

# Record

October 2007

Federal Election Commission

Volume 33, Number 10

## Table of Contents

### Regulations

- 1 NPRM on Electioneering Communications

### Reports

- 1 October Reporting Reminder
- 3 Ohio Special Election Reporting

### Advisory Opinions

### Legislation

- 9 Honest Leadership and Open Government Act of 2007

### Public Funding

- 10 Matching Fund Certifications

### Compliance

- 10 MURs 5403 and 5466: Use of Prohibited Funds; Failure to Allocate and Report Expenses
- 11 MURs 5928 and 5853: Political Blogs

### Court Cases

- 12 Shays v. FEC
- 13 CCL of Maine v. FEC
- 14 Fieger v. FEC
- 14 FEC v. Citizens Club for Growth
- 15 FEC v. Adams

### Statistics

- 16 Party Committee Fundraising
- 17 House and Senate Fundraising

### Publications

- 17 Federal Elections 2006

### Outreach

- 17 FEC Conference

### 18 Index

## Regulations

### NPRM on Electioneering Communications

On August 31, 2007, the Commission published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* seeking public comment on proposed changes to Commission regulations regarding electioneering communications (ECs). The NPRM is in response to the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*.

### Background

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (the Act) to add a new type of political communication called "electioneering communications" (EC). The BCRA defined an EC as a broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary election or within 60 days of a general election and is targeted to the relevant electorate. 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29(a). Corporations and labor organizations are prohibited from using their general treasury funds to finance ECs. 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(2)(iii).

(continued on page 5)

## Reports

### October Reporting Reminder

The following reports are due in October<sup>1</sup>:

- All principal campaign committees of House and Senate candidates must file a quarterly report by October 15. The report covers financial activity from July 1 (or the day after the closing date of the last report) through September 30.
- Principal campaign committees of Presidential candidates must file a report by October 15, if they are quarterly filers (the report covers financial activity from July 1 through September 30), or by October 20, if they are monthly filers (the report covers activity for the month of September).
- National party committees, political action committees (PACs) following a monthly filing schedule and state, district and local party committees that engage in reportable federal election activity must

(continued on page 2)

<sup>1</sup> Note that committees involved in the October 16, 2007, Special General Election in Massachusetts' 5<sup>th</sup> Congressional District may be required to file additional reports in October. See the August 2007 [Record](#), page 8, for details. Committees involved in Ohio's 5<sup>th</sup> Congressional District's Special Election should consult the article on page 3 of this issue.

## Reports

(continued from page 1)

file a monthly report by October 20. This report covers activity for the month of September.

Note that October 20 falls on a weekend. Reporting deadlines are not extended for non-working days. Accordingly, reports filed by methods other than Registered, Certified or Overnight Mail, or electronically, must be received by the Commission's (or the Secretary of the Senate's) close of business on Friday, October 19.

### Notification of Filing Deadlines

In addition to publishing this article, the Commission notifies committees of filing deadlines on its web site, via its automated Faxline and through reporting reminders called prior notices. Since January 1, 2007, prior notices have been

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

800/424-9530  
202/694-1100  
202/501-3413 (FEC Faxline)  
202/219-3336 (TDD for the  
hearing impaired)

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**Greg J. Scott**, Assistant Staff  
Director

**Amy L. Kort**, Deputy Assistant  
Staff Director

<http://www.fec.gov>

distributed exclusively by electronic mail. They are no longer sent to committees using U.S. mail. See the December 2006 *Record*, page 1. For that reason, it is important that every committee update its Statement of Organization (FEC Form 1) to disclose a current e-mail address.

### Treasurer's Responsibilities

The Commission provides reminders of upcoming filing dates as a courtesy to help committees comply with the filing deadlines set forth in the Act and Commission regulations. Committee treasurers must comply with all applicable filing deadlines established by law, and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline.

### Filing Electronically

Under the Commission's mandatory electronic filing regulations, individuals and organizations that receive contributions or make expenditures, including independent expenditures,<sup>2</sup> in excess of \$50,000 in a calendar year—or have reason to expect to do so—and who file with the FEC, must file all reports and statements electronically. Those required to file electronically who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines. Reports filed electronically must be received and validated by 11:59 p.m. Eastern Time on the applicable filing deadline.

<sup>2</sup>The regulation covers individuals and organizations required to file reports of contributions and/or expenditures with the Commission, including any person making an independent expenditure. Disbursements for "electioneering communications" do not count toward the \$50,000 threshold for mandatory electronic filing. 11 CFR 104.18(a).

The Commission's electronic filing software, FECFile 5, can be downloaded from the FEC's web site at <http://www.fec.gov/electfil/electron.shtml>. Filers may also use commercial or privately developed software as long as the software meets the Commission's format specifications, which are available on the Commission's web site.

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules.

### Timely Filing for Paper Filers

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

*Overnight Mail.* Reports filed by Express or Priority Mail with delivery confirmation will be considered timely if they are deposited with the USPS on or before the mailing deadline. Reports filed by an overnight delivery service with an on-line tracking system and scheduled for next day delivery will be timely if they are deposited with the service on or before the mailing deadline. A committee sending its reports by either of these methods should keep its proof of mailing or other means of transmittal of its reports.

Please note that a Certificate of Mailing from the USPS is not sufficient to prove that a report is timely filed using Registered, Certified or Overnight Mail.

*Other Means of Filing.* Reports sent by other means—including first class mail and courier—must be received by the FEC (or the Secretary of the Senate for Senate committees and political commit-

tees supporting only Senate candidates) before the Commission's (or the Secretary of the Senate's) close of business on the filing deadline. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e). Paper forms are available for downloading and/or printing at the FEC's web site (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413). The 2007 Reporting Schedule is also available on the FEC's web site ([http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml)), and from Faxline. For more information on reporting, call the FEC at 800/424-9530 or 202/694-1100.

**Filing Frequency for Party Committees**

National committees of political parties must file on a monthly schedule in *all* years and may not choose to change their filing schedule. 2 U.S.C. §434(a)(4)(B).

A state, district or local party committee that filed monthly in 2006 due to its federal election activity must notify the Commission in writing if it wishes to file semiannually in 2007. 11 CFR 104.5(b)(2). Electronic filers must file this request electronically. After filing a notice of change in filing frequency with the Commission all future reports must follow the new filing schedule.

**Political Action Committees**

PACs (separate segregated funds and nonconnected committees) may file on either a semiannual or monthly basis in non-election years. A committee may change its filing frequency only once a year. Electronic filers must file this request electronically. After giving notice of change in filing frequency to the Commission, all future reports must follow the new filing frequency. 11 CFR 104.5(c).

**Additional Information**

For more information on 2007 reporting dates:

- See the reporting tables in the January 2007 [Record](#);

- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Have the reporting tables immediately faxed to you using the FEC's Faxline (202/501-3413, document 586); or
- Visit the FEC's web page at [http://www.fec.gov/info/report\\_dates.shtml](http://www.fec.gov/info/report_dates.shtml) to view the reporting tables online.

—Elizabeth Kurland

**Ohio Special Election Reporting: 5<sup>th</sup> District**

Ohio will hold Special Elections to fill the U.S. House seat in Ohio's 5th Congressional District formerly held by the late Representative Paul E. Gillmor. The Special Primary Election will be held on November 6, 2007, and the Special General Election on December 11, 2007.

Candidate committees involved in one or both of these elections must

(continued on page 4)

**Ohio 5th District Special Election Reporting for Quarterly Filers**

**Quarterly Filing Committees Involved in Only the Special Primary Must File:**

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
<b>October Quarterly</b>		—waived—	
<b>Pre-Primary</b>	October 17	October 22	October 25
<b>Year-End</b>	December 31	January 31	January 31

**Quarterly Filing Committees Involved in Both the Special Primary and the Special General Must File:**

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
<b>Pre-Primary</b>	October 17	October 22	October 25
<b>Pre-General</b>	November 21	November 26	November 29
<b>Post General &amp; Year-End<sup>2</sup></b>	December 31	January 10	January 10

**Quarterly Filing Committees Involved in Only the Special General Must File:**

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
<b>Pre-General</b>	November 21	November 26	November 29
<b>Post General &amp; Year-End<sup>2</sup></b>	December 31	January 10	January 10

<sup>1</sup> This date indicates the end of a reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered.

<sup>2</sup> Committee must file a consolidated Post-General and Year-End Report by the filing date of the Post-General Report.

## Reports

(continued from page 3)

follow the reporting schedule on page 3. Please note that the reporting period for the Post-General election report spans two election cycles. For this report only, authorized committees must use the Post-Election Detailed Summary Page rather than the normal Detailed Summary Page.

PACs and party committees that file on a semiannual schedule and participate in one or both of these elections must follow the schedule on this page. PACs and party committees that file monthly must continue to file according to their regular filing schedule.

### Filing Electronically

Reports filed electronically must be received and validated by 11:59 p.m. Eastern Time on the applicable filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines.

### Timely Filing for Paper Filers

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

**Overnight Mail.** Reports filed via overnight mail<sup>1</sup> will be considered timely filed if the report is received

<sup>1</sup> "Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system.

## Ohio 5th District Special Election Reporting for Semiannual Filers

### Semiannual Filing Committees Involved in Only the Special Primary Must File:

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
Pre-Primary	October 17	October 22	October 25
Year-End	December 31	January 31	January 31

### Semiannual Filing Committees Involved in Both the Special Primary and the Special General Must File:

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
Pre-Primary	October 17	October 22	October 25
Pre-General	November 21	November 26	November 29
Post General & Year-End <sup>2</sup>	December 31	January 10	January 10

### Semiannual Filing Committees Involved in Only the Special General Must File:

	Close of Books <sup>1</sup>	Reg./Cert./Overnight Mailing Date	Filing Date
Pre-General	November 21	November 26	November 29
Post General & Year-End <sup>2</sup>	December 31	January 10	January 10

<sup>1</sup> This date indicates the end of a reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered.

<sup>2</sup> Committee must file a consolidated Post-General and Year-End Report by the filing date of the Post-General Report.

by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports.

**Other Means of Filing.** Reports sent by other means—including first class mail and courier—must be received by the FEC before the Commission's close of business

on the filing deadline. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e). Paper forms are available at the FEC's web site (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency's automated fax system (202/501-3413).

### 48-Hour Contribution Notices

Note that 48-hour notices are required of authorized committees that receive contributions of \$1,000 or more between October 18 and

November 3, for the Special Primary Election; and between November 22 and December 8, for the Special General Election.

### 24- and 48-Hour Reports of Independent Expenditures

Political committees and other persons must file 24-hour reports of independent expenditures that aggregate at or above \$1,000 between October 18 and November 4, for the Special Primary, and between November 22 and December 9, for the Special General. This requirement is in addition to that of filing 48-hour reports of independent expenditures that aggregate \$10,000 or more at other times during a calendar year.

All 24- and 48 hour notices of independent expenditures must be filed with the FEC, including independent expenditures for communications supporting or opposing only Senate candidates. 11 CFR 105.2(b). Electronic filers must file these reports electronically, and paper filers may file by fax or email. Additionally, both electronic and paper filers may file 24- and 48 hour reports using the FEC web site's on-line program. These notices must be *received* by the FEC by the 24 or 48 hour filing deadline, as appropriate. 11 CFR 104.4 (b)(2) and (c) and 109.10(c) and (d).

### Electioneering Communications

The 30-day electioneering communications period in connection with the Special Primary Election runs from October 7 through November 6, 2007. The 60-day electioneering communications period for the Special General Election runs from October 12 through December 11, 2007.

—Elizabeth Kurland

## Regulations

(continued from page 1)

In *WRTL II*, the Supreme Court reviewed an “as-applied” challenge to the EC funding prohibitions<sup>1</sup> where Wisconsin Right to Life, Inc. sought to use its own general treasury funds, which included donations it had received from other corporations, to pay for broadcast ads during the EC period that referred to both U.S. Senators from Wisconsin, one of whom was a clearly identified candidate for federal office in that election. The plaintiff argued that these communications were genuine issue ads run as part of a grassroots lobbying campaign on the issue of Senate filibusters of judicial nominations.

The Supreme Court held that because the ads in question were not the “functional equivalent of express advocacy,” the prohibition on corporate or labor organization funding of ECs was unconstitutional as applied to the plaintiff’s ads. The Supreme Court further held that a communication is the “functional equivalent of express advocacy” only if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

### Proposed Rules on Electioneering Communications

The FEC seeks comment on two proposed alternative methods of implementing the Supreme Court’s *WRTL II* decision. Both alternatives would create an exemption that includes a general standard based on the “functional equivalent” test from the *WRTL II* decision, together with

<sup>1</sup> In *McConnell v. FEC*, the Supreme Court held that BCRA’s prohibition on corporate or labor organization funding of electioneering communications was not facially overbroad. However, in *FEC v. Wisconsin Right to Life I (WRTL I)*, the Court held that *McConnell* did not preclude further “as applied” challenges to the corporate and labor organization funding prohibitions.

two safe harbor provisions for common types of communications.

*Alternative 1.* The first proposed alternative would create an exemption only from the prohibition on the use of corporate and labor organization funds to finance ECs in 11 CFR 114.2 and other similar provisions in part 114. The proposed revisions would not alter the definition of EC or the EC reporting requirements. Corporations and labor organizations would be required to file disclosure reports once they spend more than \$10,000 in a calendar year on ECs.

*Alternative 2.* The second alternative proposal would amend 11 CFR 100.29 by adding a new section that would exempt certain types of communications that otherwise meet the current definition of EC. Accordingly, under this proposal, any communication that met the criteria for the exemption would not be considered an EC and therefore would not be subject to either the corporate and labor organization funding prohibitions or the EC disclosure requirements. This alternative would extend the exemption to individuals, Qualified Nonprofit Corporations (QNCs) and unincorporated entities.

### Safe Harbor for Grassroots Lobbying Communications

Both proposed alternatives would establish identical safe harbors for grassroots lobbying communications based on the Supreme Court’s determination that the ads considered in *WRTL II* were not the “functional equivalent of express advocacy” because the content of the communications was “consistent with that of a genuine issue ad” and the communications lacked “indicia of express advocacy.” A communication would qualify for the proposed grassroots lobbying safe harbor only if it satisfies all four prongs in the proposed rule described below.

The first prong would be that the communication “exclusively discusses a pending legislative or

(continued on page 6)

## Regulations

(continued from page 5)

executive matter or issue.” The second prong would be that the communication “urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and contact the officeholder with respect to the matter or issue.” The third prong would be that the communication “does not mention any election, candidacy, political party, opposing candidate or voting by the general public.” The final prong would be that communication “does not take a position on any candidate’s or officeholder’s character, qualifications or fitness for office.”

The NPRM seeks public comment on numerous examples of communications under each of these proposed prongs of the safe harbor that illustrate the scope of the proposed exemption. The NPRM also seeks comment on the application of the proposed exemption and safe harbor to actual ads from past Commission experience.

*Safe Harbor for Commercial and Business Ads.* The Commission proposes to add an additional safe harbor provision for commercial and business ads that may otherwise meet the definition of electioneering communication, but may be reasonably interpreted as having a non-

electoral, business or commercial purpose. Communications would qualify for this safe harbor provision by satisfying all four prongs described below.

The first prong of the proposed safe harbor would be that the communication “exclusively advertises a federal candidate or officeholder’s business or professional practice or any other product or service.” The second prong would be that the communication is “made in the ordinary course of business of the entity paying for the communication.”

The third and fourth prongs of the proposed safe harbor for commercial and business ads would be identical to the third and fourth prongs of the safe harbor for grassroots lobbying: 1) the ad does not mention any election, candidacy, political party, opposing candidate or voting by the general public, and 2) the ad does not take a position on any candidate or officeholder’s character, qualifications or fitness for office.

The NPRM also seeks public comment as to examples of communications under this proposed safe harbor.

*Reporting of Electioneering Communications.* Any person that makes electioneering communications aggregating in excess of \$10,000 in a calendar year must disclose the activity in a report filed with the Commission that includes the names and addresses of each donor who donated \$1,000 or more in the aggregate during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. 11 CFR 104.20(b)-(c). Commission regulations provide that persons making electioneering communications may create a segregated bank account containing only funds contributed by individuals who are U.S. citizens or nationals, or permanent residents. If a person does not create a segregated bank account and pays for electioneering communications from a general account, that person must disclose all donors of

over \$1,000 to that person during the current and preceding calendar year. 11 CFR 104.20(c)(7)-(8).

As part of Alternative 1, the Commission proposes to amend its rules on reporting and establishing segregated bank accounts for electioneering communications to accommodate reporting by corporations and labor organizations that choose to make electioneering communications that are permissible under proposed Alternative 1.

### Comments and Hearing

The full text of this NPRM is available in the *Federal Register* (72 FR 50261) and is also posted on the FEC web site at [http://www.fec.gov/law/law\\_rulemakings.shtml](http://www.fec.gov/law/law_rulemakings.shtml). All comments must be submitted in writing to Mr. Ron B. Katwan, Assistant General Counsel, and must be submitted by e-mail, fax or paper copy form. E-mailed submissions must be sent to [wrtl.ads@fec.gov](mailto:wrtl.ads@fec.gov), and faxed submissions must be sent to (202) 219-3923. If e-mailed comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. All comments (including those submitted via e-mail) must include the full name and postal service address of the commenter or they will not be considered. All written comments must be submitted on or before October 1, 2007.

The Commission will hold a public hearing on the proposed rules at 10:00 a.m. on October 17, 2007, at the FEC’s headquarters, located at 999 E Street NW, Washington, D.C. 20463. Anyone seeking to testify at the hearing must file written comments by the due date and must include a request to testify in their written comments.

—Myles Martin

### Federal Register

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

#### Notice 2007-16

Electioneering Communications  
(72 FR 50261, August 31, 2007)

## Advisory Opinions

### AO 2007-9

#### Use of GELAC Funds to Cover Compliance Portion of Broadcast Ads

The Kerry-Edwards 2004 General Legal and Compliance Fund (Kerry-Edwards GELAC) may reimburse the Kerry-Edwards 2004, Inc. Presidential campaign committee (Kerry-Edwards 2004) for the portion of its advertising expenses dedicated to compliance with the “stand-by-your-ad” provision of the Bipartisan Campaign Reform Act (BCRA).

#### Background

Kerry-Edwards 2004 is the authorized committee of Presidential and Vice-Presidential candidates John F. Kerry and John R. Edwards. Kerry-Edwards 2004 received public funds for the 2004 general election and established a general legal and compliance fund (GELAC). During the 2004 general election, Kerry-Edwards 2004 purchased \$43,794,095 of broadcast time for political ads. Each of these ads included a minimum of four seconds devoted to compliance with disclaimer requirements. Kerry-Edwards GELAC proposes to treat some portion of these advertising costs as compliance expenses and reimburse Kerry-Edwards 2004 for this portion of the costs.

#### Legal Analysis

Presidential candidates in general elections may receive public funds under the Presidential Election Campaign Fund Act (Fund Act). In exchange for receiving public funds, candidates must accept a spending limit on qualified campaign expenses and must agree not to accept private contributions to pay for qualified campaign expenses. <sup>2</sup> U.S.C. §9002(11)(A). Commission regulations allow publicly funded

Presidential candidates to accept private contributions for a separate GELAC account, which can be used to pay for legal, accounting and other compliance expenses incurred solely to ensure compliance with the Federal Election Campaign Act (FECA) and the Fund Act. 11 CFR 9003.3. If a Presidential campaign uses public funds to pay for compliance costs, the GELAC may reimburse the campaign’s public funds account for such payments. 11 CFR 9003.3(a)(2)(ii)(G). GELAC funds may also be used for certain other expenses, such as recount expenses.

The BCRA requires candidates to devote at least four seconds of any authorized television ad to a written disclaimer and a personal statement of accountability, in which the candidate identifies him or herself and states that he or she has approved the ad. All of the ads run by Kerry-Edwards 2004 complied with this requirement.

*Use of GELAC funds.* The Commission determined that the portion of the broadcasting costs incurred by Kerry-Edwards 2004 in complying with these disclaimer requirements fits within the permissible uses of GELAC funds and that Kerry-Edwards GELAC may reimburse Kerry-Edwards 2004 for these costs. All of the Kerry-Edwards 2004 ads were required to devote a minimum of four seconds specifically to compliance with the FECA’s disclaimer requirements. Absent these disclaimer requirements, Kerry-Edwards 2004 could have used that portion of the broadcast time purely for campaign purposes. Thus, if the Kerry-Edwards Campaign were required to use public funds to pay for the cost of broadcasting the four-second disclaimer, it would be able to purchase a measurably smaller amount of broadcasting time that could actually be devoted to campaign speech than it otherwise would have been able to purchase. By contrast, if the Kerry-Edwards Campaign used GELAC funds to pay for the broad-

casting time devoted to compliance with these disclaimer requirements, the campaign’s public funds would be available to pay for costs of campaign speech. This use of funds would advance the GELAC’s purpose of preserving public funds for campaign expenses.<sup>1</sup>

*Percentage of costs deemed compliance costs.* Commission regulations provide an allocation method for identifying compliance costs that GELACs may pay or reimburse. For example, GELAC funds may be used to pay for a portion of payroll and overhead expenditures of national campaign headquarters and state offices because “a portion” of these expenditures “are related to ensuring compliance” with the FECA and the Fund Act. 11 CFR 9003.3(a)(2)(i)(A). The regulation provides several allocation methods using fixed percentages, including an allowance of five percent of all payroll and overhead expenditures associated with the national campaign headquarters office. Recognizing that compliance expenses are part of the Kerry-Edwards Campaign’s advertisement program, the Commission concluded that it is appropriate to use an analogous five percent figure in this instance. Kerry-Edwards 2004 may therefore consider up to five percent of the costs of airing ads to be compliance expenses for its television advertising program. Thus Kerry-Edwards GELAC may reimburse Kerry-Edwards 2004 an aggregate amount up to five percent of the costs of airing those ads, provided that these costs are properly documented. See 26 U.S.C. §9003(a), 11 CFR 9003.3(a)(3)(ii) and 9003.5.

(continued on page 8)

<sup>1</sup> The Commission additionally noted that the advertising costs attributable to the disclaimer requirements were not unlike recount expenses, which the Commission deemed permissible uses of GELAC funds in a previous advisory opinion. AO 2004-35.

## Advisory Opinions

(continued from page 7)

The Commission noted that this decision to allow an allocation and reimbursement from Kerry-Edwards GELAC to Kerry-Edwards 2004 stems from the unique nature of the Presidential public funding program, and that this Advisory Opinion has no applicability to any candidate or political committee without a GELAC fund.

Date: August 7, 2007;

Length: 5 pages

—Gary Mullen

### AO 2007-10

#### Campaign May Not Use Corporate Names, Trademarks or Service Marks at Golf Fundraiser

A candidate's committee may not recognize the corporate employers of individual contributors at a golf tournament fundraiser because the use of the corporation's name, trademark or service mark would result in the corporate facilitation of contributions, which is prohibited by the Federal Election Campaign Act (the Act).

#### Background

Congressman Silvestre Reyes and his authorized committee (the Reyes Committee) plan to host a golf-tournament fundraiser for the committee. Individuals or political action committees (PACs) will sponsor each of the 18 holes for the golf tournament and each hole will feature a sign that recognizes the particular sponsor of that hole. The Reyes Committee also wishes to increase participation in the fundraiser by displaying the name, trademark or service mark of the corporation that employs each individual who sponsors a hole at the tournament. Each individual would pay for the sponsorship, and the contribution would apply to that individual's contribution limit to the Reyes Committee.

#### Analysis

Corporations are prohibited from using corporate resources to facilitate the making of contributions to federal political committees other than the corporation's separate segregated fund (SSF). 11 CFR 114.2(f)(1) and (f)(4)(ii).

The names, trademarks and service marks of corporations are considered to be corporate resources. Neither a corporation nor its agents are permitted to use corporate resources to facilitate the making of a contribution to any political committee, nor may a political committee knowingly accept or receive prohibited contributions. 11 CFR 114.2(d).

In this case, the Reyes Committee's stated reason for including the corporate name, trademark or service mark is to encourage contributions to the fundraiser. A corporation would be using its resources to facilitate such contributions if it allowed the Reyes Committee to use its resources in this way. In addition, an individual employee of a corporation would act as the corporation's agent if he or she approved or accepted the Reyes Committee's use of the corporation's resources. Accordingly, if agents of a corporation were to allow the Reyes Committee to use the corporation's resources at the tournament, the corporation would be impermissibly facilitating the making of a contribution. Such corporate facilitation is prohibited, and the Reyes Committee may not accept facilitated contributions. Therefore, the Reyes Committee may not recognize the corporate employers of individual contributors at its fundraiser.

Date Issued: August 21, 2007

Length: 3 pages.

—Myles Martin

### AO 2007-11

#### Pre-Event Communications for State or Local Party Fundraisers Featuring a Federal Candidate or Officeholder

State party committees may invite federal candidates and officeholders to speak or be featured guests at fundraising events for state, district and local party committees and may publicize such events in pre-event communications that include references to the candidates as featured speakers or honored guests and are approved by the candidates who are to appear. The state party committees may also send a solicitation of nonfederal funds in a separate mailing that invites people to attend but does not refer to a federal candidate. The Commission considered, but could not reach an agreement on, the permissibility of pre-event communications that refer to a federal candidate as a featured speaker or honored guest and also contain a solicitation for nonfederal funds within the same mailing.

#### Background

The California Republican Party and the California Democratic Party plan to invite federal candidates and officeholders to be featured speakers or honored guests at various fundraising events for state, district or local party committees in California. These events would raise nonfederal funds for the respective committees. The California State Party Committees wish to publicize the appearance of the federal candidates or officeholders in pre-event communications that mention, or contain solicitations of, nonfederal funds to be raised at the event. The California State Party Committees would consult with the federal candidate or officeholder to obtain comments on, and approval of, the pre-event communication's language and form.

The California State Party Committees proposed three types of



communications sent by the state or local committee to publicize the fundraising events:

- The first type of communication would be an invitation that states that a federal candidate or officeholder will be the featured speaker or honored guest and also asks for nonfederal funds.
- The second type of communication would be an invitation that mentions the federal candidate without soliciting nonfederal funds. The mailing would include a separate “reply card” that would request nonfederal funds without referring to any federal candidate or officeholder.
- The third communication would again be an invitation to attend the state or local party committee fundraiser and would mention the federal candidate, but the mailing would not contain a nonfederal solicitation. Instead, a nonfederal solicitation that identified the fundraising event and the date, but did not mention any federal candidate, would be sent in a separate mailing.

### Analysis

The Federal Election Campaign Act (the Act) prohibits federal candidates and officeholders from soliciting or directing nonfederal funds in connection with federal elections. 11 CFR 300.61. Federal candidates and officeholders may, however, solicit, receive, direct or transfer funds in connection with nonfederal elections in amounts and from sources that are consistent with state law and that do not exceed the Act’s limitations and prohibitions. 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62.

The Act also allows candidates to “attend, speak or be a featured guest at a fundraising event for a state, district or local committee of a political party.” 2 U.S.C. §441i(e)(3) and 11 CFR 300.64. While the state party may publicize the appearance of such a candidate or officeholder,

federal candidates may not solicit nonfederal funds in written solicitations, pre-event publicity or through other fundraising appeals.

The Commission considered, but could not approve by the required four affirmative votes, the permissibility under the Act of the first and second proposed types of communications. The Commission concluded that the third communication would be permissible because the solicitation of nonfederal funds would be sent in a separate mailing that would not mention the federal candidate.

Date Issued: August 22, 2007  
Length: 4 pages.

—*Myles Martin*

### Advisory Opinion Requests

#### AOR 2007-16

Affiliation of entities in a multi-tier membership organization for solicitation purposes (American Kennel Club, Inc., August 10, 2007)

#### AOR 2007-17

Signature requirements for contributions in the form of physical checks generated through online banking services (Democratic Senatorial Campaign Committee, July 19, 2007)

#### AOR 2007-18

Use of funds from authorized committee for donation of portrait of officeholder to U.S. House of Representatives (Rangel for Congress and the National Leadership PAC, August 20, 2007)

#### AOR 2007-19

Member status in nonprofit organization of individuals selected by organization’s “controlled entities” (Renaissance Health Service Corporation, May 10, 2007)

#### AOR 2007-20

Application of media exemption to free satellite radio airtime given to presidential candidates (XM Satellite Radio, Inc., September 5, 2007)

## Legislation

### Honest Leadership and Open Government Act of 2007

On September 14, 2007, President Bush signed into law the Honest Leadership and Open Government Act of 2007 (HLOGA), which amends the House and Senate Ethics Rules and the Federal Election Campaign Act (FECA). In addition to making broad changes to the ethics rules for officeholders and candidates, the HLOGA also introduces new disclosure requirements for certain committees that receive bundled contributions from lobbyists and committees established or controlled by any lobbyist and new rules relating to travel on private jets.

The provisions of HLOGA that amend the FECA are briefly summarized below. The Commission will initiate rulemakings in the coming months to promulgate regulations to implement these statutory changes.

#### Disclosure of Bundled Contributions

The new law requires candidates’ authorized committees, leadership PACs and party committees to disclose the name, address, employer of, and the bundled contribution amount credited to, each lobbyist (or lobbyist’s committee) who has provided the committee with bundled contributions aggregating over \$15,000 during specified time periods. The report discloses the fundraising activities of registered lobbyists, individuals listed on current lobbying reports filed under the Lobbying Disclosure Act of 1995 and political committees established or controlled by such individuals.

“Bundled” contributions include both contributions physically forwarded by a lobbyist and contributions for which a lobbyist receives credit by the candidate recipient through record, designation

(continued on page 10)

## Legislation

(continued from page 9)

or some other form of recognition. For example, if a lobbyist were to receive an honorary title within the recipient's committee or gain access to an event reserved exclusively for those who generate a certain amount of contributions, he or she might be considered to have received "credit" for the bundled contributions. The provision applies to fundraising for a candidate's principal campaign committee, any Leadership PAC established, maintained, financed or controlled by a candidate or a federal officeholder and any party committee. This reporting obligation is in addition to the Commission's existing rules for disclosing earmarked contributions forwarded to a candidate's authorized committee through a "conduit." See 11 CFR 110.6(b) and 102.8. The new reporting requirement will take effect 90 days after the FEC promulgates final regulations implementing these provisions of §204.

### Travel on Private Jets

HLOGA amends the FECA to prohibit Senate and Presidential candidates, and their authorized committees, from spending campaign funds for travel on non-commercial aircraft, unless they pay the charter rate. House candidates, and their authorized committees and Leadership PACs, are prohibited from spending any campaign funds for travel on private, non-commercial aircraft. Thus, candidates will no longer be permitted to pay the first-class or coach airfare, as appropriate, for travel on a private plane.<sup>1</sup> See 11 CFR 100.93(c)). This provision took effect on September 14, 2007. §601.

<sup>1</sup> *Travel on aircraft that is owned or leased by the candidate or his or her immediate family members (or non-public corporations in which the candidate or his or her immediate family members have an ownership interest) is exempted.*

For additional information, see the FEC Press Release, dated September 24, 2007, at <http://www.fec.gov/press/press2007/20070924travel.shtml>.

### Additional Provisions

HLOGA also makes a number of changes to laws other than the FECA, and to House and Senate rules, that affect the way that federal candidates conduct their campaigns. The complete text of the Honest Leadership and Open Government Act of 2007 is available on the FEC web site at <http://www.fec.gov/law/feca/s1legislation.pdf>.

—Gary Mullen

## Public Funding

### McCain and Tancredo Certified for Matching Funds

On August 29, 2007, the Commission certified that John McCain is the first 2008 Presidential candidate eligible to receive Presidential primary matching funds. On September 10, the Commission also certified that Thomas Tancredo is eligible to receive primary matching funds. 26 U.S.C. §§9033(a) and b; 11 CFR 9033.1 and 9033.3.

Under the Presidential Primary Matching Payment Account Act, the federal government will match up to \$250 of an individual's total contributions to an eligible Presidential primary candidate. To become eligible for matching funds, a candidate must raise a threshold amount of \$100,000 by collecting \$5,000 in 20 different states in amounts no greater than \$250 from an individual. Although an individual may contribute up to \$2,300 to a primary candidate, only a maximum of \$250 per individual applies toward the \$5,000 threshold in each state. Candidates who receive matching payments must also agree to limit

their spending and submit to an audit by the Commission.

The Presidential public funding program is financed through the \$3 check-off that appears on individual income tax returns. The program has three elements: grants to parties to help fund their nominating conventions, grants available to nominees to pay for the general election campaign and matching payments to participating candidates during the primary campaign.

Treasury Department regulations require that funds for the convention and general election grants be set aside before any matching fund payments are made, and the Commission has estimated that no funds will be available for matching payments in January 2008. As deposits are made from tax returns in the early months of 2008, matching fund payments will be made from those deposits until all certified amounts have been paid. The maximum amount a candidate could receive is currently estimated to be about \$21 million.

—Diana Veiga

## Compliance

### MURs 5403 and 5466: Prohibited Funds Used to Pay Federal Expenses and Failure to Allocate and Report Shared Expenses

On August 29, 2007, the Commission announced a settlement with America Coming Together (ACT) regarding violations of the Federal Election Campaign Act (FECA) during the 2004 Presidential election. ACT agreed to pay \$775,000 to settle charges that it used funds raised outside federal limits and prohibitions to pay expenses that should have been paid with federal funds. This settlement represents the third largest civil penalty in an enforcement matter in the Commission's thirty-three year history.

## Background

ACT is a federal political action committee (PAC) that also has a nonfederal account registered under section 527 of the Internal Revenue Code. Under FECA, PACs may maintain separate federal and nonfederal accounts in order to fund both federal and nonfederal activity. Contributions to a PAC's federal account must be within federal limits and prohibitions, while donations to the nonfederal account may be raised outside of the federal amount limits and source prohibitions.

Under FEC regulations in place for the 2003-2004 cycle, a nonconnected PAC such as ACT could pay its "administrative expenses" with an allocated mixture of federal and nonfederal funds based on a ratio that reflects the relative proportion of its federal and nonfederal activities. However, expenses incurred on behalf of, or attributable to, federal candidates must be paid for with federal funds. For most of the 2004 election cycle, ACT used an allocation ratio of two percent federal funds and 98 percent nonfederal funds for its administrative expenses and generic voter drives. In October 2004, ACT changed this allocation ratio to 12 percent federal funds and 88 percent nonfederal funds.

## Conciliation Agreement

ACT raised approximately \$137 million in connection with the 2004 elections—approximately \$33.5 million in federal funds and \$103.5 million in nonfederal funds. The FEC concluded that approximately \$70 million in disbursements characterized by ACT as "administrative expenses" for door-to-door canvassing, direct mail and telemarketing were actually attributable to clearly identified federal candidates and were required either to be paid with 100 percent federal funds or to be allocated between federal and nonfederal candidates based on the time or space devoted to each candidate. Under either method, ACT was required to use a substantially higher

proportion of federal funds than that reflected in either the estimated or adjusted funds expended allocation ratio for administrative expenses used by ACT in 2003-2004.

The Commission also concluded that, even for the approximately \$30 million in disbursements that could properly be characterized as administrative and generic voter drive expenses, ACT should have used at least 90 percent federal and 10 percent nonfederal funds. Therefore, ACT should have used approximately \$27 million in federal funds and approximately \$3 million in nonfederal funds to pay for these expenses.

The conciliation agreement sets forth that ACT:

- Failed to properly attribute and report expenditures attributable to specific candidates;
- Failed to properly allocate and report joint administrative activities; and
- Used nonfederal funds to pay the federal share of allocated administrative expenses.

ACT agreed to pay the civil penalty and to cease and desist from further violating the law and Commission regulations.

—Amy Pike

## MURs 5928 and 5853 Exemptions Apply to Political Blogs

The Commission has resolved two complaints alleging that Internet blog activity is subject to Commission regulation. The Commission found that the Internet activities in question fell under exemptions addressed in the Commission's March 2006 rulemaking on Internet Communications. Thus, the Commission found that no violations of the Federal Election Campaign Act (the Act) had occurred.

### MUR 5928

In MUR 5928, the Commission rejected allegations that the web

site DailyKos, operated by Kos Media, LLC, should be regulated as a political committee because it charges a fee to place advertising on its web site and provides "a gift of free advertising and candidate media services" by posting blog entries that support candidates. The Commission determined that the web site falls squarely within the media exemption and is therefore not subject to federal regulation under the Act.

Since 1974, media activity has been explicitly exempted from federal campaign finance regulation. In its rulemaking concerning the use of the Internet, the Commission made clear that this exemption extends to online media publications. Under those rules, "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station [], Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication is not a contribution or expenditure unless the facility is owned by a political party, political committee, or candidate . . ." 11 CFR 100.73 and 100.132.

With respect to MUR 5928, the FEC found that Kos Media meets the definition of a media entity and that the activity described in the complaint falls within the media exemption. Thus, activity on the DailyKos web site does not constitute a contribution or expenditure that would trigger political committee status. The Commission therefore found no reason to believe Kos Media, DailyKos.com or Markos Moulitsas Zuniga, DailyKos.com's founder and publisher, violated federal campaign finance laws by failing to register and report as a political committee. 2 U.S.C. §§433 and 434.

### MUR 5853

In MUR 5853, the Commission rejected allegations that Michael L. Grace made unreported expenditures when he leased space on a computer

(continued on page 12)

## Compliance

(continued from page 11)

server to create a “blog” which advocated the defeat of Representative Mary Bono in the November 2006 election. The Commission also found that the respondent did not fraudulently misrepresent himself in violation of 2 U.S.C. §441h.

Under the Act, the term “expenditure” includes any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by any person for the purpose of influencing any election for federal office. See 2 U.S.C. §431(9)(A)(i). As the Commission noted in the Explanation and Justification to its Internet regulations, the cost of placing information on a web site “is often only the time and energy that is devoted by an individual to share his or her views and opinions with the rest of the Internet community.” See “Internet Communications,” 71 Fed. Reg. 18594 (April 12, 2006). The Commission found that it did not appear that Mr. Grace made any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value in connection with the blog.

Further, the Act exempts from regulation volunteer activity by individuals. In the FEC’s Internet regulations, the Commission clarified that an individual’s use, without compensation, of equipment and personal services for blogging and creating or hosting a web site for the purpose of influencing a federal election are not expenditures subject to the restrictions of campaign finance law. 11 CFR 100.155. Therefore, the Commission concluded that, even if some costs or value was associated with the blog, Mr. Grace’s blogging is exactly the type of Internet activity that the Commission exempted from the definition of “expenditure” in the Internet rulemaking. The Commission thus also rejected allegations that Mr. Grace coordinated expenditures with Representative Bono’s opponent in

the race, David Roth, and found that no in-kind contributions to Roth’s campaign resulted from Mr. Grace’s blogging activity.

The Commission additionally found that materials posted on Mr. Grace’s satirical blog would not lead a reasonable person to believe that the blog was created by Mary Bono and, thus, that the Act’s prohibition on fraudulent misrepresentation had been violated. The FEC therefore found no reason to believe Mr. Grace or the Roth campaign violated federal campaign finance laws.

—Amy Pike

## Court Cases

### Shays v. FEC

On August 30, 2007, the U.S. District Court for the District of Columbia granted the Commission’s motion for summary judgment in *Shays, et al., v. FEC*. Congressman Christopher Shays and former Congressman Martin Meehan filed suit against the FEC asking the court to compel the Commission to issue new regulations requiring, with some exceptions, that groups registered with the Internal Revenue Service as political organizations under section 527 also register with the FEC as federal political committees. In March 2006, the court had remanded the matter to the FEC to institute a rulemaking or to explain further its rationale for regulating so-called “527” organizations on a case-by-case basis rather than through a rule specific to those organizations. In response, the FEC issue a Supplemental Explanation and Justification of its rulemaking. The court found this revised explanation to be sufficient under the Administrative Procedure Act (APA).

### Background

Under the Federal Election Campaign Act (the Act), a political committee must register with the

FEC and follow the limits, prohibitions and reporting requirements of the federal campaign finance laws. The Act defines a “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. §431(4). The Supreme Court has additionally construed “political committee” only to “encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The FEC has not promulgated regulations to codify the Court’s “major purpose test.” However, the FEC applies the test in enforcement actions against individual organizations.

In 2004, the FEC issued a Notice of Proposed Rulemaking that considered, among other things, possible regulatory tests for determining a committee’s major purpose. The Commission did not ultimately choose to codify such a test and, instead, elected to continue applying the test on an individual, fact-specific basis in accordance with the relevant statutory and regulatory framework. In September 2004, the plaintiffs filed suit claiming that the Commission’s decision not to include a major purpose test in its regulations was arbitrary and capricious and asking the court to direct the Commission to promulgate regulations defining when a 527 group must register with the FEC. The court remanded the case to the FEC to institute a new rulemaking on the definition of “political committee” or to explain more fully its 2004 decision not to issue such rules. The FEC published a Supplemental Explanation and Justification in the *Federal Register* (72 FR 5595) on February 7, 2007, which is available on the FEC web site at [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-3.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-3.pdf).

The plaintiffs subsequently moved for further relief, contending that the new explanation also violates the APA and that the court should order the FEC to issue an appropriate regulation.

### Court Decision

According to the court, the “crux of the FEC’s revised justification is that the complexity of applying the ‘major purpose’ test to a particular organization requires that it be done through adjudication instead of rulemaking.” The court found that the question of whether the application of the “major purpose test” was too “multifaceted to be codified” is “exactly the type of question generally left to the expertise of an agency, and the applicable standard of review is that ‘agency discretion is at its peak.’” In addition, the court “recognize[d] that the FEC has successfully brought enforcement actions against 527 groups.” The court therefore concluded that the Commission’s Supplemental Explanation and Justification was sufficient under the APA and that the Commission’s decision not to promulgate the kind of regulation requested by the plaintiffs was not arbitrary and capricious. The court granted the FEC’s motion for summary judgment and denied the plaintiffs’ motion for further relief.

U.S. District Court for the District of Columbia, 04-1597 (EGS).

—Amy Kort

### Christian Civic League of Maine v. FEC

On August 21, 2007, the U.S. District Court for the District of Columbia granted the Christian Civic League of Maine, Inc.’s (CCL) request for declaratory relief regarding campaign finance law restrictions on a radio ad planned by CCL. CCL had challenged the constitutionality of the Bipartisan Campaign Reform Act’s (BCRA) electioneering communication financing restrictions as

applied to certain so-called “grass-roots lobbying” ads. The court denied CCL’s request for declaratory relief as to other communications and CCL’s request for injunctive relief.

### Background

CCL is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code that allegedly engages in some business activity. CCL wanted to use its general treasury funds to broadcast a radio ad prior to a 2006 Senate vote on a particular proposed constitutional amendment. The ad, named “Crossroads,” identified Senator Olympia Snowe by name and was to air in close proximity to her June 13, 2006, primary election. If the ad had aired within 30 days before her primary (or 60 days before the general) and could have been received by 50,000 or more persons in Senator Snowe’s state, it would have qualified as an electioneering communication. 2 U.S.C. §434(f)(3)(A)(i). Under the Federal Election Campaign Act (the Act), as amended by the BCRA, corporate funds cannot be used to finance an electioneering communication.

CCL did not broadcast “Crossroads” and, on April 3, 2006, filed a complaint challenging the constitutionality of the electioneering communication financing restrictions as applied to its planned ads. On September 27, 2006, the district court dismissed CCL’s request for a permanent injunction to prevent the FEC from applying its electioneering communications rules to “Crossroads,” concluding that the Senate’s June 2006 vote on the legislation referenced in the ad had rendered the issue moot. The court further granted the FEC’s motion for dismissal of CCL’s claims about possible other ads because they were not ripe for review and were too speculative. CCL admittedly had no firm plans to create or distribute any future ads besides the spring 2006 ad. The Constitution requires an

actual “case or controversy” for the court to decide, so a party’s grievance cannot be solely hypothetical.

On June 25, 2007, the Supreme Court upheld a district court ruling in another case that concerned the constitutionality of the electioneering communications provisions, *FEC v. Wisconsin Right to Life (WRTL)*. In that case, the court found the electioneering communication financing restrictions unconstitutional as applied to ads that Wisconsin Right to Life, Inc., a 501(c)(4) nonprofit corporation, intended to run before the 2004 elections. The Supreme Court concluded that the electioneering communication financing restrictions are unconstitutional as applied to these ads because:

- The ads are not express advocacy or its functional equivalent; and
- The Court found no sufficiently compelling governmental interest to justify burdening WRTL’s speech. (See the August 2007 [Record](#), page 1.)

### Court Decision

Although the district court in *CCL v. FEC* had held in its earlier opinion that CCL’s claims regarding “Crossroads” were moot, the court reviewed that opinion in light of the Supreme Court’s decision in *WRTL* and found that these claims were not moot because they fell within the Supreme Court’s exception for claims that are “capable of repetition, yet evading review.” Having reached the merits of the claims, the court found that, in accordance with the Supreme Court’s decision in *WRTL*, the BCRA’s electioneering communication financing restrictions are unconstitutional as applied to CCL’s 2006 “Crossroads” ad. The court granted CCL’s request for declaratory relief with regards to this ad, but denied CCL’s request for declaratory relief with regard to

(continued on page 14)

## Court Cases

(continued from page 13)

other communications and denied its request for injunctive relief.

U.S. District Court for the District of Columbia; 06-614.

—Amy Kort

### Fieger v. FEC

On August 15, 2007, the U.S. District Court for the Eastern District of Michigan granted the Commission's motion for summary judgment and the Attorney General's motion to dismiss the suit by Geoffrey Fieger, Nancy Fisher and the law firm of Fieger, Fieger, Kenney & Johnson, P.C., holding that the Attorney General has authority to investigate a criminal violation of the Federal Election Campaign Act (the Act) without prior referral by the Commission.

#### Background

The plaintiffs filed a complaint with the District Court for the Eastern District of Michigan, alleging that the Commission must refer, by a vote of the majority of the Commission, a matter to the Attorney General prior to the Attorney General investigating or prosecuting a criminal violation of the Federal Election Campaign Act (the Act). See March 2007 *Record*, page 3. Plaintiffs alleged that, since no such referral took place, the Attorney General's investigation of the plaintiffs for alleged violations of the Act should be declared illegal and that the Commission should be compelled to conduct the initial investigation into the plaintiffs' alleged activities.

#### Court Decision

The district court held that the Act does not limit the Attorney General's authority to investigate and prosecute criminal violations of the Act and that a Commission investigation is not a prerequisite to the Attorney General's actions.

Upon creating the Federal Election Commission, Congress gave the Commission exclusive jurisdiction over the civil enforcement of the Act. 2 U.S.C. §437c(b)(1). The Commission may refer a matter to the Attorney General if it determines that there is probable cause to believe that a "knowing and willful" violation occurred. 2 U.S.C. §437g(a)(5)(C).

The plaintiffs claimed that the Act grants the Commission exclusive jurisdiction over civil enforcement of the Act. Therefore, plaintiffs argued, all alleged violations of the Act must first be handled by the Commission, and the Attorney General may only become involved in the matter once the Commission has voted to refer the apparent violation. The court rejected the plaintiffs' argument for several reasons. The court found that the plain language of the Act does not grant exclusive criminal jurisdiction to the Commission nor does it infringe on the Attorney General's power to enforce criminal violations. Also, the legislative history of the Act and the amendments to the Act show that Congress had no intent to limit the authority of the Attorney General to prosecute criminal violations of the Act. Additionally, numerous prior court cases have held that criminal enforcement may either originate with the Attorney General or begin from a referral by the Commission to the Attorney General.

The court also rejected plaintiffs' request that the Commission be compelled to conduct its investigation in the first instance, because the Act does not require the Commission to conduct an investigation within a certain time period or in a certain manner. Additionally, while the Act permits persons who file an administrative complaint with the FEC to bring a civil action against the Commission regarding its failure to act on the complaint within a certain timeframe, Congress did not grant similar rights to persons against whom complaints are filed

(administrative respondents), such as the plaintiffs. See 2 U.S.C. §437g(a)(8).

The district court granted the Commission's motion for summary judgment and the Attorney General's motion to dismiss with prejudice.

*Fieger v. Gonzales*, U.S. District Court for the Eastern District of Michigan, 2:07-cv-10533-LPZ-MKM

—Meredith Metzler

### FEC v. Citizens Club for Growth, Inc.

On September 6, 2007, the U.S. District Court for the District of Columbia approved an agreement between the FEC and Citizens Club for Growth, Inc. (formerly known as Club for Growth, Inc.), ending a lawsuit pending before the court. Filed on September 5, 2007, the agreement asked the court to enter a consent judgment requiring Club for Growth to pay a civil penalty of \$350,000 for failing to register with the Commission as a political committee and to report its contributions and expenditures.

#### Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, organizations that make expenditures or receive contributions in excess of \$1,000 must register with the Commission and file periodic financial disclosure reports. 2 U.S.C. §§431(4)(A), 433 and 434 and 11 CFR 100.5, 102.1 and 104.3. The Act also prohibits these organizations from receiving contributions from corporations or labor organizations and limits contributions from individuals to no more than \$5,000 per year. 2 U.S.C. §441b(a) and 11 CFR 114.1(a)(1), and 2 U.S.C. §441a(f) and 11 CFR 110.1(d).

*Registering and Reporting as a Political Committee*. Following the investigation of a complaint filed with the FEC in 2003, the Commission determined that Club for

Growth spent at least \$1.28 million between 2000 and 2004 expressly advocating the election or defeat of clearly identified federal candidates. In addition, Club for Growth mailed at least five fundraising solicitations during that period that clearly indicated that funds received would be targeted to the election or defeat of specific federal candidates. Club for Growth received well in excess of \$1,000 in contributions in response to these solicitations. Because Club for Growth both made more than \$1,000 in expenditures and received over \$1,000 in contributions, it met the statutory definition of a political committee and was required to register and report with the Commission, provided that its major purpose was to influence federal elections.

*Major Purpose.* The FEC found that Club for Growth's major purpose was influencing federal elections. According to numerous fundraising solicitations from 2000 to 2004, its goals at the time were to "elect more pro-growth leaders to Congress," "help Republicans keep control of the House and take back the Senate," "elect pro-growth congressmen who will fight to cut taxes and limit government," "help Republicans retain control of the House and Senate in the upcoming elections," "help Republicans keep control of Congress" and "defeat status quo incumbents."

*Disbursements.* Further, supporting the FEC's findings as to Club for Growth's major purpose, the FEC found the vast majority of its disbursements, which totaled about \$15.1 million between August of 2000 and the end of 2004, were made in connection with federal elections. Club for Growth's spending focused on candidate research, polling and ads and other public communications referencing clearly identified federal candidates. In 2004, it spent approximately 88 percent of its disbursements on advertising supporting or criticizing clearly identified federal candidates.

*Receipts from Individual in Excess of \$5,000 and Prohibited Corporate Contributions.* From 2000 through the end of 2006, Club for Growth accepted approximately \$10.78 million in contributions from individuals that exceeded the \$5,000 contribution limit. Between 2000 and 2004, it also accepted more than \$93,000 in corporate contributions.

### Court Order

The Court entered the consent judgment proposed by the parties, which includes a permanent injunction against future violations by the defendant and its successors, officers and employees and requires that Club for Growth file disclosure reports with the FEC and pay to the U.S. Treasury any funds over \$5,000 remaining in its bank account after payment of legal expenses, up to the amount of excessive and prohibited contributions the Club originally accepted.

U.S. District Court for the District of Columbia, CV 05-01851 (RMU)

—Kathy Carothers

### FEC v. Adams

On July 6, 2007, the FEC filed a complaint in the U.S. District Court for the Central District of California against Stephen Adams, charging that he failed to report and include proper disclaimers on \$1 million worth of billboard ads during the 2004 Presidential race.

### Background

Under the Federal Election Campaign Act (the Act), persons who make independent expenditures at any time during the calendar year, up to and including the 20<sup>th</sup> day before an election, must disclose this activity within 48 hours each time that the expenditures aggregate \$10,000 or more. 2 U.S.C. §434(g)(2)(A). This report discloses the amount of the independent expenditure and certifies that the expenditure was not coordinated with a candidate or political party. Independent expen-

ditures are also required to carry a disclaimer clearly stating the name and permanent street address, telephone number or web address of the person who paid for the communication and that the communication was not coordinated with any candidate or candidate's committee. 2 U.S.C. §441d(a)(3).

In June 2004, Mr. Adams contracted for a \$1 million ad campaign to place billboards in support of President Bush's re-election in four battleground states: Michigan, Pennsylvania, Wisconsin and South Carolina. Mr. Adams' billboard ads, which expressly advocated the election or defeat of a federal candidate, were independent expenditures under the Act and were required to be reported. The billboards first appeared on September 7, 2004, and ran through the date of the general election. Mr. Adams did not file the required independent expenditure reports until October 28, 2004—just five days before the general election. Moreover, the billboards' disclaimers initially read "Personal message paid for and sponsored by Stephen Adams," and did not contain all of the required disclaimer information.

The Commission received two administrative complaints regarding alleged violations of the Act and, on November 8, 2006, found probable cause to believe that violations had occurred. The Commission was not able to reach an acceptable conciliation agreement with Mr. Adams through informal methods and, thus, filed a complaint in federal court. See 2 U.S.C. §437(g)(4)(A)(i).

### Court Case

The Commission asks the court to:

- Declare that Stephen Adams violated the Act's independent expenditure report requirements and disclaimer requirements (2 U.S.C. §§434(g)(2)(A) and 441d(a)(3));

(continued on page 16)

**Court Cases**

(continued from page 15)

- Permanently enjoin Mr. Adams from future violations of these provisions; and
- Assess an appropriate civil penalty.

U.S. District Court for the Central District of California. Western Division, 07-4419.

—Amy Kort

**Statistics**

**Party Committees Raise Over \$220 Million in First Six Months of 2007**

During the first six months of 2007, Democratic party committees raised \$111.5 million, increasing their fundraising by 29 percent over the comparable period in 2005. When compared to the same period in 2003, the last Presidential cycle, the Democrats showed a 98 percent increase in federal receipts. Republican party committees raised \$108.8 million from January 1 to June 30,

2007, representing a 24 percent decline in receipts when compared to the same period in 2005, and a 22 percent decline when compared the same period in 2003.

The largest percentage growth in fundraising came from the Democratic Congressional Campaign Committee, whose receipts increased 51 percent compared to the same period in 2005. Fundraising for the Democratic Senatorial Campaign Committee grew by 37 percent, while receipts of the Democratic National Committee declined by eight percent compared to the first six months of 2005. Each of the individual Republican committees (the Republican National Committee, the National Republican Senatorial Committee and the National Republican Congressional Committee) experienced a fundraising decline—24 percent for the Senatorial Committee, 25 percent for the National Committee and 26 percent for the Congressional Committee. State and local Democratic committees increased their fundraising by 44 percent, while their Republican counterparts' fundraising receipts

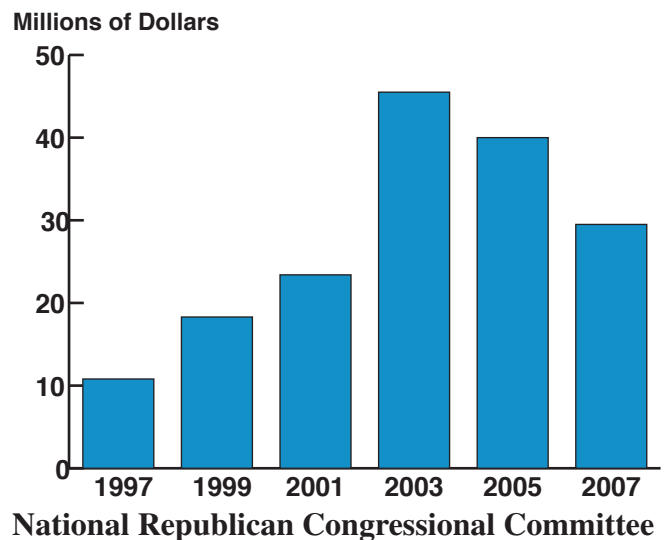
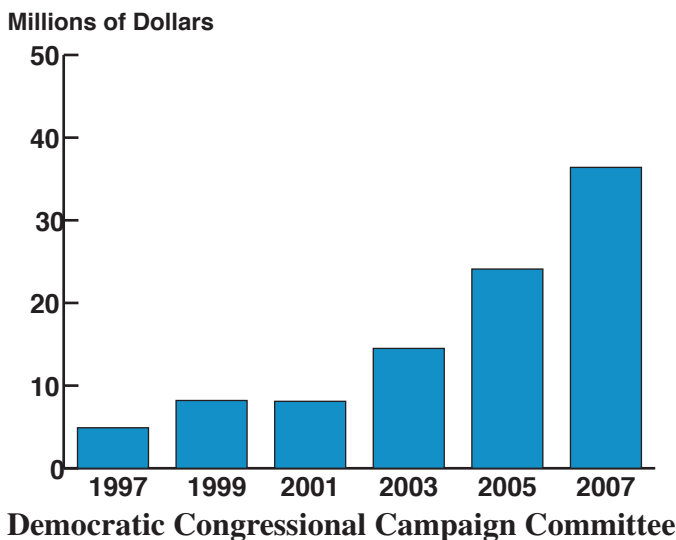
fell by 21 percent compared to fundraising from the first six months of 2005. See the charts below for details regarding the national Congressional committees' fundraising over this period for the past six election cycles.

Contributions from individuals constituted the bulk of the receipts for both parties. Democrats reported receiving \$87.1 million from individuals and \$19.6 million from political action committees (PACs), including House and Senate members' campaign committees. Republicans reported receiving \$92.3 million from individuals and \$12.7 million from PACs and House and Senate members' campaign committees.

At the end of June, Democratic party committees had \$50.9 million cash on hand and debts of \$11.7 million, and Republican party committees had \$31.8 million in cash on hand and debts of \$6.4 million.

Additional information is available in a Press Release dated August 14, 2007. The release, which is available on the FEC web site at <http://www.fec.gov/press/press2007/>

**National Congressional Committee Fundraising Through First Six Months of Election Cycle**





[20070813party/20070813party.shtml](http://www.fec.gov/disclosure/20070813party/20070813party.shtml), provides summary data for the financial activities of the federal committees of the two major parties for the first six months of 2007 and comparisons for the same period in the previous nine election cycles. It also includes tables depicting the breakdown of contributions to national parties by contribution amount.

—Amy Kort

## House and Senate Candidates Raise \$239 Million

Candidates for the U.S. Senate and House of Representatives raised a total of \$239 million from January 1 through June 30, 2007. Candidates seeking election in 2008 to the 33 U.S. Senate seats reported raising \$80.6 million during the first six months of 2007. Democratic Senate candidates raised \$47.6 million while Republicans raised \$33 million. Candidates for the House of Representatives reported raising \$157.8 million in the first six months of this year, with Democrats raising \$94.2 million and Republicans raising \$63.6 million.

### U.S. Senate

Fundraising totals for the 59 individual Senate campaigns in 2007 are similar to the same period in 2005, when receipts totaled \$84.8 million. In 2001, when this same group of 33 Senate seats was last up for election, 56 candidates raised \$43 million during the first six months of that year.

From January 1 through June 30, 2007, contributions from individuals to Senate candidates accounted for \$45.7 million, or 57 percent of the total raised. Political action committee (PAC) contributions to Senate candidates totaled \$17.9 million, representing 22 percent of receipts.

Senate candidates ended the first six months of 2007 with \$106.8 million cash-on-hand and debts of \$6.4

million, some of which were from previous elections.

### U.S. House of Representatives

Campaign finance reports filed by House candidates for the period from January 1 through June 30, 2007, show 427 House incumbents reporting receipts of \$135.5 million, a \$22.3 million (or 16.3 percent) increase from the same period in 2005. Individuals contributed \$65.1 million to House incumbents, while PAC contributions totaled \$65.6 million, in the first half of 2007. From January 1 through June 30 of this year, 228 incumbent Democrats raised \$80.3 million, while 199 incumbent Republicans raised \$55.2 million. Democratic members reported \$122.4 million in cash-on-hand at the end of the reporting period, and Republicans reported \$94.4 million.

The median receipt value for Democratic House incumbents was \$262,521, up from \$188,745 in the first six months of 2005. For Republican members, the median this year was \$241,027, down from \$245,137 in 2005. (An equal number of candidates had receipts above and below these median values.)

Receipts for the 43 Democratic House freshmen totaled \$22 million, while the 16 Republican freshmen reported receipts of \$5 million. Democratic freshmen had median receipts of \$499,360, while the median for Republican freshmen was \$218,760.

Non-incumbents raised a total of \$22.3 million for House races during the first six months of 2007, with 119 Democrats raising \$13.9 million and 78 Republicans raising \$8.4 million. In the same period in 2005, 79 Democrats raised \$6.8 million and 60 Republicans raised \$7.5 million.

More information is available in an FEC Press release dated August 22, 2007. The release, which is available on the FEC web site at <http://www.fec.gov/press/press2007/20070814candidate/20070822can.shtml> includes tables

detailing fundraising totals for the top 50 House members in the following categories: total receipts, contributions from individuals, PAC contributions, disbursements, and cash on hand. Comparative charts and graphs are also included, along with summary statistical information for each Senate candidate. Financial activity for these Senate candidates in 2003-2004 and 2005-2006 is also included.

—Amy Kort

## Publications

### Federal Elections 2006 Publication Available

*Federal Elections 2006: Election Results for the U.S. Senate and the U.S. House of Representatives* is now available. This biennial publication provides an accurate, historical record of federal election results, including primary, runoff and general elections. Color maps, bar graphs and summary charts are also included to illustrate the data.

The publication is available in both PDF and Excel formats on the FEC web site at <http://www.fec.gov/pubrec/fe2006/federalection2006.shtml>. A limited number of printed copies are available, and may be obtained by calling the Public Records Office at 800/424-9530 or 202/694-1120.

—Amy Kort

## Outreach

### St. Louis Conference for House and Senate Campaigns, Political Party Committees and Corporate/Labor/Trade PACs

The Commission will hold a regional conference in St. Louis,

(continued on page 18)

## Enforcement Query System Available on FEC Web Site

The FEC continues to update and expand its Enforcement Query System (EQS), a web-based search tool that allows users to find and examine public documents regarding closed Commission enforcement matters. Using current scanning, optical character recognition and text search technologies, the system permits intuitive and flexible searches of case documents and other materials.

Users of the system can search for specific words or phrases from the text of all public case documents. They can also identify single matters under review (MURs) or groups of cases by searching additional identifying information about cases prepared as part of the Case Management System. Included among these criteria are case names and numbers, complainants and respondents, timeframes, dispositions, legal issues and penalty amounts. The Enforcement Query System may be accessed on the Commission's web site at [www.fec.gov](http://www.fec.gov).

Currently, the EQS contains complete public case files for all MURs closed since January 1, 1999. In addition to adding all cases closed subsequently, staff is working to add cases closed prior to 1999. Within the past year, Alternative Dispute Resolution (ADR) cases were added to the system. All cases closed since the ADR program's October 2000 inception can be accessed through the system.

## Outreach

(continued from page 17)

Missouri, on November 6-7, 2007, at the Hilton St. Louis at the Ballpark Hotel. Commissioners and staff 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 web site at <http://www.fec.gov/info/conferences/2007/stlouis07.shtml>.

**Hotel Information.** The Hilton St. Louis at the Ballpark Hotel is located at One South Broadway at Market Street in downtown St. Louis, near the Gateway Arch and local subway. A room rate of \$119 (single or double) is available to conference attendees who make reservations on or before October 12. To make hotel reservations, please call 1-877-845-7354 and indicate that you are attending the campaign finance laws conference. The FEC recommends that you wait to make hotel and air reservations until you have received confirmation of your conference registration from Sylvester Management Corporation.

**Registration Information.** The registration fee for this conference is \$450, which covers the cost of the conference, a reception, materials and meals. A \$25 late fee will be added to registrations received after October 12. Complete registration information is available online at <http://www.fec.gov/info/conferences/2007/stlouis07.shtml>.

## Questions

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; e-mail: [tonis@sylvestermanagement.com](mailto:tonis@sylvestermanagement.com)). For questions about the conference program, or to receive e-mail notification of upcoming confer-

ences and workshops in 2008, call the FEC's Information Division at 1-800/424-9530 (press 6) (locally at 202/694-1100), or send an e-mail to [Conferences@fec.gov](mailto:Conferences@fec.gov).

—Dorothy Yeager

## Index

The first number in each citation refers to the numeric month of the 2007 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.

### Advisory Opinions

- 2006-33: Association May Compensate State Affiliate Collecting Agents, 2:6
- 2006-34: Political Committee Sponsored Affinity Program, 4:5
- 2006-35: Legal Fees Paid with Campaign Funds, 3:4
- 2006-36: Green Senatorial Committee Gains National Party Status, 3:5
- 2006-37: Campaign May Reimburse Candidate's Misreported Loans, 3:6
- 2006-38: Officeholder's Use of State Campaign Funds, 3:7
- 2007-1: Federal Officeholder May Raise Nonfederal Funds to Retire State Campaign Debt, 5:7
- 2007-2: State Party Status for Arizona Libertarians, 4:7
- 2007-3: Private Contributions Do Not Preclude Public Funding, 4:8
- 2007-4: Credit Card Processing Services Provided to Political Committees, 7:7
- 2007-5: Officeholder's Chief of Staff Raising Nonfederal Funds as Chairman of State Party Committee, 6:5
- 2007-6: State Party Status for Libertarian Party of Indiana, 6:6
- 2007-7: Candidate's Loans Initially Misreported as Contributions, 7:9

2007-8: Encouraging Voluntary Performances by Professional Entertainers at Campaign Events, 9:4  
 2007-9: Use of GELAC Funds to Cover Compliance Portion of Broadcast Ads, 10:7  
 2007-10: Campaign May Not Use Corporate Names, Trademarks or Service Marks at Golf Fundraiser, 10:8  
 2007-11: Pre-Event Communications for State or Local Party Fundraisers Featuring a Federal Candidate or Officeholder, 10:8

### Audits

Bush/Cheney '04 and Clark for President, 5:8  
 Gephardt for President, 8:5  
 Kerry/Edwards, 7:10

### Compliance

527 Organizations Pay Civil Penalties, 1:1  
 Administrative Fine Update, 4:9; 8:6  
 Alternative Dispute Resolution Update, 8:7  
 Comments Sought on Proposed Probable Cause Hearings, 1:5  
 Comments Sought on *Sua Sponte* Proposal, 1:5  
 MUR 5358: Jamie Jacob Morgan, 6:1  
 MURs 5403 and 5466: Use of Prohibited Funds; Failure to Allocate and Report Expenses, 10:10  
 MUR 5487: Progress for America Voter Fund, 4:1  
 MURs 5511 and 5525: Swift Boat Veterans and POWs for Truth, 1:3  
 MURs 5577/5620: Prohibited Contributions and Failure to Register as a Political Committee, 8:1  
 MUR 5634: Express Advocacy Leads to Prohibited Corporate Expenditure, 1:4  
 MUR 5645: Prohibited In-Kind Corporate Contributions, 5:4  
 MUR 5690: Reporting Joint Fundraising Proceeds, 5:4  
 MUR 5702: Colorado Democratic Party, 6:2

MUR 5753: League of Conservation Voters 527 I and II, 1:3  
 MUR 5754: MoveOn.org Voter Fund, 1:4  
 MURs 5928 and 5853: Political Blogs, 10:11  
 Policy Statement on Treasurer's Best Efforts, 7:1  
 Policy Statement on Embezzlement Misreporting Safe Harbor, 5:1  
 Policy Statement Establishing Probable Cause Hearings, 3:1  
 Policy Statement on Initial Stage of Enforcement Process, 4:3  
 Policy Statement on Reporting of "Purpose of Disbursement," 2:5  
 Policy Statement on Self-Reporting of Violations, 5:2  
 Policy Statement on Internal Controls for Political Committees, 5:3

### Court Cases

\_\_\_\_\_ v. FEC  
 – Christian Civic League of Maine, 10:13  
 – CREW, 2:3  
 – Davis, 9:1  
 – Fieger, 10:14  
 – Shays, 10:12  
 – Unity '08, 2:4  
 – Wisconsin Right to Life, 2:1; 8:1  
 Bialek v. Gonzales, Marcus v. Gonzales, Beam v. Gonzales, 4:5; 8:3  
 FEC v. \_\_\_\_\_  
 – Adams, 10:15  
 – Citizens Club for Growth, Inc., 10:14  
 – Reform Party of the USA, 7:12  
 Fieger v. Gonzales, 3:3

### Legislation

Honest Leadership and Open Government Act of 2007, 10:9  
 Legislative Recommendations Approved, 5:11

### Information

800 Line: Disclosing Multicandidate Committee Status, 9:5  
 2007-2008 Contribution Limits, 2:1  
 Coordinated Party Expenditure Limits for 2007, 3:9  
 Reporting Notices Enter the Electronic Age, 2:7; 3:10; 7:13

Staff Director Testifies on Senate E-Filing, 4:10  
 Telephone Excise Tax Refunds, 1:11

### Public Funding

Democratic and Republican Parties Certified for Convention Funding, 8:4  
 Estimated Presidential Spending Limits, 5:6  
 Matching Fund Certifications, McCain; Tancredo, 10:10

### Outreach

Conferences Scheduled for 2007, 3:10; 6:10; 7:13; 8:10; 9:6; 10:17  
 Roundtable Workshops, 4:12  
 State Outreach Workshops, 6:10; 7:13  
 Washington, DC Conference for Corporations and SSFs, 3:10; 4:10  
 Washington, DC Conference for House and Senate Campaigns and Political Party Committees, 4:11; 5:14  
 Washington, DC Conference for Trade Associations, Membership Organizations and Labor Organizations, 5:14

### Regulations

2007 Rulemaking Priorities, 4:4  
 Best Efforts Defense Replaces Extraordinary Circumstances Defense, 5:1  
 Electioneering Communications, Notice of Proposed Rulemaking, 10:1  
 Federal Election Activity and Nonfederal Elections, Notice of Proposed Rulemaking, 7:6  
 Notice of Proposed Rulemaking for Hybrid Communication, 6:1; public hearing, 9:3  
 Proposed Rules and Policy Statement on Best Efforts, 1:6  
 Supplemental E&J on Political Committee Status, 3:1  
 Use of Campaign funds, NPRM, 9:1

(continued on page 20)

**Index**

*(continued from page 19)*

**Reports**

- April Reporting Reminder, 4:1
- California Special Election, 6:7
- Georgia Special Election, 5:10
- July Reminder, 7:1
- Massachusetts Special Election, 8:8
- October Reporting Reminder, 10:1
- Ohio Special Election, 10:3
- Reports Due in 2007, 1:7
- Update, 7:3

**Staff**

- FEC Names New General Counsel, 6:9
- General Counsel and Deputy Resign, 2:6

**Statistics**

- Detailed Presidential Fundraising and Spending Information Available on FEC Web Site, 5:12
- House and Senate Fundraising, 10:17
- PAC Count, 9:6
- Party Financial Activity, 4:10; 7:10; 10:16

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