committees may not solicit unlimited contributions from individuals, corporations or labor organizations on the Committees' behalf.

The Commission noted that Section 441i limits federal officeholders and candidates to soliciting funds for a federal election within the Act's limitations and prohibitions. 2 U.S.C. §441i(e)(1)(A). Section 441i also prohibits national party committees and their officers from soliciting funds that are outside the Act's limitations and prohibitions. 2 U.S.C. §441i(a)(1). Since neither *Citizens United* nor *SpeechNow* disturbed Section 441i, federal candidates, officeholders and national party committee officers are prohibited from raising funds that are outside the limitations and prohibitions of the Act for IEOPCs.

Additionally, the Act limits contributions by any person to any other political committee to \$5,000 per calendar year. 2 U.S.C. §441a(a)(1)(C). Therefore, federal candidates, officeholders and national party committee officers are limited to soliciting \$5,000 per year for any political committee that is neither an authorized committee nor party committee.

Finally, the Commission noted that federal candidates, officeholders and national party committee officers cannot solicit contributions from sources prohibited by the Act from making contributions, including corporations, labor organizations, federal government contractors, national banks and foreign nationals. 2 U.S.C. §§441b(a), 441c and 441e.

Thus, federal officeholders and candidates, and officers of national

party committees, may only solicit up to \$5,000 from individuals and federal political action committees on behalf of an IEOPC.

Regarding the Committees' second question, the Commission found that federal officeholders and candidates and officers of national party committees, may attend, speak at or be featured guests at fundraisers for the Committees, at which unlimited individual, corporate and labor organization contributions will be solicited, so long as the officeholders, candidates and officers of national party committees restrict any solicitations they make to funds subject to limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64(b).

The Commission enacted new rules in April 2010 that allow federal candidates or officeholders to attend, speak at or be a featured guest at such a fundraising event. The new rules do not allow a federal candidate to solicit any funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64 (b). Rather a federal candidate or officeholder who solicits at such an event must limit any solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 11 CFR 300.64(b)

Date Issued: June 30, 2011;

Length: 5 pages.

—Stephanie Caccamo

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### Advisory Opinion Requests

#### AOR 2011-13

Disclaimers for Internet solicitations, including on mobile Internet devices (Democratic Senatorial Campaign Committee, May 27, 2011)

#### AOR 2011-14

SSF communications to the general public that ask individuals to contribute directly to particular federal candidates (Utah Bankers Association, June 8, 2011)

#### AOR 2011-15

Applicability of FECA and availability of Presidential matching funds for naturalized citizen (Abdul Hassan, July 5, 2011)

## Reports

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filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines.

#### Timely Filing for Paper Filers

*Registered and Certified Mail.*

Reports sent by registered or certified mail must be postmarked on or before the mailing deadline to be considered timely filed. A committee sending its reports by registered or certified mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

*Overnight Mail.* Reports filed via overnight mail<sup>1</sup> will be considered

<sup>1</sup> "Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system.

## New York 9th District Special Election Reporting

### Political Committees Involved in the Special General (09/13/11) Must File:

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
Pre-General	August 24	August 29	September 1
Post-General	October 3	October 13	October 13
October Quarterly		—WAIVED—	
Year-End	December 31	January 31, 2012	January 31, 2012

<sup>1</sup> This date indicates the end of a reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered.

timely filed if the report is received by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

*Other Means of Filing.* Reports sent by other means—including first class mail and courier—must be received by the FEC before the Commission's close of business on the filing deadline. 11 CFR 100.19 and 104.5(e).

Forms are available for downloading and printing at the FEC's website (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413).

#### 48-Hour Contribution Notices

Note that 48-hour notices are required of the participating candidate's principal campaign committee if it receives any contribution of \$1,000 or more per source between August 25 and September 10, 2011.

#### 24- and 48-Hour Reports of Independent Expenditures

Political committees and other persons must file 24-hour reports of independent expenditures that aggregate at or above \$1,000 between August 25 and September 11, 2011. This requirement is in addition to that of filing 48-hour reports of independent expenditures that aggregate \$10,000 or more during the calendar year up to and including the 20<sup>th</sup> day before an election.

#### Electioneering Communications

The 60-day electioneering communications period in connection with the Special General Election runs from July 15 through September 13, 2011.

#### Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and leadership PACs that are otherwise required to file reports in connection with the special election must simultaneously

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file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of \$16,200 during the special election reporting period (see reporting schedule chart on page 5). 11 CFR 104.22(a)(5)(v). For more information on these requirements, see the March 2009 Record.

—Elizabeth Kurland

## Outreach

### Candidate/Party/PAC Conference in Minneapolis

The Commission will hold a regional conference in Minneapolis, Minnesota, on September 7-8, 2011. Commissioners and staff will conduct a variety of technical workshops on the federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. To view the conference agenda or to register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2011/minneapolis.shtml>.

**Hotel Information.** The conference will be held at the Radisson Plaza Hotel, in the heart of downtown Minneapolis. Attendees are responsible for making their own hotel reservations. To make your hotel reservations call 1-800-333-3333 and identify yourself as attending the Federal Election Commission conference. (Alternatively, click the link on the FEC's conference website.) The FEC recommends waiting to make hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

### The FEC Record: Monthly Newsletter Becomes Online News Site

Effective immediately, we are converting the *FEC Record* from a monthly newsletter into a continuously updated news site, offering readers more timely and convenient access to campaign finance information. Articles will be posted as regulations are approved, advisory opinions are issued and court cases are decided. The articles themselves will include links that point to source documents and other related resources.

The new *Record* will also be easier to search and navigate than the old PDF version. The latest headlines will appear on the main page (<http://www.fec.gov/pages/fecrecord/fecrecord.shtml>), with links to the individual articles and to categories of articles, such as advisory opinions or court cases. Readers can sign-up to receive convenient e-mail updates any time a new article appears on the main page and/or within a particular category or categories.

Even as we implement these changes, we have not forgotten those who may prefer a monthly newsletter. At the beginning of each month, we will post a print-friendly compilation of all articles that appeared during the previous month. We will notify all registered committees and other *Record* subscribers via e-mail when the monthly compilation is available.

Additionally, as a service to readers who cannot access the *Record* on-line, we will offer copies of the monthly compilations through our automated fax system, Faxline, and will print and mail paper copies upon request. For more information, please contact the Information Division at 800/424-9530 or 202-694-1100 or email [info@fec.gov](mailto:info@fec.gov).

**Registration Information.** The registration fee is \$525 per attendee, which includes a \$25 nonrefundable transaction fee. Complete registration information is available online at <http://www.fec.gov/info/conferences/2011/minneapolis.shtml>.

#### FEC Conference Questions

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; email: [rosalyn@sylvestermanagement.com](mailto:rosalyn@sylvestermanagement.com)). For questions about the conferences and workshops, call the FEC's Information Division at 1-800/424-1100, or send an email to [Conferences@fec.gov](mailto:Conferences@fec.gov).

—Kathy Carothers

### 2011 Conference Schedule

#### Regional Conference for Campaigns, PACs and Party Committees

Radisson Plaza Hotel  
Minneapolis, MN  
September 7-8, 2011

#### Regional Conference for Campaigns, PACs and Party Committees

Omni San Diego Hotel  
San Diego, CA  
October 25-26, 2011

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