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Public Funding

Insufficient Public Funds Still Predicted for 2000 Election

The number of people who marked "Yes" in the \$3 checkoff box on their 1997 IRS tax forms is slightly below the same figure for last year. With these figures in hand, FEC officials continue to predict that a shortfall in the Presidential Election Campaign Fund is inevitable for the 2000 election.

The FEC routinely monitors the fund using monthly updates from the IRS and data from the tax agency's IRS Taxpayer Usage Study. The FEC's projections, while speculative, show an increased demand for those funds from the last Presidential election in 1996. According to FEC Staff Director John Surina, "a serious cash flow problem looks likely and both policy makers and candidates deserve the opportunity to assess the situation and take such actions as they deem appropriate."

The actual dollar figure for checkoff receipts through May of this year is about \$2 million below the figure for the corresponding period last year. At this time, however, the FEC's projections are based on the assumption that this year's checkoff receipts will match

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Court Cases

Akins v. FEC

On June 1, the U.S. Supreme Court ruled that James Akins and several other former government officials have standing to challenge in federal court the Commission's dismissal of an administrative complaint they filed in 1989 against the American Israel Public Affairs Committee (AIPAC). The Supreme Court also referred questions about the membership status of AIPAC members to the Commission.

Administrative Complaint

Mr. Akins and his associates filed an administrative complaint with the FEC alleging that AIPAC, an organization that lobbies public officials and disseminates information about federal candidates and officeholders, failed to register and report as a political committee, after it had made contributions to and expenditures on behalf of federal candidates in excess of \$1,000.

The Federal Election Campaign Act (the Act) defines a political committee as any committee, association or other group that receives contributions or makes expenditures to influence federal elections in excess of \$1,000 during a calendar year. 2 U.S.C. §431(4)(A). However, a statutory

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exception to the definition of expenditure allows membership organizations to make disbursements of more than \$1,000 for campaign-related communications to their members, without their counting as contributions or expenditures.

AIPAC claimed that its communications to its members fell within this exception and, therefore, that it did not have to register as a political committee or disclose any of its financial activities to the FEC.

The FEC did not agree. In its view, AIPAC's disbursements did qualify as expenditures because its members did not qualify as members under the Act. The Commission, nonetheless, concluded AIPAC was not subject to the registration and disclosure rules applicable to political committees. The Commission believed that, because AIPAC's major purpose was not influencing federal elections, it did not qualify

as a political committee even though it had made expenditures in excess of \$1,000. The Commission dismissed the complaint.

District and Appellate Courts Decisions

Mr. Akins and the other plaintiffs filed suit in U.S. District Court for the District of Columbia charging that the FEC failed to proceed on the administrative complaint and challenging the Commission's interpretation of what constitutes a political committee. The district court ruled in favor of the FEC, agreeing with the "major purpose" test—that an organization that receives contributions or makes expenditures of more than \$1,000 becomes a political committee only if its major purpose is the influencing of federal elections.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court ruling, but an en banc panel of the same appellate court reversed the district court decision. The en banc panel, referencing both *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life, Inc.*, found that the major purpose test can only be applied to organizations that make independent expenditures, not contributions, which is what was in question in the administrative complaint against AIPAC. The court also rejected the Commission's argument that the appellants lacked standing to bring their claim to federal court. On behalf of the FEC, the solicitor general appealed the decision to the Supreme Court.

The Supreme Court Decision

The Supreme Court focused its opinion on the three-pronged test of standing—which a plaintiff must demonstrate to show there is a "case" or "controversy" under Article III of the U.S. Constitution—injury in fact, causation and redressability. The high court also found that the plaintiffs' inability to obtain information about AIPAC's

campaign-related finances satisfied prudential standing because it was the kind of injury that the Act seeks to address.

Injury in Fact. The Supreme Court found that the injury in fact in this case was that the plaintiffs were prevented from obtaining information about AIPAC's donors and the organization's campaign-related contributions and expenditures. It said that there is no reason to doubt that this information would have helped the plaintiffs evaluate candidates for public office, especially those candidates who received assistance from AIPAC. Thus, the court said, the injury in this case is both "concrete" and "particular." The FEC argued that the lawsuit involved only a "generalized grievance" shared by many (a kind of grievance for which standing usually is not conferred); the Supreme Court disagreed. In such cases of "generalized grievance," the court said, the harm is usually "of an abstract and indefinite nature"—not the kind of concrete harm that the court found here.

The court concluded that, "[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."

Causation and Redressability. The high court also found that the harm asserted by the plaintiffs was "fairly traceable" to the FEC's decision to dismiss its administrative complaint, and that the courts have the power to redress this harm.

The Supreme Court also rejected the FEC's argument that, because the agency's decision not to undertake an enforcement action is generally an area not subject to judicial review, 2 U.S.C. § 437g(a)(8) should be interpreted narrowly.

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“Major Purpose” Test

With regard to the “major purpose” test, the Supreme Court referred the matter back to the FEC because of the uncertainty of the “membership” issue as applied to AIPAC.

Definition of Member

In the past, the FEC held that AIPAC’s campaign-related communications were directed at many people who did not qualify as “members” under the Act. However, the Commission has had to revisit its member regulations in light of the decision in *Chamber of Commerce of the United States v. FEC*. In that case, an appellate court said that the FEC’s regulations on “member” were invalid because they were unduly restrictive. The Commission is in the process of conducting a rulemaking that would modify language in its regulations to effectively broaden the class of people who would qualify as members of membership organizations.

If the Commission now concludes that AIPAC’s supporters are “members” under the Act, then its disbursements for communications to them would not count as the kind of expenditures that would trigger the requirement to register and report as a political committee. In that case, there would be no need to address the “major purpose” question in this case.

If the Commission again concludes that AIPAC’s supporters are not members, then the Commission and the lower courts, in reconsidering the plaintiffs’ arguments, can reevaluate AIPAC’s claims and actions.

U.S. Supreme Court, 96-1590; U.S. Court of Appeals for the District of Columbia Circuit, 94-5088; U.S. District Court for the District of Columbia, 92-1864. ♦

Right to Life of Dutchess County, Inc., v. FEC

On June 1, the U.S. District Court for the Southern District of New York determined that the Commission’s regulation at 11 CFR 100.22(b), which defines “express advocacy,” violates the First Amendment and enjoined the FEC from enforcing it. The court found that the regulation is “unconstitutionally overbroad” and beyond the scope of the Commission’s statute limiting corporate contributions.

Right to Life of Dutchess County, Inc., (RLDC) is a not-for-profit, membership corporation that advocates pro-life positions. RLDC says it does not intervene in political campaigns on behalf of or in opposition to any candidate for public office; nor does it support or oppose federal candidates. However, the group intends, especially in the lead-up to the federal primary and general elections, to produce and distribute communications to the general public—using newsletters, voter guides, fliers and other methods—that will comment favorably or unfavorably on the positions, qualifications and voting records (if applicable) of candidates running in 1998 primary and general elections. The court said there is little dispute that these publications are timed to influence voters when they go to the polls. RLDC contends that its proposed communications are permissible under the definition of “express advocacy” set forth in *Buckley v. Valeo* and *Massachusetts Citizens for Life v. FEC (MCFL)*, but would violate 11 CFR 100.22(b).¹

In *MCFL*, the Supreme Court held that the Federal Election Campaign Act’s ban on corporate independent expenditures only applies when the money is used to “expressly advocate” the election or

defeat of a clearly identified candidate for federal office. The *Buckley* decision lists examples of phrases that constitute express advocacy: “vote for,” “elect,” “support,” “vote against,” “defeat,” “reject.” These examples are codified in subsection (a) of 11 CFR 100.22. However, in subsection (b), the Commission further defines express advocacy as a communication that, when taken as a whole and with limited reference to external events (such as proximity to an election), can only be interpreted by a reasonable person as unambiguously advocating the election or defeat of a clearly identified candidate. This definition tracks the language of the U.S. Court of Appeals for the Ninth Circuit in *Furgatch*.²

RLDC stated that its proposed communications would not contain any of the phrases listed in *Buckley* and that it intends to pay for them with corporate funds. The group contends that the threat of FEC enforcement action against it for exercising what it considers its constitutional rights has chilled the First Amendment guarantee of free expression. See the [June 1997 Record](#), page 8.

District Court Decision

As a preliminary step, the court found that RLDC had standing to litigate this case. The court said that, in cases involving possible limits on First Amendment rights, a credible threat of prosecution is sufficient injury to confer standing.

The court held that the Commission’s regulation is constitutionally invalid because it “encompasses substantially more communication than is permissible” under 2 U.S.C. §441b, as narrowed by the Supreme Court in *Buckley* and *MCFL*. It stated that the Supreme Court requirement of express

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¹ *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986).

² *Furgatch v. FEC*, 807 F.2d 857, (9th Cir. 1987).

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or explicit words of advocacy (of the election or defeat of a candidate) is necessary to avoid prohibitions on “issue advocacy,” which is not regulated by the FEC and is protected by the First Amendment. The court also enjoined the FEC from enforcing part (b) of the regulation.

The court dismissed the Commission’s argument that RLDC could not bring a facial challenge against 11 CFR 100.22(b) and instead had to wait until it had actually been injured by the regulation. The court stated that a facial challenge may be brought when (1) a statute or regulation is substantially overbroad and (2) there is a realistic danger that the statute or regulation will significantly chill protected speech.

The court also rejected RLDC’s argument that the New York district court was bound by the decision from the First Circuit appellate court in *Maine Right to Life Committee, Inc., v. FEC*,³ which found 11 CFR 100.22(b) to be unconstitutional. It is a well-settled principle in federal court that a decision in one circuit is not binding on federal courts in another circuit.

U.S. District Court for the Southern District of New York, 97-2614. ♦

Clifton v. FEC

On April 30, the U.S. District Court for the District of Maine declared the Commission’s “electioneering message” provisions of its regulations governing voting guides to be invalid because they are inseparable from regulations struck down by the U.S. Court of Appeals for the First Circuit last year. The sections in question—11 CFR

114.4(c)(5)(ii)(D) and (E)—state that voter guides prepared on the basis of written responses from candidates to questions posed by a corporation or labor organization (1) must not include an “electioneering message” and (2) may not score or rate the candidates’ responses in a way that conveys an “electioneering message.”

In June 1997, the First Circuit invalidated two aspects of the Commission’s regulations governing the publication by corporations and unions of voter guides and voting records. The appeals court declared the voting record regulation at 11 CFR 114.4(c)(4) invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates; it declared the voter guide regulation at 11 CFR 114.4(c)(5) invalid only insofar as it limits contact with candidates to written inquiries and replies, and imposes an equal space and prominence restriction. See the [August 1997 Record](#), p. 1. The appeals court referred the plaintiffs’ challenge to the “electioneering message” portion of the voter guide regulation to the district court because, it said, there had been inadequate briefing on the issue.

Both the Commission and Clifton agreed that the “electioneering message” provisions were not severable from the portions of the FEC’s voter guide regulation that had been declared invalid. For other *Record* articles about this lawsuit, see the [April 1998 edition](#), p. 5, and the [July 1996 edition](#), p. 1.

U.S. District Court for the District of Maine, 96-66-P-H. ♦

Gottlieb v. FEC

On May 22, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a lower court ruling that dismissed this case for lack of standing. The appeals court rejected the arguments the appellants had presented in an effort to bring suit

against the FEC after the agency had dismissed their administrative complaint.

Alan Gottlieb, together with several other voters and organizations, had filed an administrative complaint with the FEC in March 1995 alleging that President Clinton’s 1992 campaign received \$1.4 million in excess entitlement allowed under the Presidential Primary Matching Payment Account Act. According to the complaint, the excess entitlement occurred because, following President Clinton’s nomination, his campaign transferred \$1.4 million in private primary contributions to his General Election Legal and Accounting Compliance Fund (GELAC Fund) instead of using the funds to pay his primary debts. According to appellants, the transfer violated 11 CFR 9003.3(a)(1), as it was written at the time of the alleged violation, because the regulation permitted transfers of funds only in excess of amounts needed to pay primary debts.

The Commission dismissed the administrative complaint after deadlocking in a 3-3 vote. Mr. Gottlieb then filed suit, asking the district court to find that the FEC’s actions had been contrary to law. The district court found that the appellants did not have standing (under Article III of the U.S. Constitution) to pursue their claims in court because they had not been harmed by the Commission’s decision. See the [July 1997 Record](#), p. 5. In affirming the lower court, the appellate court called Mr. Gottlieb’s claims of injury “speculative” and “amorphous.”

U.S. Court of Appeals for the District of Columbia Circuit, 97-5125; U.S. District Court for the District of Columbia, 95-1923. ♦

³ *Maine Right to Life Committee, Inc., v. FEC*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*).

FEC v. National Medical Political Action Committee

On May 27, the U.S. District Court for the District of Columbia entered an order submitted by the parties requiring the National Medical Political Action Committee (NMPAC) and its treasurer to pay a \$10,000 civil penalty to the FEC for failing to file 14 disclosure reports in a timely manner during 1992, 1993 and 1994. In a stipulation, both parties had agreed to the facts and to the final order and judgment.

NMPAC had filed all the reports that were due during 1992 and 1993 on May 12, 1994. NMPAC also failed to file on time six other reports due in 1994 and 1995. These tardy filings violated 2 U.S.C. §434(a)(4)(i), (ii), (iii) and (iv). See the [January 1998 Record](#), p. 3.

In addition to finding that NMPAC had violated the Act, the court permanently enjoined the PAC from failing to file reports within the time limits set out by Commission regulations.

U.S. District Court for the District of Columbia Circuit, 97-2961. ♦

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those recorded in 1997, or \$66.3 million, and that annual checkoff receipts will remain at the same dollar figure in 1998, 1999 and 2000.

Projected payments for the Democratic national convention and the Republican national convention are \$13.3 million each. Assuming the Reform Party seeks and qualifies for public funding, it should receive about \$2.5 million for its convention, based on its performance in the 1996 election. Public funding for the general election for the two major parties is projected to be approximately \$67.9 million a piece. The Reform Party nominee is projected to receive about \$12.7 million.

Under Treasury Department regulations, these amounts must be set aside on January 1, 2000, without counting the checkoff dollar amounts anticipated from tax forms filed in 2000. Funds left over, after monies for the conventions and general election are set aside, would be parceled out to qualified primary candidates.

Total primary matching funds available through the end of 2000 are estimated to be \$91.2 million, but demand for those funds is estimated to run from \$95 to \$105 million. The demand figure, however, is a rough estimate given the uncertainty over the number of primary candidates who will raise sufficient matchable contributions (individual donations of \$250 or less) to qualify for primary funding. While the total amounts needed and available will approach a balance by the end of the year, the bulk of the demand will occur early in the year before new checkoff receipts are deposited.

Because primary funding is calculated after reserving amounts for the general election and conventions, there will be a significant funding shortfall for candidates vying for their party's nomination, according to projections. Primary candidates will get only a portion of their entitlements early in the primary season—when the money is often most needed.

Mr. Surina added: "The early shortfall is exacerbated by the new political strategy whereby primary candidates commence their campaigns and fundraising early in the run-up year (here, 1999) in an effort to either scare opponents off or knock them out of the race in the early primaries and caucuses.... Given the apparent jockeying already underway in 1998, it is reasonable to assume that the accelerated fundraising will be a feature of the 2000 election also."

During the last Presidential election cycle, the first payment to

qualified primary candidates on January 1, 1996, represented 60 percent of what they were entitled to receive. Most candidates were able to secure bridge loans until checkoff receipts for 1996 overcame the shortfall in April. In the coming election, the shortfall will be more severe. On January 1, 2000, candidates likely will receive only between 37 and 41 percent of the funding to which they are entitled in an initial payment, and the shortfall will persist well into the year following the election. That means that, based on these projections, some primary candidates will not get their full share of the fund until after the general election has been decided.

Solutions

The FEC has recommended two solutions to alleviate some of the public funding shortfall, as part of its annual legislative recommendations to Congress.

- The Treasury Department, which gives primary funding to candidates, could reinterpret its present rule so that, when assessing the amount of funds available for general election grants, it took into account revenue from the \$3 checkoff received during the election year (in this case, 2000).
- Congress could change the pay-out priorities, placing convention funding last rather than first among the three categories. ♦

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Compliance

MUR 4128/4362 Excessive Contributions Result In Civil Penalty

The respondents in these matters, concerning Grant Lally's candidacies for New York's 5th Congressional District seat in 1994 and 1996, have agreed to pay a \$280,000 civil penalty. The violations included making and receiving at least \$200,000 in excessive contributions and inaccurately reporting them as coming from Grant Lally's personal funds. Respondents included Grant Lally; his candidate campaign committee, Lally for Congress; his parents, Lawrence and Ute Lally; and Lally and Lally, Esquires. Grant Lally admitted the violations, and Lawrence Lally and Lally for Congress admitted that their violations were knowing and willful.

The excessive contributions occurred during the 1994 campaign, when Grant Lally reported making loans of \$319,991 to his committee. The investigation revealed that a large portion of the reported loans were actually contributions from the candidate's father.

Between May and October 1994, Lawrence Lally gave the candidate \$116,000. Lawrence and Grant Lally later stated that these funds were for the purchase of the candidate's share of real estate investment property in New York. Within days of receipt, the candidate deposited the funds into the committee's account as loans from the candidate. The Commission found that the \$116,000 was not for a bona fide purchase of the property. Lawrence Lally also authorized an \$18,000 payment to his son from an account in which Ute Lally had an interest. The respondents claimed that the \$18,000 was for the purchase of the candidate's 1966 Corvette, but the evidence demonstrated that there was no bona fide

sale of the automobile. The candidate also loaned the campaign \$74,491 from payments he received from Lally and Lally. These funds also were actually contributions from the candidate's father. Prior to the conciliation agreement, the Commission found probable cause to believe that Grant Lally, his candidate committee, his parents and Lally and Lally knowingly and willfully violated the Act. The funneling of payments through the candidate's account, the failure to create documents and/or notations related to the payments and the submission of false and inaccurate information to the Commission formed the basis for the knowing and willful findings.

The Act at 2 U.S.C. §441a(a)(1)(A) limits the amount that a person may contribute to any candidate or to that candidate's authorized committee. Contribution limits for an individual giving to a candidate committee are currently set at \$1,000 per election. While a candidate may give unlimited amounts to his or her campaign from personal funds, members of a candidate's family must adhere to the contribution limits set out in the Act. Additionally, candidates and political committees are prohibited from knowingly accepting contributions in excess of the Act's limitations. 2 U.S.C. §441a(f).

The agreement also included a matter which involved Grant Lally's 1996 campaign (MUR 4362). In that matter, the Commission found that Grant Lally violated 2 U.S.C. §432(e) when he accepted more than \$5,000 in contributions during 1995, but failed to file a Statement of Candidacy form until June 1996. Further, the Commission found that the committee misreported a debt and failed to disclose payments for 1994 consulting fees until 1995. 2 U.S.C. §434(b).

The Lally civil penalty is among the largest obtained by the FEC for violations of the Act and Commission regulations. ♦

MUR 4617 Former Agriculture Secretary and Campaign Committee Agree to \$50,000 Civil Penalty

Former U.S. Agriculture Secretary Mike Espy has agreed to pay a \$10,000 civil penalty and his former campaign committee will pay another \$40,000 for improperly using a little more than \$50,000 in campaign funds to pay for legal services related to an ongoing Independent Counsel investigation apparently unrelated to his duties as an officeholder.

Before being named Agriculture Secretary in 1993, Mr. Espy had served as a Congressman from Mississippi's 2nd District. His authorized committee continues to be Mike Espy for Congress (the Committee). In 1994, an Independent Counsel was appointed to investigate some of Mr. Espy's activities, and he retained a law firm to represent him. On campaign disclosure reports filed with the Commission, the Committee reported \$50,244 in legal fees related to the investigation.

The Federal Election Campaign Act states that excess campaign funds may not be converted to personal use, other than to defray the ordinary and necessary expenses incurred in connection with an officeholder's duties. 2 U.S.C. §439a. It is important to note that the term "officeholder" does not include Cabinet Secretaries.

Mr. Espy stated that he actually owed the law firm over \$300,000 for services related to the investigation. Of this amount, he claimed, the payment of \$50,244 would not have been necessary but for his having been a Congressman or federal candidate. The Committee, however, produced no invoices to document this claim, citing the need to preserve attorney-client privilege in the ongoing criminal investigation by the Independent Counsel. Further, none of the 39 counts in the

indictment against Mr. Espy was for a violation that occurred while he was a Congressman—the violations all related to his tenure as Agriculture Secretary. The Commission also noted that the only payments to the law firm had come from campaign funds, and that the firm had never billed the Committee for its services related to the Independent Counsel investigation.

This MUR (Matter Under Review) was initiated by the FEC in its normal course of business. ♦

Regulations

Commission Seeks Comments on Requiring Electronic Filing by Publicly Funded Presidential Candidates

On June 11, the Commission approved a Notice of Proposed Rulemaking (NPRM) on whether its rules should specify that Presidential candidates who voluntarily accept public funding must agree to file their campaign finance reports electronically. The last day to submit comments on this NPRM is July 17, 1998.

The proposed rules would apply only to Presidential candidate committees that have already computerized their campaign finance records. The committees would file reports electronically—either by mailing a diskette with the information or by transmitting the data via the internet to the FEC. The proposed changes would affect 11 CFR 9003.1 and 9033.1. Public Law 104-79 authorized the Commission to establish its electronic filing program.

Last year, the Commission implemented a voluntary electronic filing initiative for committees, and encourages all committees to file in this way.

Nonfilers

The campaign committees of the candidates listed below failed to file required campaign finance disclosure reports. The list is based on recent FEC news releases. The FEC

is required by law to publicize the names of nonfiling campaign committees. 2 U.S.C. §438(a)(7). The agency pursues enforcement actions against nonfilers on a case-by-case basis. ♦

Candidate	Office Sought	Report Not Filed
Connelly, Maryanne S.	House NJ/07	Pre-Primary
Graham, Lindsey O.	House SC/03	Pre-Primary
Overman, John W.J.	House CA/44	Pre-Primary
Stewart, Randal M.	House CA/09	Pre-Primary
Wilson, Michael	House SC/06	Pre-Primary

Electronic filing by Presidential committees is intended to enhance public disclosure and to save a substantial amount of time and Commission resources. While the number of Presidential contenders is usually small, their reports can be voluminous, stretching for hundreds and sometimes thousands of pages.

Although the Commission's free electronic filing software, FECFile, will not generate the forms necessary for Presidential committees, the FEC's Data Systems Development Division would work with committees to assist them in generating the proper output with their current software packages. In addition, the FEC's Electronic Filing Specifications Requirements (EFSR) provide guidance to Presidential committees on how to properly structure their electronic reports. Presidential candidates would not file the Statement of Organization (Form 1) or the Statement of Candidacy (Form 2) electronically. Candidate agreements also would be exempt from the electronic filing provision.

Additionally, the Commission requests comments from committees about synchronizing filing software that meets the EFSR with the computer requirements that publicly funded candidates must meet in submitting campaign finance information for audit by the FEC.

The Commission believes that a candidate's agreement to file his or her committee's "reports electronically in exchange for public funding is a voluntary decision materially indistinguishable from the candidate's voluntary decision to abide by the spending limits in exchange for federal funds." Nevertheless, the FEC is asking for views on whether the agency has the authority to craft regulations described in the NPRM.

The NPRM is available:

- From the FEC's Public Records Office (800/424-9530, press 3, or 202/694-1120);
- Through the FEC's Faxline (202/501-3413, request document 234);
- At the FEC's web site (<http://www.fec.gov>); and
- In the June 17, 1998, *Federal Register* (63 FR 33012).

Public comments must be submitted in either written or electronic form to Susan E. Proper, Assistant General Counsel. Written comments should be mailed to the Federal Election Commission, 999 E St., N.W., Washington, DC 20463. Faxed comments should be transmitted at 202/219-3923, with a copy mailed to the preceding address to ensure legibility. Comments also may be e-mailed to

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elecfilig@fec.gov. Electronic submissions must include the commenter's full name, e-mail address and postal mail address. ♦

FEC Declines to Initiate Rulemaking on Expenditures by Qualified Nonprofit Corporations

On May 21, the Commission declined to open a rulemaking relating to the Commission's regulations governing expenditures by qualified nonprofit corporations, 11 CFR 114.10, and denied a petition submitted by the James Madison Center for Free Speech.

The section of the regulations in question describes a narrow category of nonprofit ideological corporations that are exempt from the Federal Election Campaign Act's prohibition on independent expenditures by corporate entities. 2 U.S.C. §441b. The petitioner had urged the Commission to modify portions of its regulations to conform with the decision by the U.S. Court of Appeals for the Eighth Circuit in *Minnesota Citizens Concerned for Life v. FEC (MCCL)*. The Eighth Circuit had declared 11 CFR 114.10 invalid because it denied the exemption to voluntary political associations that engage in insignificant business activity or accept insignificant corporate donations. In the Eighth Circuit's view, this infringes on those associations' First Amendment rights.

In denying the group's petition to amend FEC rules, the Commission stated that courts recognize that a decision by one circuit court is binding only in that circuit. No other appellate courts have found the Commission's regulations regarding qualified nonprofit corporations invalid.

The Commission also believes the Eighth Circuit erred in its interpretation of *FEC v. Massachusetts Citizens for Life (MCFL)* in *MCCL*. In *MCFL*, the U.S. Supreme Court had found that the FEC's ban on corporate independent expenditures could not be applied to nonprofit organizations that met three criteria: the organization was formed to promote political ideas and did not engage in business activities; it had no shareholders or other persons affiliated with it who had a claim on its assets or earnings; and it was not established by a corporation or union and had a policy against accepting contributions from either entity. The FEC interprets the *MCFL* decision to mean that, to qualify for the exemption allowing a nonprofit organization to make independent expenditures, a nonprofit organization must satisfy all the criteria named by the court, including the requirements that the organization not engage in business activities and not accept any contributions from corporations.

The Commission published a Notice of Disposition on this matter in the May 29, 1998, *Federal Register* (63 FR 29358). ♦

Advisory Opinions

AO 1998-7 Corporate Donations to Party Building Fund in Pennsylvania

The Pennsylvania Democratic Party (PDP) may accept corporate donations in order to establish and maintain a building fund for its current headquarters—including major repairs, a planned new headquarters, and three new re-

Federal Register

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

Notice 1998-10

Notice of Disposition of Petition for Rulemaking on Qualified Nonprofit Corporations (63 FR 29358, May 29, 1998)

Notice 1998-11

Notice of Proposed Rulemaking; Electronic Filing of Reports by Publicly Financed Presidential Primary and General Election Candidates (63 FR 33012, June 17, 1998)

gional headquarters. Although Pennsylvania law prohibits political contributions by corporations, it is preempted by the Federal Election Campaign Act (the Act), which allows any person to make donations to a party for these specific purposes.

The PDP proposes using the building fund to pay off the mortgage on its existing headquarters and to make several major repairs, such as constructing a new roof, installing new electrical wiring and expanding the size of the building. The building fund also would be used to purchase or build a new building to serve as the PDP's headquarters. The party also plans to purchase or construct regional headquarters in Pittsburgh, Harrisburg and Philadelphia.

The PDP states that it would follow the FEC's limitations for raising funds for the building fund and would create a separate account for the donations.

The Act and Commission regulations state that a gift, loan or anything of value made by any person to a national or state party committee that is specifically designated to defray the costs of construction or purchase of an office facility is not considered to be a

contribution or expenditure so long as the facility is not acquired for the purpose of influencing any candidate in any particular election for federal office. 2 U.S.C.

§431(8)(B)(viii) and 11 CFR 100.7(b)(12), 100.8(b)(13) and 114.1(a)(2)(ix). In past advisory opinions, the Commission has interpreted the statute and FEC regulations to permit state and national party committees to place corporate donations in building fund accounts set up specifically to purchase or construct headquarters for those committees. AOs 1997-14, 1993-9, 1991-5, 1986-40 and 1983-8.

Additionally, the Act explicitly states at 2 U.S.C. §453 that its provisions “supersede and preempt any provision of State law with respect to election to Federal office.” Citing this provision, the Commission concluded that, with respect to donations to party building funds, the Act preempts the Pennsylvania law prohibiting corporate contributions.

The Commission concludes that it would be permissible for the PDP to pay off its old mortgage and purchase new regional and state headquarters using a building fund created in accordance with the Act. The PDP may also use this building fund to pay for the necessary repairs for its current building. While the Commission does not allow building fund donations to be used for ongoing operating costs (see AOs 1991-5 and 1983-8), because the types of improvements the PDP plans to undertake fall under the IRS definition of capital improvements,¹ they may be paid for with monies

¹ Past tax case law has determined that, when repair work reaches a level that constitutes wholesale restoration or renovation of a structure, then those expenses that might have individually constituted repair work are treated as capital expenditures. *True v. United States*, 894 F.2d 1197 (10th Cir. 1990) and *Stoelizing v. C.I.R.*, 266 F.2d 374 (9th Cir. 1959).

drawn from the building fund.

The PDP also had asked the Commission whether it could use building fund donations to construct a parking lot near its existing headquarters for those with PDP business and for the general public. Under the proposal, those who parked in the lot for non-PDP business would be charged the usual and normal rate for parking in that area. Construction or acquisition of parking space that is not needed for direct use by the party may fall outside the building fund exemption. The Commission noted that, lacking sufficient information about the proposal, it would welcome a separate advisory opinion request focusing on parking lot questions.

Date Issued: May 22, 1998;
Length: 6 pages. ♦

AO 1998-8 Preemption of Iowa State Law for State Party Building Fund

The Iowa Democratic Party (IDP) may accept corporate donations to help it pay off the mortgage on an office building it purchased to serve as party headquarters. Although Iowa state law prohibits political contributions by corporations, it is preempted by the Federal Election Campaign Act (the Act), which allows donations to parties for this purpose.

The IDP has a 20-year mortgage on its recently purchased party headquarters and intends to solicit donations to pay off the balance. It will deposit the donations in a separate building fund account.

The Act and Commission regulations state that a gift, loan or anything of value made to a national or state party committee that is specifically designated to defray the costs of construction or purchase of an office facility is not considered to be a contribution or expenditure so long as the facility is not acquired for the purpose of influencing the

election of any candidate in any particular election for federal office. 2 U.S.C. §431(8)(B)(viii) and 11 CFR 100.7(b)(12), 100.8(b)(13) and 114.1(a)(2)(ix). The Act states at 2 U.S.C. §453 that its provisions “supersede and preempt any provision of State law with respect to election to Federal office.” Based on previous opinions applying this section in materially indistinguishable situations, the Commission concluded that the Act and Commission regulations preempt the application of the Iowa law prohibition on corporate contributions to party office building funds. See AOs 1997-14, 1993-9, 1991-5, and 1986-40.

The Commission notes that corporate donations are permissible only for the construction or purchase of a party office facility, but not for any ongoing operating costs such as property taxes and assessments.

Date Issued: May 22, 1998;
Length: 4 pages. ♦

AO 1998-9 Disbursements in Connection with New Mexico Special Election

The Republican Party of New Mexico (RPNM) may not treat certain disbursements for a June 23 special election as generic voter drive costs and may not use nonfederal funds to pay for any portion of them. Instead, the disbursements at issue would be either coordinated expenditures (441a(d) expenditures) or independent expenditures, both of which must be paid for with federal funds.

The RPNM planned to conduct certain activities in connection with the June 23 special election to fill the 1st Congressional District seat left vacant since March by the death of Congressman Steven Schiff. Those proposed activities included

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telephone, television, radio and direct mail communications urging the general public to vote Republican in the special election. One of the proposed communications said, in part, “On Tuesday, June 23, please vote in the special election for Congress. Vote Republican to continue the work of Steve Schiff.”

Commission regulations provide that, when a party committee makes disbursements for mixed federal and nonfederal activities, it may pay for them entirely with federal funds, or, if the committee has established federal and nonfederal accounts, it may allocate the costs between the two accounts, following formulas set out in 11 CFR 106.5. Generic voter drive activities fall under this regulation and include “voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.” 11 CFR 106.5(a)(2)(iv).

In this case, because only one office is at stake in the June 23 election and because the Republicans have nominated only one candidate—Heather A. Wilson—the RPNM’s proposed communication could mean no other candidate than the sole Republican nominee in the special election. Disbursements for a communication that urges the public to vote for a clearly identified candidate cannot be considered a generic voter drive cost.

The RPNM disbursements for such communications would therefore be either coordinated expenditures subject to its limit for this particular election, or independent expenditures.

- A party disbursement for a communication that depicts a clearly identified candidate, contains an electioneering message and results

from coordination or consultation with a federal candidate is subject to the limits set out at 2 U.S.C. §441a(d). This type of disbursement is more commonly known as a “coordinated party expenditure.” Electioneering messages include statements “designed to urge the public to elect a certain candidate or party.”¹ The message to vote Republican on June 23 fits within this definition and therefore would constitute an electioneering message. If the proposed communications are made in coordination with the candidate, the disbursements for them would be subject to the 441a(d) limits.²

- A disbursement for a communication that expressly advocates the election or defeat of a clearly identified candidate, but that is not made in coordination with a candidate or candidate’s committee, is an “independent expenditure” governed by 2 U.S.C. 431(17). Independent expenditures are not limited by the Act, but a committee that makes them must report such spending and certify that the expenditure in question was not made in coordination with a candidate.

Commission regulations give examples of express advocacy with phrases such as “support the Demo-

¹ *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957), *quoted in AO 1985-14*.

² *The Commission assumes that RPNM would apply such coordinated spending first to the section 441a(d) limit. Since any coordination between the RPNM and the candidate with respect to the proposed communications would be for the purpose of influencing a federal election, party spending for the communications would also be contributions to the candidate. See 2 U.S.C. §431(8)(A)(i). If the limit of section 441a(d) is exceeded, the disbursements for these communications will be considered contributions to the candidate subject to the \$5,000 per election limit of 2 U.S.C. §441a(a)(2)(A).*

cratic nominee” or “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” or other words that in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 CFR 100.22(a). The RPNM’s suggested communication—“Vote Republican on June 23”—in the context presented here, where there is only one election and one Republican nominee, constitutes express advocacy of a clearly identified candidate. If the proposed communications are not made in coordination with the candidate, the disbursement for them would be independent expenditures.

Under either option, the committee would have to fund the communication entirely with funds subject to the limits and prohibitions of the Act. Additionally, the RPNM would have to report them.³

Date Issued: May 22, 1998;
Length: 6 pages. ♦

Advisory Opinion Requests

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

AOR 1998-11

Contributions made and nonconnected PAC established by California limited liability company that owns or is federal contractor (Patriot Holdings, LLC, May 18,

³ *The Commission noted that this AO should not restrict the application of the Act’s definition of “expenditure,” in the context of party committee communications, only to communications that mention a particular federal candidate. Further, the Commission noted that uncoordinated disbursements made for the purpose of influencing federal elections only, although not subject to a limit, would also have to be made entirely from a federal account and reported as operating expenditures on line 21b. See footnote 8 of this advisory opinion.*

1998; 5 pages plus 6-page attachment)

AOR 1998-12

Status of employee stockholders as part of restricted class of SSF (Ashland, Inc., May 28, 1998; 6 pages plus 38-page attachment)

AOR 1998-13

Contributions made by limited liability company in New York and by its members using non-repayable drawing accounts (Lawrence, O'Donnell, Marcus, LLC, June 15, 1998; 4 pages plus 2-page attachment) ♦

Audits

Hagelin Audit Reveals No Compliance Problems

The FEC has determined that Dr. John Hagelin For President, 1996, the Presidential campaign committee of Natural Law Party nominee Dr. John Hagelin, conducted its campaign with no material problems in complying with the Federal Election Campaign Act and Commission regulations.

The Commission made its determination after the agency conducted an audit of the committee, as is required for an authorized candidate committee that receives federal funds. 26 U.S.C. §9007. The Committee received \$504,831 from the U.S. Treasury.

The audit report is available from the FEC's Public Records Office by calling 800/424-9530 (press 3) or 202/694-1120. Copies are also available at the FEC, which is located in Washington, DC, at 999 E St., N.W. ♦

Reports

July Reporting Reminder


Committees filing on a quarterly basis must file their second quarterly report by July 15. Those filing on a monthly basis have a report due on July 20.

In addition to filing quarterly reports, committees of candidates active in the 1998 primary and runoff elections must file pre-election reports and may have to file 48-hour notices. PACs and party committees filing on a quarterly basis may also have to file pre-election reports and 24-hour reports of independent expenditures.

Committees of candidates who are not active in any 1998 election must file a mid-year report by July 31.

For more information on 1998 reporting dates:

- See the reporting tables in the [January 1998 Record](#);
- Call and request the reporting tables from the FEC at 800/424-9530 (press 1) or 202/694-1100;
- Obtain a faxed copy of the reporting tables by calling the FEC's Faxline (202/501-3413, documents 586 and 587); or
- Visit the FEC's web site at <http://www.fec.gov> to view the reporting tables online. ♦



FECFile Order Form

Do you want to file your FEC reports electronically? The FEC will mail you a copy of its new, free electronic filing software—FECFile. Mail or fax this form to the address/number below. Currently, FECFile operates on Windows95 and WindowsNT platforms.

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Committee Name _____

Electronic Filing Contact Name _____

Address: Street 1 _____

Address: Street 2 _____

City _____

State _____

Zip Code _____

Phone Number _____

Fax Number _____

E-mail Address _____

Federal Election Commission
 Data Division—Room 431
 999 E Street, NW
 Washington, DC 20463
 Fax: 202/219-0674

Statistics

Republicans Ahead in Fundraising at 15-Month Mark in 1998 Election Cycle

In both hard dollar and soft money receipts, Republican party committees outpaced their Democratic counterparts during the first 15 months of the 1997-1998 election cycle. Republicans' federal committees raised \$146.8 million, or \$64 million more than the Democratic federal committees' combined total of \$83.8 million. These totals do not include transfers among national committees and between national committees and state and local committees with federal accounts.

On the disbursements side of the equation, Republican committees spent \$132 million from their federal accounts; Democrats spent \$79.7 million. The Republicans made \$286,600 in coordinated party expenditures and made \$810,552 in direct contributions to candidates. Democratic party committees spent \$2.9 million on coordinated party expenditures and contributed \$936,205 directly to federal candidates.

Republicans collected \$58.4 million in soft money, a 31 percent increase over the same period in the previous election cycle. Democrats edged closer to the Republican total with \$42.1 million in soft money receipts, a 6 percent increase over the same period in the last election cycle.

Information about these statistics, culled from party committees' reports from 1997 and 1998, is included in a June 8 news release. The release, which includes statistical information dating back to the 1988 election cycle, is available:

- At the FEC's web site at <http://www.fec.gov> (click on "News

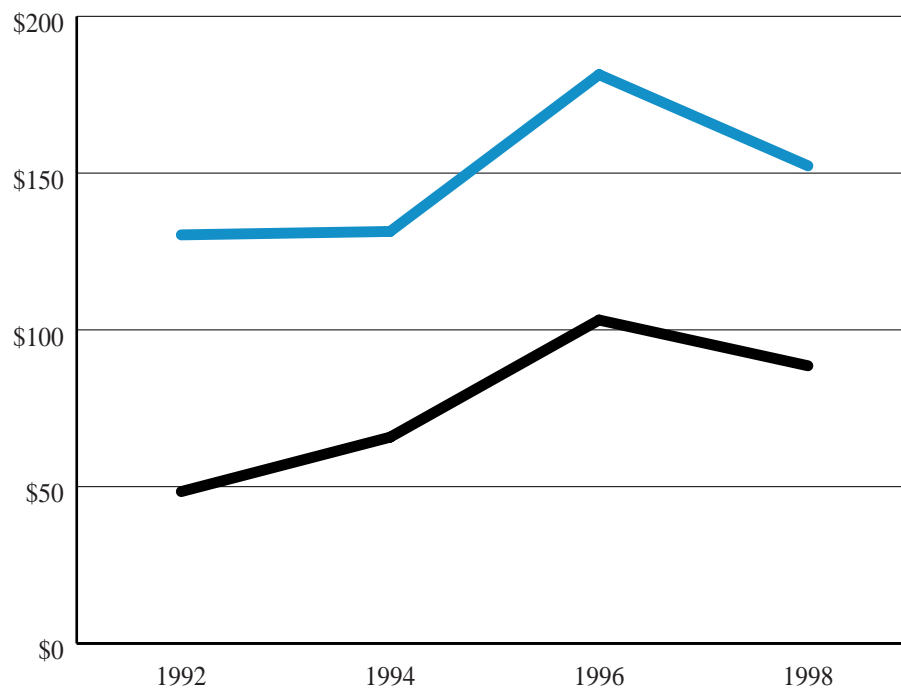
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Party Receipts: First 15 Months of Election Cycle

— Democratic Committees
 — Republican Committees

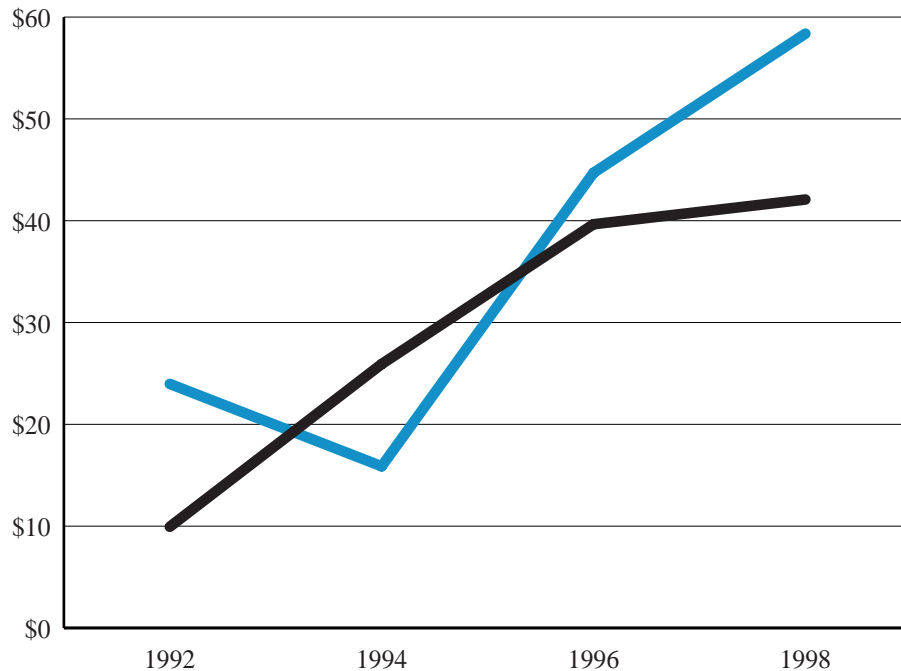
Federal Receipts

Millions



Nonfederal Receipts

Millions



Releases and Media Advisories” at the main menu);

- From the Public Records Office (call 800/424-9530 and press 3) and the Press Office (call 800/424-9530 and press 5); and
- By fax (call FEC Faxline at 202/501-3413 and request document 609).

The charts on page 12 are based on data taken from this news release. To view digital images of the party committees’ reports submitted to the Commission, visit the FEC’s web site and click on [“View Financial Reports Filed by Presidential and House Campaigns, Parties and PACs.”](#) ♦

Information

FEC Faxline Menu

FEC Faxline documents may be ordered 24 hours a day, 7 days a week, by calling **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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- 502. La Ley Federal relativa al Financiamiento de las Campañas
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