

# Record

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## Compliance

### MUR 3620 Tallying Programs and Earmarking Requirements

The Democratic Senatorial Campaign Committee (DSCC) agreed to pay a \$75,000 penalty for failing to comply with the Federal Election Campaign Act's (the Act's) earmarking<sup>1</sup> requirements. This compliance case—MUR 3620 (Matter Under Review 3620)—stems from the National Republican Senatorial Committee's complaint that the DSCC improperly transmitted and reported earmarked contributions. As a result, the Feinstein for Senate '94, Abrams '92 and

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<sup>1</sup> The regulations define "earmarking" as a designation or direct or indirect instruction resulting in all or part of a contribution being made to, or expended on behalf of, a clearly identified candidate or his or her authorized committee. 11 CFR 110.6(b)(1). Any person who receives an earmarked contribution must forward it to the candidate or authorized committee no later than 10 days after receiving the contribution. 11 CFR 102.8 and 110.6(b)(2). The intermediary or conduit of an earmarked contribution must report the source of the contribution and the intended recipient to both the FEC and the intended recipient. 11 CFR §110.6(c)(1).

## Court Cases

### Akins, et al. v. FEC

On September 29, 1995, the U.S. Court of Appeals for the District of Columbia ruled that the FEC's use of a "major purpose test" to narrow the definition of "political committee" was valid, that its application of the "major purpose test" in this case was reasonable, and that its investigation into the matters raised by appellants was adequate. The court therefore affirmed the district court's ruling dismissing appellants' complaint that the FEC's actions were contrary to law.

### Background

On January 9, 1989, Mr. James E. Akins and his colleagues (former ambassadors, congressmen and government officials) filed a complaint with the FEC alleging that the American Israel Public Affairs Committee (AIPAC), a nonprofit corporation, qualified as a political committee under the Federal Election Campaign Act (the Act). Appellants asserted, inter alia, that because AIPAC had made expenditures and contributions in excess of \$1,000 in a year for the purpose of influencing federal elections, it was a political committee and as such was subject to the Act's contribution limits and financial disclosure

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## Compliance

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Sanford for Senate committees allegedly accepted excessive contributions from individuals who had already made the maximum contribution to their campaigns.

At issue was the DSCC "tally" program, which enabled "maxed-out" contributors to express support for particular candidates by tallying their DSCC contribution to those candidates. The DSCC then credited candidates for raising money for the DSCC's coordinated expenditure<sup>2</sup> program and other activities. 2 U.S.C. §441a(d). It was DSCC's stated policy and practice to inform

<sup>2</sup> Coordinated expenditures differ from contributions because the party must spend the funds on behalf of the candidate rather than give the money directly to the candidate. Although they may consult each other about these expenditures, only the party committee making the expenditures—not the candidate committee—must report them.

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contributors that it exercised sole discretion regarding the use of tallied contributions, but that the amount "tallied" for a given candidate was a significant factor taken into account when deciding how much to spend on that candidate. The DSCC admitted that it sometimes failed to inform contributors that its official policy barred acceptance of earmarked contributions.

The DSCC and certain candidate committees produced and distributed fundraising solicitations which could be fairly read to solicit earmarked contributions and which lacked further clarification and explanation to avoid such a reading. For example, one candidate's solicitation letter said, "For those of you who have already maxed out to my campaign, the DSCC tally is an avenue through which you can offer more support." Another letter noted: "As an individual, you can contribute up to \$1,000 directly to my committee. Contributions in excess of \$1,000 must be made payable to the DSCC and marked for my tally."

During the 1992 and 1994 cycles, the DSCC raised approximately \$19,500,000 in tallied funds. The Commission did not determine the percentage of contributors who intended that their tallied contributions be earmarked toward specific campaigns.

Under the election law, when a contribution is earmarked by a contributor for a particular candidate, both the conduit and recipient committees must follow certain requirements. In this case, the DSCC failed to treat, as earmarked contributions, those tallied contributions that had been earmarked for specific candidates. The contributions were not forwarded within 10 days, they were not reported as earmarked by either the conduit or intermediary and they were not counted against the contributors' candidate limits, all in violation of 2 U.S.C. §441a(a)(8) and 11 CFR 102.8, 110.6(b)(2)(iii) and 110.6(c)(1) and (2).

In addition to paying the \$75,000 civil penalty, the DSCC agreed to implement remedial measures in future operation of the tally program. These measures include refunding to contributors improperly handled donations or forwarding them to the designated candidate in accordance with 2 U.S.C. §441(a)(8) and 11 CFR 102.8, 110.6(b)(2)(iii) and 110.6(c)(1). Additionally, the DSCC in its training programs and solicitation materials agreed to inform its staff, campaigns and contributors of its policy not to accept earmarked contributions. Finally, the DSCC agreed to review its fundraising solicitations and those of candidates to ensure that they abide by the Act. ♦

## MURs Released to the Public

Listed below are summaries of FEC enforcement cases (Matters Under Review or MURs) recently released for public review. This listing is based on the FEC press release of October 20. Files on closed MURs are available for review in the Public Records Office.

### MUR 3941

**Respondents:** (a) The Honorable Kay Bailey Hutchinson (TX), (b) Kay Bailey Hutchinson for Senate Committee, Kenneth W. Anderson, treasurer (TX)  
**Complainant:** James C. Currey (TX)  
**Subject:** Personal use of campaign funds  
**Disposition:** (a-b) Reason to believe, but took no further action

### MUR 4003

**Respondents:** (a) The Honorable Dan Rostenkowski (IL), (b) Rostenkowski for Congress Committee, Leo V. Magrini, treasurer (IL), (c) Dan Rostenkowski Campaign Fund, Leo V. Magrini, treasurer (IL)

**Complainant:** Rob Kuzman (FL)  
**Subject:** Personal use of campaign funds

**Disposition:** (a-b) Reason to believe, but took no further action; (c) no reason to believe

#### MUR 4186

**Respondents:** Phoenix Firefighters Local 493 Fire PAC Committee, Michael Gibson, treasurer (AZ)

**Complainant:** FEC initiated (RAD)  
**Subject:** Failure to file disclosure reports timely

**Disposition:** \$4,000 civil penalty

#### MUR 4220

**Respondents:** North Carolina Democratic Election Campaign, Lyndo Tippet, treasurer (NC)

**Complainant:** FEC initiated (RAD)  
**Subject:** Failure to file disclosure report timely

**Disposition:** \$2,000 civil penalty ♦

## Information

### Primary Dates and Ballot Access Filing Deadlines for 1996 Available on Flashfax

Charts of 1996 Presidential and congressional primary dates and candidate filing deadlines for ballot access are available on Flashfax. To obtain this information, call 202/501-3413 and place an order for document #550 for Presidential information and document #345 for Congressional information.

Information in the charts was supplied by state election offices. The dates listed are still subject to change by state legislatures or court challenges. As changes occur, the list will be updated. ♦

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## Court Cases

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requirements. 2 U.S.C. §§431(4)(A), 433, 434 and 441a.

The FEC undertook an investigation into the matters raised by Mr. Akins and concluded that AIPAC had likely made campaign-related expenditures in excess of \$1,000 in some years. Nevertheless, the FEC concluded that AIPAC did not qualify as a political committee because its campaign-related activities constituted only a small portion of its overall activities and were not AIPAC's major purpose. Rather, the FEC determined that AIPAC was primarily a lobbying organization and was therefore not subject to the Act's contribution limits or the reporting requirements applicable to political committees.<sup>1</sup>

Mr. Akins, unsatisfied with the FEC's conclusions, brought this case before the U.S. District Court for the District of Columbia, arguing that the FEC's determination that AIPAC was not a political committee was contrary to law. Mr. Akins challenged the legality of the major-purpose test, the adequacy of the FEC's investigation and the FEC's conclusion that AIPAC was not a political committee under the Act.

The district court granted summary judgment, upholding the FEC's conclusions and ruling that the major-purpose standard was legal and that the FEC's investigation was adequate.

### Determination of Standing

Before addressing appellants' claim on the merits, the appeals court determined appellants had constitutional standing because they

<sup>1</sup> The Commission did find that, as a corporation, AIPAC had violated 2 U.S.C. §441b, which prohibits corporations from making contributions or expenditures in connection with federal elections. However, the Commission unanimously voted to take no further action.

successfully showed "injury in fact that is fairly traceable to the defendant's action and redressable by the relief requested." *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 474-75 (1982). In determining that appellants met this requirement, the appeals court accepted appellants' argument that lack of information about AIPAC's contributors and expenditures would impair their ability, as citizens, voters and members of the public, to inform and influence policy makers.

### Court's Standard of Review

The appeals court explained that under 2 U.S.C. §437g(a)(8)(C), appellants bore "the difficult burden" of demonstrating that the Commission's interpretation was impermissible and contrary to law, while the Commission had only to show that its decision concerning Akins's administrative complaint was "sufficiently reasonable." The court said it would "presume that the Commission's action was valid, even if the court would have interpreted the Act in a different manner." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

### Defining "Political Committee"

The court of appeals determined that this case centered around the question of what constitutes a political committee. The Act defines a political committee as any group of persons that either receives contributions or makes expenditures for the purpose of influencing a federal election which, in the aggregate, exceed \$1,000 in a year. 2 U.S.C. §431(4)(A). The Act limits the amount of money individuals and other groups can give to political committees. 2 U.S.C. §441a(a)(1)(C). It also requires political committees to register with the Commission and

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## Court Cases

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to file financial disclosure reports. 2 U.S.C. §§433 and 434.

Appellants argued that the Act's definition of a political committee "depends on a single quantitative standard: whether its aggregate contributions are in excess of \$1,000 in a calendar year." They asserted that because the statutory language is clear, the Commission's interpretation was not entitled to deference under *Chevron*. The appellants also argued that the major-purpose test conflicted with the fundamental purposes of the Act.

The FEC argued that the definition of a political committee at §431(4)(A) was restricted by a major-purpose test set by *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life*. Under this test, a group qualifies as a political committee if, in addition to exceeding the \$1,000 threshold at §431(4)(A), its major purpose is the nomination, election or defeat of a candidate.

The court agreed with appellants that the Act's definition of political committee is clear. But it also examined prior court decisions in order to determine whether the FEC's use of the major-purpose test was contrary to law.

### The Major-Purpose Test

In *Buckley v. Valeo*, the Supreme Court stated that to fulfill the purposes of the Act, the term, political committee, "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."

Applying this principle in *MCFL v. FEC*, the Court found that although MCFL, a small, incorporated issue-advocacy group, had made a \$10,000 independent expenditure to influence federal elections, it had not violated the corporate prohibi-

tion on independent expenditures in 2 U.S.C. §441b because it possessed certain characteristics that made it exempt from that ban.<sup>2</sup>

The Court attached a corollary to its ruling: should MCFL's spending on independent expenditures become "so extensive that [its] major purpose may be regarded as campaign activity," it would become a political committee.

The court of appeals also cited its own previous ruling in *FEC v. Machinists Non-Partisan Political League*.<sup>3</sup> In that opinion, the court recognized the constitutional difficulties inherent in applying the term political committee to groups that were neither under the control of a candidate nor had a major purpose of promoting or defeating a clearly identified candidate. Therefore, the appeals court had ruled that draft groups (groups seeking to encourage an individual to become a candidate) were not political committees.

### The Appeals Court's Conclusions

The court of appeals found that because previous court decisions had "limited the application of [the Act's] restrictions for political committee to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major-purpose

<sup>2</sup>The Court based its holding on three features of MCFL, "one of which was that its purpose was promoting political activities, not amassing capital." The other two features cited by the Court were the citizens' group's lack of shareholders or other persons having a claim on its assets or earnings and the policy of the group, which was not formed by a labor union or business corporation, to refuse contributions from these entities. *Massachusetts Citizens for Life*, 470 U.S. at 24.

<sup>3</sup>*FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir.), cert. denied, 454 U.S. 896 (1981).

test was not contrary to law."

Further, the court concluded that the Commission correctly applied the major purpose test in this case and that the Commission's determination that AIPAC was not a political committee was not contrary to law.

Lastly, after a review of the General Counsel's report, the appeals court determined that the FEC conducted a fairly extensive inquiry into Mr. Akins's claims and arrived at a reasonable conclusion.

U.S. Court of Appeals for the District of Columbia (94-5088), D.Ct. No. 92 CV01864, September 29, 1995. ♦

## FEC v. Survival Education Fund, Inc. et al.

The U.S. Court of Appeals for the Second Circuit on September 12, 1995, denied the FEC's claim that 2 U.S.C. §441b prohibited Survival Education Fund, Inc. (SEF) and National Mobilization for Survival, Inc. (NMS) from making independent expenditures in connection with a federal election. However, it affirmed the FEC's claim that the Federal Election Campaign Act (the Act) requires communications which solicit contributions to identify who paid for them and to state whether they were authorized by a candidate.

On January 12, 1994, the U.S. District Court for the Southern District of New York ruled that defendants' pre-election 1984 communications to the general public, although "undeniably hostile" to President Reagan, did not constitute prohibited corporate expenditures because they did not expressly advocate his defeat. The district court said copies of two letters distributed by the organizations fell short of express advocacy because they lacked the necessary specific wording, such as "vote against" or "defeat."

Because the district court determined that the letters contained no express advocacy, it also granted summary judgment to defendants on the FEC's claim that SEF and NMS had failed to comply with the disclosure requirements of 2 U.S.C. §441d(a)(3).

### Corporate Expenditure

The appeals court declined to address the express advocacy question and instead used different grounds to affirm the district court's decision that defendants' letter did not violate the law. The appeals court accepted SEF's argument that SEF was within the class of nonprofit advocacy corporations whose independent campaign advocacy the Supreme Court has found to be exempt from the prohibition in §441b(a) because of the First Amendment. The appeals court relied on the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life (MCFL)* to support this idea. In that case, the Supreme Court concluded that the prohibition on corporate expenditures could not be applied to independent political communications made by certain nonprofit groups. The Court determined that MCFL, a nonprofit corporation formed for antiabortion advocacy, had three characteristics that made it "more akin to voluntary political associations than business firms." *MCFL*, 479 U.S. at 251. The Court ruled that a corporation was allowed to make independent expenditures if:

- Its purpose was promoting political activities as opposed to amassing capital;
- It lacked shareholders or other persons having a claim on its assets or earnings; and
- It was not formed by a labor or corporate organization and had a policy of refusing contributions from such entities.

The appeals court rejected FEC arguments that SEF did not qualify under these terms because, unlike MCFL, it did not have an express policy against accepting contributions from corporations or labor unions, and had in fact accepted corporate contributions. The court maintained that the core concerns of *MCFL* are the amount of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept corporate contributions. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995). The court determined that the evidence did not show that SEF received a significant amount of corporate contributions.

### Disclaimer

With regard to the disclaimer issue, the appeals court reversed the district court ruling and upheld the FEC's arguments that SEF and NMS violated §441d(a)(3) in a July 1984 mailing. The court found that even if the communication itself did not expressly advocate the defeat of a candidate (Ronald Reagan), it was a solicitation for funds that "would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." The letter read: "your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the *voting public* (emphasis added), letting them know why Ronald Reagan and his anti-people policies *must* be stopped."

Section 441d(a)(3) requires disclaimers in political communications that either expressly advocate election or defeat of a clearly identified candidate, or solicit contributions. The appeals court only addressed the second category in this case and concluded that requiring disclosure of the identity of a group that is soliciting a

contribution does not run afoul of the First Amendment.

The court concluded that §441d(a)(3) serves several compelling interests that justify any infringement on SEF's First Amendment rights. The government has an interest, the court reasoned, in ensuring that contributors know whether they are donating their money directly to a candidate or, instead, to independent critics of another candidate. Further, disclosure of the identity of the sponsor of a solicitation helps private contributors determine whether a new contribution would cause them to exceed their aggregate contribution limit for that group.

Thus, the application of §441d(a)(3) to SEF and NMS does not conflict with the Supreme Court's recent decision in *McIntyre v. Ohio Elections Commission*. In that case, the Supreme Court ruled unconstitutional a state law banning the distribution of anonymous campaign literature. The Supreme Court determined that Ohio "had not shown that its interest in preventing the misuse of anonymous election-related speech justified a prohibition of all uses of that speech."

U.S. Court of Appeals for the Second Circuit (94-6080), D.Ct. No. 89-CIV-0347, September 12, 1995. ♦

### Funk, et al. v. FEC

On August 4, 1995, the U.S. District Court for the District of Columbia dismissed this case for lack of prosecution.

Plaintiffs had sought a ruling that the FEC's decision to take no action on their administrative complaint, MUR 3625, was contrary to law. MUR 3625 alleged that the Valencia National Bank made a prohibited in-kind contribution by distributing to all bank account holders a newsletter featuring an article congratulating bank chairman Howard McKeon on his 1992 Republican primary

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## Court Cases

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victory in the race for California's 25th Congressional District seat.

Plaintiffs also asked the court to find unconstitutional a provision of the Federal Election Campaign Act establishing the District of Columbia as the sole venue for certain court cases.

For more details about the suit, see page 9 of the October 1994 *Record*.

U.S. District Court for the District of Columbia, Civil Action No. 94-1894, August 4, 1995. ♦

## Federal Register

Federal Register notices are available from the FEC's Public Records Office.

### 1995-16

Filing Dates for the California Special Elections (60 FR 55377, October 31, 1995)

### 1995-17

11 CFR 9002: Electoral College Expenditures; Notice of Disposition of Petition for Rulemaking (60 FR 56268, November 8, 1995)

### 1995-18

11 CFR 104, 110 and 114: Repeal of Obsolete Rules; Final Rule and Announcement of Effective Date (60 FR 56506, November 9, 1995)

### 1995-19

11 CFR 9034 and 9038: Public Financing of Presidential Primary and General Election Candidates; Final Rule and Correcting Amendments (60 FR 57538, November 16, 1995)

### 1995-20

11 CFR 106, 9002-9008, 9032-9034 and 9036-9039: Public Financing of Presidential Primary and General Election Candidates; Corrections (60 FR 57537, November 16, 1995)

## New Litigation

### Gottlieb, et al. v. FEC

Plaintiffs ask the court to order the Commission to take action with respect to a complaint (MUR 4192) they filed on March 9, 1995. MUR 4192 alleged that the Clinton campaign received more than \$3 million in excess of entitlement under the Presidential Primary Matching Payment Account Act.

In the original administrative complaint, plaintiffs alleged that President Clinton, The Clinton For President Committee (primary committee), its treasurers and the Clinton/Gore '92 General Election Legal and Compliance (GELAC) Fund violated 26 U.S.C. §§9034 and 9037. Plaintiffs also alleged that the primary committee treated the same contributions arbitrarily as both matchable primary contributions and contributions intended for the GELAC Fund.

On August 16, 1995, the Commission failed to adopt a recommendation of its General Counsel and dismissed MUR 4192 without finding that a violation of law had occurred. The plaintiffs therefore ask the court to find that the Commission's dismissal of MUR 4192 was contrary to law and to order the Commission to take action in this matter.

U.S. District Court for the District of Columbia, 1:95CV01923, October 11, 1995. ♦

### FEC v. Orton, et al.

The FEC on October 25, 1995, filed for declaratory and injunctive relief in U.S. District Court, District of Utah, Central Division. The case arose from an administrative complaint which alleged that Congressman William H. Orton of Utah's Third Congressional District, his 1990 campaign committee, and Utahns for Ethical Government (UEG), a political committee, had

violated the Federal Election Campaign Act (the Act).

Central to this case were expenditures for print and broadcast communications made by UEG in opposition to Mr. Orton's opponent. UEG reported the expenditures as independent expenditures<sup>1</sup> on behalf of Mr. Orton. However, the FEC alleges that they were excess contributions to the Orton campaign because UEG had coordinated them with Congressman Orton, in violation of 2 U.S.C. §441a(a)(7)(B)(1).

Additionally, UEG failed to comply with the Act's disclaimer requirements. They state that when a public communication advocates the election or defeat of a clearly identified candidate, it must include a clear and conspicuous disclaimer indicating whether the communication was authorized by the candidate or his committee. The disclaimer must also identify the name of the person or committee that financed the expenditure. 11 CFR 109.3 and 110.11; 2 U.S.C. §441d(a).

UEG made four allegedly independent expenditures during the campaign's final weeks. Although all four included disclaimers stating who paid for the ad, none included a statement as to whether the communication had been authorized by the candidate or his committee, in violation of 2 U.S.C. §441d(a).

The FEC's complaint lists 10 counts, including the violations described above and the committees' failure to report the expenditures as in-kind contributions, in violation of 2 U.S.C. §441a(a)(7)(B)(i). The FEC also alleges that UEG filed its statement of organization late, and accepted prohibited in-kind corpo-

<sup>1</sup> An independent expenditure expressly advocates the election or defeat of a clearly identified federal candidate. An independent expenditure may not be made with the candidate's or authorized campaign committee's cooperation, consent or consultation, or at their request or suggestion. 11 CFR. 100.16.

rate contributions made in the names of others, in violation of 2 U.S.C. §§441(b), 441a(a)(1)(A), 441a(f), 441d, 441f, 433(a) and 434(b).

The FEC asks the court to assess civil penalties totaling \$94,260 against the defendants. In addition, Orton for Congress would give up \$10,453 to the U.S. Treasury, the amount of the excessive contributions the campaign committee received. UEG would pay \$1,800 to the Treasury, the amount of prohibited contributions it received.

U.S. District Court, District of Utah, Central Division, No. 2:95CV-0977, October 25, 1995. ♦

## Audits

### Republican State Committee of Delaware: Final Audit Report

A final audit of the Republican State Committee of Delaware found that the committee improperly disclosed during calendar years 1991 and 1992 its shared federal and nonfederal activities, contributions received and expenditures. It also received impermissible corporate funds during this period.

The Commission conducted the audit pursuant to 2 U.S.C. §438(b), which states the Commission may audit any political committee whose reports fail to meet a threshold level of compliance set by the Commission.<sup>1</sup> The final audit report noted the committee's effort to follow the recommendations of the interim audit report.

<sup>1</sup> Following Commission recommendations does not necessarily preclude the agency from conducting enforcement proceedings with regard to apparent violations of the Federal Election Campaign Act.

### Shared Federal and Nonfederal Activities

Initially filed committee reports improperly disclosed or failed to disclose information about shared federal and nonfederal activity, including \$212,333 in transfers from its nonfederal account to its federal account. In response to the interim audit report, the committee filed amended reports that corrected the public record.

The committee also transferred from its nonfederal account approximately \$41,000 in excess of the nonfederal account's portion of shared expenses. 11 CFR 106.5 and 102.5(a). The committee later filed an amendment recognizing an outstanding debt to its nonfederal account.

### Disclosure of Financial Activity

In its initial reports, the committee understated its totals for receipts and disbursements by \$214,688 and \$201,299, respectively. Additionally, the committee misstated its beginning and ending cash and failed to itemize \$32,500 in contributions. Further, the committee failed to disclose the occupation and employer of contributors for \$37,600 in itemized contributions. Finally, reported entries for \$66,707 in disbursements were either incomplete or inaccurate. 2 U.S.C. §434(b)(1)-(5).

In response to the interim audit report, the Committee filed amendments which corrected the public record.

### Receipt of Impermissible Funds

The committee received \$4,000 in impermissible funds from the Republican National State Elections Committee corporate account. 11 CFR 102.6(a)(ii) and (iv). The committee refunded this contribution after receiving the interim audit report. ♦

### Democratic Executive Committee of Florida: Audit Report

An FEC audit of the Democratic Executive Committee of Florida (the committee) found that, during calendar year 1991-92, the committee had:

- Improperly reported shared federal and nonfederal activities;
- Understated reported totals for receipts and disbursements;
- Failed to disclose contributions from political action committees and interest received; and
- Failed to itemize debts and obligations.

The audit was conducted pursuant to 2 U.S.C. §438(b), which states the Commission may audit any political committee whose reports fail to meet the threshold level of compliance set by the Commission. Subsequent to a final audit report, the FEC may choose to pursue unresolved issues in an enforcement action.

### Shared Federal and Nonfederal Activities

The committee's reports, as initially filed, did not properly disclose information related to its shared federal and nonfederal activities. The committee generally paid for shared activity from its nonfederal account and then reimbursed its nonfederal account with federal account funds. In addition, the Committee failed to disclose payroll transactions (\$820,269) and other disbursements (\$25,738). Finally, \$62,591 of the committee's nonfederal account expenditures appeared to have been made in connection with federal elections.

As a result of the manner in which the committee managed its shared activities, transfers between various federal and nonfederal accounts totalling \$748,413 were not itemized as required. 11 CFR 106.5 and 102.5(a).

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## Audits

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### Disclosure of Financial Activity, Receipts and Debts and Obligations

The committee understated its total receipts and disbursements by \$797,942 and \$843,379, respectively, and misstated its beginning and ending cash totals. Also, the committee failed to itemize contributions from political action committees (\$10,000) and interest received (\$3,967). Finally, debts and obligations amounting to \$31,929 were not disclosed as required. 2 U.S.C. §434(b). ♦

### People for English Audit Report

An FEC audit of People for English, Mr. Philip S. English's principal campaign committee during his 1994 bid for the U.S. House seat in Pennsylvania's 21st district, found that the committee:

- Received \$4,065 in apparent excessive contributions from nine contributors. The committee issued refund checks to the contributors, but these refunds were not timely. One \$1,000 refund check remains uncashed.
- Received \$3,200 in apparent corporate contributions from eight contributors. The committee issued refund checks to the contributors, but these refunds were not timely. One \$200 refund check remains uncashed.
- Failed to disclose in its FEC reports the addresses of a number of vendors that received committee disbursements. The committee has since filed amended Schedule Bs, disclosing most of the missing addresses.
- Failed to disclose in its FEC reports the occupation and name of employer of a number of contributors, and failed to demonstrate that it undertook "best efforts" to

obtain this information. The committee has since filed amended Schedule As that disclose this information for some of the contributors and has submitted copies of letters sent to the others requesting the missing information.

- Failed to itemize in its FEC reports a \$13,964 offset to operating expenditures. The committee has since filed an amended Schedule A to correct the public record.

This audit was conducted pursuant to 2 U.S.C. §438(b), which authorizes the Commission to conduct audits of any political committee that files reports that fail to meet the threshold level of compliance set by the Commission. Subsequent to a final audit report, the FEC may choose to pursue unresolved issues in an enforcement matter. ♦

## Advisory Opinions

### AO 1995-27 Solicitation of Trust Members of Trade Association

The political action committee (PAC) of the National Association of Real Estate Investment Trusts, Inc. (NAREIT), a trade association, may solicit contributions from the restricted class of members organized as business trusts only if the trusts are organized as corporations under state law.

The Commission partially overruled advisory opinion (AO) 1981-52, concluding that contributions by a state-defined trust with no corporate members need not be attributed among the trust's beneficial owners. However, the Commission reaffirmed that a trust that has

beneficial owners that are corporations must ensure that those corporate members do not participate in the PAC contribution.

### Background

Business trusts, which have certain attributes of both corporations and partnerships, are not necessarily corporations but are treated as such for some purposes by the courts of different states.

In AO 1981-52, the Commission concluded that NAREIT could solicit its trust members. However, AO 1981-52 also determined that the trust would have to attribute contributions among all the beneficial owners of the trust. Additionally, owners who would be barred from making an individual contribution to a federal candidate, such as a corporation, could not participate in the trust contribution.

In its request that AO 1981-52 be overruled, NAREIT cited burdens of attribution and the similarities between corporations and trusts.

### Membership Association and Members

NAREIT meets the definition of "membership association" at 11 CFR 114.1(e)(1)(i), (ii) and (iii).<sup>1</sup> Additionally, NAREIT trust members are considered members for the purposes of the Federal Election Campaign Act (the Act) because they are required to pay dues and have the right to elect members to NAREIT's highest governing body,

<sup>1</sup> The Act defines "membership association" as an organization that: (1) provides for "members" in its articles and bylaws; (2) solicits members; and (3) acknowledges members' acceptance of membership, such as by sending them a membership card or including them on a membership newsletter list.



the Board of Governors.<sup>2</sup> NAREIT may therefore solicit contributions to its PAC from noncorporate NAREIT members and from the restricted class of its corporate members.

### Solicitation of NAREIT Trust Members

Commission regulations at 11 CFR 114.7 state that the corporate status of a professional organization is determined by the laws of the state in which it is located. Consequently, REIT trusts in states that do not consider them corporations cannot be treated as corporations for purposes of the Act. The AO request cited Maryland and Delaware statutes, which regard a business trust as a separate form of business organization distinct from a corporation. Accordingly, NAREIT may not solicit the executive and administrative classes of the Maryland and Delaware trusts, unless those individuals or business entities are themselves members of NAREIT. The Commission based this decision on AOs 1988-3 and 1976-63.

NAREIT may, however, solicit the noncorporate trust itself. It may direct its solicitation to the trust member representative with whom

the trade association usually conducts its activities. NAREIT bylaws identify one employee of the member trust who represents the member and exercises its voting right. 11 CFR §114.8(d)(3).

### Attribution of Contributions by REIT Trust Members

The Commission partially overruled AO 1981-52, concluding that where there are no corporate beneficial owners of the REIT trust, contributions need not be attributed among its beneficial owners. The Commission reached this conclusion based on its previous analysis of limited liability companies. In AO 1995-11, the Commission concluded that attribution of a contribution among the members or principals of a limited liability company was not required.

The Commission reaffirmed, however, that the participation of the corporate beneficial owners of a trust in political contributions made by that trust is still prohibited by 2 U.S.C. §441b. AOs 1995-11 and 1981-52. NAREIT trust members must therefore screen out corporate participation in the PAC contribution by ensuring that the earnings or losses of corporate beneficial owners are unaffected.

The Commission also noted that, although it is difficult to determine whether a trust has any corporate beneficial owners, doing so is not impossible. If that were the case, then the trust would be barred from making political contributions.

The Commission expressed no opinion regarding tax ramifications.

Date Issued: Oct. 6, 1995;  
Length: 10 pages. ♦

## 1995-34 Providing 900 Line Fundraising Services to Political Committees

Politechs, Inc., an information provider, may contract directly with political committees that are not separate segregated funds to deliver an array of 900 line services related to federal elections.

### Politechs' Proposal

Politechs intends to offer the public and political committees five services via touchtone prompts:

- Information about a candidate's positions on various issues will be available to callers, who may enter their telephone and fax numbers to request a call or fax back.
- Politechs will also provide the committee with a summary of caller responses to a candidate's positions.
- Callers may contribute to the committee by selecting a dollar amount and entering their credit card numbers and expiration dates.
- Politechs will communicate to the committee a caller's interest in contributing to the committee by means other than credit card.
- Political committees may also receive a list of caller names, addresses, phone and fax numbers.

Politechs will charge the caller up to \$50 for the call itself on a per minute basis. If the caller makes a credit card contribution, the committee will receive the amount of the contribution minus the usual and normal service charges of the credit card issuers.

### Past Precedents

The Commission noted that Politechs' proposal entails a broader range of services than discussed in previous advisory opinions about 900 line services. The Commission has addressed responsibilities of

(continued on page 10)

<sup>2</sup> Under the Act, a person is a member if that person satisfies the association's requirements for membership, accepts an invitation to join, and has: (1) some significant financial attachment to the membership association, such as a significant investment or ownership stake; (2) is required to pay dues on a regular basis and is entitled to vote directly either for at least one member who has voting rights on the highest governing body of the association, or for those who select at least one member of the governing body; or (3) is entitled to vote directly for all those on the highest governing body of the membership association. 2 U.S.C. §114.1(e)(2)(ii).

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long distance providers in AOs 1991-2 and 1990-14, of service bureaus in AOs 1991-20 and 1990-1, and of a billing and collection company performing some service bureau functions in AO 1991-26. Politechs' proposal raises a number of the issues discussed in those opinions.

### Payments by Political Committees

The advisory opinions cited above state that political committees must pay the usual and normal charge for services, including adequate compensation to third party vendors, to avoid impermissible corporate contributions. 2 U.S.C. §§441b(a) and 441b(b)(2); 11 CFR 114.2(b), 114.1(a) and 100.7(a)(1)(iii)(A) and (B). The Commission assumes that Politechs' and its vendor's usual and normal fees, as well as the usual and normal fees passed on to them by third party vendors, will be included in the computation of the usual and normal charge to the committee. AOs 1991-26, 1991-2 and 1990-1. Politechs' requirement for advance payment for setup charges, a deposit sufficient to cover costs, and termination of services to prevent losses exceeding the deposit appear to ensure that political committees will not receive in-kind corporate contributions.

### Contribution Information and Prevention of Unlawful Contributions

Politechs' proposal entails a number of functions intended to identify contributors and prevent unlawful and excessive contributions. It also avoids a number of the concerns about contributor identity addressed in AO 1991-20. The committee will not receive revenue from unidentified sources because a separate billing company, not a local exchange carrier, will bill only identified callers.

Although no part of the revenue from the call itself reaches the political committee, Politechs still must obtain the names and addresses of contributors along with the contribution amounts and dates, and must forward that information to the committee. Although the \$50 ceiling for calls from the same telephone number would not trigger the recordkeeping requirement of 2 U.S.C. §432(c)(2) and 11 CFR 102.9(a)(1), the contributor may still make other contributions to a committee. In those cases, the same individual's contributions could aggregate to more than \$200, triggering further recordkeeping requirements and the need to report the contribution date and amount and the name, address, employer and occupation of the contributor. 2 U.S.C. §§431(13), 432(c)(3) and 434(b)(3)(A); 11 CFR 100.12, 102.9(a)(2) and 104.3(a)(4)(i).

The Commission suggested, therefore, that the billing company request that the billed individual provide, on a form accompanying the check, his or her occupation and employer. Alternatively, Politechs could arrange with the committee to contact the appropriate contributors for that information. AO 1990-1, n.7. The invoice sent to the caller should make clear to which committee or committees he or she is contributing and the amount. These methods enable the contributor to monitor his or her contribution totals to a particular committee. 2 U.S.C. §441(a)(1)(A) and (C).

Because checks from callers are political contributions, the company depositing these checks should separate them from the company's other business receipts by placing them in a bank account set up for the political committee clients. 2 U.S.C. §432(h)(1) and 11 CFR 103.2 and 103.3(a). The company needs only one separate account to contain the proceeds for all the political committees. Politechs should tell the committees the

depository's identity so that each committee may disclose the depository on an amended Statement of Organization.

Politechs has proposed adequate measures for screening out prohibited contributions, as follows: Further inquiry may be made to the contributor by Politechs, the collecting entity or the committee to enable the return of those contributions that appear to be illegal. The billing company or service bureau will bill only identified callers, while the collecting entity will also review a form accompanying the check which provides the caller's name and address. Also, the recipient committee should further screen checks and forms and separate out those checks which appear illegal. AO 1991-26.

The companies which process contributions and the political committees must comply with the time limits for the return of prohibited contributions set out in 11 CFR 103.3(b)(1).

### Timely Transmittal of Contributions and Information

A contribution to an authorized committee must be forwarded to its treasurer no later than 10 days after receipt. If the contribution exceeds \$50, the name and address of the contributor and the date of receipt must be forwarded with the contribution. If the contribution is more than \$200, the employer and occupation must also be forwarded.

The same rules apply to contributions in excess of \$50 to nonauthorized committees, which must be forwarded within 30 days. 2 U.S.C. §432(b)(1) and (2); 11 CFR 102.8(a) and (b).

With respect to the payments for the calls themselves, the time limits for forwarding contributions and contributor information do not apply. This is because no part of the funds will be transmitted to the committee and the amount of each of these contributions will be \$50 or

less. The information must still be forwarded at some point to the political committee for record-keeping and reporting purposes, however. The committee must complete full, timely disclosure reports and return contributions which, when aggregated, exceed legal limits in 2 U.S.C. §441a, §434(a) and 11 CFR 103.3(b)(3).

Time limits may apply to credit card contributions, which are officially received when the political committee obtains the contributor's authorization. In this situation, a contribution is received by the committee when the subcontractor contacts the caller and obtains his or her authorization. AO 1990-4. The subcontractor should also get information about a contributor's employer and occupation if this information was not obtained in the initial call.

### Reporting

Politechs should advise committees of their reporting obligations resulting from 900 line transactions. The committee should include in its reports the full amount charged to the caller on his or her credit card, and itemize those charges where appropriate. 2 U.S.C. §§434(b)(2)(A) and (3)(A); 11 CFR 104.3(a)(2)(i), (3)(i) and (4)(i). Also, the committee must report as operating expenditures charges for credit card clearing, processing and related expenses. 2 U.S.C. §§434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(3)(i) and (4)(i); AO 1991-1.

As to the contributions for the calls themselves, the committee must report the full amount paid by a caller as both a contribution and an operating expenditure. The amount is an operating expenditure because Politechs retains the money for payment to itself and subcontractors. Fees the committee pays directly to Politechs should also be reported as operating expenditures.

Date Issued: October 19, 1995;  
Length: 13 pages. ♦

## AO 1995-36 Disaffiliation of PACs

The separate segregated funds (SSFs or PACs) of AK Steel Corporation and Armco, Inc., may disaffiliate because Armco no longer has any ownership interest or significant role in AK Steel. AK Steel was formerly Armco Steel Company, L.P., a joint venture partnership between Armco and Kawasaki Steel Corporation.

### Background

The Federal Election Campaign Act (the Act) and Commission regulations provide that committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. Contributions made to or by such committees are considered to have been made to or by a single committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii).

Where an entity is not an acknowledged subsidiary of another entity, Commission regulations provide for an examination of various factors in the context of an overall relationship to determine whether one company is an affiliate of another and whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J) and 110.3(a)(3)(i) and (ii)(A)-(J).

AK Steel previously posed the same question in AO 1994-9. At that time the Commission determined that, due to various factors, it was premature for AK Steel to disaffiliate from Armco and Kawasaki.

A number of circumstances have altered the original arrangement addressed by AO 1994-9. First, Armco has sold its remaining stock in AK Steel. Additionally, AK Steel expanded its Board of Directors, diminishing the significance of Armco's earlier role in the reorgani-

zation and management of AK Steel. An election to elect the next Board of Directors has also taken place. Further, the separate operations of Armco and AK Steel since the public offering of AK Steel stock have diminished the historical relationship between these two companies.

AK Steel should amend its Statement of Organization to delete Armco PAC as an affiliated committee, and Armco PAC should do the same.

Date Issued: November 2, 1995;  
Length: 5 pages. ♦

## Advisory Opinion Requests

Advisory opinion requests are available for review and comment in the Public Records Office.

### AOR 1995-37

Status of nonvoting realtor-associate members as solicitable members of a trade association (National Association of Realtors; September 21, 1995; 3 pages plus 59-page attachment)

### AOR 1995-38

Association management corporation retained to administer nonconnected committee (Washington Policy Associates, Inc.; October 10, 1995; 1 page)

### AOR 1995-39

Avoidance of presumption of affiliation between county and state party committees; ability to disaffiliate (Los Angeles County Republican Central Committee; October 10, 1995; 8 pages plus 260-page attachment)

### AOR 1995-40

Disaffiliation of PACs connected to formerly affiliated companies (Continental Airlines; October 16, 1995; 2 pages plus 2-page attachment)

### AOR 1995-41

Preemption of state reporting requirement applicable to polling by federal candidates (Congresswoman Carolyn Maloney; October 30, 1995; 3 pages plus 5-page attachment)

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### AOR 1995-42

Use of campaign funds to pay candidate's child care expenses (Representative Jim McCrery; November 8, 1995; 1 page)

### AOR 1995-43

Applicability of contribution prohibitions to refund of legal fees to candidate committee (Arnold & Porter; November 24, 1995; 2 pages plus 13-page attachment) ♦

## Conferences

### FEC to Hold Conferences in Washington and Chicago

Three upcoming FEC conferences in Washington, DC, and Chicago will offer basic and advanced workshops on the federal campaign finance law and provide attendees the opportunity to discuss problems and questions with FEC Commissioners and staff, and representatives of the Internal Revenue Service.

The FEC has scheduled the following three conferences:

- January 11-12, 1996, in Washington, DC: Membership/Trade Association Conference at the Madison Hotel; \$165 registration fee.
- March 8, 1996, in Washington, DC: Candidate Conference at the Madison Hotel; \$110 registration fee.
- April 11-12, 1996, in Chicago, IL: Regional Conference at the Drake Hotel for candidates, party committees, corporations, labor organizations and trade associations; \$150 registration fee.

Registration fees include the cost of all conference materials and two or three meals (two continental breakfasts and a lunch), depending on the length of the conference. Fees do not include hotel accommodations.

To receive registration materials and further information, call 800/424-9530 or 202/219-3420. ♦

## Public Funding

### Clinton and LaRouche Declared Eligible for Matching Funds

The FEC has certified President Bill Clinton and Mr. Lyndon H. LaRouche, Jr., as the eighth and ninth Presidential candidates eligible to receive public matching funds. President Clinton's campaign received certification on October 31, 1995; Mr. LaRouche's received certification on November 2, 1995. The other seven candidates with eligible campaigns are Governor Lamar Alexander, Mr. Patrick Buchanan, Senator Robert Dole, Senator Phil Gramm, Senator Richard G. Lugar, Senator Arlen Specter and Governor Pete Wilson.<sup>1</sup> These candidates will receive their first payments from the Presidential Public Funding Program in January 1996.

To establish eligibility for the Presidential public funding program, a candidate must submit documentation to the FEC Audit Division showing campaign receipts in excess of \$5,000 in matchable contributions in each of at least 20 states. Only contributions received from individuals, and only up to \$250 of a contributor's total, are

<sup>1</sup> On September 29, 1995, Governor Wilson withdrew from the 1996 Presidential race.

matchable. The candidate must also certify that he or she will abide by spending limits and use funds for campaign-related expenses only. Additionally, the candidate must agree to an FEC audit of his or her campaign and otherwise comply with election law.

Eligible Presidential candidates may submit additional contributions for matching fund consideration on a monthly basis. ♦

## Change of Address

### Political Committees

Treasurers of registered political committees automatically receive the *Record*. A change of address by a political committee (or any change to information disclosed on the Statement of Organization) must, by law, be made in writing on FEC Form 1 or by letter. The treasurer must sign the amendment and file it with the Secretary of the Senate, the Clerk of the House or the FEC (as appropriate) and with the appropriate state office.

### Other Subscribers

*Record* subscribers who are not registered political committees should include the following information when requesting a change of address:

- Subscription number (located on the upper left corner of the mailing label);
- Subscriber's name;
- Old address; and
- New address.

Subscribers (other than political committees) may correct their addresses by phone as well as by mail.

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To order any of these documents, 24 hours a day, 7 days a week, call **202/501-3413** on a touch tone phone. You will be asked for the numbers of the documents you want, your fax number and your telephone number. The documents will be faxed shortly thereafter.

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