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Contents

Federal Election Commission
999 E Street, NW
Washington, DC 20463

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Toll free 800-424-9530
Local 202-694-1100
Email info@fec.gov

Greg Scott, Asst. Staff Director
George Smaragdis, Deputy Asst. Staff Director, Publications
Dorothy Yeager, Senior Communications Specialist

Regulations

Notice of Proposed Rulemaking on Technological Modernization

On November 2, 2016, the Commission published a Notice of Proposed Rulemaking (NPRM) on Technological Modernization in the *Federal Register* (81 *Fed. Reg.* 76416). The NPRM proposes revisions to over 100 FEC regulations to reflect technological advances and their impact on the financing of campaigns for federal office. The Commission requests public comment on the proposed revisions. Comments must be submitted in writing on or before December 2, 2016.

Background

The Commission has noted that the campaign finance statutes, as well as its own regulations, predate many technological advances and the growing use of electronic transactions, communications and recordkeeping by political committees. On May 2, 2013, the Commission published in the *Federal Register* an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment on possible updates to its regulations to address these technological advances.

NPRM

Proposed General Definitions. In order to account for electronic documents and transactions, the Commission proposes to add new definitions to 11 CFR part 100 for "record," "written, writing, and in writing," and "signature and signed," and to revise the definition of "file, filed, and filing." The proposed definitions clarify that documents and transactions can be either tangible or electronic and reflect the Commission's interest in being flexible to other emerging forms of electronic documentation, records, and communications.

Electronic Contributions. The Commission proposes to revise 11 CFR 110.1, 110.2 and 102.8 to describe when electronic contributions are considered "made" and "received." Under the proposed rules, electronic contributions would be considered made when the contributor authorizes the transaction and received when the authorization of the electronic transaction is received.

The Commission would also revise its forwarding and earmarking regulations to account for modern commercial payment practices. Under the Commission's proposed revisions, the forwarding requirement at 11 CFR 102.8 would be triggered at the payment processor's receipt of the contributor's authorization, even if the contributor's funds have not been received. The Commission would also revise 11 CFR 110.6 to exempt commercial payment processors from the definition of conduit or intermediary. The Commission also proposes to exempt third-party merchant "pass-through" accounts (over which political committees exercise no ownership or control) from treatment as a "campaign depository" under 11 CFR 103.3 and to revise recordkeeping requirements to ensure that records of electronic receipts include sufficient information associating contributions with their deposit in the political committee's campaign depository.

Other Electronic Contributions and Disbursements. Because some non-cash electronic payment methods — particularly prepaid cards and internet-based alternative mediums of exchange — have characteristics very similar to cash, the Commission proposes to revise its regulations regarding "cash" payments to apply the limitations on contributions of cash or currency at 11 CFR 110.4(c) to contributions made by prepaid cards. The Commission seeks comments on this proposal and on whether it should also revise its regulations to treat contributions of bitcoin and other internet-based alternative mediums of exchange as cash contributions or as in-kind contributions.

The Commission proposes updating references to contributions and disbursements by check in 11 CFR 102.10, 103.3, 110.1 and 110.6 and several other regulations to account for electronic transfers and records of electronic receipts. It would, for example, also revise the recordkeeping regulations at 11 CFR 102.9(b)(2) to allow for electronic transactions that do not produce "cancelled checks." The Commission would make similar revisions to enable electronic contributions to SSFs at 11 CFR 102.6(c) and to allow for electronic transfers of funds forwarded to the SSF by custodians at 11 CFR 114.6(d).

The Commission's current presidential public funding regulations allow a political committee to receive matching funds for electronic credit card contributions only if the committee records the contributor's name and credit card number. In light of modern payment security practices and in recognition of the risks attendant upon storing credit card numbers, the Commission proposes revising 11 CFR 9034.2 to eliminate this requirement.

The Commission also proposes to revise several provisions in 110.1, 110.2 and 9003.3 concerning the designation and attribution of contributions. To ensure that the regulations apply uniformly to electronic and non-electronic transactions, the Commission proposes removing the reference to a "check, money order, or other negotiable instrument" from several provisions. The Commission also proposes that joint contributions be indicated by "the signature of each contributor in writing," without reference to a written instrument.

References to Outmoded Technologies. Finally, the Commission proposes to update regulatory terminology to reflect technological advances and to remove references to outmoded technologies. Among the changes are to remove (or replace with updated technologies) references to telegrams, telephones, typewriters, audio tapes, microfilm, magnetic tape, and facsimiles. For example, the Commission would replace the reference to typewriters with "computers," and add "internet service" to lists that include "telephone service."

The Commission is also considering whether to revise certain regulatory references to "websites" to accommodate newer technologies, such as mobile applications, e-book readers, and wearable devices that take on characteristics similar to websites. These proposals include updating the definition of "public communication" in 11 CFR 100.26 to include "internet-enabled device or application[s]," as well as to update the disclaimer provisions at 11 CFR 110.11 to include political committees' "websites and internet applications." The Commission would also revise the definition of "federal election activity" to exclude *de minimis* costs incurred by state, district or local party committees for certain activities associated with mobile applications.

Public Comments
All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's website at http://sers.fec.gov/fosers, reference REG 2013-01, or by email to techmod@fec.gov. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn: Neven F. Stipanovic, Acting Assistant General Counsel, 999 E Street, N.W., Washington, DC 20463. All comments must include the first name, last name, city, state, and zip code of the commenter, or they will not be considered. The Commission will post all comments to its website at the conclusion of the comment period.

(Posted 11/03/2016; By: Zainab Smith)

Resources:
- *Federal Register* notice (November 2, 2016) [PDF]
- Commission Regulations

Advisory Opinions

AO 2016-11: Members May Collect and Forward Contributions to Membership Organization's SSF

Plains Cotton Growers (PCG) and its cotton gin members may collect and transmit voluntary contributions from individual members to the separate segregated fund (SSF) of PCG. Since PCG is a membership organization collecting contributions solely from its members, the Commission concluded that PCG is not limited in the methods that it may use to solicit and forward such contributions to its own SSF.

Background
PCG is an incorporated non-profit, non-stock corporation in Texas that is exempted from federal income tax under section 501(c)(6) of the Internal Revenue Code. PCG is organized to promote and protect the interests of cotton producers in the Texas high plains. PCG offers three specific classes of membership including 1) cotton gins, 2) cotton producers, and 3) cotton businesses. Cotton gins are organized as agricultural cooperatives under Texas law, while cotton producers and cotton businesses may be individuals, partnerships or corporations. Currently, the cotton gins collect membership dues from the cotton producers and cotton business on behalf of PCG.

PCG maintains a federal separate segregated fund, Plains Cotton Growers Political Action Committee (PCGPAC). PCG and PCGPAC intend to solicit voluntary contributions to the PAC (which are separate from the membership dues) from individual cotton producers by establishing an automatic voluntary deduction program that would be administered by the cotton gins, to whom producers deliver cotton for processing. PCG proposes to recommend a fixed deduction amount based on each bale of processed cotton that is produced. Such contributions would be charged against the producers' individual cotton proceeds. PCG would authorize the cotton gins to collect contributions on PCG's behalf and then transmit them to PCGPAC. PCG would pay for any costs incurred by the cotton gins for administering this contribution collection plan.

Any individual producers wishing to contribute to PCGPAC via this method would sign automatic deduction forms that authorize PCG to collect funds from them and transfer the proceeds to PCGPAC. Contributors would be informed that their contribution is voluntary and would be for the purpose of supporting federal candidates. They would also be informed that they would be free to contribute more or less than the recommended amount (or not at all) and that they may revoke their authorization at any time without penalty or adverse action.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations permit incorporated membership organizations to establish and solicit voluntary contributions on behalf of an SSF from its individual members. 52 U.S.C. § 30118(b)(3)(C); 11 CFR 114.1(j), 114.7(a). A membership organization itself may also act as the "collecting agent" on behalf of its own SSF. A collecting agent is defined as "an organization or committee that collects and transmits contributions to one or more separate segregated funds to which the collecting agent is related." 11 CFR 102.6(b)(1).

PCG qualifies as a membership organization under Commission regulations because it is composed of members who have the power and authority to operate and administer the organization. See 11 CFR 114.1(e)(1)(i)-(vi). Members are generally defined as persons who 1) satisfy the requirements for membership in a membership organization, 2) affirmatively accept the organization's invitation to become a member, and 3) have a significant financial or organizational attachment to the organization or pay membership dues on at least an annual basis. 11 CFR 114.1(e)(2)(i)-(iii).

Under PCG's membership rules, cotton gins and producers qualify as members because they must pay membership dues and be located within a required geographical location. Therefore, PCG and PCGPAC may solicit contributions from individual cotton producers. As the connected organization for PCGPAC, PCG may serve as the collecting agent for the PAC and may collect and transmit contributions from its individual cotton producer members to PCGPAC. 11 CFR 102.6(b)(1)(ii).

PCG's proposal to enter into contracts with cotton gin members to collect and transmit contributions to PCGPAC is permissible under the Act and Commission regulations because the Commission has held previously that "[t]here is no limitation...on the method of...facilitating the making of voluntary contributions [to its SSF] which may be used" by a membership organization. 11 CFR 114.7(f). See AO 2012-15 (American Physical Therapy Association).

The Commission also held that PCG's proposal of calculating a recommended contribution amount from individual cotton producers to PCGPAC based on a per-bale of cotton basis is

also permissible, because PCG will notify potential contributors that the recommended amounts are merely suggestions and that a person is free to contribute more or less than the suggested amount without reprisal. Furthermore, PCG will inform all potential contributors of the political purpose of PCGPAC and that the organization will not favor or disadvantage a member by reason of the amount of any person's contribution or decision not to contribute. 11 CFR 114.5(a). See also AO 2011-22 (Virginia Poultry Growers Cooperative).

(Date Issued: October 27, 2016; 6 pages)

(Posted 11/02/2016; By: Myles Martin)

Resources:

- AO 2016-11 [PDF]
- Commission consideration of AO 2016-11

AO 2016-14: Libertarian Party Organizations Qualify as State Party Committees

Because they are part of the official party structure of a national party committee, and responsible for the day-to-day operation of the national party on the state level, Libertarian Party Committees of multiple states ("the Committees") all qualify as state committees of a political party under the Federal Election Campaign Act (the Act).

Background
In a group of Advisory Opinion Request submissions, Libertarian Party Committees of 11 states (Alabama, Arkansas, Arizona, Hawaii, Idaho, Maryland, Mississippi, Missouri, New Mexico, North Dakota, and Texas) asked the Commission to confirm their status as state committees of a political party under the Act.

A "state committee" is an organization that, "by virtue of the bylaws of a political party... is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, . . . as determined by the Commission." 11 CFR 100.14(a); 52 U.S.C. § 30101(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." 52 U.S.C. § 30101(16); 11 CFR 100.15.

For a state party organization to qualify as a state committee of a national political party, it must meet three criteria: (1) the national party of which the state party organization is a part must itself be a "political party;" (2) the state party organization must be part of the official structure of the national party; and (3) the state party organization must be responsible for the day-to-day operation of the national party at the state level.

Analysis
The Commission applied these three criteria to each state party organization to determine if they qualify as state committees of a national political party.

The Commission previously found that the Libertarian National Party ("LNP") qualified as a national political party (AO 1975-129), and the Libertarian National Committee ("LNC") is the national party committee of the LNP. The Commission found no factual changes that would alter that analysis.

1. In determining whether a state party organization is part of the official national party structure, the Commission evaluates documentation from the national party. The Commission found that the documentation provided by LNC Executive Director Wes Benedict confirms that the 11 state party organizations are part of the LNP's official party structure.
2. To determine whether a state party organization is responsible for the day-to-day operations of a national party at the state level, the Commission considers two factors: (a) whether the state party organization has placed a federal candidate on the ballot (thereby qualifying as a "political party" under 52 U.S.C. § 30101(16)); and (b) whether the bylaws or other governing documents of the state organization indicate it is responsible for the day-to-day operations of a political party at the state level.
    - *Candidate on the Ballot.* To qualify as a state committee of a political party, the state level organization must obtain ballot access for a federal candidate. 52 U.S.C. § 30101(2); 11 CFR 100.3(a). Each of the Committees assisted in placing the LNP nominee Gary Johnson as a candidate for President in the 2016 general election. According to FEC disclosure reports, Gary Johnson has received contributions or made expenditures in excess of $5,000 according, therefore meeting the Act's definition of a "candidate." 52 U.S.C. § 30101(2); 11 CFR 100.3(a).
    - *Day-To-Day Functions and Operations*. In addition to placing a federal candidate on the ballot, a state party organization must demonstrate, in its bylaws or other governing documents, that it is responsible for the day-to-day functioning of a political party committee within a state. The Commission analyzed bylaws and governing documents submitted by each of the 11 state party organizations, and found that each state party organization was indeed responsible for day-to-day functions of a political party committee on the state level.

Two of the state party committees (Arizona Libertarian Party and the Libertarian Party of Maryland) had been previously terminated and had reformed as new committees. Therefore, the Commission, by applying the above criteria, reaffirmed that these new committees qualified as state committees of a political party committee.

Therefore, having each met the three criteria, the Committees qualify as state committees of a national political party under the Act and Commission regulations.

Date issued 10/27/2016; 8 pages.

(Posted 11/03/2016; By: Isaac Baker)

Resources:

- Advisory Opinion 2016-14 [PDF]
- Commission Consideration of Advisory Opinion 2016-14

AO 2016-16: Fundraising for Public Funding Repayments and Civil Penalties

Gary Johnson 2012, Inc. (the "Committee") may use its cash on hand and may raise additional funds to fulfill obligations to the United States Treasury and to the Commission, consistent with the restrictions set forth in the Presidential Primary Matching Payment Account Act (the "Public Funding Act") and FEC regulations.

Background
The Public Funding Act requires payments to the Secretary of the Treasury for any public fund overpayments or payments that the candidate used for purposes other than qualified expenses. 26 U.S.C. § 9038(b)(1)-(2); see also 11 CFR 9038.2(a)(1). Such repayments must come from either the personal funds of the candidate, contributions and federal funds in the committee's account(s), or any additional funds raised subject to the limitations and prohibitions of the Federal Election Campaign Act ("FECA"). 11 CFR 9038.2(a)(4).

Additionally, a publicly funded candidate must agree that the "candidate and the candidate's authorized committee(s) will pay any civil penalties included in a conciliation agreement or otherwise imposed" under FECA, but such civil penalties may not be paid from contributions or matching payments that the committee received for its publicly financed primary campaign. 11 CFR 9033.1(b)(11); 11 CFR 9034.4(b)(4). Commission regulations allow committees to raise funds to pay civil penalties. 11 CFR 9034.4(b)(4). Such funds are not considered "contributions" subject to contribution limits, but must comply with the FECA prohibitions and be reported in accordance with 11 CFR Part 104. See 11 CFR 9034.4(b)(4).

After conducting a mandatory audit of the candidate and Committee under the Public Funding Act, the Commission determined that Governor Johnson and the Committee had to repay $333,441 to the U.S. Treasury. The Commission also made two audit findings concerning reporting and the use of general election contributions for primary expenses that may result in an enforcement action and civil penalty.

Analysis
The Commission concluded that the Committee may: (1) solicit and accept funds to pay its obligations from individuals who are currently allowed to contribute to candidates but who were prohibited sources (either federal contractors or foreign nationals) at the time of the 2012 election; (2) use cash on hand in its general election account to pay its obligations; and (3) raise funds outside the amount limitations of the FECA to pay civil penalties but not to repay the U.S. Treasury. The Commission also noted that payments by a third party to the U.S. Treasury or to the Commission are subject to the same source or amount limitations and the same reporting requirements as payments received by the Committee for those purposes.

Date issued: November 17, 2016; 6 pages

(Posted 11/23/2016; By: Zainab Smith)

Resources:
- AO 2016-16 [PDF]
- Commission consideration of AO 2016-16
- Brochure: *Public Funding of Presidential Elections*

AO 2016-17: Libertarian Party of Michigan Qualifies as State Party Committee

The Libertarian Party of Michigan Executive Committee, Inc. (the LPM) qualifies as a state party committee under the Federal Election Campaign Act (the Act).

Background
Under the Act and Commission regulations, a state party committee is an organization that by virtue of the bylaws of a political party is part of the official party structure and is responsible for the day-to-day operation of a political party at the state level, as determined by the Commission. 52 U.S.C. § 30101(15); 11 CFR 100.14(a). In order for a committee to qualify as a state party committee, there must also be at least one candidate for federal office whose name appears on the ballot as a party candidate.

Analysis
The Commission determined that the Libertarian Party of Michigan Executive Committee meets the three criteria essential to qualify as a state committee: (1) the national Libertarian National Party (LNP) qualifies as a political party; (2) the LPM is part of the official LNP structure; and (3) the LPM is responsible for the day-to-day operations of the LNP at the state level. See also Advisory Opinion (AOs) 2016-14 (11 Libertarian State Committees), 2015-01 (Green-Rainbow Party), 2012-39 (Green Party of Virginia) and 1975-129 (National Committee of the Libertarian Party).

Date Issued: November 17, 2016; 5 pages

(Posted 11/28/2016; By: Jonella Culmer)

Resources:

- Advisory Opinion 2016-17 [PDF]
- Commission consideration of AO 2016-17

AO 2016-18: Green Party of Ohio Qualifies as State Party Committee

The Green Party of Ohio qualifies as a state party committee under the Federal Election Campaign Act (the Act).

Background
Under the Act and Commission regulations, a state party committee is an organization that by virtue of the bylaws of a political party is part of the official party structure and is responsible for the day-to-day operation of a political party at the state level, as determined by the Commission. 52 U.S.C. § 30101(15); 11 CFR 100.14(a). In order for a committee to qualify as a state party committee, there must also be at least one candidate for federal office whose name appears on the ballot as a party candidate.

Analysis
The Commission determined that the Green Party of Ohio meets the three criteria essential to qualify as a state committee: (1) the Green Party of the U.S. (the GPUS) qualifies as a political party; (2) Green Party of Ohio is part of the official GPUS structure; and (3) Green Party of Ohio is responsible for the day-to-day operations of the

GPUS at the state level. See also Advisory Opinion (AOs) 2016-14 (11 Libertarian State Committees), 2015-01 (Green-Rainbow Party), 2012-39 (Green Party of Virginia) and 2001-13 (GPUS).

Date Issued: November 17, 2016; 5 pages

(Posted 11/28/2016; By: Katherine Carothers)

Resources:

- Advisory Opinion 2016-18 [PDF]
- Commission consideration of AO 2016-18 

AO 2016-19: Libertarian Party of Colorado Qualifies as State Party

The Libertarian Party of Colorado (LPC) qualifies as a state committee of the Libertarian Party because it is a part of the official party structure and it is responsible for the day-to-day operation of the party at the state level.

Background
Under the Act and Commission regulations, a state party committee is an organization that, by virtue of the bylaws of a political party, is part of the official party structure and is responsible for the day-to-day operation of a political party at the state level, as determined by the Commission. 52 U.S.C. § 30101(15); 11 CFR 100.14(a). In order for a committee to qualify as a state party committee, there must also be at least one candidate for federal office whose name appears on the state ballot as a party candidate.

Analysis
The Commission determined that the LPC meets the three criteria essential to qualify as a state committee: (1) the Libertarian National Party (LNP) qualifies as a political party; (2) the LPC is part of the official LNP structure; and (3) the LPC is responsible for the day-to-day operations of the LNP at the state level. See also Advisory Opinion (AOs) 2016-14 (11 Libertarian State Committees), 2015-01 (Green-Rainbow Party), 2012-39 (Green Party of Virginia) and 1975-129 (National Committee of the Libertarian Party).

Date Issued: November 17, 2016; 5 pages

(Posted 11/18/2016; By: Christopher Berg)

Resources:

- Advisory Opinion 2016-19 [PDF]
- Commission consideration of AO 2016-19 

AOR 2016-12: Citizen Super PAC

On November 3, 2016, the Commission considered an Advisory Opinion Request (AOR) from Citizen Super PAC. In its request, the PAC asked several questions regarding the application of coordination rules to proposed online activity of the PAC and a federal candidate. The Commission was unable to render an opinion by the required four affirmative votes and concluded its consideration of the request.

(Date Posted: 11/07/2016; By: Dorothy Yeager)

Resources:

- AOR 2016-12 [PDF]

AOR 2016-20: Mlinarchik

On December 1, 2016, the Commission considered an Advisory Opinion Request (AOR) from Christoph Mlinarchik, the sole-member of a limited liability company (LLC). The LLC has not elected to be treated as a corporation for federal income tax purposes and is negotiating a contract with the federal government. Given these facts, Mr. Mlinarchik asked whether he would be able to make contributions to federal political committees from his personal funds. The Commission was unable to render an opinion by the required four affirmative votes and concluded its consideration of the request.

(Date Posted: 12/05/2016; By: Isaac Baker)

Resources:

- AOR 2016-20 [PDF]
- Commission Discussion of AOR 2016-20

Pending Advisory Opinion Requests as of November 30, 2016

Advisory Opinion Requests (AORs) pending before the Commission as of the end of the month are listed below. Procedures for commenting on pending AORs are described here.

- **AOR 2016-21** [PDF] Application of the former employee element of the coordinated communications conduct standard (Great America PAC; received September 26, 2016. Extension of time granted November 16 through December 15, 2016.)
- **AOR 2016-22** [PDF] State party committee status (Libertarian Party Committees of Georgia and Tennessee; received November 1, 2016)
- **AOR 2016-23** [PDF] Renewal of partial reporting exemption for Socialist Workers Party committees. (Socialist Workers Party; received November 14, 2016)
- **AOR 2016-24** [PDF] State party committee status (Independence Party of Minnesota; received November 18, 2016)

(Posted 12/05/2016; By: Dorothy Yeager)

Resources:

- Advisory Opinion Search

Litigation

Supreme Court Denies Petition for Certiorari in *Stop Reckless Economic Instability caused by Democrats, et al. v. FEC* (Case 16-109)

On October 31, 2016, the United States Supreme Court denied a petition for a writ of certiorari filed by the plaintiffs in Stop Reckless Economic Instability caused by Democrats, et al. v. FEC. The high court will not review the February 2016 decision of the United States Court of Appeals for the Fourth Circuit that denied the plaintiffs' First and Fifth Amendment challenges to the differing contribution limits for multicandidate and non-multicandidate political committees.

(Posted 11/07/2016; By: Dorothy Yeager)

Resources:

- *Stop Reckless Economic Instability caused by Democrats, et al. v. FEC* Litigation Page

Lieu, et al. v. FEC (D.D.C. 1:16-cv-02201) (New)

On November 4, 2016, Representative Ted Lieu, Representative Walter Jones, Senator Jeff Merkley, State Senator (Ret.) John Howe, Zephyr Teachout, and Michael Wager ("Plaintiffs") filed suit against the Commission in the United States District Court for the District of Columbia. Plaintiffs seek declaratory and injunctive relief against the Commission.

Plaintiffs filed an administrative complaint with the Commission on July 7, 2016, identifying ten respondents and alleging that they accepted contributions substantially exceeding the $5,000 per contributor per year limit. Plaintiffs ask that the Court declare that the Commission's failure to act on their administrative complaint within 120 days is contrary to law under 52 U.S.C. § 30109(a)(8)(A) and constitutes an unlawful withholding and/or unreasonable delay of agency action under 5 U.S.C. § 706(1). Plaintiffs also seek an order requiring the Commission to conform with this declaration within 30 days.

(Posted 11/08/2016; By: Christopher Berg)

Resources:

- *Lieu v. FEC* Ongoing Litigation Page

Independence Institute v. FEC (1:14-cv-01500) (District Court)

On November 4, 2016, the U.S. District Court for the District of Columbia rejected the Independence Institute's challenge to the Bipartisan Campaign Reform Act's electioneering communication provisions, and granted the FEC's motion for summary judgment.

Background

The Bipartisan Campaign Reform Act (BCRA) defines an "electioneering communication" as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is made within 30 days of a primary election or 60 days of a general, special or runoff election, and is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i). The statute provides that persons making disbursements that aggregate more than $10,000 per year must file a report with the Commission disclosing the names and addresses of all contributors who contributed more than $1,000. 52 U.S.C. § 30104(f)(1), (2)(A). Commission regulations provide that when a corporation finances an electioneering communication, only the sources of donations to the corporation made "for the purpose of further electioneering communications" must be disclosed. 11 CFR 104.20(c)(9).

Independence Institute (the "Institute") is a 501(c)(3) tax-exempt organization based in Colorado. In the 60 days preceding the 2014 general election, the Institute sought to run a radio advertisement that urged Coloradoans to call two federal officeholders (one of whom was a candidate in the 2014 election) to express support for certain legislation. The Institute planned to spend at least $10,000 on the advertisement that would have reached at least 50,000 persons in the Denver metropolitan area.

On September 2, 2014, the Institute filed suit invoking BCRA's special judicial review provision, 52 U.S.C. § 30110 note, and requesting a three-judge court to hear its challenge to BCRA's definition of "electioneering communication" and related disclosure requirements. The Institute contended that BCRA's requirements are overbroad as applied to its proposed radio advertisement and violate the First Amendment because the advertisement is "genuine issue advocacy." The Institute also argued that BCRA's large-donor disclosure requirement cannot constitutionally apply to advertisements financed by a 501(c)(3) tax-exempt organization.

On October 6, 2014, the district court found the plaintiff's challenge to be foreclosed by Supreme Court precedent, principally by *Citizens United v. FEC*, concluded that a three-judge court was not warranted, and dismissed the case in its entirety. The plaintiff appealed and on March 1, 2016, a panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decision not to convene a three-judge court and remanded the case with instructions to convene a three-judge district court to consider the merits of the plaintiff's constitutional challenge.

District Court Decision

Mootness. Before addressing the merits, the court first considered its jurisdiction to decide the case. The court explained that it lacks jurisdiction under Article III of the Constitution to decide a lawsuit that has become moot and thus no longer presents a case or controversy. The question of mootness had arisen in this case, the court explained, because the Institute's complaint sought only to run a single advertisement in the run up to the 2014 general election when one of the federal officeholders

mentioned in its advertisement was up for reelection. Become the 2014 election has long since passed and the identified officeholder is no longer a candidate, the proposed advertisement underlying the Institute's complaint is no longer subject to the challenged disclosure requirement. Nevertheless, the court proceeded to evaluate whether the Institute's claims fall within the "capable of repetition yet evading review" exception to mootness. Ultimately, the court concluded that this case is not moot, because the other officeholder referenced in the Institute's proposed advertisement was up for reelection this fall, and the Institute made clear at oral argument that it still desired to run the advertisement during the 2016 general election cycle.

First Amendment. In examining the Institute's First Amendment argument, the court first noted that BCRA's disclosure provision does not regulate issue advocacy *per se*, but only communications that clearly identify a federal candidate within a certain time period before a federal election. The court pointed out options available to the Institute that would not fall within the disclosure provisions: running the advertisement outside of the electioneering window; running the advertisement during the window without identifying a candidate for federal office; or accepting donations less than $1,000 that would not trigger the disclosure requirements.

On remand, the district court noted that the Supreme Court twice upheld the electioneering communication disclosure provision and rejected an issue-centered exception. In *McConnell v. FEC*, the Court rejected a facial constitutional challenge to BCRA's electioneering communication disclosure requirement and refused to impose a distinction between express advocacy and issue advocacy for purposes of that disclosure requirement. And in *Citizens United v. FEC*, the Supreme Court explained that its holding in *Wisconsin Right to Life v. FEC*, which limited certain restrictions on independent expenditures to express advocacy and its functional equivalent, could not be imported into BCRA's disclosure scheme since "disclosure is a less restrictive alternative to more comprehensive regulations of speech."

According to the district court, precedent "already largely, if not completely, closed the door" to the Institute's argument that the First Amendment requires the disclosure provision to treat issue advocacy differently from express advocacy. "...[The] First Amendment is not so tight-fisted as to permit large-donor disclosure only when the speaker invokes magic words of explicit endorsement. That would make the constitutional balancing of interests turn on form not substance." The court found that not only would it be unworkable to have the Commission make the distinction, but under McConnell and Citizens United, "it is the tying of an identified candidate to an issue or message that justifies the [law's] tailored disclosure requirement because that linkage gives rise to the voting public's informational interest in knowing 'who is speaking about a candidate shortly before an election.'"

The court pointed out that the Supreme Court has already held the electioneering communications disclosure rule passes the "exacting scrutiny" required for campaign finance disclosure requirements. Under this test, there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest. Quoting *McConnell*, the court concluded that the disclosure rule "advances substantial and important governmental interests in 'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.'" The court found that the Institute's advertisement triggers the same informational interests because it links a federal candidate to a political issue and solicits voters to press the candidate for his position in the run up to an election. "Providing the electorate with information about the source of the

advertisement will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments." The court further pointed out the disclosure regulation imposes no ceiling on campaign related activity and does not prevent anyone from speaking. Disclosure is also required only for donors who contribute $1,000 or more for the specific purpose of supporting the advertisement.

Finally, the court rejected the Institute's argument that its tax-exempt status requires it to be exempt from the electioneering communications disclosure provisions. The court concluded that the First Amendment permits BCRA's electioneering communications disclosure provisions which regulate speech based on references to electoral candidates and not on the speaker's identity or taxpaying status.

(Posted 11/09/2016; By: Zainab Smith)

Resources:

- *Independence Institute v. FEC* Ongoing Litigation Page

Appeals Filed in *CREW v. FEC* (14-1419)

On November 14, 2016, Citizens for Responsibility and Ethics in Washington (CREW) filed a notice of cross-appeal with the United States Court of Appeals for the D.C. Circuit in their lawsuit against the Commission. CREW had challenged the Commission's dismissal of their administrative complaints against the American Action Network (AAN) and Americans for Job Security (AJS). Previously, on October 19, 2016, intervenor-defendant American Action Network (AAN) filed its own notice of appeal of the district court's decision in this case.

The district court's September 19, 2016, opinion concluded that the Commission's dismissals of CREW's administrative complaints against AJS and AAN were "contrary to law." The Court accordingly granted CREW's motion for summary judgment and remanded the matters to the Commission for further proceedings consistent with the Opinion of the Court. On September 29, 2016, the Commission announced it would not appeal the district court's decision.

(Posted 11/15/2016; By: Dorothy Yeager)

Resources:

- *CREW v. FEC* (14-1419) Ongoing Litigation Page

FEC v. Lynch (District Court)

On November 7, the United States District Court for the Southern District of Florida issued a Consent Judgment in *FEC v. Lynch*. The judgment found a violation of the personal use prohibition at 52 U.S.C. § 30114(b) and ordered a disgorgement of the converted funds and civil penalty of $10,000.

Background
Lynch for Congress was the principal campaign committee for Edward J. Lynch, Sr. for his 2008 and 2010 campaigns for U.S. Congress. Evidence was uncovered that between 2008 and 2010, the defendants may have converted as much as $53,500 of campaign contributions for Mr. Lynch's personal use; however, the complaint focused on specific expenditures made on or after August 20, 2010. The FEC alleged that Mr. Lynch used campaign funds to pay for various personal expenses during that time period, including gym membership dues, personal loan payments, automobile expenses and retail purchases.

Compliance Action
The Federal Election Campaign Act (the Act) defines "personal use" as the use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 52 U.S.C. § 30114(b)(2). Personal use includes, among other things, payments of home mortgages, rent, or utilities; clothing purchases; non-campaign related automobile expenses; and health club dues, among other payments. 52 U.S.C. § 30114(b)(2); 11 CFR 113.1(g).

The Commission initiated enforcement proceedings against the defendants after reviewing information in the normal course of carrying out its supervisory responsibilities. Unable to secure acceptable conciliation agreements with the defendants, the Commission filed suit in the U.S. District Court for the Southern District of Florida against Edward Lynch, Sr., Lynch for Congress and Edward Lynch, Sr. in his official capacity as treasurer (defendants).

The FEC sought a declaration that defendants' conversion of $1,374 of campaign funds for Mr. Lynch's personal use on or after August 20, 2010 violated the Act, the assessment of a $7,500 civil penalty against Mr. Lynch in his personal capacity, and the assessment of a $7,500 civil penalty against Lynch for Congress and Mr. Lynch in his official capacity as treasurer of that committee. The FEC also sought an order requiring Mr. Lynch to disgorge the $1,374 of campaign funds converted to personal use on or after August 20, 2010, and a permanent injunction against future similar violations by defendants.

Consent Judgment
On November 7, 2016, the court entered a Consent Judgment that Mr. Lynch converted $1,374 of Lynch for Congress' campaign funds to personal use. The judgment ordered that Mr. Lynch disgorge the converted funds back to Lynch for Congress and assessed a $10,000 civil penalty against the defendants. The judgment also ordered Mr. Lynch never again to serve as treasurer for any federal authorized committee for which he is the candidate.

(Posted 11/16/2016; By: Zainab Smith)

Resources:

- *FEC v. Lynch* Litigation Page

Republican Party of Louisiana, et al. v. FEC (District Court)

On November 7, 2016, a three-judge court of the U.S. District Court for the District of Columbia granted summary judgment to the Commission in a lawsuit brought by the Republican Party of Louisiana and several local Republican party committees in Louisiana (collectively, plaintiffs). The plaintiffs challenged federal campaign finance provisions requiring state and local political parties to use certain types of funds to finance activities in connection with federal elections, including get-out-the-vote, voter registration drives and other communications and activities.

The court denied the Commission's motion to dissolve the three-judge court or dismiss the case, denied the plaintiffs' motion for summary judgment and ruled in favor of the Commission on the merits.

Background and Challenge

Under the Federal Election Campaign Act (the Act), state and local political parties generally must pay for "federal election activity" (FEA) with funds raised subject to the limitations and prohibitions of the Act. 52 U.S.C. § 30125(b)(1). This type of money — subject to the Act's source and amount restrictions — is known as "hard money." "Soft money" refers to funds that are raised outside of those limitations. FEA includes activities such as get-out-the-vote activity, voter identification, generic campaign activity, and voter registration activity conducted within a specific time period prior to a federal election. 52 U.S.C. § 30101(20). It also includes public communications that promote, attack, support, or oppose (PASO) any clearly identified federal candidate when made at any time, and the salaries and wages of state and local party employees who spend more than 25 percent of their compensated time on activities in connection with a federal election during any given month. See 52 U.S.C. § 30101(20). 52 U.S.C. § 30101 (20). The Act further prohibits the use of soft money to raise money for FEA. 52 U.S.C. § 30125(c). It also requires state, district and local party committees to disclose their FEA above a certain threshold in reports filed with the Commission. 52 U.S.C. § 30104 (e)(2).

The plaintiffs challenged sections 30125(b)(1), 30125(c) and 30104(e)(2). They argued that the three provisions unconstitutionally burden their First Amendment rights by restricting their ability to use soft money — or nonfederal funds — to finance FEA that they alleged they wanted to do, including certain FEA that they planned to do independently.

District Court Decision

Standing. The district court first determined that the plaintiffs have standing before the three-judge court. It wrote that the invalidation of section 30104(e)(2) would alleviate the Republican Party of Louisiana's need to submit monthly reports to the Commission and that invalidation of section 30125(b)(1) would permit the Republican Party of Louisiana to use corporate funds on at least some kinds of FEA.

Facial Challenge. The plaintiffs challenged section 30125(b)(1) on the basis that the provision deprives them of their First Amendment rights. Although the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003) had already rejected a facial challenge to that provision, the plaintiffs argued that the Supreme Court had superseded its earlier opinion in *McConnell* with the plurality's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The district court disagreed. It explained that "the approach of the *McCutcheon*

plurality is consistent with *McConnell*'s treatment of [§ 30125(b)] as a contribution limit subject to less demanding scrutiny" and quoted the *McCutcheon* opinion's "express[]" statement that *McCutcheon*'s "'holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about "soft money."'"

The district court also rejected the plaintiffs' facial challenge to the reporting requirements, citing the holdings of earlier Supreme Court decisions finding that disclosure obligations, unlike contribution and expenditure limitations, are additionally justified by governmental interests in providing information to the electorate about the sources of election-related spending. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

As-Applied Challenge. The plaintiffs also mounted an as-applied challenge to the Act's provisions specifying the types of funds state and local parties may use for FEA. The plaintiffs contended that the Act's restrictions on using soft money for FEA conducted independently of a federal candidate or campaign are invalid because such FEA poses an insufficient risk of actual or apparent corruption. The district court again disagreed. It found the plaintiffs' argument incompatible with the Supreme Court's holding in *McConnell*, which stated that because the categories of FEA confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption. The district court also relied on *RNC v. FEC* in which another three-judge court in the same district rejected "comparable" claims and was summarily affirmed by the Supreme Court. Based on those decisions, the district court explained that the plaintiffs could not deny that the activities would provide a direct benefit to such federal candidates, even if they were to be conducted independently of them.

The district court found that the plaintiffs' reliance on the Supreme Court's reasoning in *Citizens United*, which invalidated a ban on independent expenditures by corporations and labor unions to support federal candidates, was "misperceive[d]." The district court distinguished independent expenditures by corporations and labor unions, and contributions to independent-expenditure nonprofit organizations, which courts previously had concluded do not give rise to the appearance or reality of corruption. The district court also noted that the close connection and alignment of interests between political parties and federal officeholders means that large contributions raise a danger of actual and apparent corruption regardless of how a political party committee ultimately spends funds it raises. The court explained that "[t]he potential for quid pro quo corruption stemming from soft-money contributions to political parties not only distinguishes them from spending **by** independent-expenditure organizations, but it also distinguishes them from contributions **to** independent-expenditure organizations."

The district court thus found the plaintiffs' as-applied challenge to section 30125(b)(1) to be incompatible with the Supreme Court's decision to uphold that provision in *McConnell*, as well as the subsequent decision in RNC. Finally, the court also rejected the plaintiffs' as applied challenges to sections 30125(c) and 30104(e)(2).

On November 11, 2016, plaintiffs filed a notice of appeal with the U.S. Supreme Court, as authorized by the Bipartisan Campaign Reform Act. See Note, 52 U.S.C. § 30110.

(Posted 11/17/2016; By: Myles Martin)

Resources:

- *Republican Party of Louisiana, et al. v. FEC* Ongoing Litigation Page

CREW v. FEC (16-2255) (New)

On November 14, 2016, Citizens for Responsibility and Ethics in Washington (CREW) and its executive director Melanie Sloan (collectively, plaintiffs) filed suit in the U.S. District Court for the District of Columbia challenging the Commission's dismissal of two administrative complaints. The complaints alleged that American Action Network (AAN) and Americans for Job Security (AJS) had violated the Federal Election Campaign Act (the Act) by failing to register as political committees and disclose required information with the Commission.

Background
The Act defines a "political committee" as any committee, club, association, or other group of persons which receives contributions or makes expenditures for the purpose of influencing federal elections in excess of $1,000 in a calendar year. 52 U.S.C. § 30101 (4)(A) and 11 CFR 100.5(a). Any political committee that meets these thresholds must register with the Commission and file periodic disclosure reports on their receipts and disbursements. 52 U.S.C. § 30103(a) and 11 CFR 102.1, 104.3, 104.4. However, the Supreme Court has stated that only committees under the control of a federal candidate or whose "major purpose" is the election or defeat of federal candidates are required to register as political committees. See *Buckley v. Valeo*, 424 U.S. 1, at 79-80. An organization's major purpose may be demonstrated by its activities and a group that devotes a sufficiently extensive amount of its spending to campaign activity may be subjected to the Act's registration and reporting requirements. See *Massachusetts Citizens for Life v. FEC*.

American Action Network. AAN is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code which spent funds to distribute independent expenditures and electioneering communications in 2010. In June 2012, plaintiffs filed a complaint with the Commission that alleged that AAN's major purpose was the election or defeat of federal candidates, and as such, should have registered and reported as a political committee with the Commission. In June 2013, the Commission voted 3-3 on whether to find reason to believe that AAN had violated the Act. (An affirmative vote of at least 4 Commissioners is required for the agency to take action.) The plaintiffs then filed suit against the Commission challenging the dismissal of the administrative complaint as contrary to law.

On September 19, 2016, the district court granted the plaintiffs' motion for summary judgment and agreed that the Commission's dismissal of the complaint was contrary to law. The court reversed the dismissal and remanded the case for reconsideration within 30 days to be made in conformity with the court's declaration.

On October 19, 2016, the Commission notified the plaintiffs that it had considered the matter and there was an insufficient number of votes to find reason to believe that AAN had violated the Act and the Commission subsequently closed the file.

Americans for Job Security. AJS is a tax-exempt organization organized under section 501(c)(6) of the Internal Revenue Code which spent funds to distribute electioneering communications and independent expenditures in 2010. In March 2012, plaintiffs filed a complaint with the Commission against AJS, alleging violations of the Act, and that the major purpose of AJS was the election or defeat of federal candidates. As such, the plaintiffs maintained that AJS should have been required to register with the Commission and file disclosure reports as a political committee. In June 2014, however, the

Commission failed by a vote of three to three to find reason to believe that AJS had violated the Act. The plaintiffs subsequently filed suit against the Commission in August 2014, alleging that the Commission had acted contrary to law in doing so.

The district court agreed with the plaintiffs and on September 19, 2016, in the same order that addressed the complaints against AAN, found that the Commission had acted contrary to law in dismissing the complaint against AJS. The court then reversed the dismissal of the plaintiffs' complaint against AJS and remanded the case to the Commission for reconsideration within thirty days, which expired on October 19, 2016. To date, plaintiffs maintain, the Commission has not informed the plaintiffs of any action it has taken on the AJS matter.

Request for Relief
Plaintiffs ask the district court to declare that the Commission is in violation of its statutory responsibilities under the Act and acted arbitrarily and capriciously in dismissing on remand plaintiffs' complaint against AAN and by failing to act with respect to the complaint against AJS on remand. Plaintiffs request that the court order the Commission to conform with the decision within 30 days and award plaintiffs costs and reasonable attorneys' fees and to grant any further relief that the court may deem proper.

(Posted 11/18/2016; By: Myles Martin)

Resources:

- Related article: Appeals Filed in CREW v. FEC (14-1419)
- *FEC v. CREW* (16-1225) Ongoing Litigation Page

Public Funding

Public Funding Repayment for 2012 Gary Johnson Presidential Campaign

On November 23, 2016, the Commission made public a repayment of public funds received from the 2012 campaign of presidential candidate Gary Johnson, and his principal campaign committee, Gary Johnson 2012, Inc.

After administrative review, the Commission determined that Gary Johnson and Gary Johnson 2012, Inc. must repay a total of $333,441 to the United States Treasury for matching funds received, based upon the use of public funds for non-qualified campaign expenses and for submitting contributions that were later determined to be ineligible for matching. The final repayment of $333,874.75 represents the repayment determination as well as accrued interest.

Federal law requires the Commission to audit every political committee established by a presidential candidate who receives public funds for the primary campaign. The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether

the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions and disclosure requirements of the election law. 26 U.S.C. § 9038; 11 CFR Part 9038.

Click here to view documents related to this repayment determination.

(Posted 11/28/2016; By: Dorothy Yeager)

Resources:

- Brochure: *Public Funding of Presidential Elections*

Compliance

FEC Cites 30 Campaigns for Failure to File Pre-General Financial Report

The Federal Election Commission has cited 30 campaign committees for failing to file the 12-Day Pre-General Report required by the Federal Election Campaign Act of 1971, as amended (the Act).

As of November 3, the required disclosure report had not been received from:

- Campaign to Elect Steven Reynolds for US Congress (TN-04)
- Citizens for August (O'Neill) Deuser (IL-01)
- Cleveland for Congress (SC-03)
- Committee to Elect Florida's Candidate, Basil E Dalack to the US Senate (FL)
- Committee to Elect Jesse T Smith for Congress (AL-03)
- Committee to Elect Michael Cole District 14 (TX-14)
- Committee to Elect Timmy Westley (TX-15)
- Connors for Senate (OH)
- Crumpton for Alabama (AL)
- Derickson K for Congress (NY-16)
- Donald Endriss Committee to Elect for US Congress District 23 (FL-23)
- Dr Fox 2016 (CA-18)
- Elect Dr. McKellar U.S. Congress (TX-01)
- Eve Nunez for US Congress (AZ-07)
- Faust for Congress (LA-01)
- Friends of Lenny McAllister (PA-14)
- Friends of Matt Detch (WV-03)
- Friends of Mike Lorentz for Congress (OH-06)
- Friends of Tony Gumina (NV)
- HEROJSLC2016 (AZ)
- Lily for US Senate (CO)
- Machat for Senate Campaign Committee (FL)

- Mark Gibson for Congress (TX-22)
- Mike Molesevich for Congress (PA-10)
- Misty K Snow for US Senate (UT)
- Pellerin for US Senate LLC) LA)
- Sam Gaskins for Congress (KY-01)
- Scott L. Fenstermaker (NY-13)
- The Committee to Elect Derrick Edwards (LA)
- Woolridge Campaign (TX-06)

The Pre-General report was due on October 27, 2016, and should have included financial activity for the period October 1, 2016, through October 19, 2016. If sent by certified or registered mail, the report should have been postmarked by October 24. The Commission notified committees of their pre-general election filing requirements on October 3. Those committees that did not file by the due date were sent notification on October 28 that their reports had not been received and that their names would be published if they did not respond within four business days.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends $5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

Other political committees that support federal candidates, but are not authorized units of a candidate's campaign, also may have been required to file a pre-general election report. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 11/04/2016)

Resources:

- FEC Non-Filer Press Release (November 4, 2016)
- Compliance Map
- The Administrative Fine Program
- FEC Reporting Dates
- Late Filing and Other Enforcement Penalties (Reports Analysis Division)