

# Record

September 1996

Federal Election Commission

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## Regulations

### Regulations to Conform with Colorado Republican Ruling

The Commission took steps to comply with a recent Supreme Court decision by deleting an FEC regulation that prohibited party committees from making independent expenditures in House and Senate elections. In a related action, the agency published a request for comments on a rulemaking petition submitted by Democrats seeking guidance on how national party committees may make independent expenditures.

#### Background

The Supreme Court ruled in June that party committees are capable of making independent expenditures. *Colorado Republican Federal Campaign Committee v. FEC*, 116 S.Ct. 2309, June 26, 1996 (summarized in the August *Record*). An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified federal candidate but that is made "independently" in that it is not coordinated with any candidate. 11 CFR 100.16 and 109.1(a). Independent expenditures are not subject to the dollar limits set forth in the Federal Election Campaign Act.

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## Court Cases

### New Litigation

#### FEC v. The Christian Coalition

The FEC asks the court to find that the Christian Coalition, a corporation, made prohibited in-kind contributions and independent expenditures on behalf of Republican candidates during the 1990, 1992 and 1994 election cycles (in violation of 2 U.S.C. §441b) and failed to report the independent expenditures (in violation of 2 U.S.C. §434(c)).

Specifically, the FEC alleges that the Christian Coalition:

- Made prohibited in-kind contributions by coordinating, cooperating or consulting with candidates when making expenditures for voter identification drives, get-out-the-vote drives and voter guides.
- Made prohibited in-kind contributions by coordinating with the National Republican Senatorial Committee when making expenditures for voter guides distributed in several states.
- Made a prohibited and unreported independent expenditure by expressly advocating the defeat of a candidate at a conference.
- Made prohibited and unreported independent expenditures for direct mailings whose content—

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## Regulations

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### Removal of Independent Expenditure Prohibition

The Commission had previously taken the position that party committee spending on behalf of candidates was subject to either the contribution limits or the coordinated party expenditure limits of the Act, and that party committees were incapable of making independent expenditures because of their close ties to candidates. Reflecting that view, section 110.7(b)(4) of FEC rules stated that party committees could not make independent expenditures in connection with the general election campaign of candidates for the U.S. House of Representative or Senate. That provision has now been deleted from the regulations, effective August 7, 1996 (61 FR 40961).

The change is limited to independent expenditures advocating the election or defeat of House and

Senate candidates—not Presidential candidates—since the *Colorado Republican* Court specifically said that its decision did not address issues that might grow out of the public funding of Presidential campaigns.

### Petition for Rulemaking

The FEC is seeking comments on a rulemaking petition submitted by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee. The Committees request that the FEC amend its regulations to provide “meaningful guidance” on independent expenditures by national party committees.

The Petition for Expedited Rulemaking is available from the Public Records Office and from the FEC’s Flashfax service (document #231).

Public comments on the petition must be submitted in writing by September 6 to: Susan E. Propper, Assistant General Counsel, 999 E Street, NW, Washington, DC 20463.

Although the Committees have requested that the FEC prepare new rules in time for the general election in November, it is unlikely that the agency will be able to do so, given the time needed to satisfy the statutory notice and comment requirements and the legislative review requirements. The Committees have, however, requested an advisory opinion on similar issues (AOR 1996-30).<sup>1</sup> These issues may also be affected by ongoing litigation in the *Colorado Republican* case. (The Supreme Court remanded the case to the lower courts for further proceedings consistent with its decision.) ♦

<sup>1</sup> The Commission failed to issue an opinion because it could not reach agreement by the required 4-vote majority. See Agenda Document #96-85 (meeting of 8/22/96).

## Court Cases

(continued from page 1)

cover letters and scorecards rating incumbents on their House and Senate votes—constituted express advocacy on behalf of candidates receiving high scores and against candidates receiving low scores.

The Commission further asks the court to enjoin the Christian Coalition from violating §§441b and 434(c) and to assess an appropriate civil penalty for each violation.

U.S. District Court for the District of Columbia, 1:96CV01781, July 30, 1996. ♦

## New Litigation

### FEC v. McCallum

The FEC alleges that Elkin McCallum made \$250,000 in excessive contributions in the form of three loans to the Tsongas for President Committee, the committee authorized by Senator Paul E. Tsongas for his 1992 Presidential campaign. The FEC further alleges that, in the case of one of the loans in the amount of \$100,000, Mr. McCallum attempted to circumvent the contribution limits knowingly and willfully by making the check payable to the Committee’s chief fundraiser with the intention that the funds would eventually be provided to the Committee.

The Commission therefore asks the court to find that Mr. McCallum made excessive contributions in violation of 2 U.S.C. §441a(a)(1) (A), assess the appropriate civil penalties and permanently enjoin him from committing similar violations.

U.S. District Court for the District of Massachusetts, 96-11418WGY, July 12, 1996. ♦

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# 800 Line

## Last-Minute Independent Expenditures: 24-Hour Reporting

This article explains the 24-hour reporting of independent expenditures aggregating \$1,000 or more that are made shortly before an election.

### Who Reports

Any person making independent expenditures is responsible for complying with independent expenditure reporting requirements:

- Political committees registered with the FEC;
- Other groups of persons that are not FEC-registered political committees;<sup>1</sup>
- Individuals; and
- Qualified nonprofit corporations exempt under 11 CFR 114.10 from

<sup>1</sup> Note that an unregistered group whose federal election activity exceeds \$1,000 in a calendar year must register as a political committee under federal law if its major purpose is campaign activity—i.e., making payments or donations to influence any election to public office. 11 CFR 100.5(a) and AO 1996-13.

### On Appeal?

The FEC voted on whether to appeal the following court decisions:

#### Republican National Committee v. FEC (94-1017)

Appellate court, D.C. Circuit, upheld FEC's "best efforts" regulations (11 CFR 104.7(b)) except the specific language required when seeking contributor information. See the April 1996 Record, page 10.

#### Clifton v. FEC (96-66-P-H)

District court, Maine, ruled that FEC regulations on voting records and voter guides (11 CFR 114.4(c)(4) and (5)) were invalid because they regulate issue advocacy and therefore go beyond the FEC's authority. See the July 1996 Record, page 1.

the prohibition on corporate independent expenditures.

### Definition of Independent Expenditure

An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is not made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, any candidate or his or her authorized committees or agents. 11 CFR 100.16 and 109.1(a).

### What Triggers 24-Hour Reporting

The requirement to file a 24-hour report is triggered when a person makes independent expenditures aggregating \$1,000 or more between 2 and 20 days before the election. 11 CFR 104.4(b), 104.5(g) and 109.2(b).

### When to Report

Information on a last-minute independent expenditure must be reported within 24 hours after such expenditure is made. 11 CFR 104.4(b), 104.5(g) and 109.2(b). (A political committee must disclose a last-minute independent expenditure a second time on a Schedule E filed with its next scheduled report. 11 CFR 104.3(b)(3)(vii).)

### Reporting Forms

Information on last-minute independent expenditures must be disclosed in a statement or on Schedule E (political committees) or Form 5 (other groups, individuals, qualified nonprofit corporations). 2 U.S.C. §434(c); 11 CFR 104.4(a) and 109.2(a).

### What to Report

A 24-hour report must include the following:

- The political committee's name, address and FEC identification number or, in the case of an individual, group or qualified nonprofit corporation, the reporting person's name, address and, if applicable, occupation and employer.
- The name and address of the payee (i.e., the vendor or other person who received payment for providing goods or services related to the independent expenditure).
- The date, amount and purpose of the expenditure;
- The name of the candidate, the office sought and whether the expenditure was made to support or oppose the candidate.
- The name, address, occupation and employer of each person who made a contribution in excess of \$200 for the purpose of furthering the independent expenditure. However, this requirement to include contributor information does not apply to political committees.
- A notarized statement certifying that the expenditure was made without the cooperation or consent of any candidate or authorized committee, and, in the case of a corporation, that the corporation is a qualified nonprofit corporation under 11 CFR 114.10.
- The signature of the committee treasurer or, in the case of an individual, a group or a qualified nonprofit corporation, the signature of the individual filling out the report.

(continued on page 4)

### Appeal?

No

Yes

## 800 Line

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11 CFR 104.3(b)(3)(vii), 104.5 (g), 109.2 and 114.10(e). See also instructions to FEC Form 5.

### Where to File

- Reports on independent expenditures are filed with the FEC, except that reports on independent expenditures supporting or opposing only U.S. Senate candidates are filed with the Secretary of the Senate.
- Copies must also be filed with the Secretary of State (or equivalent officer) of the states in which the candidates supported or opposed are seeking election. 11 CFR 104.4(c).

The report may not be faxed because an original signature is required. ♦

## Information

### Correction: Contributions to Convention Host Committees by Local Individuals

An article in the February 1996 *Record* stated that “any individual or any local business, local labor organization or other local organization may donate funds or make in-kind donations to a host committee to defray certain convention-related expenses.”

The sentence should have read: “any **local** individual or any local business....”

The article, “Presidential Nominating Conventions: Permissible Corporate/Labor Activity,” appeared on page 7.

Commission regulations at 11 CFR 9008.52(c) permit local individuals to donate funds and make in-kind donations to a host committee to be used for a variety

of purposes, such as promoting the city, facilitating commerce, defraying construction costs in the convention center and defraying the city’s additional costs for transportation or law enforcement.

Local individuals are individuals who reside in the Metropolitan Area of the convention city. 11 CFR 9008.52(c)(2) and AO 1995-32. ♦

## Election Administration

### Updated Summary of State Campaign Finance Laws

The FEC’s Office of Election Administration recently published *Campaign Finance Law 96*, which summarizes the campaign finance laws of each state and includes state code citations.

For quick reference, a series of charts lists each state’s reporting requirements, contribution restrictions, solicitation restrictions and expenditure limits.

The publication would be particularly valuable for PACs whose nonfederal election activity requires them to comply with laws in several states.

*Campaign Finance Law 96* is available for purchase from the Government Printing Office. To order, list the title and stock number (052-006-00059-7), enclose a \$40 check payable to the Superintendent of Public Documents, and send the order to the Superintendent of Public Documents, Government Printing Office, Washington, DC 20402. ♦

## Advisory Opinions

### AO 1996-23

#### Disaffiliation of Reorganized Corporations and Their PACs

Due to circumstances resulting from a corporate reorganization, three separate segregated funds (SSFs), previously affiliated through the parent-subsidary relationship of their connected organizations, are no longer affiliated, based on an analysis of the affiliation factors in FEC regulations. Therefore, they no longer share the same limits on contributions received or made. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii).

#### Background

The former ITT Corporation (Old ITT) completed a corporate breakup that resulted in three independent, publicly-traded companies operating in separate business areas:

1. ITT Corporation (New ITT), which specializes in hospitality, gaming, entertainment and information services businesses;
2. ITT Industries, Inc., which consists of three manufacturing businesses; and
3. ITT Hartford Group, Inc., made up of insurance providers.

On December 19, 1995, the day of the breakup, approximately 56,000 shareholders of Old ITT received stock in each of the three new companies. Active public trading of these stocks rapidly diversified the ownership.

Prior to the breakup, three SSFs existed; after the breakup, each SSF was designated as the PAC of one of the three new companies.

#### Analysis of Affiliation Factors

When an entity is not an acknowledged subsidiary of another, FEC regulations provide for an examination of several factors to

determine whether one company is an affiliate of another and, hence, whether their respective SSFs are affiliated. This list of factors (11 CFR 100.5(g)(4)(ii)(A)–(J) and 110.3(a)(3)(ii)(A)–(J)) is not exhaustive; other factors may be considered. See AO 1995-36.

Moreover, there is no formula whereby the presence of a specific number of factors indicates affiliation. In proposed disaffiliation situations, the historic background of the relationships provides a context for assessing the factors. See AOs 1995-36 and 1994-9.

In this particular situation, the Commission considered the following factors:

*Common Ownership.* None of the companies owns stock in the others. See 110.3(a)(3)(ii)(A). As a related matter, the common shareholder base of the companies appears to be decreasing rapidly due to vigorous public trading of stock.

*Authority Over Another Company.* None of the companies has authority to participate in the governance of the others; nor does any company have the right to hire, demote or otherwise control the decisionmakers of the others. See 11 CFR 110.3(a)(3)(ii)(B) and (C).

*Funding of SSFs.* Since the breakup, it appears that there have been no transfers of funds between the SSFs, and there has been no indication that one SSF will solicit contributions on behalf of another SSF. See 11 CFR 110.3(a)(3)(ii)(G) and (H).

*Formation, Overlap and Continuity.* Old ITT still survives in reincorporated form as ITT Industries, which could thus be viewed as the entity responsible for the formation of the other two companies. See 11 CFR 110.3(a)(3)(ii)(I). However, the three entities can also be viewed as newly created entities, with none responsible for the formation of the others. In addition, all three entities existed in some form prior to breakup.

Facts indicate some continuity between the board of Old ITT and the boards of the new companies. Although the presence of some old board members on the boards of spun-off companies may, by itself, not be particularly significant, some of the members of the board of Old ITT continue to serve on the boards of more than one of the three present companies. This overlap may indicate an ongoing relationship among the three companies. See 11 CFR 110.3(a)(3)(ii)(E) and (F).

This situation, however, is balanced by the presence of several other circumstances. First, each company held a shareholder election of its board in May 1996, by which time public trading had substantially reduced common ownership. Second, two of the boards were enlarged by one new member each. Third, most of the board members are not overlapping.

### Conclusion

In view of these countervailing considerations with respect to the composition of the boards, and in the absence of other affiliation factors, the three companies (and their respective SSFs) are not affiliated. Date Issued: July 12, 1996; Length: 7 pages. ♦

### Record Available On-Line

Each new *Record* issue is available on the World Wide Web several days before it reaches subscribers. To get a head start, you can download the issue (usually by the first of the month) from the FEC's web site: <http://www.fec.gov>. Record issues are listed under the menu option *Help for Candidates, Parties and PACs*. Once downloaded, you can view the document using the Adobe® Acrobat® Reader, or you can print it. (Only 1996 issues are available.)

## AO 1996-26 Corporation as Collecting Agent for PAC of Affiliated Association

Because FTD, Inc. (the Corporation) and the FTD Association, a nonprofit corporation, are affiliated entities, with a relationship analogous to that of dependent branches of a common enterprise, the Corporation may act as a collecting agent for the Association's separate segregated fund, FlowerPAC.

### Background

The FTD (Florists Transworld Delivery)—created nearly a hundred years ago—was divided into the present two entities in 1995, with the Corporation acting as the clearinghouse for flower orders, and the Association assuming the trade association functions.

The Corporation bills its subscribers (which overlap with the Association's membership) for monthly Association dues. The Association proposed using this billing arrangement to collect monthly contributions to FlowerPAC from Association members. Acting as a collecting agent, the Corporation would deposit the combined dues/contributions into a separate account; the Association would then transfer the contributions to FlowerPAC.

The collecting agent rules at 11 CFR 102.6(b) allow an organization to collect contributions for a separate segregated fund (SSF) and to pay the related solicitation costs without having to register and report as a political committee. A collecting agent may be the SSF's connected organization, or a subsidiary, branch or local unit of the connected organization, or a committee affiliated with the SSF. (Collecting agents must follow the procedures set forth at 11 CFR 102.6(c).)

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## Advisory Opinions

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### Analysis

Although the relationship between the Association and the Corporation is not that of standard corporate affiliates, the two organizations are affiliated based on the affiliation factors in FEC rules. For example:

- Because the two appoint directors to each other's governing boards (these appointments constitute at least 20 percent of each board), each entity has the right to participate in the governance of the other and, through this control, each plays a role in the employee-related decisions of the other.
- All of the subscribers to the Corporation are members of the Association, and there is also some overlap in their employees.
- The payments by the Corporation to the Association for services (10 percent of the Association's revenue), and the agreements regarding the Association's use of the Corporation-owned FTD Mercury Man logo, indicate an ongoing transfer of funds between the two.
- Finally, because Corporation-appointed members of the Association's board joined in the vote to establish FlowerPAC, the Corporation played some role in the establishment of the SSF. 11 CFR 100.5(g)(4)(ii)(B)-(I) and 110.3(a)(3)(ii)(B)-(I).

As an affiliate of the Association, the Corporation may pay the administrative costs of FlowerPAC. See AOs 1992-17, 1988-14 and 1983-19. (Any SSF established by the Corporation would automatically be affiliated with FlowerPAC.)

In conclusion, although neither entity can be considered a subsidiary of the other, both operate as dependent branches of a common enterprise, based on their common origin and the complementary roles they play in the florist industry.

Therefore, the Corporation may act as a collecting agent, and the proposed billing procedures may be used to handle the payment of contributions to FlowerPAC.

Date Issued: July 18, 1996;  
Length: 7 pages. ♦

### AO 1996-27 Qualifying as State Party Committee

The Libertarian Party of Illinois qualifies as a state committee of the Libertarian Party because it meets the two necessary requirements:

- (1) its relationship with the national party is based on an agreement under which it performs activities commensurate with the day-to-day operation of the party on a state level; and (2) it has achieved ballot access for the party's Presidential and other federal candidates. 2 U.S.C. §431(15); 11 CFR 100.14; AOs 1995-49 and 1992-30.

The Illinois Party's rules show that it meets the first requirement. Under those rules, it is responsible for promoting the ideals and principles of the Libertarian Party and for holding state conventions. The rules also contemplate the creation of local clubs and committees. The convention rules outline the procedures for nominating state candidates and for selecting delegates to the Libertarian Party's national convention.

The Illinois Party meets the second requirement because it gained ballot access for the Party's 1992 Presidential candidate and for its 1993 6th Congressional District candidate and because it received sufficient votes (5 percent for one statewide race) in the 1994 election to qualify for the ballot in 1996.

Date Issued: July 18, 1996;  
Length: 3 pages. ♦

## Advisory Opinion Requests

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

### AOR 1996-30

Standards for "independence" of independent expenditures by party committees. (Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee; July 15, 1996; 7 pages)

The Commission failed to issue an opinion because it could not reach agreement by the required 4-vote majority. See Agenda Document #96-85 (meeting of 8/22/96).

### AOR 1996-31

Corporate voter guides distributed as televised ads. (Sierra Club; July 15, 1996; 3 pages plus 8-page attachment and 1-page supplement)

AOR 1996-31 was withdrawn by the Sierra Club on August 13, 1996.

### AOR 1996-32

Retroactive reallocation of administrative expenses and corrective transfer from nonfederal account. (National Republican Senatorial Committee; July 15, 1996; 7 pages)

The Commission failed to issue an opinion because it could not reach agreement by the required 4-vote majority. See Agenda Document #96-91 (meeting of 8/22/96).

### AOR 1996-33

Contributions from state legislators to federal candidate whose state campaign committee plans to contribute surplus funds to same legislators. (Colantuono for Congress, July 30, 1996; 5 pages)

### AOR 1996-34

Campaign's payment of travel expenses of Congressman's family. (Thornberry for U.S. Congress, August 1, 1996; 6 pages)

### AOR 1996-35

Status of Green Party as national committee of political party. (Greens/Green Party USA, August

9, 1996; 1 page plus 62-page attachment)

**AOR 1996-36**

Special elections resulting from court order to void primary elections in redrawn districts: contribution limits, surplus funds, party expenditures, accounting. (Members of Congress Frost, Lee, Bentsen, Green and Johnson; August 14, 1996; 4 pages)

**AOR 1996-37**

Contribution limits for special election resulting from court order to void primary elections in redrawn district. (Brady for Congress, August 15, 1996; 1 page) ♦

**Statistics**

**1996 Midyear PAC Count**

As of July 1, 1996, there were 4,033 PACs registered with the FEC. This represents an increase of 17 PACs since the last six-month count. (The number of PACs does

not necessarily correspond to PAC financial activity, since many registered PACs have little or no activity.) The table below shows midyear and year-end PAC counts since 1990. A July 11, 1996, press release contains PAC counts dating back to 1974. The press release may be ordered via the Flashfax system: 202/501-3413, document #526. ♦

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The first number in each citation refers to the “number” (month) of the 1996 Record issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, “1:4” means that the article is in the January issue on page 4.

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**Midyear and Year-End PAC Counts, 1990-1996**

	Corporate	Labor	Trade/ Member/ Health	Coop- erative	Corp. w/o Capital Stock	Non- connected <sup>1</sup>	Total
Jul. '90	1,782	346	753	58	139	1,115	4,193
Dec. '90	1,795	346	774	59	136	1,062	4,172
Jul. '91	1,745	339	749	57	137	1,096	4,123
Dec. '91	1,738	338	742	57	136	1,083	4,094
Jul. '92	1,731	344	759	56	144	1,091	4,125
Dec. '92	1,735	347	770	56	142	1,145	4,195
Jul. '93	1,715	338	767	55	139	1,011	4,025
Dec. '93	1,789	337	761	56	146	1,121	4,210
Jul. '94	1,666	336	777	53	138	963	3,933
Dec. '94	1,660	333	792	53	136	980	3,954
Jul. '95	1,670	334	804	43	129	1,002	3,982
Dec. '95	1,674	334	815	44	129	1,020	4,016
Jul. '96	1,645	332	829	43	126	1,058	4,033

<sup>1</sup> Nonconnected PACs must use their own funds to pay fundraising and administrative expenses, while the other categories of PACs have corporate or labor “connected organizations” that are permitted to pay those expenses for their PACs. On the other hand, nonconnected PACs may solicit contributions from the general public, while solicitations by corporate and labor PACs are restricted.

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### Budgetary Cutbacks Reduce Record

Due to budget constraints, the *Record* will no longer feature:

- Lists of recently released MURs (Matters Under Review);
- Hearings on proposed regulations;
- Summaries of audit reports; and
- Summaries of public funding repayment determinations and hearings.

The *Record* will also reduce the size and number of graphs on campaign finance statistics. These measures will reduce the number of pages per issue, thus reducing printing and mailing costs.

Information on new MUR releases and the other topics listed above remain available in the FEC's Public Records Office.

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