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Table of Contents

	Regulations
1	Final Rules on the Use of Campaign Funds
1	Advisory Opinions
8	Federal Register
	Court Cases
8	Shays v. FEC
	Outreach
10	FEC Conference
11	Index

Regulations

Final Rules on the Use of Campaign Funds

On September 24, 2007, the Commission approved final rules that add donations to nonfederal candidates, as permitted by state law, and “any other lawful purpose” other than personal use to FEC regulations’ list of permissible uses of campaign funds.

Background

The Act broadly prohibits the personal use of campaign funds and sets forth six specific permissible uses of funds by a federal candidate or officeholder:

- Expenditures in connection with the candidate’s campaign for federal office;
- Ordinary and necessary expenses incurred by a federal officeholder;
- Donations to charity (organizations defined in 26 U.S.C. §170(c));
- Unlimited transfers to a national, state or local political party;
- Donations to nonfederal candidates as permitted by state law; and
- Any other lawful purpose other than personal use. See 2 U.S.C. §439a(a)(1)-(6).

Prior to the passage of the Bipartisan Campaign Reform Act of 2002

(continued on page 8)

Advisory Opinions

AO 2007-12

Disaffiliation of SSFs After Corporate Spin-Off

Tyco US PAC, the separate segregated fund (SSF) of Tyco International Management Company (Tyco), is disaffiliated from the SSFs of Covidien U.S. and Tyco Electronics Corporation, which are subsidiaries of parent corporations spun-off from Tyco International Ltd. as of the close of business on June 29, 2007.

Background

Tyco US is a wholly owned U.S. subsidiary of Tyco International Ltd. (Tyco International). On June 29, 2007, Tyco International separated into three publicly traded corporations: Covidien Ltd. (Covidien), Tyco Electronics Ltd. (Tyco Electronics) and Tyco International Ltd. At the time of the spin-off, Covidien and Tyco Electronics each had wholly owned U.S. subsidiaries, now identified as Covidien (U.S.) and Tyco Electronics Corporation, respectively.

In the spin-off, Tyco International distributed all of its shares of common stock in Covidien and Tyco Electronics to the shareholders of

(continued on page 2)

Advisory Opinions

(continued from page 1)

Tyco International's common stock. Upon completion of the spin-off, the shareholders of Tyco International owned almost 100 percent of Covidien and Tyco Electronics, and none of the three companies owned any shares in either of the other companies. The three companies also executed a Separation and Distribution Agreement to effect the separation and provide a framework for the relationship among the companies after the spin-off.

Tyco US PAC has been registered as a political committee since 1979. Covidien US PAC and TELPAC are, respectively, the SSFs of Covidien (U.S.) and Tyco Electronics Corporation. Both SSFs were created in anticipation of the spin-off and filed their Statements of Organization

with the Commission when Tyco US was still the connected organization for all three SSFs.¹ Tyco US PAC asked the Commission whether Tyco International, Covidien and Tyco Electronics are disaffiliated from each other under the Federal Election Campaign Act (the Act) and Commission regulations as of June 29, 2007, so that the SSFs of their respective U.S. subsidiaries are no longer affiliated with each other as of that date.

Legal Analysis and Conclusions

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. See 11 CFR 100.5(g)(2); 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, hence, whether, the respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).

The Commission considered eight of these circumstantial factors, plus the issue of common shareholders after the spin-offs, in determining that Tyco US PAC, Covidien US PAC and TELPAC are not affiliated.

Organization owns a controlling interest in voting stock or securities. One affiliation factor considers whether a sponsoring organization owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A). None of the three companies owns any stock in the other two companies. Before the spin-off, Tyco US PAC, Covidien US PAC and TELPAC were *per se* affiliated because Covidien and Tyco Electronics were wholly owned by Tyco International, and hence the SSFs' respective connected organizations were also wholly owned by Tyco International. Immediately after the spin-off, Covidien and Tyco Electronics, and their wholly owned U.S. subsidiaries, were owned by Tyco International's shareholders, not by Tyco International. This lack of ownership interest by one company in another points toward disaffiliation.

Authority or ability to direct or participate in governance or to control officers. The law also considers the authority or ability of one corporate sponsor to participate in the governance of another corporate sponsor or to hire, appoint, demote or otherwise control the officers, or other decision-making employees, of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(B); 110.3(a)(3)(ii)(B); 100.5(g)(4)(ii)(C); 110.3(a)(3)(ii)(C).

The bylaws of Covidien and Tyco Electronics do not contain provisions granting authority to Tyco International over operations of Covidien and Tyco Electronics. Before the spin-off, Tyco International, as the lone shareholder, selected the current boards of directors of Covidien and Tyco Electronics. The governing

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¹ *Tyco US PAC, Covidien US PAC and TELPAC will comply with the prohibitions placed on foreign national participation in the funding and the decision-making processes of the SSFs by the Federal Election Campaign Act, Commission regulations and advisory opinions.* 2 U.S.C. §441e; 11 CFR 110.20. AOs 2006-15, 2004-42 and 2000-17.

documents of Covidien and Tyco Electronics contain certain anti-take-over provisions that would tend to preserve these board members' positions, but also lack other significant provisions of this type. The Commission concluded that the effect on Covidien and Tyco Electronics of the pre-spin-off selection of the boards was outweighed by the minimal nature of director, officer and employee overlap, the background of the board members selected and vigorous trading of the shares in the companies resulting in a diversification in the groups of persons holding shares in the three companies. The Commission also considered the provisions of the spin-off agreement that make Tyco International the managing party for all legal matters related to Tyco International, contingent on other corporate liabilities assumed by Covidien and Tyco Electronics, and the companies may decide on an annual basis to change the managing party. The Commission noted that this arrangement would be a natural part of a separation arrangement in view of the fact that the involvement of Covidien and Tyco Electronics in such legal affairs would stem from activities before the spin-off or from the separation itself.

Common or overlapping officers or employees indicating a formal or ongoing relationship or the creation of a successor entity. The affiliation factors also address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization indicating a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(E); 110.3(a)(3)(ii)(E). An additional factor asks whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F); 110.3(a)(3)(ii)(F). The eleven-member boards

of each of the companies have been independent of each other since the spin-off. In addition, since the spin-off, there has been only a minimal personnel overlap between the parent companies. One individual serves on both Tyco Electronics' and Tyco International's boards of directors, and Tyco International's Chief Financial Officer serves on Covidien's board of directors. Since the spin-off, these two individuals represent the only overlap between the group of directors, officers and employees of one company and its subsidiaries and the corresponding group of either of the other two companies and their subsidiaries.

In addition, only two of the eleven Covidien directors in place since the spin-off and only three of the eleven Tyco Electronics directors in place since the spin-off previously served as directors or officers of any pre-spin-off Tyco International entities. Moreover, there are no plans for any future transfer of officers or employees from one company or its subsidiaries to another company or its subsidiaries. The Commission also noted that, after the spin-off occurred, amended statements of organization were filed indicating no overlap among Tyco US PAC, Covidien US PAC and TELPAC with respect to officers or to other SSF personnel.

Providing funds or goods in a significant amount or on an ongoing basis. The affiliation factors also address whether a sponsoring organization provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Tyco International ceased providing either Covidien or Tyco Electronics with funds to finance their working capital or other cash

requirements once the spin-off occurred. After the spin-off, the three parent corporations will, in accordance with percentages agreed to in the Separation Agreement, share responsibility for Tyco International's contingent liabilities regarding securities litigation and actions brought by third parties as to the separation or stock distribution, but not with regard to any liabilities related to any one of the three companies. However, if any one of the companies defaults on its payments, each of the other companies will be required to pay equally the amounts in default.

Separation agreements after corporate spin-offs often entail restrictions on the activities of the companies involved and provide for some continuing transactions between the companies. The Commission concluded in past advisory opinions that such continuing transactions were outweighed by other facts or were merely aimed at sorting out the companies' post-spin-off obligations that existed as an outgrowth of the previous relationship and were not aimed at continuing one company's control over another. AOs 1996-42 and 1993-23. Similarly, any transfers between the companies provided for in the Separation and other agreements would be part of the normal separation process and the contingent liabilities would relate to activities occurring before the spin-off or to the separation itself.

Having an active or significant role in the formation of another sponsoring organization or committee. The factors also address whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I); 110.3(a)(3)(ii)(I). Although Covidien and Tyco Electronics were once part of Tyco International, they are now subject to agreements separating them into separate publicly

(continued on page 4)

Advisory Opinions

(continued from page 3)

traded corporations. The previous relationship between sponsoring organizations is part of the context for assessing the overall relationship between such organizations. 11 CFR 100.5(g)(4)(ii); 110.3(a)(3)(ii); see also AO 1996-23. The Commission noted that a sponsoring organization's involvement in the formation of a spun-off sponsoring organization does not require a finding of continued affiliation when significant changes in the relevant relationships have occurred, such as arrangements separating the operations of the companies and apportioning their assets and obligations, and the nearly complete separation of corporate leadership and personnel.

Common Shareholder Base. Commission regulations provide for *per se* affiliation between committees established by "the same person or group of persons." 11 CFR 100.5(g)(3)(v); 110.3(a)(2)(v). In past advisory opinions, the Commission has recognized that a sizeable break in the common identity of persons owning shares in two companies supported a conclusion that two companies were no longer affiliated after a spin-off, when vigorous public trading was anticipated. AOs 1996-42 and 1993-23; see also AO 1997-25.

Upon completion of the spin-off, Tyco International shareholders owned almost all of the shares of Covidien and Tyco Electronics, and there was almost a complete overlap among the shareholders of the three companies. However, this situation involves a spin-off by a large publicly traded company of subsidiaries, resulting in three large, separately listed, publicly traded companies with very specific plans for operations that are separate from each other and that involve differing business sectors. Given that, in general, each of the shareholders of these companies will buy and sell shares in

accordance with such shareholder's own financial interests, it would be very difficult for one group of shareholders to maintain purposefully a large common ownership in more than one publicly traded company. The usual consequence of such spin-offs is vigorous public trading by shareholders attempting to maximize their own profit, resulting in a sizeable diversification between the identity of the shareholders of the former parent and each of the spun off companies.

The Commission determined that, in this case, there is ample evidence to show that significant shareholder diversification will result from the spin-off. The post-spin-off active trading indicates that the large, but ever diminishing, overlap still existing in the first few weeks after the spin-off date should not delay disaffiliation past that date. It confirms that a large common identity of shareholders in two large publicly traded corporations does not, by itself, indicate common control of the corporations. This common identity does not reflect any effort by such a large group of shareholders to control the stocks of the corporations and dissipates rapidly because of the shareholders' independent interests.

Conclusion

The Commission noted that, in some important respects, the case for the current disaffiliation of the three companies compares favorably with past advisory opinions where the Commission found organizations to be disaffiliated. AOs 2003-21, 2002-12 and 1996-23. In this case, based on the application of the affiliation factors described above, the Commission concluded that Tyco US PAC, Covidien US PAC and TELPAC are disaffiliated as of the completion of the spin-off at the close of business on June 29, 2007.

Date Issued: September 12, 2007; Length: 11 pages.

—Gary Mullen

AO 2007-13

Union and Association SSFs Not Affiliated

The United American Nurses, AFL-CIO (the Union) and the American Nurses Association (the Association) are not affiliated under the Federal Election Campaign Act and Commission regulations. Thus, a separate segregated fund (SSF) established by the Union would not be affiliated with the Association's SSF.

Background

The Association. The Association is a national professional organization dedicated to advancing the standing and interests of registered nurses (RNs). It is composed of 75 disparate nursing-related organizations," including the Association's 54 constituent member associations (state nursing associations), the Union, the Center for American Nurses, 16 national nursing organizations and three related entities. In addition, 1,182 individuals who are not otherwise members of a state nursing association are members of the Association.

The Association's governmental structure consists of a House

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of Delegates with 675 delegates, including 600 who are elected by the state nursing associations, fifteen Association directors and officers and 60 delegates from other Association affiliates, including only one delegate from the Union (the Union president). Of the 675 delegates, approximately 630 have voting rights. The Association's Board of Directors, elected by the delegates, handles the Association's day-to-day operations.

While the Association itself has never made union representation of RNs a significant focus, 27 of its state nursing association members are considered "labor organizations" under the National Labor Relations Act. 29 U.S.C. §152(5). These 27 state nursing associations engage in collective bargaining on behalf of their eligible RN members.

In 1999, the RNs represented for collective bargaining by the state nursing associations created the Union as an independent organization within the Association to serve as the national union for the state nursing associations that engaged in collective bargaining. The Association granted the Union autonomy in all things required by law to be addressed by a labor union.

The Union. The Union is an unincorporated national labor organization. Its highest governing body is its National Labor Assembly, comprising delegates elected by individual RNs represented in collective bargaining by the state nursing associations and the national bargaining councils. The National Labor Assembly has the authority, among other things, to develop labor policies for Union members, collect Union dues and develop the Union's strategic plan. The National Labor Assembly also elects, from among the Union-represented RNs, the Union's Executive Council, which sets Union priorities, policies and procedures and determine membership status within the Union.

Originally, the Association's Executive Director had the author-

ity to "manage" the Union, including implementing National Labor Assembly and Executive Council policies and appointing the Union's Program Director. The Association also provided the Union with staff and financial support.

In 2001 the AFL-CIO granted a charter to the Union as a direct affiliate. This charter was granted only to the Union, and not to the Association.¹ In 2002 the Union and the Association negotiated a new relationship in which the Union became a wholly autonomous organization with its own finances, governance, staff and direction. The Association created new bylaws following the agreement, and the Union drafted its own constitution, which now excludes the Association from any participation in the Union's governance.

Analysis

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof, are affiliated. 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

In some cases, organizations are considered to be *per se* affiliated under Commission regulations. For example, a national or international union is considered *per se* affiliated with its local or subordinate organizations, and a membership organization is considered *per se* affiliated

with its state or local subordinate organizations. 11 CFR 100.5(g)(3)(ii), (iv) and (v); 110.3(a)(2)(ii), (iv) and (v).

In this case, the Association is not a "labor organization" and therefore is not a local union or subordinate organization of the Union. 11 CFR 100.134(b). Similarly, while the Association might qualify as a membership organization, the Union is not a related state or local subordinate organization. 11 CFR 100.134(e). Thus, the Union and the Association are not *per se* affiliated.

When entities do not meet any definition of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained or controlled the other sponsoring organization or committee and, thus, whether their respective SSFs are affiliated. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J) and 110.3(a)(3)(ii) and (ii)(A)-(J). The most relevant affiliation factors in this case are discussed below.

Directing or participating in governance. One affiliation factor addresses whether a sponsoring organization has the authority or ability to direct or participate in the governance of the other through provisions of their rules or by laws, or through their formal or informal practices. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B). Under the Union's constitution and the Association's bylaws, the Association cannot participate in the governance of the Union, and the Union can only minimally participate in the governance of the Association. The Union President has an *ex officio* seat on the Association's Board of Directors and, in this capacity, may vote on certain matters before the Association's House of Delegates, representing 0.16 percent of the votes cast by delegates. The Union President may

¹ *The AFL-CIO charters only labor organizations whose principal function is collective bargaining representation. The Association, a professional organization, was and is ineligible for a charter.*

(continued on page 6)

Advisory Opinions

(continued from page 5)

not vote in the election of the Association's officers and directors.

The Union President is also one of the Association's 17 Directors on the Board. The Association President may exclude the Union President from business or confidential matters. Apart from the Union President's participation on the Board, no Union representative may direct or participate in the governance of the Association's SSF. The Union's current Vice President was elected to the Association's Board of Directors in her individual capacity and does not represent the Union on the Association's Board. The Union Vice President, like the Union President, is described as being excluded from discussions regarding the Union. Overall, each organization has, at best, a minimal ability to participate in the governance of the other, giving neither organization direction over, or control of, the governance of the other organization.

Common or overlapping membership. Another significant affiliation factor in this case is whether a sponsoring organization has common or overlapping membership with another sponsoring organization, which indicates a formal or ongoing relationship between the organizations. 11 CFR 100.5(g)(4)(ii)(D) and 110.3(a)(3)(ii)(D).

The only Union members who are eligible to join the Association directly are those who are not also members of a state nursing association—fewer than 500 of the Union's 97,000 members are currently described as falling into this category. Thus, assuming that each eligible Union member becomes an individual member of the Association, only 0.5 percent of the Union's membership would directly overlap with the Association's membership.

There is also some indirect overlap between the individual members in the Union and individual mem-

bers in the state nursing associations that are, themselves, members of the Association. Approximately 97,000 individual members of the Union are members of the 27 state nursing associations that engage in collective bargaining. There are approximately 157,000 individual members in the 54 state nursing association members of the Association, creating a maximum possible indirect overlap of about 62 percent.

In this case, the Commission determined that any direct or indirect overlap in membership between the Union and the Association results from the negotiated agreement separating the two organizations. The Union's Constitution provides that any RN who is a member of the Association's state nursing associations that engage in collective bargaining will be eligible for Union membership. The RN is then described as being free to join or not to join the Union as an individual member, and is free to maintain or terminate his or her membership in the Association through the state nursing association. Thus, even if there is significant overlap in membership, the overlap alone is not sufficient evidence that one organization currently finances, maintains or controls the other. See AO 2004-41.

Overlapping officers and employees. Two additional affiliation factors address whether a sponsoring organization has common or overlapping officers or employees with another sponsoring organization, which indicates a formal or ongoing relationship, and whether a sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization, indicating a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(E) and (F) and 110.3(a)(3)(ii)(E) and (F).

Initially, the Association's staff performed all of the staff functions for the Union. However, the orga-

nizations stopped sharing staff after their relationship was re-negotiated. Now the Union and the Association have only one official overlapping decision-maker, the Union President, and one unofficial overlapping officer, the Union Vice-President. Any Union member who runs for one of the 15 elected seats on the Association's Board of Directors at the House of Delegates meeting is described as serving in an individual capacity, not as a Union representative. Moreover, only three of the Union's twenty-four staff members were formerly employed by the Association.

Provision of goods and funds. The affiliation factors also address whether a sponsoring organization provides goods in a significant amount or on an ongoing basis to another sponsoring organization, and whether a sponsoring organization causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(G) and (H) and 110.3(a)(3)(ii)(G) and (H).

Although the two organizations share office space and the Association performs some administrative tasks for the Union, the Union pays the Association for the space and services, and these payments do not represent a significant portion of the Association's receipts. These payments do not suggest affiliation.

The Association also agreed to make a one-time grant of \$740,000 in working capital and transitional support to the Union upon the restructuring of the two organizations. The Commission has in past advisory opinions recognized that these types of transactions can be part of the transition to independence for one organization, rather than a sign of affiliation. See AO 2000-28. Here, the one-time grant is part of the process of establishing the Union's independence and separation from the Association.

Role in the formation of another organization. Finally, an affiliation factor considers whether a sponsoring organization had an active or significant role in the formation of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I). In past advisory opinions, the Commission has recognized that one organization's creation of another does not, in and of itself, make the two organizations permanent affiliates. See AOs 2004-41 and 2000-36. Considering the steps taken in this case to sever operational and financial ties, this factor alone does not indicate current affiliation.

Conclusion

The Association and the Union are not affiliated under the factors discussed above, including the separation of the staffs, treasuries and functions of the two organizations, the minimal overlap in governance and the minimal direct overlap in membership. Accordingly, if the Union were to establish an SSF, that political committee would not be affiliated with the Association's SSF.

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Length: 12 pages.

—Amy Kort

AO 2007-14

Trade Associations' Sponsorship of Joint Telephone Conferences to Restricted Classes

The Associated Builders and Contractors, the National Federation of Independent Business and the National Restaurant Association (the Trade Associations) may pay for a series of jointly sponsored telephone conferences featuring Presidential candidates, which will be made available simultaneously to the three Trade Associations' restricted classes. The Trade Associations must split the costs of the conferences on a pro rata basis determined by restricted class participation (or by another reasonable method if it is

not possible to track participation) to ensure that no trade association pays the costs of candidate appearances to a restricted class other than its own.

Background

The Trade Associations plan to host telephone conferences open to the restricted class members of each association. The three restricted classes will have access to the conferences either by dialing in and providing a password or by receiving a phone call connecting them to the conference. The Trade Associations will invite several Presidential candidates to participate, and the candidates will be free to solicit contributions and campaign volunteers by asking conference participants to visit a web site or call a phone number. The Trade Associations will split the costs of the conferences, and may be able to track restricted class participation in order to split costs based on the number of restricted class members from each trade association participating in the conferences.

Analysis

The Federal Election Campaign Act (the Act) prohibits corporations from using their general treasury funds to make contributions and expenditures in connection with a federal election, including giving "anything of value" to a campaign. 2 U.S.C. §441b(a); 11 CFR 114.2(b). Under an exception to this general prohibition, an incorporated trade association may sponsor candidate campaign appearances, but only if:

- The audience is limited to the trade association's restricted class and to employees who are necessary to administer the meeting; or
- The audience is limited to the trade association's employees and their families.

Other guests of the corporation who are being honored or speaking or participating in the event, and representatives of the news media, may also attend. 2 U.S.C. §441b(b)

(2)(A); 11 CFR 114.3(c)(2) and 11 CFR 114.4(b)(1).

In this case, each trade association would use its general treasury funds to sponsor candidate appearances to its own restricted class. Because the Trade Associations would sponsor the same candidate to address their restricted classes simultaneously, each trade association must pay only the portion of the costs of the conferences incurred because of its restricted class's participation. So long as the Trade Associations split the costs of the conferences on a pro rata basis according to the participation of each trade association's restricted class, or on another reasonable method calculated to closely approximate the pro rata participation, the proposed conferences will come within the exemptions from the definitions of "contribution" and "expenditure" for corporate-sponsored candidate

(continued on page 8)

FEC Accepts Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Visa and MasterCard. While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment.

Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since prepayment is required, using a credit card or funds placed on deposit can speed the process and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 or 202/694-1120.

Advisory Opinions

(continued from page 7)

campaign appearances to the restricted class.¹

Date Issued: September 25, 2007;
Length: 4 pages.

—Amy Kort

Advisory Opinion Requests

AOR 2007-22

Volunteer activity by foreign nationals (Jim Hurysz for Congress Campaign Committee, August 7, 2007)

AOR 2007-23

Qualification as state committee of political party (Independence Party of New York, September 18, 2007)

AOR 2007-24

Permissibility of joint campaign fundraising and spending (Jeff Walz and Jim Burkee, October 1, 2007)

Regulations

(continued from page 1)

(BCRA), the Act permitted candidates and their committees to use their funds for “any other lawful purpose,” as long as that purpose was not personal use of the campaign’s funds by any person. In BCRA, Congress deleted the “any other lawful purpose” language, and the Commission amended its regulations to reflect the change. In the Consolidated Appropriations Act of 2005, Congress restored this provision, and added the provision concerning donations to nonfederal candidates. Accordingly, the Commission has amended its regulations at 11 CFR

113.2(d) and (e) to add these permissible uses of campaign funds.

The full text of this final rule is available in the *Federal Register* (72 FR 56245) and on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-18.pdf.

—Amy Kort

Court Cases

Shays v. FEC

On September 12, 2007, the U.S. District Court for the District of Columbia granted in part and denied in part the plaintiffs’ motion for summary judgment in this case. The court remanded to the FEC a number of FEC regulations implementing certain provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). These rules included:

- The revised coordinated communications content standard at 11 CFR 109.21(c)(4);
- The 120-day window for coordination through common vendors and former employees under the conduct standard at 11 CFR 109.21(d)(4) and (d)(5);
- The safe harbor from the definition of “coordinated communication” for a common vendor that establishes a “firewall” (11 CFR 109.21(h)(1) and (h)(2)); and
- The definitions of “voter registration activity” and “get-out-the-vote activity” (GOTV) at 11 CFR 100.24(a)(2)-(a)(3).

Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a number of its BCRA regulations, including the rules governing coordinated communications, certain definitions of FEA and the solicitation of soft money by federal officeholders and candidates at state party fundraising

events. For more information, see the August 2005 *Record*, page 1, the March 2006 *Record*, page 2, and the July 2006 *Record*, page 1.

On July 11, 2006, U.S. Representative Christopher Shays and then-Representative Martin Meehan (the plaintiffs) filed another complaint in the U.S. District Court for the District of Columbia. The complaint challenged the FEC’s recent revisions to, or expanded explanations for, regulations governing coordinated communications, federal election activity (FEA) and solicitations by federal candidates and officeholders at state party fundraising events. The plaintiffs claimed that the rules did not comply with the court’s judgment in *Shays I* or with the BCRA. The complaint also alleged the FEC did not adequately explain and justify its actions.

Court Decision

The standard for judicial review in a case such as this, where one party alleges that an agency’s actions are contrary to the statute, is called *Chevron* review, after the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron* review, the court asks first whether Congress has spoken to the precise issue at hand. If so, then

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 and from the FEC Faxline, 202/501-3413.

Notice 2007-18

Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose Other Than Personal Use; Final Rule (72 FR 56245, October 3, 2007)

¹The situation presented here is similar to that considered by the Commission in AO 1984-13, where the Commission concluded that a corporation could host candidates as speakers at a conference for its restricted class and jointly sponsor the conference with another entity.

the agency's interpretation of the statute must implement Congress's unambiguous intent. If, however, Congress has not spoken explicitly to the question at hand, the court must defer to the agency's answer unless it rests on an impermissible construction of the statute.

In this case, the plaintiffs also claimed that in some instances the FEC failed to engage in a reasoned analysis when it promulgated the regulations, or failed to follow proper procedures regarding public notice and comment. Under the Administrative Procedure Act (APA), regulations that are promulgated without a reasoned analysis may be found "arbitrary and capricious" and may be set aside by a reviewing court. 5 U.S.C. §706(2)(A).

Candidate and officeholder solicitation at state party fundraisers. Commission regulation 11 CFR 300.64(b) provides that federal candidates and officeholders may speak at state, district or local party fundraising events "without restriction or regulation." The regulation implements 2 U.S.C. §441i(e)(3), which permits federal candidates and officeholders to attend, speak or be featured guests at such events. The court held that the regulation passed *Chevron* review and was consistent with the requirements of the APA.

The plaintiffs had argued that the Commission had failed to explain why this broad exemption is uniquely necessary in the state party fundraising context and thus failed to provide a reasoned basis for the exemption. The court, however, found that this exemption was both supported by the record and rationally explained. The court noted that Congress itself treated state, district and local party committee fundraisers differently from other fundraisers when it enacted 2 U.S.C. §441i(e)(3).

Coordinated communications content standard. The plaintiffs charged that the Commission's re-

vised "content standard" impermissibly reduces the pre-election window¹ for coordinated communications in House and Senate races from 120 days to 90 days, in violation of the decision in *Shays I*. The plaintiffs also argued that the Commission impermissibly retained the election year "gap period" in Congressional races (which begins on the day of the primary and runs until 90 days before the general election) and preserved the Presidential 120-day pre-primary window that was struck down by the court in *Shays I*.

The court found the revised content standard to be consistent with the statute. However, it ruled that the Explanation and Justification for the revised rule failed to explain how the regulation rationally separated election-related activity from other activity that occurs outside of the coordinated communications windows. According to court, the record before the FEC "demonstrates that candidates do run advertisements—which do not necessarily include express advocacy, but are nevertheless intended to influence federal elections—outside of the pre-election windows included in the revised content standard. The E&J presents no persuasive justification for writing off that evidence and does not suggest that it would somehow be captured by the 'functionally meaningful' express advocacy standard." The court thus found that the revised regulation does not meet the APA standard of reasoned decision-making.

As a separate issue, the plaintiffs challenged the Commission's methodology in determining these pre-election windows, alleging that the Commission's use of a set of data from TNS Media Intelligence/

¹ A communication that satisfies the payment, content and conduct prongs of the "coordinated communication test" is an in-kind contribution from the entity paying for the communication. 11 CFR 109.21.

CMAG to support its revised coordination regulations was arbitrary and capricious because the data set does not support the revised regulations and, in some instances, actually undermines them. The court, however, noted that it lacked "any basis, either factual or legal, on which to conclude that the FEC's very reliance on the CMAG data was arbitrary and capricious." The court further noted that in drawing a bright-line rule the FEC "appears to have drawn the line in a reasonable place based on the data available to it."

Common vendor and former employee conduct standard. Following the court decisions in *Shays I*, the Commission revised the conduct standard of the coordinated communications rules that addresses the activities of common vendors and former employees of a candidate or a political party committee. Under the revised rule, this standard can be met based on the activities of common vendors or former employees during a 120-day period, rather than during the entire election cycle, as was the case in the original rule. 11 CFR 109.21(d)(4) and (d)(5). The court found that the standard for "reasoned analysis" in a case where an agency changes course requires that the agency explain that its prior rules are being "deliberately changed" rather than "casually ignored." The court found that the Commission had not adequately explained how the new rules would capture the "universe of coordinated communications" and thus found the rule arbitrary and capricious, in violation of the APA.

Firewall safe harbor. During its rulemaking process, the Commission also revised its rules to create a safe harbor for an organization using a common vendor or individuals who currently or previously provided services to a candidate clearly identified in the organization's communication or to that candidate's opponent or to a political party committee. For

(continued on page 10)

Court Cases

(continued from page 9)

the safe harbor provision to apply, the vendor, former employee or political committee must establish a “firewall” between the parts of the organization working on each project. The court found that this provision both fails the second part of the *Chevron* test and is arbitrary and capricious in violation of the APA.

Under the Federal Election Campaign Act (the Act), expenditures count as contributions when they are made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate.” 2 U.S.C. § 441a(a)(7). The court found that the Commission’s safe harbor completely exempts communications when the organization creating them provides information that a firewall is in place. However, the court concluded that the rule fails to provide “substantive guidance” concerning what constitutes an effective firewall. The court further determined that the safe harbor might permit information to be passed through an organization’s leaders or administrative personnel and “sets a high evidentiary standard for overcoming the presumption created by the firewall.” According to the court, these factors together create a potential for gross abuse and compromise the purposes of the Act. Thus, the court found that the rule failed the second step of the *Chevron* test.

The court also found the rule arbitrary and capricious, in violation of the APA, because, again, the standard for “reasoned analysis” is higher when an agency changes course, and the Commission’s explanation of this rule had not met that standard.

Definitions of federal election activity. In *Shays I*, the court held that the Commission had not provided adequate notice of the approach it took in defining FEA “voter registration” and FEA “get-out-the-vote activity” (GOTV activity). In

response, the Commission expanded its Explanation and Justification for the definitions. In the current case, the plaintiffs alleged that the Commission unlawfully left intact the limitation that only activities that “assist” voters by “individualized means” may constitute FEA “voter registration” or FEA “GOTV” activity, and did not revise its definition of voter registration activity.

The court found that the expanded Explanation and Justification for the regulation defining voter registration activity does not “address the vast gray area of activities that state and local parties may conduct and that may benefit federal candidates,” nor does it show that activities that fall within this gray area do not directly benefit candidates or significantly affect federal elections. Thus, the court ruled that the regulation “unduly compromises the Act” and therefore violates the second part of the *Chevron* test. The court additionally found that, for this same reason, the rule is arbitrary and capricious in violation of the APA. The court found that the expanded Explanation and Justification “focuses on straw men, citing only examples falling at the far ends of the spectrum of potential voter registration activity without explaining how its definition, which apparently excludes the significant amount of activity in between, either supports or does not undermine BCRA’s purposes.” As a result, the court did not find that the rule meets the APA’s requirement of reasoned decision-making.

The court also found that the expanded Explanation and Justification fails to establish that the Commission’s definition of GOTV activity will not “unduly compromise” the Act’s purposes. In addition, citing the same reasons it gave in finding that the Commission failed adequately to explain its definition of voter registration activity, the court held that the Commission failed to provide a reasoned explanation in

promulgating its definition of GOTV activity.

Decision. The court granted in part and denied in part the plaintiffs’ motion for summary judgment in this case and remanded these regulations to the Commission for further actions consistent with the court’s opinion.

Notices of Appeal

On October 16, 2007, the Commission filed a Notice of Appeal seeking appellate review of all of the adverse rulings issued by the district court. On October 23, Representative Shays cross-appealed the district court’s judgment insofar as it denied the plaintiff’s “claims or requested relief.”

U.S. District Court for the District of Columbia, 06-1247 (CKK).

—Diana Veiga

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, Missouri, on November 6-7, 2007, at the Hilton St. Louis at the Ballpark Hotel. 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 web site 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). For questions about the conference program, or to receive e-mail notification of upcoming conferences 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.

—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
- 2007-12: Disaffiliation of SSFs After Corporate Spin-Off, 11:1
- 2007-13: Union and Association SSFs not Affiliated, 11:4
- 2007-14: Trade Associations' Joint Sponsorship of Telephone Conferences to Restricted Classes, 11:7

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 II, 10:12
- Shays III, 11:8
- 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

(continued on page 12)

Index*(continued from page 11)*

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

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; Final Rules, 11:1

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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