Record

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Regulations

Commission Approves Final Best Efforts Rules

Political committees and their treasurers must exercise "best efforts" to obtain, maintain and report the identification[1] of individuals who contribute more than $200 in a calendar year. If they fail to disclose contributor information, but can demonstrate that they made "best efforts" to obtain it, they will be in compliance with the law. 11 CFR 104.7. On October 21, the Commission revised its rules to clarify the steps that must be taken to demonstrate "best efforts":

1. Requesting contributor information in the initial solicitation;
2. Making a follow-up request (if necessary);
3. Reporting the information; and
4. Filing amendments to disclose previously unreported information.

The new rules and their explanation and justification were published in the Federal Register on October 27 (58 FR 57725). The Commission will announce an effective date after the rules have been before Congress for 30 legislative days.

[1] *"Identification" means the name, mailing address, occupation and employer of an individual. 11 CFR 100.12.*

Court Ruling Finds Composition of FEC Unconstitutional

In *FEC v. NRA Political Victory Fund,* a court of appeals recently ruled that the composition of the Commission violated the Constitution's separation of powers. See page 2 for a summary of the decision and the Commission's actions in response to it.

Solicitations

Under the new rules, committees must include in each solicitation a clear and conspicuous request for the identification of contributors who give more than $200 per calendar year. That request must contain the following statement:

Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year.

The request will not be considered "clear and conspicuous" if it is illegible or smaller than the text of the solicitation and response materials or if it is placed where it may be easily overlooked.

Follow-up Request

If a committee receives a contribution that exceeds the $200 threshold

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Court Cases

FEC v. NRA Political Victory Fund: Composition of FEC Found Unconstitutional

On October 22, the U.S. Court of Appeals for the District of Columbia ruled that the composition of the Federal Election Commission "violates the Constitution's separation of powers."

Under the Federal Election Campaign Act (FECA), the President appoints the Commission's six voting members, and Congress designates two non-voting *ex officio* members. The court found that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members."

The court rejected the Commission's contention that the *ex officio* members play an "informational or advisory role." The court noted that "advice...implies influence, and Congress must limit the exercise of its influence...to its legislative role." The court added that the "mere presence" of the Congressional representatives "has the potential to influence the other Commissioners." Citing legislative history, the court concluded that Congress intended the *ex officio* members to "serve its interests while serving as commissioners." Ultimately, the court said, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."

Based on a severability clause in the FECA,[1] the court concluded that "the unconstitutional *ex officio* membership provision can be severed from the rest of" the statute, permitting a reconstituted Commission to continue to operate. The court added that Congress was not, in this instance, required to amend the statute.

The court rejected two other Constitutional challenges raised in the case; one regarding the Commission's bipartisan composition and the other, its status as an independent agency. The NRA had argued that:

- The "FECA's requirement that '[n]o more than 3 members of the Commission...may be affiliated with the same political party,' 2 U.S.C. §437c(a)(1) (1988), impermissibly limits the President's nomination power under the Appointments clause;" and
- The FEC's independence denies the President "sufficient control over the Commission's civil enforcement authority, a core executive function."

The court found the first of these challenges to be nonjusticiable because it is the Senatorial confirmation process, and not the statute itself, that arguably restrains the President. Indeed, the court noted that "without the statute the President could have appointed exactly the same members" to the Commission.

The court also upheld the FEC's status as an independent agency, citing a number of court cases that specifically sanction such entities.

The appeals court ruling reversed a district court decision that the NRA had violated 2 U.S.C. §441b(a) by contributing corporate funds to its separate segregated fund, the NRA Political Victory Fund. (For a summary of that case, see the January 1992 *Record.)* Having ruled on the Constitutional issue, the appeals court did not consider the merits of the case.

Commission Response

In the wake of the appeals court decision, the Commission has taken a number of steps to ensure the uninterrupted enforcement of the federal election law.

October 26: Reconstitution. Subject to further judicial review, the Commission voted to reconstitute itself as a six-member body, comprising only those Commissioners appointed by the President.

November 2: Appeal to Supreme Court. The reconstituted Commission decided to petition the Supreme Court for a writ of certiorari in the case. That decision is consistent with the agency's tradition of defending the constitutionality of the FECA. In its petition, the FEC will ask the high court to address the separation of powers issue, and—if necessary—to consider its effect on other agency actions.

November 4: Ratification of Regulations, Forms and Advisory Opinions. As a precaution, the Commission voted to ratify its existing regulations and forms, and to confirm the efficacy of its advisory opinions.

November 9: Ratification of Audits, MURs and Litigation. The Commission re-voted or ratified its past actions regarding ongoing audits, and adopted specific procedures for re-voting or ratifying its decisions related to ongoing enforcement cases (MURs) and litigation.

[1] *2 U.S.C. §454.*

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Future actions on MURs will depend upon the status of the enforcement matter and the facts of the specific cases:

- If the MUR is in the investigative stage, the Commission will re-vote on the question of reason to believe (RTB);
- If the Commission has authorized formal discovery, but the respondent has not complied with the subpoena or order, the Commission will re-vote on authorizing the subpoena or order;
- If the MUR investigation is complete, the Commission will ratify its prior finding of RTB;
- If the Commission has found probable cause to believe, it will re-vote on that question;
- If the Commission is engaged in pre-probable cause conciliation with a respondent, it will re-vote on entering conciliation and on the last approved proposed conciliation agreement; and
- If the Commission is engaged in post-probable cause conciliation with a respondent, it will re-vote on approval of the last proposed conciliation agreement.

With respect to enforcement litigation, for each case the Commission will vote to ratify its prior actions and to authorize the General Counsel to continue proceeding with the suit. ✦

FEC v. Committee of 100 Democrats

On September 30, 1993, the District Court for the District of Columbia granted the Commission's motion for summary judgment against the Committee of 100 Democrats, Throw the Rascals Out (a.k.a. the Committee to Elect Fusco to Congress) and Dominick A. Fusco, the treasurer of both committees.

The court ruled that Mr. Fusco and the committees had violated the terms of two conciliation agreements related to an FEC enforcement action (Matter Under Review 3148). The court ordered the defendants to comply with the agreements, assessed $1,000 penalties against each committee and enjoined the defendants from future violations of the agreements.

Noting that Mr. Fusco was named as a party to the conciliation agreements and had signed them both, the court concluded that his "status as a party to each of the agreements subjects him to personal liability for their violation." As a result, the court held Mr. Fusco and the committees "jointly liable" for compliance with the conciliation agreements and payment of the additional penalties.

To comply with the conciliation agreements, the Committee of 100 Democrats—and Mr. Fusco, as its treasurer—had to register with the Commission and file the appropriate reports of receipts and disbursements. Mr. Fusco and his Committee to Elect Fusco to Congress (formerly Throw the Rascals Out) had to pay the FEC a $3,500 civil penalty. The court directed the defendants to comply with its order within 10 days. ✦

Khachaturian v. FEC

The U.S. Court of Appeals for the Fifth Circuit dismissed this case on October 13 at the request of Jon Khachaturian. (No. 93-3365).

Mr. Khachaturian had appealed a district court ruling that he failed to present a plausible constitutional challenge to the $1,000 contribution limit. Mr. Khachaturian had argued that the limit, as applied to his independent candidacy, impeded him from raising sufficient funds to compete effectively against the incumbent major-party candidate. The district court opinion was summarized in the August 1993 *Record*, page 5. ✦

New Litigation

Robertson v. FEC

Pat Robertson and his 1988 Presidential campaign committee, Americans for Robertson, ask the court to review the FEC's determination that the campaign repay almost $300,000 in public funds to the U.S. Treasury.[1] (The campaign had received over $10 million in federal matching funds for the 1988 Presidential primaries.) Contending that the FEC failed to notify the campaign of its repayment obligation within the deadline specified in 26 U.S.C. §9038(c), the campaign asks the court, *inter alia*, whether the FEC has the authority to seek repayment.

Michael Dukakis and Senator Paul Simon have also challenged the FEC's repayment determinations with respect to their 1988 Presidential primary campaigns. Both candidates raised the late-notification argument as well[2] (in addition to other issues). The Robertson campaign has asked the court to schedule the campaign's case before the same panel of judges who will hear the Simon and Dukakis suits and on the same day as those suits. The Commission has opposed this motion, maintaining that the Robertson campaign waived the late-notification argument by failing to raise it before the Commission in a timely manner, as FEC regulations require.[1]

U.S. Court of Appeals for the District of Columbia Circuit, No. 93-1698, October 20, 1992. ✦

[1] *See the November* Record, *page 5.*

[2] *See the August issue, page 7.*

Regulations

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but lacks contributor identification, the treasurer must—within 30 days—make an additional written or oral request for the information. That request may not include an additional solicitation or material on any other subject. It may, however, thank the contributor for his/her donation. Written requests must include a pre-addressed return post card or envelope for the contributor's response.

Reporting

Committees must, of course, disclose on their FEC reports the information provided by each contributor. Under the new rules, committee treasurers must also disclose information that was not provided by the contributor, but is available in the committee's records for that two-year election cycle, including its contributor records, fundraising records and previous reports.

Filing Amendments

If a committee receives contributor information after the contributions have been reported, the committee must either:

- Submit with its next report, an amended memo Schedule A listing all the contributions for which additional information was received during that reporting period; or
- File, on or before the next reporting date, amendments to the previous reports on which the contributions were originally disclosed.

Under either option, committees should cross reference the new information to the specific reports and entries that are being amended. Committees need only amend the information pertaining to contributions received during the current two-year election cycle. ✦

Commission Promulgates New Membership Rules

The Commission's new membership regulations took effect November 10, 1993. (58 FR 59641). The new regulations specify the organizational and financial attachments necessary for persons to qualify as "members" of incorporated membership groups. (For a summary of the new rules, see the October 1993 *Record.)*

The American Society of Association Executives (ASAE) had asked the FEC to withdraw the rules, but the Commission denied that request. In doing so, the Commission noted that, contrary to the concerns expressed by ASAE, the new rules were designed to be less restrictive than those previously in place.

Under the new rules, the Commission will consider, through the advisory opinion process, whether alternative membership arrangements might satisfy the new definition of member.

The new regulations were published in the Federal Register on August 30, 1993 (58 FR 45770). ✦

New Multicandidate Rules Effective January 1

New requirements for multicandidate committees will take effect January 1, 1994 (58 FR 59641). The new rules will make it easier to identify committees that have achieved multicandidate status.[1] (Multicandidate committees may contribute up to $5,000 to a candidate per election; other committees are subject to a $1,000 per election limit.)

Under the new rules, committees that qualify for multicandidate status must disclose that fact on each report (Form 3X) they file. Committees that have not disclosed their multicandidate status by January 1, 1994, must also submit an FEC Form 1M to demonstrate that they have met the multicandidate criteria, before they contribute more than $1,000 to a candidate per election.

In addition, multicandidate committees must include written notice of their status with each contribution they make.

The new regulations were published in the August 6, 1993, Federal Register (58 FR 42172) and were summarized in the September 1993 *Record.* ✦

[1] *To qualify for multicandidate status, committees must receive contributions from at least 51 persons, be registered at least six months and contribute to at least five federal candidates. (The last requirement does not apply to state party committees.)*

Hearing Held on Proposed Changes to Enforcement Rules

On October 20, the Commission held a public hearing on proposed regulations designed to clarify and streamline the agency's enforcement procedures. (For a summary of the proposed changes, see the August 1993 *Record.*)

The Commission received nine written comments on the proposed rules and heard testimony from three witnesses. Each of the witnesses acknowledged the difficulty in crafting rules that streamline enforcement procedures without jeopardizing the respondents' right to due process.

Two of the witnesses—Dravid Frulla (Brand & Lowell) and Thomas Josefiak (RNC)—urged the Commission to ease deadlines on respondents at all stages of the enforcement process. They also argued that respondents should have greater access to the Commission. Mr. Frulla urged the Commission to hold oral hearings to allow respondents to present their case directly to the Commission. Mr. Josefiak suggested that the Commission eliminate the review and analysis of respondents' briefs, currently conducted by the agency's Office of General Counsel (OGC). This, he argued, would ensure due process and expedite enforcement.

The third witness—Elizabeth Hedlund (Center for Responsive Politics)—stressed the importance of expediting enforcement. She urged the Commission to adhere strictly to the statutory deadlines, and opposed holding oral hearings because they would further delay enforcement proceedings.

The witnesses also discussed treasurer and candidate liability for committee violations.

In drafting the final rules, the Commission will review all written comments and testimony. ✦

Parties Testify on Proposed Convention Rules

On October 27, representatives from the Republican and Democratic national party committees testified at a public hearing on proposed changes to the FEC's rules governing publicly funded Presidential nominating conventions. The proposed rules would address the audit process, vendor documentation, legal and accounting expenses, civil penalties and reporting by host committees, municipalities and convention committees. (For a summary of the proposed rules, see the September 1993 *Record.*)

The Democrats supported some of the Commission's proposals, but the Republicans opposed the entire rulemaking, claiming that it was "an unwarranted intrusion into internal party activities" protected by the First Amendment. The RNC warned that the party would challenge the rules in court, if the Commission prescribed them.

Both parties raised objections to specific proposals that:

- Convention committees attach to their reports copies of contracts with host committees and convention cities;
- Municipalities and government agencies supporting convention activities file reports with the FEC; and
- Convention committees obtain signed statements from vendors confirming that discounts are offered according to normal business practices and do not exceed the commercial benefit the vendor expects to receive.

The DNC supported many of the other changes the Commission has suggested, including a proposal that convention committees begin to file reports earlier. The proposed rule would require a convention committee to file its first report at the end of the quarter during which it either received its first payment of public funds or began making disbursements. The DNC suggested, however, that the Commission not require convention committees to register and report until their disbursements exceed $5,000. ✦

Commission Revises Interim Ex Parte Rules

On October 28, the Commission adopted revised interim rules on ex parte communications that reflect public comments and testimony, and its own experience with the previous rules. (Ex parte communications are written and oral communications made by persons outside the agency to Commissioners or their staff concerning substantive Commission action.) The revised rules, which took effect November 10, replace those adopted in December 1992. (For a summary of the previous rules, see the January 1993 *Record.)*

The amended rules extend the ban on ex parte communications regarding audits and litigation to those concerning public funding. (Ex parte communications pertaining to enforcement actions are subject to a separate prohibition. 11 CFR 7.15 and 111.22.) Commissioners and their staff must attempt to prevent these communications. If, however, they do receive a prohibited communication, they must:

- Advise the person making the communication that it will not be considered; and
- Submit to the Designated Agency Ethics Official a statement describing the substance and circumstances of the communication. That submission must occur within three business days or prior to the agency's next consideration of the matter, whichever occurs first. The statement becomes part of the file related to the pertinent audit, court case or public funding decision.

Ex parte communications related to rulemaking proceedings and advisory opinions continue to be permitted, but the recipient Commissioner or staff member must disclose the contact within three business days (rather than two) or prior to the Commission's next consideration of the matter, whichever occurs first. Such communications become part of the public record.

The ex parte rules do not apply to discussions involving the procedural status of an open matter or to statements made in a public forum.

The revised regulations include the possibility of sanctions for violations of the rules. In response to a written complaint, the Designated Agency Ethics Official would recommend to the Commission an appropriate action. The Commission would consider the recommendation and decide what action to take by a vote of at least four Commissioners.

Only communications made *to* Commissioners and members of their staff are governed by the revised rules. The previous rules had applied to both incoming and outgoing communications. The Commission now plans to consider an internal agency directive to address outgoing communications.

The Commission adopted the revised rules on an interim basis and may reevaluate them in light of any written comments received. (Comments were due December 10.) 58 FR 59642, November 10, 1993. ✦

Advisory Opinions

FEC Invites Comments on Draft AOs

The FEC, on a trial basis, has adopted a procedure to permit interested persons to comment on draft advisory opinions. The new policy builds upon a statutory requirement that advisory opinion requests (AORs) be released to the public for comment. 2 U.S.C. §437f(d). The Commission will now accept comments not only on the AOR, but also on the proposed response prepared by the Office of General Counsel (OGC).

Under the new policy, each OGC draft opinion will be available in the FEC's Public Disclosure Division one week before the Commission considers it in a public meeting. Comments on the OGC draft must be submitted in duplicate to the Secretary of the Commission and to OGC by noon, the day before the meeting. Legible telefax transmissions will be accepted. Since the Commission typically holds its open meetings on Thursdays, draft opinions generally will be available on the preceding Thursday, and comments will be due by noon on the Wednesday before the meeting. The new procedures will not apply to advisory opinion requests that qualify for the expedited 20-day opinion process set forth at 11 CFR 112.4(b).

The Commission has adopted this policy on a trial basis, until June 1, 1994. At that time, it will determine whether the policy should become permanent.

To obtain a copy of an AOR and draft opinion, call 800/424-9530 (ask for Public Records) or 202/219-4140. ✦

AO 1993-17
Preemption of State Allocation Rules

Commission regulations require committees that maintain separate federal and nonfederal bank accounts to allocate certain expenses between those accounts, according to specific formulas. 11 CFR 106.5 and 106.6. The Commission determined that these rules preempt a Massachusetts requirement that party committees pay a prescribed portion of shared federal/nonfederal expenses with funds raised under state law. As a result, the Massachusetts Democratic Party may use federal funds to pay up to 100 percent of its allocable administrative expenses.

Background

Under 11 CFR 106.5, state and local party committees with separate federal and nonfederal accounts must allocate their administrative and generic voter drive expenses using the "ballot composition method." Costs are allocated according to the ratio of federal offices to total federal and nonfederal offices expected on the ballot in the next general election. Committees calculate this ratio by assigning federal and nonfederal points that correspond to the offices appearing on the ballot. The points for federal offices are mandatory, but the nonfederal points are optional. The ratio, therefore, establishes the minimum percentage of expenses that must be paid with federal funds (i.e. those raised under federal restrictions).

The Massachusetts Office of Campaign & Political Finance, through an interpretive bulletin applying state law, sought to make the nonfederal points mandatory—establishing fixed federal and nonfederal percentages for allocable expenses. The Commission, however, stated that the allocation regulations were designed to give committees the flexibility to pay for more than the minimum federal share of allocable expenses with federal funds. To the extent that the state provision denied the state party committee that flexibility, the Commission preempted it.

In doing so, the Commission exercised its statutory authority to preempt any state law that attempts to regulate federal elections. 2 U.S.C. §453; 11 CFR 108.7(b). Since allocable expenses are subject to FEC rules, and "are inextricably intertwined with federal election activity," the Commission determined that preemption was appropriate.

Date Issued: October 25, 1993; Length: 6 pages. Vice Chairman Trevor Potter and Commissioner Joan D. Aikens submitted a dissenting opinion (3 pages). Commissioner Lee Ann Elliott wrote a concurring opinion (2 pages). ✦

Advisory Opinion Requests

The advisory opinion requests (AORs) listed below are available for review and comment in the FEC's Public Records Office.

AOR 1993-20
Campaign's discounted purchase of the candidate's biography for distribution to campaign supporters. (Senator Ben Nighthorse Campbell; October 26, 1993; 4 pages)

AOR 1993-21
Preemption of state law prohibiting deposit of tax-checkoff funds into allocation account for payment of administrative expenses. (Ohio Republican Party; November 1, 1993; 2 pages plus attachments) ✦

Compliance

MURs Released to the Public

Listed below are FEC enforcement cases (Matters Under Review or MURs) recently released for public review. The list is based on the FEC press releases of October 22 and November 1, 1993. Files on closed MURs are available for review in the Public Records Office.

MUR 2576
Respondents (all in NY): (a) William J. Levitt; (b) Rowenroy, Ltd.; (c) 15 individuals; (d) one individual; (e) six individuals
Complainant: Pamela A. Mann, Assistant New York Attorney General, Charities Bureau
Subject: Contributions in the name of another; contributions by a foreign national; corporate contributions
Disposition: (a) $19,500 civil penalty; (b) $19,500 civil penalty; (c) civil penalties of between $150 and $1,000; (d) admission of violation but no civil penalty; (e) reason to believe but took no further action

MUR 3380
Respondents: Collins for Congress, James G. Collins, treasurer (MA)
Complainant: Sua sponte
Subject: Excessive contribution in form of a loan
Disposition: $6,000 civil penalty

MUR 3724
Respondents: Dave Emery for Congress, James Nicholson, treasurer (VA)
Complainant: FEC initiated (audit for cause)
Subject: Excessive contributions; failure to file 48-hour notices
Disposition: $2,250 civil penalty

MUR 3742
Respondents: Rhea Jezer for Congress, Richard P. Cox, treasurer
Complainant: Maria Cino, Executive Director, National Republican Congressional Committee (DC)
Subject: Disclaimer; failure to amend Statement of Organization on time
Disposition: Reason to believe but took no further action

MUR 3760
Respondents: National Beer Wholesalers' Association PAC, Ronald Sarasin, treasurer (VA)
Complainant: FEC initiated
Subject: Excessive contributions; inaccurate disclosure
Disposition: $1,300 civil penalty

MUR 3794
Respondents: (a) Committee to Elect Olene Walker for Congress (UT); (b) J. Myron Walker (UT)
Complainant: FEC initiated
Subject: Excessive contributions
Disposition: (a) and (b) Reason to believe but took no further action ✦

Correction

In the November issue, one of the respondents in MUR 3714/3612 was incorrectly identified as "KSKA-TV." The respondent should have been listed as "KDKA-TV."

Federal Register

Copies of Federal Register notices are available from the Public Records Office.

1993-25
11 CFR Part 104: Recordkeeping and Reporting by Political Committees: Best Efforts; Final Rule; Transmittal to Congress (58 FR 57725, October 27, 1993)

1993-26
11 CFR Part 201: Ex Parte Communications; Revised Interim Rules (58 FR 59642, November 10, 1993)
11 CFR Chapter 1: Ratification of Regulations (58 FR 59640, November 10, 1993)

1993-28
11 CFR Parts 100 and 114: Definition of "Member" of a Membership Association; Final Rule; Announcement of Effective Date (58 FR 59641, November 10, 1993)

1993-29
11 CFR Parts 102 and 110: Multicandidate Political Committees; Final Rule; Announcement of Effective Date (58 FR 59641, November 10, 1993)

1993-30
11 CFR Part 112: Policy Statement on Advisory Opinion Precedent (58 FR 59642, November 10, 1993)

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