

# Record

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## Regulations

### Revised E&J for Agent

On January 23, 2006, the Commission approved a revised Explanation and Justification (E&J) for the definitions of agent used in its regulations on coordinated and independent expenditures and its regulations regarding nonfederal funds. The revisions respond to the district court decision in *Shays v. FEC*.

### Background

In its September 18, 2004 decision in *Shays*, the U.S. District Court for the District of Columbia held that the Commission had not adequately explained its decision to include in its definitions of agent those with “actual authority,” but not “persons acting only with apparent authority.” Having concluded that the Commission’s inadequate explanation violated the reasoned analysis requirement of the Administrative Procedure Act (APA), the court remanded the definitions to the agency for further action consistent with its opinion.

In response, the Commission approved a Notice of Proposed Rulemaking (NPRM) on January 27, 2005 requesting comments on several alternatives, including possible changes to the definitions of agent used in its regulations. On May 1,

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## Court Cases

### Wisconsin Right to Life v. FEC

On January 23, 2006, the U.S. Supreme Court issued a *per curiam* decision vacating the U.S. District Court for the District of Columbia’s judgment and held that the *McConnell v. FEC* decision did not preclude “as applied” challenges to the electioneering communication (EC) restrictions in the Bipartisan Campaign Reform Act (BCRA). The Supreme Court asked the District Court to reconsider the merits of Wisconsin Right to Life’s (WRTL) challenge “as applied” to certain activities that WRTL describes as grassroots lobbying.

### Background

WRTL filed suit in the U.S. District Court for the District of Columbia on July 26, 2004, asking the court to find the prohibition on the use of corporate funds to pay for ECs unconstitutional as applied to what it described as grassroots lobbying activities. On August 17, 2004, the District Court denied WRTL’s motion for a preliminary injunction. WRTL appealed the decision, but on May 9, 2005 the District Court dismissed the case, with prejudice, for the same reasons given in the court’s August 2004

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## Regulations

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2005, the Commission held a public hearing to receive testimony on the proposed rules. For more information on the public hearing, see the July 2005 *Record*, page 6.

### Revised E&J

After considering public comments and testimony, the Commission decided to retain the current definitions of agent in 11 CFR 109.3 and 300.2(b), but to explain more fully its decision to exclude “apparent authority.” In short, the Commission believes that the current definitions, which include “actual authority,” either express or implied, best reflect the intent and purposes of the statute.

Furthermore, after examining its pre- and post-BCRA enforcement record, the Commission has

determined that excluding “apparent authority” from the definitions of agent has not allowed circumvention of the Act nor led to actual or apparent corruption. The current definitions cover individuals engaged in a broad range of activities specifically related to BCRA-regulated conduct, rather than only to expenditures. This has dramatically increased the number of individuals and type of conduct subject to the Act, especially when compared to the Commission’s pre-BCRA definition of agent.

Similarly, the Commission believes including “apparent authority” in the definitions of agent is not necessary in order to implement BCRA or the Act. “Actual authority,” either express or implied, is a broad concept that covers the wide range of activities prohibited by the statute. This not only provides committees with appropriate incentives for compliance, but also protects core political activity that could otherwise be restricted or subject to Commission investigation under an apparent authority standard. The revised E&J also provides analysis of several specific hypothetical situations raised by commenters to illustrate how “actual authority” sufficiently addresses behavior.

Finally, the E&J concludes that liability premised on “actual authority” is best suited for the political context. Although “apparent authority” is applicable in commercial contexts, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations.

Applying “apparent authority” concepts developed to remedy fraud and economic loss to the electoral arena could restrict permissible electoral activity where there is no corruption or the appearance thereof.

The revised Explanation and Justification was published in the January 31, 2006, Federal Register

(71 FR 4975) and is available on the FEC web site at [http://www.fec.gov/pdf/nprm/definition\\_agent/notice\\_2006-1.pdf](http://www.fec.gov/pdf/nprm/definition_agent/notice_2006-1.pdf).

—Amy Pike

### FEA Final Rules

On February 9, 2006, the Commission approved final rules that revise the definitions of certain types of federal election activity (FEA). The revised rules, which take effect March 24, comply with the district court’s decision in *Shays v. FEC*.

### Background

As part of its decision in *Shays*, the district court invalidated portions of the regulatory definition of FEA that describe voter registration activity, get-out-the-vote (GOTV) activity and voter identification. The court found that the voter registration and GOTV definitions were improperly promulgated because the Commission’s initial Notice of Proposed Rulemaking (NPRM) did not indicate that the definitions would be limited to activities that “assist” individuals in registering or voting.

The court also invalidated the portion of the GOTV definition that exempts communications by associations or similar groups of state or local candidate/officeholders that refer only to state or local candidates. With regard to the definition of voter identification, the court found the Commission’s decision to exclude voter list acquisition and the activities of groups of state and local candidates/officeholders to be contrary to Congressional intent. For these reasons, the district court remanded the regulations to the Commission for further action consistent with its decision.

### Final Rules

In response to the district court’s decision, the Commission published an NPRM on May 4, 2005 that proposed possible modifications

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## Federal Register

*Federal Register* notices are available from the FEC's Public Records Office, on the web site at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml) and from the FEC Faxline, 202/501-3413

### Notice 2006-1

Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures (71 FR 4975, January 31, 2006)

### Notice 2006-2

Definition of Federal Election Activity (71 FR 8926, February 22, 2006)

to the definitions of voter registration activity, GOTV activity and voter identification. In addition, the NPRM proposed several changes to the definition of "in connection with an election in which a candidate for federal office appears on the ballot." See page 1 of the June 2005 Record.

On August 4, 2005, the Commission held a public hearing to receive testimony on the proposed rules. See page 4 of the September 2005 Record. After considering the public comments and testimony, the Commission issued final rules that:

- Retain the current definitions of voter registration and GOTV activity, which exclude from these definitions mere encouragement to register and/or vote, and provide a more complete explanation of what the term voter registration activity encompasses;
- Amend the definition of voter identification to include acquiring information about potential voters, including, but not limited to, obtaining voter lists;

- Remove the exception to the definitions of GOTV activity and voter identification for associations or other similar groups of candidates for state and local office;
- Remove the reference to "within 72 hours of an election" from the definition of GOTV activity;
- Revise the definition of "in connection with an election in which a candidate for federal office appears on the ballot" to remove restrictions on the rules for special elections to odd-numbered years.

### Interim Final Rule

The Commission also voted to promulgate an interim final rule modifying the definition of "in connection with an election in which a candidate for federal office appears on the ballot." This rule exempts activities and communications that are in connection with a nonfederal election held on a date separate from a date of any federal election and that refer *exclusively* to nonfederal candidates participating in the nonfederal election, ballot referenda or initiatives scheduled for the date of the nonfederal election, or the date, polling hours and locations of the nonfederal election.

The Commission approved the text of the new rule and directed the Office of General Counsel to draft an appropriate Explanation and Justification that will also seek public comment on the interim final rule. The final rules were promulgated in the *Federal Register* (71 FR 8926) on February 22, 2006 and are available on the FEC web site at [http://www.fec.gov/law/law\\_rulemakings.shtml#definition\\_fea](http://www.fec.gov/law/law_rulemakings.shtml#definition_fea). The Interim Final Rule will be published and available in the *Federal Register* after final Commission approval of the Explanation and Justification.

—Amy Pike

## Public Hearings on Coordinated Communications

On January 25 and 26, 2006, the Commission held public hearings concerning proposed changes to its coordinated communications regulations, resulting from the court decisions in *Shays v. FEC*. Specifically, the Court of Appeals in *Shays* found that the Commission had not sufficiently justified the 120-day time frame contained in the content prong of its three-prong coordination test. In response, the Commission published a Notice of Proposed Rulemaking (NPRM) seeking comments on possible changes to the time frame and to other aspects of the content prong, as well as possible amendments to the conduct and payment prongs of the coordination rules.

Commenters<sup>1</sup> agreed that the Commission should create a bright-line regulation and balance effective

<sup>1</sup> The commenters at the public hearings were: Jan Witold Baran, Chamber of Commerce; Robert F. Bauer, Democratic Congressional Campaign Committee; Donald J. Simon, Democracy 21; Marc E. Elias, Democratic Senatorial Campaign Committee; Paul S. Ryan, The Campaign Legal Center; Laurence E. Gold, AFL-CIO; Thomas J. Josefiak, Republican National Committee; Steve Hoersting, Center for Competitive Politics; Joseph E. Sandler, Democratic National Committee; William J. McGinley, National Republican Senatorial Committee; Clela Mitchell, Foley & Lardner, LLP; Brian G. Svoboda, Democratic Legislative Campaign Committee; Ellen R. Malcolm, EMILY's List; Karl J. Sandstrom, Association of State Democratic Chairs; Michael B. Trister, Service Employees International Union; Margaret McCormick, National Education Association; Donald F. McGahn II, National Republican Congressional Committee; and Lawrence M. Noble, The Center for Responsive Politics.

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## Regulations

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regulations with First Amendment rights. There was disagreement, however, as to the time frame those regulations should cover,

Some who appeared, such as Jan Baran and Joseph Sandler, preferred to keep the current 120-day time frame and revise the Explanation and Justification to reflect evidence that most communications with the purpose of influencing a federal election are distributed within 120 days of a primary or general election. Those distributed outside that period tend to be financed by candidates' own campaigns. Others argued that the 120-day time frame is inadequate because some ads distributed more than 120 days before a federal election are likely to be for

### FEC Web Site Offers Podcasts

In an effort to provide more information to the regulated community and the public, the Commission is making its open meetings and public hearings available as audio recordings through the FEC web site, as well as by podcasts. The audio files, and directions on how to subscribe to the podcasts are available under *Audio Recordings* through the *Commission Meetings* tab at <http://www.fec.gov>.

The audio files are divided into tracks corresponding to each portion of the agenda for ease of use. To listen to the open meeting without subscribing to the podcasts, click the icon next to each agenda item. Although the service is free, anyone interested in listening to podcasts must download the appropriate software listed on the web site. Podcast subscribers will automatically receive the files as soon as they become available—typically a day or two after the meeting.

the purpose of influencing that federal election. Therefore, if those ads are paid for by someone other than a candidate and are coordinated with a candidate, they should be regulated as coordinated communications.

Other commenters, such as Robert Bauer, Clea Mitchell and Donald McGahn, sought to apply the 30- and 60-day periods that currently govern electioneering communications. They argued that regulating communications during the 30-day period before a primary election and the 60-day period before a general election best reflected congressional intent to restrict only communications made for the purpose of influencing an election. Others argued that there were deficiencies with this proposal because many such communications fall within the gap between the proposed primary and general election periods and in the time frames prior to these periods.

Democracy 21, The Campaign Legal Center and The Center for Responsive Politics offered an alternative “tiered system” of regulation that focuses on the identity of the entity paying for the communication and the content and timing of the communication itself. They argued that their proposal best dealt with groups with different objectives and levels of participation and also prevented circumvention of the law. Others felt this proposal was confusing and complicated.

Many commenters focused on the lack of evidence regarding when candidates and others distribute communications that are election-related. Given that only one cycle has passed since the current coordinated communication rules were instituted, some felt that meaningful trend analysis was impossible. Karl Sandstrom noted that even if trends could be found, the regulations that are promulgated could influence the behavior that follows, indicating that it would be difficult to base a decision on such evidence. Democracy

21, The Campaign Legal Center and the Center for Responsive Politics compiled an extensive list of ads that were run in the previous election cycle, but the commenters could not agree on what conclusions should be drawn from this evidence.

The commenters devoted a significant amount of time to discussing possible safe harbors to protect certain actions. Nearly all agreed that a safe harbor should be created to protect communications in which federal candidates endorse nonfederal candidates, as long as the endorsement does not promote, attack, support or oppose the election or defeat of the endorsing federal candidate or his or her opponent.

Another safe harbor sought by party groups was an amendment to, or elimination of, the common vendor standard. The common vendor conduct standard is satisfied where an entity paying for a communication uses the same vendor as used by a candidate or political party committee during an election cycle and that common vendor transmits material information about the candidate or political party committee campaign to the entity paying for the communication.

Many commenters argued that this common vendor rule is burdensome for vendors and committees alike. Some argued that the rule is applicable for an unnecessarily long period, as long as six years in the case of senate campaigns. Other groups were skeptical of this interpretation and believed decreasing the time period to, for example, 60 days, would encourage circumvention of the law.

For more information about the NPRM or public hearings, visit our web site at [http://www.fec.gov/law/law\\_rulemakings.shtml#coordinated](http://www.fec.gov/law/law_rulemakings.shtml#coordinated) where audio recordings of the public hearings are available, as well as the original NPRM text, public comments and the January 2006 *Record* summary.

—Carlin E. Bunch

## Party Activities

### 2006 Coordinated Party Expenditure Limits

The 2006 coordinated party expenditure limits are now available. They are:

- \$39,600 for House nominees;<sup>1</sup> and
- between \$79,200 to \$2,093,800 for Senate nominees, depending on each state’s voting age population.

Party committees may make these special expenditures on behalf of their 2006 general election nominees. National party committees have a separate limit for each nominee, but they share their limits with their national senatorial and congressional committees. Each state party committee has a separate limit for each House and Senate nominee in its state. Local party committees do not have their own separate limit. One party committee may authorize another party committee to make an expenditure against its limit. Local committees may only make coordinated party expenditures with advance authorization from another committee.

Coordinated party expenditure limits are separate from the contribution limits; they also differ from contributions in that the party committee must spend the funds on behalf of the candidate rather than give the money directly to the campaign. Although these expenditures may be made in consultation with the candidate, only the party committee making the expenditure — not the

<sup>1</sup> In states that have only one U.S. House Representative, the coordinated party expenditure limit for the House nominee is \$79,200, the same amount as the lowest Senate limit. In other states, the limit for each House nominee is \$39,600.

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### Authority to Make Coordinated Party Expenditures on Behalf of House and Senate Nominees

<b>National Party Committee</b>	May make expenditures on behalf of House and Senate nominees. May authorize <sup>1</sup> other party committees to make expenditures against its own spending limits. Shares limits with national congressional and senatorial campaign committees.
<b>State Party Committee</b>	May make expenditures on behalf of House and Senate nominees seeking election in the committee’s state. May authorize <sup>1</sup> other party committees to make expenditures against its own spending limits.
<b>Local Party Committee</b>	May be authorized <sup>1</sup> by national or state party committee to make expenditures against its limits.

### Calculating 2006 Coordinated Party Expenditure Limits

	Amount	Formula
<b>Senate Nominee</b>	See table on facing page	The greater of: \$20,000 x COLA <sup>2</sup> or 2 cents x state VAP <sup>3</sup> x COLA
<b>House Nominee in State with Only One Representative</b>	\$79,200	\$20,000 x COLA <sup>2</sup>
<b>House Nominee in Other States</b>	\$39,600	\$10,000 x COLA <sup>2</sup>
<b>Nominee for Delegate or Resident Commissioner<sup>4</sup></b>	\$39,600	\$10,000 x COLA <sup>2</sup>

<sup>1</sup> The authorizing committee must provide prior authorization specifying the amount the committee may spend.

<sup>2</sup> COLA means cost-of-living adjustment. The 2006 COLA is 3.961. Limits are rounded to the nearest hundred.

<sup>3</sup> VAP means voting age population.

<sup>4</sup> American Samoa, the District of Columbia, Guam and the Virgin Islands elect Delegates; Puerto Rico elects a Resident Commissioner.

## Coordinated Party Expenditure Limits for 2006 Senate Nominees

State	Voting Age Population (In thousands)	Expenditure Limit
Alabama	3,468	\$274,700
Alaska*	475	\$79,200
Arizona	4,359	\$345,300
Arkansas	2,104	\$166,700
California	26,430	\$2,093,800
Colorado	3,485	\$276,100
Connecticut	2,675	\$211,900
Delaware*	648	\$79,200
Florida	13,722	\$1,087,100
Georgia	6,710	\$531,600
Hawaii*	975	\$79,200
Idaho	1,055	\$83,600
Illinois	9,522	\$754,300
Indiana	4,669	\$369,900
Iowa	2,296	\$181,900
Kansas	2,070	\$164,000
Kentucky	3,193	\$252,900
Louisiana	3,376	\$267,400
Maine	1,044	\$82,700
Maryland	4,197	\$332,500
Massachusetts	4,941	\$391,400
Michigan	7,597	\$601,800
Minnesota	3,903	\$309,200
Mississippi	2,173	\$172,100
Missouri	4,422	\$350,300
Montana*	731	\$79,200
Nebraska	1,327	\$105,100
Nevada	1,794	\$142,100
New Hampshire	1,007	\$79,800
New Jersey	6,556	\$519,400
New Mexico	1,439	\$114,000
New York	14,709	\$1,165,200
North Carolina	6,542	\$518,300
North Dakota*	500	\$79,200
Ohio	8,705	\$689,600
Oklahoma	2,695	\$213,500
Oregon	2,791	\$221,100
Pennsylvania	9,613	\$761,500
Rhode Island*	831	\$79,200
South Carolina	3,228	\$255,700
South Dakota*	588	\$79,200
Tennessee	4,572	\$362,200
Texas	16,534	\$1,309,800
Utah	1,727	\$136,800
Vermont*	490	\$79,200
Virginia	5,743	\$455,000
Washington	4,803	\$380,500
West Virginia	1,434	\$113,600
Wisconsin	4,240	\$335,900
Wyoming*	395	\$79,200

\* In these states, which have only one U.S. House Representative, the spending limit for the House nominee is \$79,200.

candidate committee — must report them. Coordinated party expenditures are reported on FEC Form 3X, line 25, and are always itemized on Schedule F, regardless of amount.

The accompanying tables on pages 5 and 6 include:

- Information on which party committees have the authority to make coordinated party expenditures;
- The formula used to calculate the coordinated party expenditure limits; and
- A listing of the state-by-state coordinated party expenditure limits.

—Carlin E. Bunch

### Court Cases

(continued from page 1)

decision. WRTL appealed to the Supreme Court and on September 17, 2005, the Supreme Court agreed to hear the case.

Under the Federal Election Campaign Act (the Act) and Commission regulations, an EC is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed in the relevant jurisdiction within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. 434(f)(3) and 11 CFR 100.29. Corporations may not make ECs using their general treasury funds.<sup>1</sup> 2 U.S.C. 441b(a)-(b) and 11 CFR 114.2 and 114.14.

The plaintiff's activities involved paying for broadcast advertisements in 2004 that asked Wisconsin listeners to contact U.S. Senators Kohl and Feingold and to ask them

<sup>1</sup> Commission regulations provide an exception allowing "qualified nonprofit corporations" to pay for electioneering communications. 11 CFR 114.2(b)(2); 11 CFR 114.10. However, WRTL alleges that it does not meet the definition of a qualified nonprofit corporation.

to vote against anticipated filibusters of federal judicial nominees. Senator Feingold was up for re-election in 2004 and some of the intended ads would have run during the EC periods for Wisconsin's primary and general elections.

According to WRTL, because the ads expressed an opinion on pending Senate legislative activity, urged listeners to contact their Senators and did not refer to any political party or support or attack any candidate, they constituted *bona fide* grassroots lobbying. WRTL argued that the ads were not the "functional equivalent of express advocacy;" thus, there was no constitutional justification for the prohibition on corporate payments for these ads or for requiring the ads to be paid for through a political action committee. WRTL asserted that in this instance the prohibition on corporate-sponsored ECs unconstitutionally burdened the rights of free speech, free association and petitioning the government — all in violation of the First Amendment.

### Court Decision

The Supreme Court issued a *per curiam* decision vacating the District Court's judgment in this case based on the district court's incorrect interpretation of *McConnell*.

The district court reasoned that in upholding the EC provisions of BCRA in *McConnell*, the Supreme Court left no room for the kind of "as applied" challenge brought by WRTL. According to the District Court's interpretation, *McConnell* upheld all applications of the primary definition of electioneering communication, suggesting little likelihood of success for an "as applied" challenge to a particular application of that definition. The District Court determined that this deliberate upholding of "all applications" stands in contrast to the Supreme Court's explicit acknowledgment that other parts of the statute, which it also upheld, might

be subject to "as applied" challenges in the future.

The Supreme Court, however, concluded that the District Court misinterpreted the relevance of *McConnell*'s statement that it was upholding "all applications of the primary definition of electioneering communications." The Supreme Court clarified that *McConnell*, in upholding the primary definition against a facial challenge, "did not purport to resolve future as applied challenges," such as the one brought forth by WRTL. The Supreme Court vacated the judgment in the case and remanded it to the District Court to reconsider the merits of WRTL's as applied challenge in the first instance.

WRTL filed a motion to reinstate the parties' prior cross-motions for summary judgment on January 24, 2006.

—Carrie Hoback

### Kean for Congress v. FEC

In separate rulings issued on January 13 and January 20, the U.S. District Court for the District of Columbia ordered the Commission to pay attorney's fees totaling over \$31,000 to the Kean for Congress Committee. The fees stem from the Committee's lawsuit challenging the Commission's dismissal of an administrative complaint it had filed — a decision the Commission ultimately reversed on remand from the district court. For additional information, see the December 2001 *Record*, page 3 and the March 2004 *Record*, page 7.

### Background

In 2000, Kean for Congress Committee brought an administrative complaint to the FEC regarding the Council for Responsible Government's funding of campaign mailings in an attempt to influence the New Jersey Congressional Seventh District Republican primary. The Commission subsequently

voted 3-3 on whether to find "reason to believe" that the Act had been violated and then unanimously voted to dismiss the complaint and close the file. The committee asked the U.S. District Court for the District of Columbia to find that the Commission acted contrary to law when it dismissed the committee's administrative complaint.

At the FEC's request and over the committee's opposition, the court remanded the case to the FEC for 60 days so it could reconsider the committee's administrative complaint in light of *McConnell v. FEC*, 540 U.S. 93 (2003), which the Supreme Court had issued after the FEC had dismissed the committee's administrative complaint but before the Commissioners had issued their Statements of Reasons for that dismissal. The court's order did not direct the FEC to take any particular position on remand or compel the agency to reverse its dismissal. On remand, the FEC found "reason to believe" and subsequently entered into a conciliation agreement with the Council for Responsible Government.

### Analysis

On May 31, 2005 Kean for Congress filed a motion for attorney's fees and expenses, arguing that under the Equal Access to Justice Act it was a "prevailing party." In order to be a prevailing party, the party must prove that:

- There has been a court-ordered change in the legal relationship between the parties;
- Judgment was entered in the party's favor; and
- The judicial pronouncement confers some judicial relief.

The court found that the remand order was a court-ordered change in the legal relationship, by forcing the FEC to reconsider the administrative complaint within 60 days. Additionally, it was favorable to the

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## Court Cases

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committee, even though it originally had opposed the remand, and offered relief in the form of time constraints, which addressed the grievances of the committee.

After concluding that the committee was a prevailing party, the court considered whether the FEC's position was "substantially justified." The court found that the FEC's position was not substantially justified because, among other reasons, the three Commissioners who initially voted against pursuing the administrative complaint did not address the *McConnell* decision in their Statement of Reasons. The court found the committee's request for attorney's fees to be reasonable and ordered the FEC to pay over \$31,000. For more information on this case, see December 2001 *Record*, page 3 and March 2004 *Record*, page 7.

—Carlin E. Bunch

## FEC v. Kalogianis

On January 11, 2006, the Commission asked the U.S. District Court for the Middle District of Florida to find that Constantine Kalogianis, Kalogianis for Congress, Inc.; Patricia Jones, as treasurer of Kalogianis for Congress; Kalogianis and Associates, P.A.; and Liberty Title Agency, Inc. violated the Federal Election Campaign Act's (the Act) ban on corporate contributions and its reporting requirements.

### Background

The Act prohibits making or accepting corporate contributions in connection with a federal election. 2 U.S.C. 441b(a). A contribution is any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. The Act also requires, among other things, that the identity of each person who makes a loan be disclosed along with the

identification of any endorser of the loan and the date and amount of the loan. 2 U.S.C. 434(b).

### Analysis

During the 2002 campaign, the Kalogianis Committee accepted six loans totaling over \$54,000 from Kalogianis & Associates and Liberty Title Agency, corporations Mr. Kalogianis owns. Additionally, the committee operated from the offices of Kalogianis & Associates without charge for administrative and overhead expenses. The committee reported that it had received personal loans from Constantine Kalogianis, when part of one loan was from Kalogianis & Associates and part of another loan was from Liberty Title Agency. The committee also failed to report the correct dates on which it repaid loans made by Liberty Title Agency.

The FEC asked the court to find that the defendants violated 2 U.S.C. 441b(a) and 434(b), permanently enjoin them from violating these acts and assess a civil penalty against each defendant.

—Carlin E. Bunch

## Advisory Opinions

### Advisory Opinion 2005-20: Payroll Deduction for LLP PAC

Partners at Pillsbury Winthrop Shaw Pittman LLP (PWSP) may use an automated electronic payroll system to make voluntary contributions to PWSP's PAC, provided that the PAC pays PWSP in advance for the costs associated with the use of the system.

### Background

PWSP is a limited liability partnership consisting of over 900 attorneys, more than 300 of whom are partners. PWSP qualifies as a federal contractor because it

occasionally provides legal services to federal government agencies.

As a partnership, PWSP cannot act as the connected organization for a separate segregated fund (SSF); instead it sponsors a nonconnected political action committee (PAC). Any support PWSP might provide to the PAC would be a partnership contribution.

In 2006, the PAC wants to allow PWSP partners to contribute voluntarily to the PAC by means of PWSP's automated electronic payroll system. Currently, partners wishing to contribute to PWSP PAC must do so by personal check. The PAC would pay all costs associated with the use of the payroll system.

### Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit federal contractors — including partnerships — from making contributions or expenditures in connection with any federal election. 2 U.S.C. 441c(a); 11 CFR 115.4(a). However, individuals who work for a federal contractor may contribute in their own name from their own personal assets. 11 CFR 115.4(b). PWSP partners using PWSP's automated electronic payroll system exercise complete control over the funds that represent their net compensation by making their individual account designations, and the partners may modify or revoke those designations at any time.

Significantly, PWSP has no control over the partners' choice of the recipient of any disbursement from the firm's payroll account and at the moment a disbursement takes place from PWSP's payroll account, the funds being disbursed are the personal assets of the partner. This is the functional equivalent of the partner writing a personal check.

In past advisory opinions, the Commission has stated that the federal contractor prohibition extends to the use of any partnership funds to pay for the PAC's establishment,

administration and solicitation costs. As a result, PWSP may not pay any of the costs associated with a partner's use of PWSP's automated electronic payroll system to make voluntary contributions to the PAC without PWSP making a prohibited contribution. However, the Commission has allowed a partnership to pay for its PAC's use of goods and/or services that the partnership offers in the usual course of its business, so long as the political committee provides reimbursement within a "commercially reasonable time." AO 2001-7. This allowance does not extend to goods and services that are not offered by the partnership in the ordinary course of its business. Since use of its automated electronic payroll system is not offered to PWSP's clients in its normal course of business, the PAC must pay in advance all costs associated with using the system in order to avoid an impermissible contribution by federal contractor PWSP to the PAC.<sup>1</sup>

Date issued: January 23, 2006

Length: 4 pages

—Myles Martin

## Advisory Opinion Requests

### AOR 2006-1

Leadership PAC's ability to purchase at a discounted rate from the publisher copies of a Senator's book. (PAC for a Change, January 20, 2006)

### AOR 2006-2

Whether for-profit company with owners is a membership organization that may solicit separate group of dues-payers for contributions to the company's SSF (Robert Titley, January 18, 2006)

<sup>1</sup>The Commission considered, but could not reach a consensus on, whether the PAC may reimburse PWSP within a commercially reasonable time, rather than pre-pay for these costs.

### AOR 2006-3

Use of common username and password for web site communication with restricted class (Sean Mackay, January 31, 2006)

### AOR 2006-4

Donation of campaign funds by Congressional candidate to state ballot initiative committee and campaign committee's financing of endorsement ads (Jon Ponder February 7, 2006)

### AOR 2006-5

Affiliation of local committee with state party committee and ability of local party to contribute to federal candidates without registering (J. Mark White, January 30, 2006)

## Information

### FEC Designates New Chief FOIA Officer

The Commission has designated Thomasenia P. Duncan, Associate General Counsel for General Law and Advice, to serve as the agency's new Chief Freedom of Information Act (FOIA) Officer, and members of the Administrative Law Team she oversees to function as the FOIA Public Liaison and the FOIA Service Center. This move, which comes in response to Executive Order 13392, consolidates operations previously shared by the FEC's Press Officer and the Office of General Counsel. Now, Ms. Duncan and her team will process all requests for information made under FOIA. For additional information, visit the FEC's FOIA web page at <http://www.fec.gov/press/foia.shtml>.

## Alternative Dispute Resolution

### ADR Program Update

The Commission recently resolved 10 additional cases under the Alternative Dispute Resolution (ADR) program. The respondents, the alleged violations of the Federal Election Campaign Act (the Act) and final disposition of the cases are listed below.

1. The Commission reached an agreement with M. Jaliman for US House of Representatives, M. Kathryn Jaliman, treasurer regarding failure to register, failing to report and failing to include a disclaimer with public communications. The respondents stated that the committee's financial reports were filed in accordance with the provisions of the Act; however, they acknowledged distributing direct mail without the required disclaimer notice and failed to include appropriate disclaimers on the web site and phone messages. They agreed to correct the committee web site to ensure it complies with the Act and send the treasurer to an FEC seminar. (ADR 258)

2. The Commission reached an agreement with Walcher for Congress, Lon Carpenter, treasurer, regarding failure to accurately report debts. The respondents acknowledged that their staff is inexperienced with reporting responsibilities. They have hired an accounting firm to facilitate reporting and agreed to maintain the contract with that firm. They also agreed to establish an internal control system to monitor all campaign related expenditures, establish a campaign finance resource library for staff, send a staff member to an FEC seminar and pay a \$9,000 penalty. (ADR 263\*)

\* This case was internally generated.

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## Alternative Dispute Resolution

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3. The Commission rejected the settlement agreement for Brady for Congress, W. R. Eissler, treasurer, and closed the file. The agreement suggested the Commission prematurely had found a violation of law and further indicated that it would be inappropriate for the Commission to make even a preliminary finding when, as here, the committee had failed to make a “best efforts” showing to the Reports Analysis Division. In a Statement of Reasons issued by Commissioners Michael Toner, Danny McDonald, David Mason, Ellen Weintraub and Scott Thomas, the Commission found that this agreement would confuse the ADR process and the “best efforts” requirements. (ADR 264\*)

4. The Commission reached an agreement with Jim Feldkamp for Congress, Ronald D. Calkins, treasurer, regarding failure to disclose disbursements. The respondents

contend that the alleged “campaign-related activity” occurred during a personal trip and involved incidental encounters. They agreed to amend the committee’s 2004 Quarterly Report to reflect the candidate’s expenditures, establish and maintain a resource center for staff and pay a \$300 penalty. (ADR 265)

5. The Commission reached an agreement with Millican for U.S. Senate, Marc J. Millican, treasurer, regarding failure to register and report. The respondents acknowledged misunderstanding the Commission’s requirement to file a Statement of Candidacy, register with the Commission and file reports. They explained that the committee filed the necessary reports with the Commission on receipt of the complaint and receiving guidance from the Commission. They agreed to send a staff member to an FEC seminar and pay a \$7,500 penalty.

6. The Commission reached an agreement with the Law Offices of James G. Sokolove, regarding failure to file an independent expenditure statement, lack of disclaimer and making an illegal corporate contribution. The respondent stated that the letter in question did not constitute a prohibited corporate contribution or a corporate independent expenditure given the respondent’s status as a sole proprietorship. Instead, it was a “permissible” independent expenditure as defined in the regulations. He acknowledged the error in failing to file an independent expenditure report and failing to include a disclaimer notice on the letter. The respondent acknowledged receipt of a letter of admonishment from the Commission. (ADR 274)

7. The Commission reached an agreement with Republican Main Street Partnership PAC, Sara Chamberlain Resnick, treasurer, regarding failure to file 24-Hour reports. The respondents failed to file the reports because they believed they had not

authorized the expenditure. They agreed to pay the \$1,250 civil penalty and to establish internal operating procedures that will require prior review by the committee before expenditures are authorized. (ADR 281\*)

8. The Commission reached an agreement with Magnum for Congress, Thomas Diehl, treasurer, regarding failure to accurately report receipts. The respondents explained that the committee had software problems and contended that there was no intent to mislead. They have instituted a number of changes to their procedures for reporting, including hiring a professional accounting firm, which they have agreed to keep under contract for the length of the campaign. They also agreed to send a staff member to an FEC seminar, train personnel on reporting requirements, prepare a manual on reporting responsibilities, set up and maintain a resource center on reporting requirements and pay a \$2,000 penalty. (ADR 286\*)

9. The Commission reached an agreement with Hostetler for Congress, John Grab, treasurer, regarding failure to accurately report disbursements. The respondents acknowledged inadvertent violations of the Act due to inexperience. They agreed to file all amended reports with an accurate and adequate description of the purpose of each disclosure and work with Commission staff to terminate the committee. (ADR 291\*)

10. The Commission rejected the settlement agreement for Thelma for Congress, Robert J. Catron, treasurer, and closed the file. The agreement suggested the Commission prematurely had found a violation of law and further indicated that it would be inappropriate for the Commission to make even a preliminary finding when, as here, the committee had failed to make a “best efforts” showing to the Reports Analysis Division. In a Statement of Reasons

### Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site [www.fec.gov](http://www.fec.gov).

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

issued by Commissioners Michael Toner, Danny McDonald, David Mason, Ellen Weintraub and Scott Thomas, the Commission found that this agreement would confuse the ADR process and the “best efforts” requirements. (ADR 293\*)

—*Carlin E. Bunch*

## Reports

### FECFile Update

The FEC’s electronic filing software, FECFile, has been updated. The new FECFile Version 5.3.1.0 replaces Version 5.2.0.1. Version 5.2.0.1 will no longer be accepted. Committees that file electronically must update their filing software. Committees that use commercial software should contact their vendors for the latest release. The new FECFile version is available for download at <http://www.fec.gov/electfil/FECFileIntroPage.shtml>.

If you have any questions, please call the Electronic Filing Office at 202/694-1307 or 800/424-9530 ext. 1307.

### Roundtable Schedule

Date	Subject	Intended Audience
April 5 9:30-11 a.m. Meet and Greet 11-11:30 a.m.	<b>Reporting for PACs and Party Committees</b> , plus Talk to Your Analyst One-On-One	Individuals responsible for filing FEC reports for PACs and Party Committees. Up to 30 may attend.
April 5 1:30-3 p.m.	<b>Hands-on Help with FEC-File and E-filing for PACs and Party Committees</b>	PACs and Party Committees that use FECFile and/or have questions about electronic filing. Up to 16 may attend.
April 5 1:30-3 p.m. Meet and Greet 3-3:30 p.m.	<b>Reporting for Candidates and Their Committees</b> , plus Talk to Your Analyst One-On-One	Individuals responsible for filing FEC reports for Candidate Committees. Up to 30 may attend.
April 5 9:30-11 a.m.	<b>Hands-on Help with FECFile and E-filing for Candidates and their Committees</b>	Campaigns that use FECFile and/or have questions about electronic filing. Up to 16 may attend.

## Outreach

### Reporting and FECFile Help

On April 5, 2006, the Commission will host reporting and electronic filing workshops. See the chart below for details. The reporting workshops will address common filing problems and respond to questions committees may have as they prepare to file their 1<sup>st</sup> quarter April 15 report. The workshops will be followed by a half-hour “meet and greet” at which each attendee will have an opportunity to meet the campaign finance analyst who reviews his or her committee’s reports. The electronic filing sessions will provide hands-on instruction for committees that use the Commission’s FECFile software and will address questions filers may have concerning electronic filing.

Attendance is limited to 30 people per session for reporting workshops, and 16 people per session for the electronic filing workshops. Registration is accepted on a first-come, first-served basis. The registration

form is available on the FEC web site at <http://www.fec.gov/info/outreach.shtml#roundtables> and from Faxline, the FEC’s automated fax system at 202/501-3414 (request document 590). For more information, call the Information Division at 800/424-9530, or locally at 202/694-1100.

—*Kathy Carothers*

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