Record

May 2010 Federal Election Commission Volume 36, Number 5

Table of Contents

Regulations

Final Rules on Debt Collection

On April 16, 2010, the Commission published final rules and their Explanation and Justification in the *Federal Register* implementing statutory and regulatory provisions regarding the collection of delinquent debts owed to the United States Government. The final rules also integrate existing regulations regarding the collection of debts arising solely from the Administrative Fine program into the new rules.

Background

The Commission is promulgating new rules to implement the Debt Collection Improvement Act of 1996 (DCIA), which governs the federal government's debt collection activities and mandates that all nontax debts or claims owed to the United States that have been delinquent for a period of more than 180 days shall be referred to the U.S. Department of the Treasury or a Treasury-designated collection center for appropriate action to collect or terminate collection of the claim or debt.

The Federal Claims Collection Standards (FCCS), which were promulgated by the U.S. Department of the Treasury and the U.S. Department of Justice, prescribe the standards that federal agencies must

(continued on page 6)

Court Cases

SpeechNow.org v. FEC

On March 26, 2010, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *SpeechNow.org. v. FEC* that the contribution limits of 2 U.S.C. §441a are unconstitutional as applied to individuals' contributions to SpeechNow. The court also ruled that the reporting requirements of 2 U.S.C. §§432, 433 and 434(a) and the organizational requirements of 2 U.S.C. §431(4) and §431(8) can be constitutionally applied to SpeechNow.

Background

SpeechNow is an unincorporated nonprofit association registered as a "political organization" under §527 of the Internal Revenue Code. SpeechNow intends to raise funds solely through donations by individuals and intends to operate exclusively through independent expenditures, which are defined by the Federal Election Campaign Act (the Act) as expenditures that expressly advocate the election or defeat of a clearly identified federal candidate and are not made in concert or cooperation with, or at the request or suggestion of such candidate, the candidate's authorized committee or their agents or a political party committee or its agents. 2 U.S.C. §431(17). SpeechNow intends to run

(continued on page 2)

Court Cases

(continued from page 1)

ads for the 2010 election cycle if it is not subject to the contribution limits of the Act.

In November 2007, SpeechNow filed an advisory opinion request with the Commission, asking whether it must register as a political committee under the Act and if donations to SpeechNow would qualify as "contributions," as defined by the Act, which are subject to the amount limitations of 2 U.S.C. §441a(a)(1)(C) and §441a(a)(3). At the time, the Commission did not have enough Commissioners to issue an opinion, but the Commission's Office of General Counsel did issue a draft advisory opinion which stated that SpeechNow would be a political committee and contributions to it would be subject to the political committee contribution limits. SpeechNow filed a complaint in the U.S. District Court for the District of Columbia, alleging that the restrictions applicable to political committees would be unconstitutional as applied to SpeechNow.

The Act defines a political committee as "any committee, club, association, or other group of persons" that receives contributions or makes expenditures in excess of $1,000 in a calendar year. 2 U.S.C. §431(4). Once a group qualifies as a political committee, contributions to that committee are restricted to $5,000 from an individual in a calendar year; additionally, an individual's total contributions to all political committees are limited, currently to $69,900 biennially. 2 U.S.C. §441a(a)(1)(C) and §441a(a)(3). A political committee must also comply with all applicable recordkeeping and reporting requirements of the Act, which include, among other things, filing periodic campaign finance reports with the Commission. See 2 U.S.C. §434(a)(4) and §434(b).

Appellate Court Decision

Contribution Limits. The court of appeals held that when the government attempts to regulate the financing of political campaigns and express advocacy through contribution limits, it must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights. In light of the Supreme Court's recent decision in *Citizens United v. FEC*, in which the Supreme Court held that the government has no anti-corruption interest in limiting independent expenditures, the appeals court ruled that "contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption." As a result, the court of appeals held that the government has no anti-corruption interest in limiting contributions to an independent group such as SpeechNow. Contributions limits as applied to SpeechNow "violate the First Amendment by preventing [individuals] from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits." The court noted that its holding does not affect direct contributions to candidates, but rather contributions to a group that makes only independent expenditures.

Disclosure and Reporting Requirements. The appeals court held that, while disclosure and reporting requirements do impose a burden on First Amendment interests, they "'impose no ceiling on campaign-related activities'" and "'do not prevent anyone from speaking.'" Furthermore, the court held that the additional reporting requirements that the Commission would impose on SpeechNow if it were organized as a political committee are minimal, "given the relative simplicity with which SpeechNow intends to operate." Since SpeechNow already has a number of "planned contributions" from individuals, the court ruled that SpeechNow could not compare itself to "ad hoc groups that want to create themselves on the spur of the moment." Since the public has an interest in knowing who is speaking about a candidate and who is funding that speech, the court held that requiring such disclosure and organization as a political committee are sufficiently important governmental interests to justify the additional reporting and registration burdens on SpeechNow.

The court's decision is available at http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf.

United States Court of Appeals for the District of Columbia Circuit, Case Nos. 08-5223 and 09-5342.

—Myles Martin

(continued on page 3)

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FEC Record to Become a News Site

In an effort to provide more timely and user-friendly information, the FEC *Record* will transition this summer from a print-based online publication to a wholly web-based format that better utilizes the medium. We're excited to improve this already useful resource in a way that will help our readers keep up with FEC-related news even better than before.

Converting the *Record* into a continuously updated news site will allow us to provide campaign finance information in a more timely and responsive manner, adding stories as regulations are approved, advisory opinions are issued and court cases are decided. We will be able to add links within articles that point to related resources, including audio of Commission meetings, advisory opinion documents, *Federal Register* notices and helpful web-based training materials devoted to new or complex areas of the law.

The new *Record* will be more searchable than the old PDF version, with a custom search bar for the site providing more useful results. The categories and tags we've added will make browsing and navigating the *Record* faster and more convenient than before, and you will be able to subscribe to the RSS feed to receive automatic updates as stories are posted. We look forward to our transition this summer and hope you'll let us know how we can continue to improve and better serve our readers.

Court Cases

(continued from page 2)

RNC v. FEC

On March 26, 2010, the U.S. District Court for the District of Columbia granted the FEC's Motion for Summary Judgment and denied the Plaintiff's Motion for Summary Judgment in *RNC v. FEC*. The court concluded that the Plaintiff's challenge to the Bipartisan Campaign Reform Act's (BCRA) restrictions on political party fundraising conflict with the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003). The court concluded that the Supreme Court's recent decision in *Citizens United v. FEC* does not affect *McConnell*'s holding with respect to BCRA's limits on contributions to political parties.

Background

Sections 323(a) and (b) of the BCRA, codified at 2 U.S.C. §441i(a)-(b), prohibit national parties from soliciting, receiving or spending any nonfederal funds. They also require state, district and local party committees to fund certain "federal election activity" (FEA) either with federal funds or with a combination of federal and Levin funds.

On November 13, 2008, the Republican National Committee, the Chairman of the RNC, the California Republican Party and the Republican Party of San Diego County (the Plaintiffs) filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of these soft money provisions. The Plaintiffs intended to use unlimited nonfederal funds to support candidates in elections where only state candidates appeared on the ballot, and to take part in other activities that the Plaintiffs characterized as insufficiently connected to federal elections. The Plaintiffs argued that the soft money provisions as applied to their intended activities

(continued on page 4)

Court Cases

(continued from page 3)

are overly broad and unconstitutional under the First Amendment.

Court Decision

In denying the Plaintiffs' Motion for Summary Judgment, the court first rejected their argument that it should apply a "strict scrutiny" level of analysis to their claims. The court referenced the Supreme Court's decision in *McConnell* which held that the appropriate level of scrutiny for limitations on contributions to candidates and political parties is a "closely drawn" standard that validates regulations if they meet a sufficiently important governmental interest.

Next, the RNC asserted that 323(a) could not constitutionally be applied to activities that are not unambiguously related to the campaign of a particular federal candidate. It also argued that 323(a) violates the First Amendment to the extent that it applies to contributions that would be used for nonfederal elections, and that there was no viable theory of corruption to justify limits on contributions to political parties. It asserted that if it pledged not to sell preferential access to federal officeholders and candidates in exchange for soft-money contributions, it would eliminate *McConnell's* concerns about the corrupting influences of soft-money contributions. The court rejected all of these arguments, stating that *McConnell* not only upheld BCRA's ban on nonfederal contributions to national political parties, but also held that 323(a) is not overbroad simply because it subjects all funds raised and spent by national parties to Federal Election Campaign Act's limits. Although the court found that the RNC's as-applied argument may have merit if the selling of access for soft-money contributions were eliminated, it pointed out that in upholding the 323(a) limits, the Supreme Court in *McConnell* also was concerned about the close relationship between federal officeholders and national parties. The *McConnell* Court felt that because they were inextricably intertwined, federal officeholders and candidates may value contributions to their national parties, and that those contributions have the same tendency to result (or appear to result) in *quid pro quo* corruption. Although the court acknowledged that the *McConnell* opinion is ambiguous as to whether the "unity of interests" rational was an independently sufficient standard to uphold the ban on soft-money contributions to national parties, it stated that it didn't possess the authority to clarify or refine *McConnell's* holding on this issue.

The California Republican Party and the Republican Party of San Diego County claimed that 323(b) unconstitutionally prohibited them from raising soft money contributions to participate in certain federal election activity that does not target, but may incidentally criticize or oppose, federal candidates. The court rejected this claim as already having been considered and rejected in *McConnell*. The court pointed out that whether 323(b) can be constitutionally applied to a particular state or local party activity depends on whether the activity would provide a direct benefit to a federal candidate, not on who the party's primary target is. Since the party committees did not deny that the activities could benefit federal candidates, the court rejected their as-applied challenge.

Finally, the RNC chairman claimed that 323(a) is unconstitutional as applied to his efforts to solicit soft money contributions to the RNC, state parties and state candidates. In rejecting the chairman's claim, the court stated that, although the chairman, in his individual capacity, may solicit soft-money donations on behalf of state and local party committees and candidates, *McConnell* upheld 323(a)'s prohibition against national party committees and their officers acting in their official capacities from soliciting or directing soft-money contributions.

On April 2, 2010, the Plaintiffs filed a Notice of Appeal to the U.S. Supreme Court.

The text of the court's opinion is available on the Commission's website at http://www.fec.gov/law/litigation/rnc_opinion_3judge.pdf.

U.S. District Court for the District of Columbia, 08-1953 (BMK)(RJL) (RMC).

—Zainab Smith

(continued on page 5)

Screen-Fillable Forms 1 and 2 Available on the FEC Website

FEC Form 1 (Statement of Organization) and FEC Form 2 (Statement of Candidacy) are now available in screen-fillable format on the FEC website. This will allow those committees who are registering for the first time or those committees who are filing amendments to these forms to fill them out by typing the required information on their computer rather than handwriting them. Screen-fillable Form 1 is available at http://www.fec.gov/pdf/forms/fecfrm1auth.pdf and screen-fillable Form 2 is available at http://www.fec.gov/pdf/forms/fecfrm2cand.pdf.

Court Cases

(continued from page 4)

FEC v. Novacek

On April 14, 2010, the United States District Court for the Northern District of Texas granted the Commission's Motion for Summary Judgment against the Defendants, Jody L. Novacek, Republican Victory Committee, Inc. ("RVC"), BPO, Inc., and BPO Advantage, LP (Defendants). The court found that Ms. Novacek and the RVC knowingly and willfully violated 2 U.S.C §441h(b)(1) by fraudulently misrepresenting themselves as acting for, or on behalf of, a political party for the purpose of soliciting contributions. The court also found that BPO, Inc., and BPO Advantage, LP, knowingly and willfully violated 2 U.S.C §441h(b)(2) by participating in Novacek and RVC's plan, scheme or design to fraudulently misrepresent themselves as acting for, or on behalf of, a political party for the purpose of soliciting contributions. Finally, the court found that Ms. Novacek and RVC violated 2 U.S.C § 441d(a) and (c) by failing to include on their communications the required disclaimer information in the manner specified by the statute. The court ordered the Defendants to pay a civil penalty of $47,414.15.

Background

On June 29, 2004, the Republican National Committee filed an administrative complaint with the Commission that alleged certain solicitations made by RVC violated the Federal Election Campaign Act (the Act) because these solicitations contained misrepresentations that RVC was acting on behalf of the Republican Party.

The Commission began its own investigation in 2005 and found probable cause that the Defendants had knowingly and willfully violated the Act. In October 2008, the Commission sent letters to the Defendants which proposed a conciliation agreement. The Commission was unable through informal methods to secure an acceptable conciliation agreement with the defendants.

On March 6, 2009, the Commission filed a Complaint in the U.S. District Court for Northern Texas against the Defendants for violations of the Act. On November 30, 2009, the Commission filed a Motion for Summary Judgment. The Commission argued that the Defendants made fundraising solicitations by phone and in mailers that fraudulently misrepresented the source of the solicitation as the Republican National Committee and the Republican Party in what constitutes a knowing and willful violation of the Act. Ms. Novacek created and operated the RVC, as well as BPO, Inc., and BPO Advantage, LP. Through these entities, Ms. Novacek made misrepresentations to vendors and the general public stating or implying that RVC was raising money for the Republican Party and the Republican National Committee. In addition, Ms. Novacek and RVC violated the Act by failing to include on their communications some of the required disclaimer information in the manner specified by the Act.

District Court Decision

The court granted the Commission's Motion for Summary Judgment against the Defendants.

The court found that the Defendants had violated 2 U.S.C. §441h(b)(1) and (2). The court noted that Ms. Novacek and RVC had knowingly and willfully misrepresented themselves as acting for, or on behalf of, the Republican Party and the Republican National Committee for the purpose of soliciting contributions. The court also found that the defendants BPO, Inc., and BPO Advantage, LP, had willfully and knowingly participated in Ms. Novacek and RVC's scheme, design or plan to fraudulently misrepresent themselves for the purpose of soliciting contributions. The court found that the Defendants failed to argue any of the material facts of the allegations and that the Defendants admitted to authoring scripts and follow-up letters to potential contributors for solicitation purposes.

The court rejected the Defendants' claim that the call transcripts obtained by the Commission may not be an accurate sample of the calls made by call centers on behalf of the Defendants. The court also denied the Defendants' request for additional discovery regarding further evidence from the call centers.

The court rejected the Defendants' claim that Ms. Novacek did not commit any "knowing and intentional" fraud and misrepresentation because the "RNC does not own the term 'Republican Party.'" *FEC v. Novacek,* No. 09-00444 (N.D. Tex. April 14, 2010). The court found the Defendants' position unsupportable in light of the script's clear implication that donations were solicited for the Republican Party and/or the Republican National Committee.

Finally, the court found that Defendants violated 2 U.S.C. § 441d(a) and (c) by failing to include a disclaimer in their communications. The Defendants failed to include RVC's permanent address, phone number or website address, or state that the solicitation was not authorized by a candidate or candidate committee. In RVC's mailings, the written material failed to properly format that information in clearly readable type size in a printed box set apart from the content of that communication. The court dismissed the Defendants' arguments that the violations were unintentional since intent is not an element of the offense and the Commission did not request higher civil penalties that would become available if Ms. Novacek had acted with "knowing and willful" intent for those violations.

The court ordered the Defendants to pay a civil penalty in the amount of $47,414.15. The court also ordered that any funds raised by these solicitations and held by

(continued on page 6)

Court Cases

(continued from page 5)

a non-party, the call center Apex CoVantage, L.L.C., shall be turned over to the Commission for return to the contributors.

The text of the court's opinion is available at http://www.fec.gov/law/litigation/novacek_opinion.pdf.

U.S. District Court for the Northern District of Texas (No. 3:09cv00444-M)

—*Stephanie Caccomo*

Regulations

(continued from page 1)

use in the administrative collection, offset, compromise and suspension or termination of collection activity for civil claims of money, funds or property. 31 CFR 900-904. The FCCS clarifies and simplifies federal debt collection procedures and prescribes the steps that an agency must take before initiating debt collection to ensure that individuals' rights are protected, which include notifying the debtor of the debt and the consequences of failing to resolve the debt.

The Commission published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on February 24, 2010, requesting comment on the proposed rules. (See the April 2010 *Record*). The comment period closed on March 26, 2010, and the Commission received one comment on the proposed rules.

Collection of Administrative Debts

The Commission is adding new part 8 and new subpart C to 11 CFR Part 111 to provide for debt collection. Together, both parts are designed to cover all types of debt that the Commission must collect. The regulations in part 8 cover only those debts that are either owed to the U.S. government by current or former Commission employees, or arise from the provision of goods or services by contractors or vendors doing business with the Commission. New 11 CFR 8.3 states that the Commission will collect the claims or debts covered by 11 CFR part 8 in accordance with the DCIA, the FCCS and certain other Treasury regulations governing debt collection. The new rules also state that the Commission will refer all debts to the Treasury Department that are more than 180 days delinquent and may, at its discretion, transfer delinquent debts prior to the end of the 180 day period. 11 CFR 8.3(c).

Additionally, the Commission's final rules provide for instances where a debtor has sought bankruptcy protection, which may require the Commission to take different action pursuant to bankruptcy law. 11 CFR 8.4.

The Commission shall also assess interest, penalties and administrative costs on debts owed to the United States, in accordance with federal law. The final rules state that the Commission shall waive collection of interest and administrative costs on debts that are paid within 30 days after the date on which interest begins to accrue. The final rules also provide that the Commission may, at its discretion, waive collection of interest, penalties or administrative costs on any debt, and sets out the criteria for waiver. 11 CFR 8.5.

Collection of Debts Arising from Enforcement and Administration of Campaign Finance Laws

The Commission's final rules remove 11 CFR 111.45, which governed debt collection with respect to the Administrative Fine program. Instead, the new regulations at 11 CFR part 111, subpart C, now govern the Commission's collection of debts arising from compliance matters, administrative fines, alternative dispute resolution, repayments of public funds and court judgments arising from the Commission's enforcement of the campaign finance laws. The new regulations cover the collection of debts only, and will be invoked only after the completion of existing Commission processes during which respondents or other parties have had a full and fair opportunity to demonstrate that no civil penalty or repayment should be imposed. See 11 CFR parts 111 and 9038, and 9008.11-9008.15.

Like new 11 CFR part 8, the new regulations at 11 CFR part 111, subpart C, state that the Commission will collect claims or debts covered by the new regulations in accordance with the DCIA, the FCCS and certain other Treasury regulations governing debt collection, and will refer debts to the Treasury Department that have been delinquent for more than 180 days and may, at its discretion, transfer delinquent debts prior to the end of the 180 day period. 11 CFR 111.52.

The new regulations at 11 CFR part 111, subpart C, also contain the same provisions governing the impact of bankruptcy law on debt collection and assessment and waiver of interest, penalties and administrative costs contained in new 11 CFR part 8, discussed above. 11 CFR 111.54 and 111.55.

The new regulations also note that nothing in new 11 CFR part 111, subpart C, precludes the Commission from filing suit in court to enforce compliance with a conciliation agreement, seek a civil money penalty, petition the court for a contempt order or otherwise exercise its authority to enforce or administer the Federal Election Campaign Act, the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act. 11 CFR 111.53.

Additional Information

The Final Rules and Explanation and Justification were transmitted to Congress on April 12, 2010, and published in the *Federal Register* on

(continued on page 7)

Regulations

(continued from page 6)

April 16, 2010. The *Federal Register* Notice is available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-10.pdf. The rules are effective on May 17, 2010.

—*Myles Martin*

Advisory Opinions

Advisory Opinion Requests

AOR 2010-05

Sale of advertising time on foreign-owned television station to candidates (Starchannel Communications, Inc., March 2, 2010)

AOR 2010-06

Affinity type program between corporation and political committees to provide an Internet web-based platform (Famos LLC, April 2, 2010)

AOR 2010-07

Federal candidate solicitation for a State ballot initiative committee under 2 U.S.C. §441i(e) (Yes on FAIR, April 7, 2010)

PACRONYMS Now Available

The December 2009 edition of PACRONYMS, a list of the acronyms, abbreviations and common names of federal political action committees (PACs), is available on the Commission's website.

PACRONYMS is available at http://www.fec.gov/pubrec/pacronyms/pacronyms.shtml and is also available from the FEC's Public Records Office at (202) 694-1120.

Statistics

PAC Activity Remains Steady in 2009

The 4,618 federally-registered political action committees (PACs) raised $555.7 million, spent $464.6 million and contributed $174.4 million to candidates, according to reports filed with the Commission for January 1 through December 31, 2009, the first calendar year of the 2009-2010 election cycle. While the total number of federal PACs increased by almost 3 percent compared to 2007, the first calendar year of the previous election cycle, receipts decreased by less than 1 percent, disbursements increased by nearly 2 percent and contributions to candidates grew by almost 1 percent. This is the first time in almost two decades that total receipts of federal PACs were lower than in the previous odd-numbered year.

Labor PACs had the most significant increase in financial activity compared to 2007, reporting $128.9 million in receipts, $95.7 million in disbursements and $26.3 million in contributions to candidates, gains of 12 percent, 22.5 percent and 9 percent, respectively. Nonconnected PACs (PACs not sponsored by particular corporations, labor organizations, trade or membership groups, etc.) reported $154.9 million in receipts and $146.3 million in disbursements, the highest totals when compared to the other PAC categories in 2009. Corporate PACs reported making $72.1 million in contributions to candidates in 2009, exceeding the totals of the other PAC categories.

PAC contributions made to Senate Democratic candidates totaled $27.8 million and $82.8 million for House Democratic candidates, representing an increase from 2007 totals of 39 percent and 5 percent, respectively. PAC contributions to Senate Republican candidates were $19.4 million, a decrease of 18 percent from 2007 totals. Contributions made by PACs to House Republican candidates were $44.5 million, a decrease of almost 13 percent compared to 2007. Generally, historical data show that PACs tend to contribute more to the party controlling each house of Congress.

PACs ended 2009 with $403.5 million cash-on-hand, up 6 percent from 2007 and the highest cash balance total reported for an odd-numbered year since the FEC began keeping records. PACs reported total outstanding debts of $5.8 million, down 16 percent from 2007.

The Commission's press release on PAC activity is available at http://www.fec.gov/press/press2010/20100406PAC.shtml.

—*Myles Martin*

Outreach

Washington, DC, Conference for Trade Associations, Membership Organizations and Labor Organizations

The Commission will hold its annual conference for trade associations, membership organizations and labor organizations and their PACs in Arlington, VA, on June 8-9, 2010. Commissioners and staff will conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. For additional information, to view the conference agenda or to register for the conference, please visit the conference website at http://www.fec.gov/info/conferences/2010/tradememberlabor10.shtml.

Hotel Information. The conference will be held at the DoubleTree

(continued on page 8)

Outreach

(continued from page 7)

Crystal City Hotel in Arlington, VA (near the Pentagon). A room rate of $226 single/$246 double is available to conference attendees who make reservations on or before May 7, 2010. To make your hotel reservations and reserve this group rate, call 1-800-HHONORS and identify yourself as attending the Federal Election Commission conference. The hotel is in walking distance (10 minutes) from the Pentagon City Metro subway station. The FEC recommends waiting to make hotel and air reservations until you have received confirmation or your conference registration from Sylvester Management Corporation.

Registration Information. The registration fee is $499 per attendee, which includes a $25 non-refundable transaction fee. A late registration fee of $51 will be added to registrations received after 5 p.m. EDT on May 7. For additional information, or to register for the conference, please visit the conference website at http://www.fec.gov/info/conferences/2010/tradememberlabor10.shtml.

FEC Conference Questions

Please direct all questions about the June conference registration and fees to Sylvester Management Corporation at 1-800/246-7277 or by e-mail to toni@sylvestermanagement.com. For all questions about the conference program, or to receive e-mail notification of upcoming conferences and workshops, call the FEC's Information Division at 1-800/424-9530 (press 6) or locally at 202/694-1100, or send an e-mail to Conferences@fec.gov.

—Dorothy Yeager

Index

The first number in each citation refers to the numeric month of the 2010 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, "1:4" means that the article is in the January issue on page four.