

Record

July 2011

Federal Election Commission

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Reports

July Reporting Reminder

The following reports are due in July:

- All principal campaign committees of House and Senate candidates must file a quarterly report by July 15, 2011. The report covers financial activity from April 1 (or the day after the closing date of the last report) through June 30;
- Principal campaign committees of Presidential candidates must file a report by July 15, if they are quarterly filers (the report covers financial activity from April 1 through June 30), or by July 20, if they are monthly filers (the report covers activity for the month of June); and
- National party committees, political action 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 July 20. This report covers activity for the month of June. Other PACs and party committees must file a Mid-Year Report by July 31 (the report covers financial activity from January 1 through June 30).

Court Cases

Carey v. FEC

On June 14, 2011, the U.S. District Court for the District of Columbia granted a limited preliminary injunction to Plaintiffs Rear Adm. (Ret.) James J. Carey, Kelly S. Eustis and the National Defense Political Action Committee (NDPAC) (collectively, "Plaintiffs") enjoining the Commission from enforcing certain provisions of the Federal Election Campaign Act (the Act) which limit the amount of contributions individuals may make and that NDPAC may accept into a separate bank account for the purpose of making independent expenditures.

Federal Election Campaign Law

The Act imposes contribution limits on the sources and amounts of contributions that may be made by individuals and groups to federal candidates, political party committees and political action committees (PACs). Currently, the Act limits contributions from individuals to PACs to \$5,000 per calendar year. 2 U.S.C. §441a(a)(1)(C). Additionally, the Act limits the total amount of contributions that an individual may make to all committees during a two-year period, beginning on January 1 of an odd-numbered year and ending on December 31 of the

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Reports

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Notification of Filing Deadlines

In addition to publishing this article, the Commission notifies committees of filing deadlines on its website, via its automated Faxline and through reporting reminders called prior notices. Prior notices are distributed exclusively by e-mail. For that reason, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address.

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

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

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To amend Form 1, electronic filers must submit Form 1 filled out in its entirety. Paper filers should include only the committee's name, address, FEC identification number and the updated or changed portions of the form.

Treasurer's Responsibilities

The Commission provides reminders of upcoming filing dates as a courtesy to help committees comply with the filing deadlines set forth in the Federal Election Campaign Act and Commission regulations. Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline. Accordingly, reports filed by methods other than Registered, Certified or Overnight Mail (see below), or electronically, must be received by the Commission's (or the Secretary of the Senate Public Records Office's) close of business on the last business day before the deadline.

Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures, in excess of \$50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC electronically.¹ 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

¹ The regulation covers individuals and organizations required to file reports of contributions and/or expenditures with the Commission, including any person making an independent expenditure. Disbursements for "electioneering communications" do not count toward the \$50,000 threshold for mandatory electronic filing. 11 CFR 104.18(a).

submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines. 11 CFR 104.18(e).

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

On April 5, the Commission released a new version of the Commission's free electronic filing software, FECFile, which is available for download from the FEC website at <http://www.fec.gov/electfil/updates.html>. Current FECFile users need only open their software and accept the automatic update to Format Version 7. Reports filed in previous formats will not be accepted. 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 website. Committees using commercial software should contact their vendors for more information about the Commission's latest software release.

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 Certified or Registered 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. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e) and 100.19.

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Reports

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Overnight Mail. Reports filed via overnight mail² will be considered 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. See 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e), 100.19 and 111.35(b).

Other Means of Filing. Reports sent by other means—including first class mail and courier—must be received by the FEC (or the Secretary of the Senate Public Records Office) before close of business on the filing deadline. See 11 CFR 100.19 and 104.5(e).

Paper forms are available for downloading 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). The 2011 Reporting Schedule is also available on the FEC's website (http://www.fec.gov/info/report_dates_2011.shtml), and from Faxline. For more information on reporting, call the FEC at 800/424-9530 or 202/694-1100.

Presidential Campaign Committees

The Commission recently updated the disclosure form used by Presidential candidates—FEC Form 3P—to make it more consistent with the disclosure forms used by other candidates, party committees and political action committees. Specifically, the Commission added to the Detailed Summary Page lines 17(a)(i) and (ii) for itemized and unitemized contributions from individuals

²“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 online tracking system.

and persons other than political committees. Presidential candidates must use the revised form for all reports due on or after April 15, 2011. Paper filers may download the updated Form 3P from the FEC's website at <http://www.fec.gov/info/forms.shtml#candidates>.

State, District and Local Party Committees

State, district and local party committees that engage in certain levels of “federal election activity” must file on a monthly schedule. See 11 CFR 300.36(b) and (c)(1). Committees that do not engage in reportable “federal election activity” may file on a semi-annual basis in 2011. See 11 CFR 104.5(c)(2)(i).

National Party Committees

National committees of political parties must file on a monthly schedule in all years. 2 U.S.C. §434(a)(4)(B) and 11 CFR 104.5(c).

Political Action Committees

PACs (separate segregated funds and nonconnected committees) that filed on a quarterly basis in 2010 file on a semi-annual basis in 2011. 11 CFR 104.5(c)(2). Monthly filers continue on the monthly schedule. PACs may change their filing schedule, but must first notify the Commission in writing. Electronic filers must file this request electronically. A committee may change its filing frequency only once a year, after giving notice of change in filing frequency to the Commission. The committee will receive a letter indicating the Commission's acknowledgment of the request. All future reports must follow the new filing frequency. 11 CFR 104.5(c).

Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and leadership PACs may need to file FEC Form 3L in July if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant

PACs that aggregate in excess of \$16,200 during the applicable covered period. 11 CFR 104.22(a)(5)(v). See the January 2011 *Record*, page 9, for more information.

Additional Information

For more information on 2011 reporting dates:

- See the reporting tables in the January 2011 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_2011.shtml to view the reporting tables online.

—Elizabeth Kurland

2011 Combined Federal/State Disclosure Directory Now Available

The 2011 edition of the *Combined Federal/State Disclosure and Election Directory* is now available on the Commission's website (www.fec.gov). This directory identifies the federal and state agencies responsible for the disclosure of campaign finances, lobbying, personal finances, public financing, candidates on the ballot, election results, spending on state initiatives and other financial filings.

The Directory is available at <http://www.fec.gov/pubrec/cfsddd/cfsddd.shtml>. Printed editions of the Directory are also available. To order a copy, please contact the FEC's Public Disclosure Division at 800/424-9530 or 202/694-1120.

Court Cases

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next even-numbered year. 2 U.S.C. §441a(a)(3).

Recent Supreme Court and D.C. Circuit Court cases have partially invalidated certain provisions of the Act with respect to the limits placed on contributions made to pay for independent expenditures. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *SpeechNow.org v. FEC*, 599 F. 3d. 686 (D.C. Cir. 2010). The Act defines an independent expenditure as an expenditure for a communication by a person “expressly advocating the election or defeat of a clearly identified [federal] candidate” and that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s campaign committee, or their agents, or a political party committee or its agents. 2 U.S.C. §431(17). These courts have found that limits on contributions used for independent expenditures are unconstitutional because limiting them violates the First Amendment rights of prospective contributors and recipients.

Background

Admiral Carey is the founder and treasurer of NDPAC, which raises funds pursuant to the Act’s amount and source limitations and makes contributions to candidates for federal office up to the applicable limit and also plans to make independent expenditures in support of or in opposition to federal candidates. Plaintiff Kelly S. Eustis is a potential contributor to NDPAC who would like to contribute more than the amount currently allowed toward NDPAC’s planned independent expenditures in federal campaigns.

NDPAC requested an advisory opinion from the Commission in August, 2010, asking whether it would be lawful for NDPAC to accept unlimited contributions for the purpose of making independent expenditures into a bank account that

was separated from funds it used to make campaign contributions. The Commission failed to issue a binding advisory opinion by the required four affirmative votes. On January 31, 2011, the Plaintiffs filed a complaint and motion for preliminary injunction in the District Court for the District of Columbia, seeking to enjoin the Commission from enforcing 2 U.S.C. §§441(a)(1)(C) and 441a(a)(3) against the Plaintiffs should NDPAC and Admiral Carey solicit and receive contributions in excess of the Act’s limits and/or should Mr. Eustis contribute more than currently allowed.

Legal Analysis

The District Court held that the Plaintiffs have a high likelihood of partial success on the merits of their complaint. The District Court reasoned that since laws that burden political speech are subject to “strict scrutiny,” the Government must prove that restrictions further a compelling interest and are narrowly tailored to achieve that interest. The court held that the Government did not meet this burden because it did not adequately explain why NDPAC’s proposed separation of accounts does not satisfy the same objective as separate political action committees. The court also held that NDPAC’s proposal would comply with the D.C. Circuit Court of Appeals decision in *EMILY’s List v. FEC* (581 F.3d 1 (D.C. Cir. 2009)) by establishing separate accounts to 1) solicit and spend unlimited funds for independent federal expenditures (soft money); and 2) solicit and spend federally permissible funds on direct contributions to federal political candidates and/or political parties (hard money).

The court further held that because the 2012 Presidential election cycle is under way, the Plaintiffs “must be freed immediately from the chill of possible FEC enforcement,” and that prior cases from the D.C. Circuit and Supreme Courts support the Plaintiffs’ position. The court

concluded that the Plaintiffs demonstrate that the Commission’s interference with their First Amendment rights constitutes irreparable harm.

Preliminary Injunction

The District court granted a preliminary injunction to the Plaintiffs that the Commission shall not enforce 2 U.S.C. §§441a(a)(1)(C) and 441a(a)(3) against the Plaintiffs with regard to independent expenditures so long as NDPAC maintains separate bank accounts for its “hard money” and “soft money,” proportionately pays related administrative costs and complies with the applicable “hard money” limits for its PAC account that is used to make contributions directly to federal candidates.

U.S. District Court for the District of Columbia: 1:11-cv-00259-RMC.

—Myles Martin

[The Real Truth About Obama, Inc. v. FEC and U.S. Department of Justice](#)

On June 16, 2011, the U.S. District Court for the Eastern District of Virginia granted summary judgment in favor of the Commission and denied The Real Truth About Obama’s (RTAO’s) motions for preliminary injunction and summary judgment in this case. RTAO challenges the constitutionality of the Commission regulation defining “express advocacy” at 11 CFR 100.22(b) and the Commission’s approach to determining when an organization becomes a “political committee” under the Federal Election Campaign Act (Act).

Background

On July 30, 2008, RTAO sued the Commission and the U.S. Department of Justice, challenging the constitutionality of several FEC regulations, including 11 CFR 100.22(b), as well as the FEC’s approach to determining whether an

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organization qualifies as a “political committee” under the Act (“political committee status”). See 2 U.S.C. §431(4). Along with raising facial challenges to the regulations and political committee status methodology, RTAO challenged the application of the regulations and the methodology to two RTAO radio ads mentioning then-Senator Barack Obama. During the 2008 Presidential campaign, RTAO planned to disburse over \$1,000 to air the two ads, which might have brought RTAO within the statutory definition of “political committee.”

RTAO argued that the Commission’s regulation at 11 CFR 100.22(b), which provides a definition of “expressly advocacating,” was overbroad and vague. RTAO also argued that the Commission’s approach to determining political committee status on a case-by-case basis was overbroad and vague. In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court limited the application of the Act’s political committee provisions to organizations “under the control of a candidate” or “the major purpose of which is the nomination or election of a candidate.” The Commission’s current approach to determining political committee status considers several factors, such as the organization’s level of spending on federal campaigns, public statements and fundraising appeals when determining whether an organization’s “major purpose” is the election or defeat of federal candidates.

The District Court denied RTAO’s motions for preliminary injunctions and issued an opinion on September 24, 2008, and the Fourth Circuit Court of Appeals affirmed that decision. RTAO filed a petition for a *writ of certiorari* with the Supreme Court in December 2009. In January 2010, the Supreme Court held unconstitutional the Act’s restrictions on corporate financing of independent

expenditures and electioneering communications in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). On April 26, 2010, the Supreme Court vacated the Fourth Circuit’s judgment in this case and remanded the case for further consideration in light of the decision in *Citizens United* and the Solicitor General’s suggestion of mootness.

Upon remand, RTAO moved for a preliminary injunction and for summary judgment in its challenges to 11 CFR 100.22(b) and the Commission’s approach to determining political committee status. The Commission and the Department of Justice opposed RTAO’s motions and moved for summary judgment.

District Court Decision

Express Advocacy. The court held that the Commission’s regulation at 11 CFR 100.22(b) defining express advocacy is consistent with the Supreme Court’s opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). In that opinion, the Supreme Court had upheld the constitutionality of the Act’s financing restrictions on electioneering communications as applied to communications that are the “functional equivalent of express advocacy,” which the Court defined as communications that are subject to “no reasonable interpretation” other than as an appeal to vote for or against a candidate. The District Court determined that the regulation at 11 CFR 100.22(b), which requires that “reasonable minds [cannot] differ” about an advertisement’s message, was similar to the standard from *Wisconsin Right to Life*. The District Court further determined that the interpretation of 100.22(b) was not altered by the decision in *Citizens United*, and that had the Commission deemed both RTAO ads to be express advocacy under 100.22(b), that application would not have been unconstitutional.

Political Committee Status. The court denied RTAO’s challenge to the Commission’s approach to de-

termining political committee status. The court stated that the Commission undertakes a “fact-intensive, case-by-case adjudication to determine whether a group’s major purpose” is the election or defeat of federal candidates, including examining whether the group spends money extensively on campaign activities such as canvassing or phone banks. The court noted that the Commission also examines the organization’s public statements, fundraising appeals and personal meetings.

The court agreed with the Commission that determining an organization’s “major purpose” is an “inherently comparative task and requires consideration of the full range of an organization’s activities.” Furthermore, the court held that RTAO had not shown that the Commission’s approach had harmed RTAO’s ability to speak, nor had *Citizens United* altered the constitutionality of the Commission’s approach to political committee status.

The District Court accordingly granted summary judgment in favor of the Commission and the Department of Justice and rejected RTAO’s challenges to both 11 CFR 100.22(b) and the Commission’s approach to determining political committee status.

U.S. District Court for the Eastern District of Virginia: 3:08-cv-00483-JRS.

—Myles Martin

Advisory Opinions

AO 2011-06

Vendor May Collect and Forward Contributions Without Making Impermissible Contribution

A vendor may collect contributions from a group of subscribers and forward them to recipient political committees. The vendor's services in collecting and forwarding these contributions do not amount to impermissible corporate contributions from the vendor. A convenience fee paid by the contributor to the vendor does not constitute a contribution by the contributor to any of the recipient political committees.

Background

Democracy Engine, LLC (the vendor) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. is the connected organization of the separate segregated fund (SSF) Democracy Engine, Inc., PAC (the PAC). Mr. Jonathan Zucker and Mr. Erik Pennebaker are United States citizens who qualify as part of the restricted class of Democracy Engine, Inc., and therefore may be solicited by and contribute to the PAC. The vendor is a for-profit limited liability company offering a web-based payment service that provides "subscribers" with the opportunity to make contributions to federal political committees and donations to non-political entities. Mr. Zucker and Mr. Pennebaker plan to become subscribers and use the vendor's services.

A subscriber wishing to make a contribution using the vendor's service must first go to the vendor's website and choose the intended recipient political committee and the amount of the contribution. If the recipient political committee is not already included in the vendor's directory of potential recipients,

the vendor will add that recipient political committee to its directory. If the recipient political committee is an SSF, the vendor ensures that the subscriber is a member of the restricted class of the SSF's connected organization. The vendor does not solicit contributions for any political committee or other entity, nor does the vendor exercise any direction or control over any subscriber's choice of recipient political committees. If a subscriber designates a political committee as a recipient, the vendor informs the subscriber of the contribution limits established by 11 CFR 110.1. The vendor will not process contributions that the vendor determines or believes will exceed those limits.

The subscriber is required to provide information to the vendor that the recipient political committee must maintain or report, including the subscriber's name, mailing address, employer and occupation. 11 CFR 104.8(a). The vendor will forward this information to the recipient political committee.

The vendor deducts a convenience fee from the subscriber's payment before transmitting the remaining amount to the recipient political committee. The convenience fee covers all of the costs of the financial institutions involved in the credit card transaction and the vendor's costs, and provides a reasonable profit to the vendor. The vendor, and not the recipient political committee, pays the fees and costs to those financial institutions.

The vendor indicates that it will set the convenience fee in a commercially reasonable manner in accordance with market conditions with respect to all recipients, regardless of whether the recipient is a political committee or a non-political entity. This amount will reflect a complete payment of the vendor's costs plus an amount as profit. After the subscriber provides the vendor with the required information, attests to his or her ability to make the contribution

and agrees to the terms of service, the vendor accepts the subscriber's payment by means of credit card, debit card or electronic check. The vendor then deposits the subscriber's contribution, via a vendor merchant account, into a vendor bank account that is completely separate from the vendor's corporate operating funds.

The vendor will transfer the subscriber's funds from its transfer account to the recipient political committee no later than ten days after the subscriber authorizes the contribution to the recipient political committee. The vendor will also forward all the necessary contributor information required for the recipient committees' reports.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations from making a contribution in connection with federal elections. 2 U.S.C. §441b(a); 11 CFR 114.2(b)(1). A "contribution" includes, among other things, the provision of goods or services without charge or at a charge that is less than the usual and normal charge.

In this case, the vendor's services in processing subscribers' contributions to the committee and other recipient political committees would not result in impermissible corporate contributions by the vendor to those political committees because the vendor is not providing services or anything else of value to any recipient political committee.

The payment of the convenience fee will not relieve the PAC or any other recipient political committee of a financial burden that it would otherwise have had to pay for itself. Therefore, a subscriber's payment of the convenience fee would not constitute a contribution

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Advisory Opinions

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by the subscribers to the PAC or any other recipient political committee. Because the subscriber's payment of the convenience fee is not a contribution or any other form of receipt, the convenience fee does not need to be reported to the Commission.

Date Issued: May 26, 2011;

Length: 7 pages.

—Isaac J. Baker

AO 2011-07

Principal Campaign Committee May Pay Certain Campaign Consultant's Legal Fees

A principal campaign committee may use campaign funds to pay a campaign consultant's legal fees and expenses described in the advisory opinion request because the payment is for a lawful purpose that would not constitute personal use.

Background

Chuck Fleischmann is the U.S. Representative from the Third District of Tennessee. Chuck Fleischmann for Congress, Inc. (the Committee) is Representative Fleischmann's principal campaign committee. In the 2010 primary election, Representative Fleischmann won the Republican Party nomination for the Third District of Tennessee over his opponent, Robin Smith.

During the 2010 campaign, John Saltsman, Jr. was a consultant employed by S&S Strategies LLC. Through S&S Strategies LLC, Mr. Saltsman provided campaign advice to then-candidate Fleischmann. Mr. Saltsman has been sued by Mark Winslow, a former campaign staffer for then-candidate Robin Smith, for tortious interference with a contractual relationship and defamation. Mr. Winslow's complaint alleges that Mr. Saltsman helped create attack ads directed at Ms. Smith

and "improperly obtained" and disseminated to the press a confidential employment agreement between Mr. Winslow and his former employer, the Tennessee Republican Party. The complaint also alleges that then-candidate Fleishmann used the employment agreement to attack then-candidate Smith and that Mr. Saltsman made defamatory statements about Mr. Winslow. The complaint alleges Ms. Smith was defeated in large part due to Mr. Saltsman's actions.

The Committee has asked the Commission if it may use campaign funds to pay Mr. Saltsman's legal fees and expenses that arise from the Mr. Winslow's civil suit.

Analysis

The Federal Election Campaign Act (the Act) identifies six categories of permissible uses of campaign funds, including: (1) payments for expenses in connection with the candidate's campaign for federal office; (2) payments for ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder; and (3) for any other lawful purpose not prohibited by 2 U.S.C. §439a(b), 2 U.S.C. §439a(a); 11 CFR 113.2(a)-(e). However, campaign funds may not be converted to "personal use." 2 U.S.C. §439a(b)(1); 11 CFR 113.2(e). Personal use is any use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2). The Act and Commission regulations provide a non-exhaustive list of items that would constitute personal use. See 11 CFR 113.1(g)(1)(i)(A-J). For items not on this list, the Commission determines on a case-by-case basis whether the expense is personal use. Commission regulations specifically provide that "legal expenses" are subject to a case-by-case determination. 11 CFR 113.1(g)(1)(ii)(A).

The Commission noted that in previous advisory opinions, it has concluded that the use of campaign funds for legal expenses did not constitute personal use when the legal proceedings involved allegations directly related to the candidate's campaign or duties as a federal officeholder. See, e.g., AO 2009-20, 2009-10, 2008-07, 2006-35, 2005-11 and 2003-17. The Commission specifically cited to 2009-20, where it approved the use of campaign funds for legal fees of persons other than the candidate. In that case, Representative Visclosky's current and former congressional staff members received, or were expecting to receive, grand jury subpoenas related to a federal investigation of Representative Visclosky. The Commission concluded that the staffers' legal expenses would not exist irrespective of the Congressman's campaign or duties as a federal of-

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Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site (www.fec.gov).

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

Advisory Opinions

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ficemaker and could be paid using campaign funds.

In distinguishing the facts in AO 2009-20 from the facts here, the Commission pointed out that in 2009-20, although approving the use of campaign funds for the legal fees of persons other than the Congressman, the Congressman's alleged activity was the subject of the federal investigation. In this case, the basis of the lawsuit is the alleged activity of Mr. Saltsman, not Representative Fleishmann. Nonetheless, the Commission concluded that the legal fees and expenses involve allegations directly relating to campaign activities engaged in by Mr. Saltsman in his role as a campaign consultant for Representative Fleischmann's campaign. As a result, the lawsuit against Mr. Saltsman would not exist irrespective of Representative Fleischmann's campaign.

The Commission concluded that, to the extent that the legal proceedings derive from allegations directly relating to campaign activity, the Committee may use campaign funds to pay the campaign consultant's legal fees and expenses.

Date Issued: May 26, 2011;

Length: 7 pages

—Zainab Smith

AO 2011-08

Trade Association Members May Be Solicited for PAC Contributions

The American Society of Anesthesiologists (ASA), an incorporated nonprofit medical society, qualifies as a "membership organization" and may solicit certain categories of its members for contributions to its separate segregated fund (SSF).

Background

ASA serves as the connected organization for the American Society of Anesthesiologists Political Action Committee (ASAPAC). ASA's membership consists of some 45,000 physicians and other professionals who engage in or are interested in the medical practice of anesthesiology.

ASA has eight categories of membership, and its bylaws expressly lay out qualifications and requirements for each type of membership. When an individual accepts ASA's request for membership, ASA responds by sending written confirmation of membership and a membership card and lists the new member on the "members only" section of ASA's website.

ASA seeks to solicit contributions from two classes of members, Life Members and Retired Members, for contributions to ASAPAC. Life Members are past presidents of ASA. They have the right to vote for ASA's delegates and directors and serve as members of the House of Delegates, ASA's highest governing body. Retired Members consist of several classes: individuals who have been active or affiliate members of ASA for 20 years or more and who have retired from practice; individuals who have been active or affiliate members for 20 years or more and have reached the age of 70; or individuals who are active members and who are disabled and therefore unable to practice for one year or more. Unlike Life Members, Retired Members do not have a vote in ASA.

Neither Life Members nor Retired Members are required to pay dues, but they must confirm their ASA membership annually. All members are subject to the same sanctions and disciplinary procedures.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations define a restricted class of persons who can be solicited by SSFs such as ASAPAC. 2 U.S.C. §441b(b)(4). The solicitable class of an incorporated membership organization includes its "members," its executive and administrative personnel and their families.

In determining whether Life Members and Retired Members qualify as "members" for solicitation purposes, the Commission first determined that ASA qualifies as a "membership organization." The Commission defines a "membership organization" as a trade association, cooperative or corporation without capital stock that:

- Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws or other formal organization documents;
- Expressly states in these organizational documents the qualifications and requirements for membership;
- Makes these formal organizational documents available to its members upon request;
- Expressly solicits persons to become members;
- Expressly acknowledges acceptance of membership; and
- Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual for federal office.

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Advisory Opinions

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ASA meets all of these criteria, and therefore qualifies as a membership organization within the meaning of 11 CFR 100.134 and 114.1(e).

The Commission also determined that both Life Members and Retired Members meet the Commission's definition of "members" and may, therefore, be solicited by ASA for contributions to ASAPAC.

Commission regulations define a member as a person who satisfies the requirements for membership in a membership organization, affirmatively accepts the membership's invitation to become a member and has significant financial attachment to the membership organization, pays membership dues or has significant organizational attachment to the membership organization. Factors indicating significant organizational attachment include affirmation of membership on at least an annual basis, direct participatory rights in the governance of the organization, the right to vote on policy questions and the right to approve the organization's budget.

Life Members have the right to vote in ASA's elections for the House of Delegates, the ASA's highest governing body. Life Members qualify as members under Commission regulations because they currently satisfy the requirements for membership, affirmatively accept membership in ASA and have a significant organizational attachment to ASA.

Retired Members satisfy ASA's membership requirements and annually accept the invitation to maintain membership. But, unlike Life Members, they do not have the right to vote in elections for the ASA House of Delegates. As such,

Retired Members do not have the same type of organizational attachment as do Life Members. However, the Commission may determine on a case-by-case basis whether persons qualify as members on the basis that they have a relatively enduring and independently significant financial or organization attachment to the organization. 11 CFR 100.134(g) and 114.1(e)(3).

Two types of Retired Members have similar requirements: a person must have paid dues for at least 20 years and must either be retired from anesthesiology or have reached the age of 70. Because these types of members are long-term dues-paying members, the Commission determined they qualify as "members" and may be solicited for contributions to ASAPAC. The third type of Retired Members consists of active members who are disabled and therefore are unable to engage in the practice of anesthesiology for one year or more. Once they become Retired Members they no longer pay dues and no longer have the right to vote in ASA elections as Active Members. In AO 2008-21 (CME Group, Inc.) the Commission determined that when a member of the Chicago Board of Trade (CBOT) temporarily transferred a seat on CBOT, that individual still remained a solicitable "member" under Commission regulations. The Commission stated that, "while they do not exercise most of the prerogatives of membership... they have reversionary interests in the membership and may reacquire those prerogatives," and that this demonstrated a relatively enduring and independently significant financial attachment. Also, these third types of Retired Members maintain the same member benefit resources as active members and are also subject to sanction by the ASA, even while they are retired.

Taking these factors into consideration, the Commission determined that these Retired Members also have an enduring and independently significant organization attachment to ASA. Therefore, Retired Members also qualify as "members" and may be solicited for contributions to ASAPAC.

Date Issued: June 15, 2011;

Length: 7 pages.

—Isaac J. Baker

AO 2011-10

Partnerships May Deduct PAC Contributions from Sales Contracts

A family of partnerships may make preauthorized deductions from amounts due on sales contracts for contributions to a nonconnected committee.

Background

POET, LLC is a single-member, limited liability company that has elected not to be treated as a corporation for income tax purposes. POET PAC is registered with the Commission as a nonconnected, multicandidate committee.

The POET family of companies includes 27 POET plants that produce and refine ethanol. To produce ethanol, the POET plants purchase corn from corn farmers, the vast majority of whom are individuals, partnerships or limited liability companies electing partnership treatment for tax purposes. The sales are conducted pursuant to sales contracts between the corn farmers and the POET plants.

POET, LLC, POET PAC and Sioux River Ethanol, LLC d/b/a POET Biorefining-Hudson want to establish the POET PAC Cultivator Club (the "program") to make it

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easier for corn farmers to contribute to POET PAC.¹ Under the program, the participating POET plants would solicit contributions to POET PAC from the corn farmers with whom they do business. The corn farmers may opt to have the participating POET plants deduct a portion of the money owed to them for their corn, and the participating POET plants would transfer the deducted amounts to POET PAC each week. A corn farmer wishing to participate in the program would check a box on the farmer's corn sales contract, thereby authorizing the participating POET plant to make deductions for contribution purposes. A farmer could modify or revoke the authorization at any time by notifying the participating POET plant in writing and via the POET companies' website. The authorization would not carry over from contract to contract, but a farmer wishing to continue to participate in the program after his or her contract expires would have to affirmatively elect to do so on the new sales contract.

Under the proposal, the POET PAC solicitation and check-off box would be preprinted on each corn sales contract, while the necessary disclaimers, statement of political purpose and best efforts statement would appear with the Terms and Conditions. The Terms and Conditions would also state that con-

¹ Under the program, only corn farmers that are individuals, partnerships, or limited liability companies electing to be treated as partnerships for tax purposes could make contributions to POET PAC. Only the 24 POET plants that are limited liability companies treated as partnerships and the single POET plant that is a limited liability partnership will participate in the Cultivator Club. The remaining two POET plants, one of which is a corporation and the other of which is treated as such for tax purposes, will not participate.

tributions from foreign nationals, federal government contractors and corporations are prohibited. POET, LLC, POET PAC and Sioux River Ethanol, LLC would implement compliance safeguards to ensure that POET PAC does not accept any excessive contributions or contributions from prohibited sources, and POET PAC would retain all necessary records and would report all contributions received on its reports filed with the Commission. All required disclaimers and "best efforts" information would be placed on a single double-sided document that includes the contract on one side and the Terms and Conditions on the other side. Finally, POET PAC proposes to compensate the participating POET plants for the services that they provide in soliciting, deducting and transmitting contributions by paying the usual and normal charge for these services to the participating POET plants in advance every month. The payments would be based on estimates of staff compensation and the time involved in administering the fundraising program.

Analysis

The Commission determined that the planned Cultivator Club program is permissible and similar to other programs previously approved by the Commission. See AOs 1982-63 and 2005-20. In this case, the solicitation, deduction and transmittal of contributions to POET PAC would constitute the provision of services and could be considered in-kind contributions by the participating POET plants to POET PAC. 2 U.S.C. §431(8)(A)(i) and 11 CFR 100.52(a) and (d)(1) and (2). However, the participating POET plants are all either partnerships or LLCs that have elected treatment as partnerships for tax purposes and are, thus, treated as partnerships under the Act and Commission regulations as well. See 11 CFR 110.1(g)(2). As such, they may make contributions of up to \$5,000 per calendar year to nonconnected

multicandidate political committees. 2 U.S.C. §441a(a)(1)(C); 11 CFR 110.1(d).

In this case, however, POET PAC indicates it will pay in advance for the services furnished by the participating POET plants. Thus, the Commission concluded that no contribution would result if POET PAC pays in advance the usual and normal charge for the participating POET plants' services in soliciting and processing contributions made by corn farmers. See AO 2005-20.

The Commission also determined that POET PAC may include required disclaimers on a separate Terms and Conditions page rather than on the page with the actual

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Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1985 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 1985. 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.

You will need Adobe® Acrobat® Reader software to view the publication. The FEC's web site has a link that will take you to Adobe's web site, where you can download the latest version of the software for free.

Advisory Opinions

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check-off box for the POET PAC Cultivator Club. See 2 U.S.C. §441d(a); 11 CFR 110.11(a)(3); 11 CFR 100.26; 11 CFR 100.27. Under Commission regulations, every disclaimer “must be presented in a clear and conspicuous manner.” 11 CFR 110.11(c)(1). Disclaimers on printed communications must be of sufficient type size to be clearly readable, must have a reasonable degree of color contrast between text and background and must be contained in a box set apart from the rest of the communication. 2 U.S.C. §441d(c); 11 CFR 110.11(c)(2)(i)-(iii). A communication that would require a disclaimer if distributed separately must contain the required disclaimers if it is included in a package. 11 CFR 110.11(c)(2)(v). However, a disclaimer need not appear on the front cover of a communication with multiple pages. 11 CFR 110.11(c)(2)(iv). Political committees are also required to make their “best efforts” to gather information about contributors and to include in solicitations “a clear request” for the required identifying information from the contributor. 11 CFR 104.7(b)(1)(i).

Here, POET PAC proposes to place all required disclaimers and “best efforts” information on a single double-sided document that includes the contract on one side and the Terms and Conditions on the other side. The disclaimer would be set apart in a box and it would be printed in the same font size as other material on the rest of the page. The Commission concluded that this proposal would satisfy the disclaimer requirement because the disclaimers and the solicitation and check-off will be distributed as a single document.

Finally, the Commission allowed POET PAC to perform a quarterly reconciliation of the actual staff time spent administering the POET PAC Cultivator Club by participating POET plants and POET, LLC employees to the amounts paid in advance by POET PAC. POET PAC plans to provide advance payment to the participating POET plants based on an initial estimate of plant employee time to be spent soliciting and processing contributions in connection with the POET PAC Cultivator Club. It would then adjust these payments each calendar quarter to reflect the actual time spent.

If POET PAC’s initial advance payment to the participating POET plant underestimates the amount due to the participating POET plant for the staff time actually expended, the resulting difference would be considered an advance or an extension of credit by the participating POET plant to POET PAC, and therefore a contribution, until it is repaid. 2 U.S.C. §431(8)(A)(i), 11 CFR 100.52(a). As such, it would be subject to contribution limits. See 11 CFR 110.1(e). The Commission instructed POET PAC to report each advance payment to a participating POET plant on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the expense is an advance payment for solicitation and contribution processing services to be provided by the participating POET plant. If POET PAC later determines that its advance payment to a participating POET plant was less than the amount actually due for services rendered, then POET PAC must report the difference between the two amounts as a debt owed to the participating POET plant on Schedule D until the difference is paid in full. See 11 CFR 104.11. When POET PAC pays the amount owed to a participating POET plant for services rendered, it must report the payment on Schedule B, Line 21(b), as an operating expense, with

a memo text explaining that the amount is an additional payment for services rendered and the date(s) that the services were rendered, and identifying the report in which the advance payment was reported.

Date: June 16, 2011;

Length: 9 pages.

—Zainab Smith

Alternative Disposition of Advisory Opinion Request

AOR 2011-09

On June 15, 2011, the Commission considered, but could not approve by the required four votes, an advisory opinion request on behalf of Facebook regarding the disclaimer requirement with respect to small character-limited ads.

Thus, the Commission was unable to render an opinion in this matter and concluded its consideration of the request.

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)

Commission

Agency Procedure for Document and Information Disclosure During Enforcement

On June 15, 2011, the Commission published a notice in the *Federal Register* of its new procedures for providing respondents in enforcement proceedings with relevant documents obtained by the Commission as part of its investigation.

The Commission believes that the principles of the due process clause set forth in *Brady v. Maryland* (373 U.S. 83) should apply following investigations conducted under 2 U.S.C. §437g and 11 CFR Part 111. These principles hold that the government is required to provide defendants with exculpatory or potentially exculpatory evidence that is “material to guilt or punishment.” Although courts have held that *Brady* does not apply in administrative proceedings, the Commission’s enforcement proceedings may occasionally inform potential or concurrent criminal proceedings, and therefore the Commission is adopting a formal internal procedure requiring disclosure of information to respondents.

The Commission also believes that formalizing the procedure will promote fairness in the enforcement process, promote administrative efficiency and certainty and contribute to the Commission’s goal of fair and open investigations.

Procedure

The Commission will make available to the respondent all relevant documents gathered by the Office of General Counsel (OGC) during the course of its investigation, including all documents not publicly available and any documents containing exculpatory information—in other words, information that is likely to

prove that a respondent is free from blame. The documents covered by this procedure include:

- Documents turned over in response to any subpoena or other request, written or otherwise, which are not already in the possession of the respondent;
- All deposition transcripts and exhibits; and
- Any other documents gathered by the Commission which are not publicly available and not otherwise in the respondent’s possession.

Unless otherwise determined by the Commission, OGC may withhold a document or a category of documents from a respondent if it contains privileged information or if OGC finds that it is not relevant to the subject of the proceeding. OGC may also withhold documents if the Commission is prevented by law or regulation from disclosing the information in the documents, or if a document contains some information that cannot be disclosed and the information cannot be removed from the document without changing its meaning. Finally, OGC may withhold a document or a category of documents (along with any information derived from the documents) if the Commission obtained the information from the Department of Justice or another government entity and a written agreement prevents its disclosure.

OGC will disclose the documents and information if the respondent files a written request within 15 days of either the date of the General Counsel’s notification of a recommendation to proceed to a vote on probable cause, or no later than seven days after the certification of a vote by the Commission to conciliate with a respondent. Within ten business days of receiving these disclosed documents, a respondent may request in writing that OGC produce a list of documents or categories of documents withheld.

Co-Respondents and Disclosure

In some cases there may be more than one respondent under investigation in the same or a related matter. In these cases, OGC must get a confidentiality waiver from the co-respondent before disclosing documents that are about the co-respondent or were provided by the co-respondent. Additionally, the respondent receiving these documents may be required to sign a nondisclosure agreement to keep confidential any document or information it obtains from the Commission. If the co-respondent does not agree to provide a confidentiality waiver, OGC will (if possible) summarize or redact those portions of the document subject to confidentiality. If this is not possible, OGC will ask the Commission to balance competing concerns of disclosure and confidentiality. If the confidentiality issue cannot be resolved with respect to a co-respondent, then OGC may try to segregate the matters under review.

In some cases information provided by one co-respondent may contain exculpatory information or be relevant to the General Counsel’s brief accompanying the notice of a recommendation to vote on probable cause for another co-respondent. In these cases, that information will be provided to the other co-respondent, subject to the same confidentiality concerns described above.

Before disclosing any portion of a document that raises an unresolved confidentiality issue, OGC will ask the Commission to decide whether disclosure of a document containing exculpatory information conforms to the confidentiality provisions of 2 U.S.C. §§437g(a)(4)(B)(i) and 437g(a)(12).

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Commission

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Conciliation and Document Production

If the Commission votes to enter into conciliation prior to completing an investigation, the General Counsel will take reasonable steps to limit further formal investigation related to that respondent, as long as the respondent agrees to toll the applicable statute of limitation. Without a tolling agreement, the formal investigation and conciliation may take place simultaneously. If the Commission receives documents during conciliation, the General Counsel will inform the respondent of any documents that it would otherwise be required to be produced under this procedure.

Conclusion

No later than June 1 of each year, the General Counsel will prepare and distribute to the Commission a report describing the application of this procedure over the previous year. Failure to adhere to this procedure does not create a jurisdictional

bar for the Commission to pursue all remedies to correct or prevent a violation of the Act. Disclosure of documents under the provisions of this procedure is not an admission by the Commission that the information takes away the respondent's liability for potential violations of the Act. The Commission retains discretion in its enforcement program and will exercise it as appropriate with respect to facts and circumstances of each matter it considers.

—*Christopher Berg*

Outreach

FEC to Host Reporting and E-Filing Workshops in July

On July 13, 2011, the Commission will host roundtable workshops on reporting and electronic filing. The reporting sessions will address common filing problems and provide answers to questions committees may have as they prepare to file their July Quarterly, Monthly or Mid-Year reports. The electronic filing sessions will provide hands-on instruction for committees that use the Commission's FECFile software and will address questions filers may have concerning electronic filing. All attendees will have an opportunity to meet the Campaign Finance Analyst who reviews their reports. Attendance is limited to 50 people per reporting workshop and 16 people per electronic filing workshop; the registration fee is \$25 per workshop. The registration form is available on the FEC's website at <http://www.fec.gov/info/outreach.shtml#roundtables>. For more information, please call the Information Division at 800/424-9530, or locally at 202/694-1100.

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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Roundtable Schedule

Reporting Roundtables
FEC Headquarters
Washington, DC
July 13, 2011

Reporting for PACs and Party Committees

9:30 a.m.-11:00 a.m.

FECFile and E-Filing for Candidate Committees

9:30 a.m.-11:00 a.m.

Reporting for Candidate Committees

1:00 p.m.-2:30 p.m.

FECFile and E-Filing for PACs and Party Committees

1:00 p.m.-2:30 p.m.

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