

# Record

November 2008

Federal Election Commission

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## Reporting

### Post-General Reporting Reminder

The 30-day Post-General Election report is due on December 4, 2008. The Post-General Election report covers activity from October 16 (or from the close of books of the last report filed) through November 24. The following committees must file this report:

- All registered PACs and party committees—even committees with little or no activity to disclose. Monthly filers must submit this report in lieu of the December monthly report.<sup>1</sup>
- Authorized committees of federal candidates running in the general election, including committees of unopposed candidates. Note that because the reporting period for the Post-General Election report spans two election cycles, candidate committees must use the Post-Election Detailed Summary Page (FEC Form 3, Pages 5-8, or FEC Form 3P, Page 3) instead of the normal Detailed Summary Page.

(continued on page 2)

<sup>1</sup> Monthly filers are not required to file a December monthly report in addition to the Post-General report.

## Advisory Opinions

### [AO 2008-11](#)

### Federal Contractor May Not Make Contributions

An individual who serves as a personal services contractor with the United States Agency for International Development (USAID) is considered a federal contractor under the Federal Election Campaign Act (the Act). As such, he is prohibited from making contributions for any political purpose.

#### Background

Mr. Lawrence Brown entered into a personal services contract with USAID in his individual capacity. The contract began in 2006 and is scheduled to end in September 2010. Under the contract, Mr. Brown is a senior Human Resources advisor for the USAID Bureau of Global Health, Office of Professional Development and Management Support. Payment for Mr. Brown's services under the contract is made from funds appropriated by Congress.

#### Analysis

The Act and Commission regulations prohibit federal government contractors from making contributions to any party, committee or candidate for federal office or to any

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## Reports

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### Notification of Filing Deadlines

In addition to publishing this article, the Commission notifies committees of filing deadlines on its web site, via its automated Faxline and through reporting reminders called prior notices. Since January 1, 2007, prior notices have been distributed exclusively by electronic mail. They are no longer sent to committees via U.S. mail. See December 2006 *Record*, page 1. For that reason, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address. To amend Form 1, electronic filers must submit Form 1 filled out in its entirety. Paper filers should include only the committee's

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name, address, FEC identification number and the updated or changed portions of the form.

### Treasurer's Responsibilities

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

### Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures, in excess of \$50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC electronically. Reports filed electronically must be received and validated by the Commission by 11:59 p.m. Eastern Time on the December 4 filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines.

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial copy of

their reports with the Commission in order to speed disclosure.

The Commission's electronic filing software, FECFile, is free and can be downloaded from the FEC's web site. New FECFile Version 6.2.1.0 is available for download from the FEC web site at <http://www.fec.gov/electfil/updateslist.html>. All reports filed after June 9, 2008, must be filed in Format Version 6.2 (the new version). Reports filed in previous formats will not be accepted. Filers may also use commercial or privately developed software as long as the software meets the Commission's format specifications, which are available on the Commission's web site. Committees using commercial software should contact their vendors for more information about the Commission's latest software release.

### Timely Filing for Paper Filers

*Registered and Certified Mail.* Reports sent by registered or certified mail must be postmarked on or before December 4 to be considered timely filed. A committee sending its reports by certified or registered mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail.

*Overnight Mail.* Reports filed via overnight mail<sup>2</sup> will be considered timely filed if the report is received by the delivery service on or before the December 4 mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports.

*Other Means of Filing.* Reports sent by other means—including first

<sup>2</sup> "Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system.

class mail and courier—must be received by the FEC (or the Secretary of the Senate) before close of business on the December 4 filing deadline. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

Paper forms are available at the FEC's web site (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413). The 2008 Reporting Schedule is also available on the FEC's web site ([http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml)), and from Faxline. For more information on reporting, call the FEC at 800/424-9530 or 202/694-1100.

### Filing Frequency for Party Committees

National committees of political parties must file on a monthly schedule in all years. 11 CFR 104.5(c)(4).

State, district and local party committees that engage in reportable federal election activity must automatically switch to a monthly filing schedule. Once a committee triggers the monthly filing requirement, a committee must file the next regularly scheduled monthly report and must continue to file monthly for the remainder of the calendar year.

### Political Action Committees

PACs (separate segregated funds and nonconnected committees) may file on either a quarterly or monthly basis in election years. A committee may change its filing frequency only once a year. After giving notice of change in filing frequency to the Commission and receiving the Commission's approval, all future reports must follow the new filing frequency. 11 CFR 104.5(c).

### Additional Information

For more information on 2008 reporting dates:

- See the reporting tables in the January 2008 *Record*;
- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;

- Fax the reporting tables to yourself using the FEC's Faxline (202/501-3413, document 586); or
- Visit the FEC's web page at [http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml) to view the reporting tables online.

—Elizabeth Kurland

## Advisory Opinions

(continued from page 1)

person for any political purpose or use. 11 CFR 115.2. Specifically, the Act prohibits contributions by any person who enters into a contract with any department or agency of the United States for the rendition of personal services if the payment for the performance of the contract is to be made in whole or in part from funds appropriated by Congress. 2 U.S.C. §441c(a).

Under government contract law, while the government is normally required to obtain its employees by direct hire under competitive appointment, it may obtain personal services by contract where "Congress has specifically authorized acquisition of the services by contract." 48 CFR 37.104(a).

Since Mr. Brown has entered into a written contract with USAID in his individual capacity and is paid with funds appropriated by Congress, he is considered a federal contractor under the Act and Commission regulations. As a federal contractor, he is prohibited from making contributions for any political purpose from either his business or personal funds. 2 U.S.C. §441c(a)(1); 11 CFR 115.2(a), 115.5.

Date Issued: October 14, 2008;  
Length: 4 pages.

—Myles Martin

## AO 2008-12

### Independent Party of Oregon Qualifies as State Party Committee

The Independent Party of Oregon (the IPO) qualifies as a state party committee under the Federal Election Campaign Act (the Act). The IPO is not affiliated with a national political party, but such an affiliation is not needed to qualify as a state party committee under the Act and Commission regulations.

### Background

The Act defines a "state committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission." 2 U.S.C. §431(15). See also 11 CFR 100.14(a).

The IPO is not affiliated with a national party, but qualifies under Oregon law as a "minor political party." In order for a state party organization that is not affiliated with a national party to achieve state committee status under Commission regulations, the organization must meet three requirements.

First, the organization must qualify as a "political party" under the Act and Commission regulations. See AO 2007-23. The Act and Commission regulations define a "political party" as an "association, committee, or organization which nominates a candidate for election to any Federal office, whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. §431(16); 11 CFR 100.15.

Second, the organization must itself possess an official party structure. 2 U.S.C. §431(15); 11 CFR 100.14(a).

Third, the organization must be responsible for the day-to-day operation of a political party at the

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## Advisory Opinions

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state level. See AOs 2000-21 and 2000-14.

### Analysis

The IPO meets all three requirements and thus qualifies as a political party under the Act and Commission regulations. It satisfies the first requirement because Mr. Joel Haugen will appear on Oregon's 2008 general election ballot as the party's candidate for the U.S. House of Representatives.

The IPO satisfies the second requirement because its constitution and bylaws establish an official party structure.

The IPO satisfies the third requirement because it is responsible for the day-to-day operation of a political party at the state level. The IPO's constitution and bylaws set out a comprehensive organizational structure for the party from the statewide level down through various local levels, and clearly identify the role of the IPO and its responsibilities for the day-to-day functions and operations of the political party at the state level. The IPO's responsibility for the operations of the political party at the state level is commensurate with the responsibility of other state party committees that the Commission has previously recognized.

Date Issued: October 8, 2008;

Length: 4 pages.

—Isaac J. Baker

### AO 2008-13

## Pacific Green Party of Oregon Qualifies as State Party Committee

The Pacific Green Party of Oregon (the PGPO) qualifies as a state party committee of the Green Party of the United States.

### Background

The PGPO first applied for and received recognition as a state party

affiliate of the Association of State Green Parties, the predecessor of the current Green Party of the United States (GPUS),<sup>1</sup> in November 2000. AO 2000-39. In September 2003 the PGPO filed a termination report, and in October the Commission informed the PGPO it had accepted the report as valid termination of registration and advised the committee that if it again became active in federal elections, it would have to re-register as a new committee. The PGPO did re-register by filing a new Statement of Organization on FEC Form 1 in July 2008.

### Analysis

The Federal Election Campaign Act (the Act) defines a state committee as “the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.” 2 U.S.C. §431(15). A “political party” is an “association, committee, or organization that nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.” 2 U.S.C. §431(16); 11 CFR 100.15.

Thus, in order to achieve status as a state committee of a national party under Commission regulations, an organization must meet three requirements. First, the national party with which the state party organization is associated must itself be a “political party.” Second, the state party organization must be part of the official structure of the national party. Third, the state party organization must be responsible for the day-to-day operation of the national party at the state level.

PGPO meets the first requirement because the Commission recognized the national party status of the GPUS in 2001. PGPO meets

the second requirement because it is the GPUS's sole recognized affiliate in the state of Oregon, thus showing the PGPO's role in the national party's official structure. In order to meet the third requirement, a state party organization must have:

- Bylaws or a similar document that “delineates activities commensurate with the day-to-day operation” of a party at a state level; and
- Ballot access for at least one federal candidate who has qualified as a candidate under Commission regulations.

The PGPO satisfies this requirement as well. Its bylaws set out a comprehensive organizational structure for the party from the statewide level down through local levels, and the bylaws clearly identify the role of the PGPO. Further, the PGPO has placed former Representative Cynthia McKinney on Oregon's 2008 general election ballot as the party's Presidential candidate. Thus, the PGPO satisfies all three requirements and qualifies as a state committee of a political party.

Date Issued: October 8, 2008;

Length: 5 pages.

—Isaac J. Baker

## Advisory Opinion Requests

### AOR 2008-15

Corporate-funded advertisements as electioneering communications and/or independent expenditures (National Right to Life Committee, Inc., September 26, 2008)

<sup>1</sup>The Commission has recognized the GPUS as a national committee of a political party since 2001. AO 2001-13.

## Court Cases

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

On October 1, 2008, the U.S. Court of Appeals for the Fourth Circuit denied The Real Truth About Obama, Inc.'s (RTAO) motion for an injunction pending appeal and motion to expedite consideration of the case.

In July 2008, RTAO, a nonprofit "527" corporation, filed a complaint in the U.S. District Court for the Eastern District of Virginia challenging the constitutionality of three Commission regulations and an FEC "enforcement policy." In September 2008, the district court denied RTAO's motions for preliminary injunctions against the FEC and the Department of Justice. For additional information regarding this case, please consult the October 2008 *Record*, page 11, at <http://www.fec.gov/pages/record.shtml>.

—Michelle Ryan

### Fieger v. U.S. Attorney General, et al.

On September 15, 2008, the U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the U.S. District Court for the Eastern District of Michigan to dismiss Gregory N. Fieger and others' (Plaintiffs) suit. The district court ruled that the Federal Election Campaign Act (the Act) permits the Attorney General of the United States to conduct investigations into suspected criminal violations of campaign finance law without a referral from the FEC, and that the Plaintiffs are not entitled to have a court compel the FEC to review the case.

#### Background

In February 2007, the Plaintiffs filed suit against then-Attorney General Alberto R. Gonzalez and

then-FEC Chairman Michael E. Toner. See May 2008 *Record*, page 3, and August, 2008 *Record*, page 8. The Plaintiffs sought judgment that the defendants acted contrary to the plain language of the Act, which the Plaintiffs assert bars the Attorney General from conducting an investigation of alleged violations of the Act until the FEC has investigated the matter itself and referred the matter to the Attorney General by an affirmative vote of four of its members. The Plaintiffs also asserted that the FEC's failure to comply with the requirements of the Act violated the Administrative Procedure Act (APA), and sought an order from the district court compelling the FEC to perform its statutorily defined duties pursuant to the Act.

The Act established the FEC, which consists of six voting members, no more than three of whom may be affiliated with the same political party. If the FEC, through an affirmative vote of at least four of its members, determines that there is probable cause to believe there has been or is about to be a knowing and willful violation of the Act's criminal provisions, the Commission may refer the violation to the Attorney General without regard to the Act's conciliation provisions.

#### Analysis

The appeals court agreed with the analysis of the district court that the Act also does not limit in any way the Attorney General's "plenary power" to enforce such criminal provisions of the Act. The appeals court also concluded that the plaintiffs' insistence that the Act does not allow the Attorney General to prosecute violations of the Act without a referral from the FEC is without basis or merit, since Congress has vested in the Attorney General the power to conduct the criminal litigation of the U.S. Government. While Congress may delegate such authority to other executive agencies or offices, the Supreme Court has explained that this requires a "clear

and unambiguous expression of the legislative will."

The Act states that the FEC has "exclusive jurisdiction with respect to the civil enforcement" of the provisions of the Act. The Act, however, is silent with respect to criminal jurisdiction. The court concluded that the fact that Congress chose to vest exclusive civil jurisdiction in the Commission while including no analogous provision regarding criminal jurisdiction suggests that Congress did not intend to supplant the traditional criminal enforcement powers of the Attorney General with respect to the Act. In examining the legislative history of the Act and its amendments, the court concluded that Congress expressly decided against granting exclusive criminal jurisdiction to the FEC.

In an analogous case, *Bialek v. Mukasey*, the Tenth Circuit Court of Appeals also examined a 1977 Memorandum of Understanding in which both the FEC and the Department of Justice acknowledged that the Attorney General "may investigate and prosecute knowing and willful violations [of the Act] without first exhausting FEC's investigative and conciliation procedures." The court in that case concluded that Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated violations of the Act. See August 2008 *Record*, page 8.

U.S. Court of Appeals for the Sixth Circuit, CV 07-2291.

—Myles Martin

### Koerber v. FEC

On October 2, 2008, Committee for Truth in Politics, Inc. (CTP) and Holly Lynn Koerber (collectively the Plaintiffs) filed suit against the FEC in the U.S. District Court for the Eastern District of North Carolina. The suit challenges the constitutionality of the FEC's disclaimer and

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## Court Cases

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reporting requirements for electioneering communications (ECs) that “may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate,” as described by the Supreme Court in *FEC v. Wisconsin Right to Life (WRTL)*. 127 S. Ct. 2652, 2667 (2007). The Plaintiffs also challenge the constitutionality of the Commission’s “enforcement policy”<sup>1</sup> on political committee status. The CTP asks the court to declare that the ads described in their complaint are neither express advocacy nor electioneering communications subject to the prohibition on corporate treasury funding under *WRTL*, that the Federal Election Campaign Act’s disclosure requirements for such ECs are unconstitutional and that the FEC’s “PAC enforcement policy” is unconstitutional and beyond FEC authority under the Administrative Procedure Act.

### Background

An electioneering communication (EC) is defined by the Federal Election Campaign Act (the Act) and FEC regulations as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed within 30 days of a primary election or 60 days of a general election for the office sought by the candidate, and is targeted to the relevant electorate. 11 CFR 100.29(a). The Act and FEC regulations require disclosure of ECs that aggregate more than \$10,000 in a calendar year. 2 U.S.C. §434(f)(1). In *FEC v. Wisconsin Right to Life*, the Supreme Court held that corporations and labor organizations cannot be prohibited from using treasury funds to make an EC unless the EC is “susceptible

<sup>1</sup> The complaint references the FEC’s Supplemental Explanation and Justification of its Political Committee Status rules, 72 FR 5595 (February 7, 2007).

of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S.Ct. at 2667.

CTP is a nonstock, nonprofit North Carolina corporation that incorporated in September 2008. CTP states that it is presently engaging in “issue advocacy” advertising and that it has broadcast one ad that mentions Senator Barack Obama within 60 days of the November 2008 general election and that it intends to broadcast another ad before the election. CTP states that it is currently including disclaimers on the ads, but is not disclosing them under the Act’s disclosure requirements for ECs. The complaint states that Holly Lynn Koerber is a resident of Elizabeth City, NC, one of the places where CTP is broadcasting its ads, who wishes to exercise her “First Amendment right to continue hearing CTP’s issue-advocacy speech.”

### Complaint

The Plaintiffs seek a declaration from the court that the ads that CTP has run do not constitute express advocacy, as defined in Commission regulations at 11 CFR 100.22. CTP also maintains that the ads are ECs that are not subject to financing restrictions under the *WRTL* rule because they do not constitute an appeal to vote for or against a particular candidate.

The Plaintiffs also seek a declaration from the court that the electioneering communication disclosure requirements are unconstitutionally overbroad as applied to ads that *WRTL* held are not subject to the EC financing restrictions.

CTP maintains that it is not a political committee under the relevant law because it is neither controlled by a candidate nor does it have the “major purpose” of primarily engaging in regulable, election-related speech. CTP maintains that its activities will be nonpolitical intervention, including social welfare activities and lobbying. CTP seeks a declaration

from the court that the FEC’s PAC status enforcement policy is unconstitutional on its face and as applied and void for being beyond statutory authority.

U.S. District Court for the Eastern District of North Carolina, Northern Division, 2:08CV00039-BR.

—Myles Martin

## Regulations

### Notice of Proposed Rulemaking on Repeal of Millionaires’ Amendment Regulations

On October 2, 2008, the Commission approved a Notice of Proposed Rulemaking (NPRM) that would implement the Supreme Court’s decision in *Davis v. Federal Election Commission (Davis)*. The NPRM proposes deleting the Commission’s regulations implementing the Millionaires’ Amendment. Additionally, the Commission proposes to revise several regulations to conform to the *Davis* decision and retain others that were not affected by the Supreme Court’s ruling. Comments on the NPRM must be received by the Commission on or before November 21, 2008.

### Background

On June 26, 2008, the Supreme Court ruled in *Davis* that the Millionaires’ Amendment provisions of the Bipartisan Campaign Reform Act (BCRA) relating to House of Representatives elections unconstitutionally burden the First Amendment rights of self-financed candidates. Under the Millionaires’ Amendment, Senate and House candidates facing opponents who spent personal funds above certain threshold amounts were eligible for increased contribution and coordinated party expenditure limits.

On July 25, 2008, the Commission issued a public statement

announcing that the *Davis* decision precluded the enforcement of the House provision and effectively precluded the enforcement of the Senate provision. The statement noted that, as of June 26, 2008, the increased contribution limits and reporting requirements of the Millionaires' Amendment were no longer in effect, and political party committees were no longer permitted to make increased coordinated party expenditures under these provisions. See August 2008 *Record*, page 3.

### **Proposed Removal of 11 CFR Part 400 – Increased Limits for Candidates Opposing Self-Financed Candidates**

Part 400 of FEC regulations implements the statutory provisions of the Millionaires' Amendment. The Supreme Court's decision in *Davis* invalidated the entire BCRA section 319 relating to House elections, including the increased limits in 319(a) and its companion disclosure requirements in 319(b). While the *Davis* decision struck down only the BCRA sections 319(a) and (b) governing House elections, the Commission believes that the Supreme Court's analysis in *Davis* also precludes enforcement of the parallel provisions applicable to Senate elections. Therefore, the Commission proposes to delete regulations currently found at 11 CFR Part 400 in their entirety.

### **Proposed Amendments to Other Provisions**

The proposed deletion of current 11 CFR Part 400 affects several other Commission regulations, as noted below.

*Definition of File, Filed or Filing.* Section 100.19 specifies when a document is considered timely filed. The Commission proposes to delete paragraph (g), which describes the candidate's notification of expenditures of personal funds under 400.21 and 400.22.

*Definition of Personal Funds.* The term "personal funds" found

in section 100.33 contains a cross-reference to section 400.2. The Commission proposes deleting the cross-reference, while retaining the remaining language of section 100.33.

*Candidate Designations.* On the Statement of Candidacy (FEC Form 2), candidates are required by section 101.1(a) to disclose the amount by which the candidate intends to spend personal funds in excess of the threshold amount, as defined in 400.9. The Commission proposes to delete the sentence within paragraph (a) referencing this disclosure.

*Statement of Organization.* Section 102.2(a)(1)(viii) requires principal campaign committees of House and Senate candidates to provide an e-mail address and fax number on their Statement of Organization (FEC Form 1). This regulation was promulgated to aid with the expedited notifications required by the Millionaires' Amendment under Part 400. The Commission wishes to retain the requirement that these committees provide e-mail addresses, because it facilitates the exchange of information between the Commission and committees for other purposes under the Act. However, because the Commission does not routinely communicate with committees via facsimile, the NPRM proposes that the requirement for committees to provide fax numbers be deleted from paragraph (a)(1)(viii).

*Calculation of "Gross Receipts Advantage."* Section 104.19 requires the principal campaign committees of House and Senate candidates to report information used to calculate their "gross receipts advantage." This calculation is then used to determine the "opposition personal funds amount" under 400.10. With the Commission's proposal to delete Part 400, the reporting under section 104.19 would no longer be required. As such, the Commission proposes the deletion of section 104.19.

*Biennial Limit.* Section 110.5(b)(2) states that contributions to candidates made by individuals under the increased limits provided in the rules at Part 400 are not subject to the individual biennial limit. With the proposed removal of Part 400, this exception would no longer exist, therefore the Commission proposes that paragraph (b)(2) be deleted from section 110.

### **Proposed Retention of Certain Other Regulations**

*Repayment of candidates' personal loans.* The BCRA added a new provision limiting to \$250,000 the amount of contributions collected after the date of the election that can be used to repay loans made by the candidate to the campaign. When promulgating regulations to enforce this statutory provision, the Commission added new sections 116.11 and 116.12 to the regulations rather than including them in Part 400 with the other Millionaires' Amendment provisions. Unlike other aspects of the Millionaires' Amendment, this statutory provision applies equally to all federal candidates, including Presidential candidates. The personal loan repayment provision was not challenged in *Davis*, nor did the Supreme Court's decision address the validity of this provision. Therefore, the Commission proposes to retain sections 116.11 and 116.12 and seeks comment on this proposal.<sup>1</sup>

*Net debts outstanding calculation.* Section 110.1(b)(1)(i) states that candidates and their committees cannot accept contributions after the election unless the candidate still has net debts outstanding from that election and only up to the amount of

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<sup>1</sup> The proposal to retain sections 116.11 and 116.12 is consistent with the approach the Commission took in AO 2008-9, issued after the Millionaires' Amendment was invalidated by the *Davis* decision. See October 2008 *Record*, page 9.

## Regulations

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that net debts calculation. This rule was in place before BCRA added the loan repayment restriction. However, to conform with the fundraising constraints put in place with the BCRA by section 116.11, the Commission added language to 110.1(b)(3)(ii) to exclude the amount of personal loans that exceed \$250,000 from the definition of net debts outstanding. For the same reasons stated above, the Commission proposes to retain paragraph (b)(3)(ii)(C).

*Expenditure Limitations.* Limitations on expenditures from personal or family funds when a candidate has accepted matching funds in a Presidential primary election is outlined in section 9035.2(c). As part of the rulemaking implementing the Millionaires' Amendment, the Commission changed the definition of personal funds applicable to FECA and moved it to current section 100.33. At that time, the Commission felt it appropriate to change the cross-reference in section 9035.2(c) to the definition of personal funds in section 9003.2(c), which applies to Title 26 regulations. The Commission continues to believe this cross-reference is appropriate and therefore should be retained.

### Additional Information

The full text of the NPRM was published in the October 20, 2008, *Federal Register* and is available on the FEC web site at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml). All comments must be submitted in writing and addressed to Mr. Robert M. Knop, Assistant General Counsel, by November 21, 2008. Comments must be submitted via e-mail, facsimile or paper copy form. Comments by e-mail must be sent to [millionairepeal@fec.gov](mailto:millionairepeal@fec.gov). If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with

paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW, Washington, D.C. 20463. All comments (including those by e-mail) must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its web site after the comment period ends.

—Elizabeth Kurland

## Commission Hearing on Proposed Rules for Bundled Contributions

The Federal Election Commission held a public hearing on September 17, 2008, on proposed rules governing the disclosure of information about lobbyists, registrants and the political action committees (PACs) of lobbyists and registrants that bundle contributions over a threshold amount during a covered period to certain committees.

The Commission published a Notice of Proposed Rulemaking (NPRM) on November 6, 2007, seeking public comment on the proposed regulations, which are in response to provisions of the Honest Leadership and Open Government Act of 2007 (HLOGA). The Commission received six comments from 11 commenters on the NPRM. Six of the commenters testified at the hearing and offered their views on the scope and substance of the proposed rules. The Commission reopened the record for one week after the hearing to receive further comments on issues discussed at the hearing. The Commission received two such comments during that period.

### Background

HLOGA amends the Federal Election Campaign Act (the Act) to require candidates' authorized committees, leadership PACs and political party committees to disclose

information about each lobbyist and registrant, and each political committee the lobbyist/registrant establishes or controls, who forwards or is credited with raising two or more bundled contributions totaling more than \$15,000<sup>1</sup> during a specific time period. Reporting committees must disclose the name and address of the lobbyist/registrant or lobbyist/registrant PAC, employer (for individual persons) and the aggregate amount of contributions bundled to the committee within the covered period.

The NPRM proposes rules requiring the reporting of, and recordkeeping for, information about lobbyists/registrants and lobbyist/registrant PACs that bundle contributions. For example, HLOGA requires the disclosure of information about a person who forwards, or is credited with raising, contributions if the person is "reasonably known" by the reporting committee to be a lobbyist/registrant or lobbyist/registrant PAC. The NPRM proposes rules to provide guidance about how a reporting committee can determine whether a person qualifies as a lobbyist, a registrant or a political committee established or controlled by a registrant or lobbyist and therefore must be identified on a filing. The Commission sought comments on this proposal and also specifically requested comments on proposed rules to define the terms used in HLOGA, among other issues discussed below. (See the December 2007 *Record*, page 10).

### Testimony Regarding Proposed Rules

Much of the hearing testimony centered on three broad concerns: how to define the concept of "crediting" a bundled contribution to a lobbyist/registrant or a lobbyist/registrant PAC; how to credit bundled

<sup>1</sup> This amount is to be indexed for inflation annually, and thus the threshold amount may be different when the regulations take effect in early 2009.



contributions to multiple lobbyists/registrants who co-host an event; and whether the statute applies to contributions bundled by non-lobbyist employees of a registrant organization.

*Definition of "credit."* Testimony focused on the issue of what "credit" means, in the context of the statutory language. Witnesses discussed whether "crediting" should be defined as mere knowledge on the part of the candidate or committee that the lobbyist/registrant raised a certain amount of money, or whether it should be defined to require something tangible, like a title for lobbyists/registrants who raise funds beyond certain thresholds or tickets to a special event. Don Simon, counsel to Democracy 21, told the Commissioners that if a lobbyist/registrant verbally indicates to a Member of Congress that the lobbyist/registrant raised a certain amount of bundled contributions for that Member, but does not provide that information in writing, the Member should still be held accountable for knowing and designating those contributions as such.

Timothy Jenkins of the Coalition for Tax Equity, told the Commissioners that a Member of Congress could not be held to such a standard. He said there needs to be a written record or other means to quantify the amount raised, otherwise the statute would be difficult to enforce.

Joseph Sandler of Sandler, Reiff & Young, P.C., said the issue of written versus oral designation of credit largely dissolves in practical application because most committees ensure they have a way of tracking who raises funds for them and how much.

*Treatment of lobbyist/registrants who co-host events.* The Commission requested comments on how the new law should be applied with regard to crediting multiple lobbyist/registrants who co-host a single fundraiser. For example, the Commission asked whether, if three

lobbyist/registrants jointly co-host a fundraiser that raised \$20,000 in contributions for Senator X, each of the three co-hosts should be deemed to have raised the entire \$20,000 for reporting purposes. The Commission asked whether this approach would be misleading or inaccurate from a disclosure perspective and whether the sum total should instead be prorated among the three co-hosts.

Mr. Simon, Mr. Sandler, Paul Ryan of the Campaign Legal Center and Craig Holman of Public Citizen all spoke in favor of crediting each lobbyist/registrant with the entire amount of contributions raised at a multi-host event. They argued that prorating the sum total among the bundlers would, as Mr. Holman suggested, "distort the actual role of each bundler in the fundraising process."

In contrast, Mr. Jenkins told the Commissioners that the only way the Commission could accurately determine whether the bundling threshold of \$15,000 is met is to prorate the total amount raised among the event's multiple hosts. This method would also ensure that the funds raised at events with multiple hosts are accurately attributed to the separate hosts, he told the Commissioners.

Marc Elias of Perkins Coie expressed disapproval of both of these options. He told the Commissioners that the candidate or committee receiving the bundled contributions should determine how much credit to give each lobbyist/registrant, thus determining who and what must be disclosed. He pointed out that the recipient candidate or committee is in the best position to determine how much credit to give each fundraiser.

*Employees of lobbyist/registrants.* Questions were also raised at the hearing concerning whether the statute (and the proposed regulations) would apply to non-lobbyist employees of a registrant organization. The questions centered on how to determine, for reporting purposes, whether an individual bundling

contributions is doing so on his or her own behalf or on behalf of his or her employer.

Mr. Jenkins said that disclosure should be required if, for example, a PAC supervisor or coordinator who is not a registered lobbyist bundles contributions on behalf of a registered lobbyist.

Mr. Sandler suggested that the regulations should outline "some objective criteria rather than leaving it to some sort of case-by-case investigation." He suggested, as an example, "Possibly there should be a presumption that senior officers of the company, individuals involved in a government relations division of a company, should be presumed to be acting on behalf of, or acting as agents rather, for their company for purposes of the disclosure."

#### **Additional Information**

The full text of the NPRM, written comments in response to the NPRM, a transcript of the FEC hearing and the witness' supplemental written comments filed after the hearing are available at [http://www.fec.gov/law/law\\_rulemakings.shtml#bundling](http://www.fec.gov/law/law_rulemakings.shtml#bundling).

—Isaac J. Baker

## **Legislation**

### **Administrative Fine Program Extended to 2013**

On Thursday, October 16, 2008, President Bush signed H.R. 6296 into law, extending the Commission's Administrative Fine Program for late- and non-filed reports for an additional five years. Under the new law, the Administrative Fine Program will apply to reports covering periods that end on or before December 31, 2013. This bill, introduced by Representatives Robert Brady (PA), Vernon Ehlers (MI) and Zoe Lofgren (CA), provides the pro-

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## Legislation

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gram with its longest extension since its inception.

The Administrative Fine Program was created in 1999 by amendments to the Federal Election Campaign Act that authorized the Commission to assess civil money penalties for committees that failed to file reports on time or at all, and for campaign committees that failed to file 48-hour notices. 2 USC §437g(a)(4)(C); 11 CFR 111.30 to 111.46. As of the end of fiscal year 2008, the Commission has assessed fines of \$3,177,607 and closed 1,641 cases under the Administrative Fine Program.

As Representative Lofgren explained on the floor of the House of Representatives, the Administrative Fine Program “allows the FEC to quickly resolve minor violations of the [Federal Election Campaign Act] and concentrate its resources on more complex enforcement matters. The fines program also assures political and candidate committees that they can resolve minor errors by paying a fixed monetary penalty, avoiding a long and potentially complicated enforcement process.” She also explained that “there has been a significant decrease in the number of late and nonfiled reports since the start of this program.” Compared to increases in the number of political committees, the number of reports due, and the amount of financial activity disclosed on those reports, a decrease in the absolute number of late and nonfiled reports marks a significant achievement in encouraging compliance.

Representative Ehlers described H.R. 6296 and the Administrative Fine Programs as follows: “This bill is not a glamorous one... Nonetheless, it is an important program designed to protect our Nation’s campaign process from being thwarted by insisting upon the utmost transparency if an individual chooses to seek public office.”

At the Commission, the Admin-

istrative Fine Program has enjoyed bipartisan support. On four separate occasions, the Commission issued Legislative Recommendations seeking to extend or make it permanent, and each recommendation received a unanimous, bipartisan vote of the Commissioners. Additionally, during 2008, then-Chairman David Mason and Vice Chair Ellen Weintraub worked with Congress to ensure that it would renew the legislative authority for the Administrative Fine Program.

—Myles Martin

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