

Law & Policy Update

Election Law • Lobbying and Government Ethics • Tax-Exempt Organizations

IRS Issues Compliance Guides for Tax-Exempt Organizations

New Guide for Non-501(c)(3) Organizations Available

The IRS issued a new compliance guide for tax-exempt organizations other than 501(c)(3) public charities, and also issued an updated compliance guide pertaining to 501(c)(3) public charities. Organizations such as 501(c)(4) social welfare organizations and 501(c)(6) trade associations will find the "Compliance Guide for Tax-Exempt Organizations other than 501(c)(3) Public Charities and Private Foundations" quite useful in identifying issues pertinent to maintaining their tax exempt status and staying compliant with federal tax law. Of course, in addition to federal law, there are state specific nonprofit laws as well, and organizations should consult their legal counsel regarding these issues.

In the "Compliance Guide for Tax-Exempt Organizations" for non-501(c)(3) organizations, the Service addresses the types of activities that could jeopardize an organization's tax-exempt status. For instance, a 501(c)(4) or 501(c)(6) organization can not engage in private inurement. A prime example of private inurement would be to pay an officer or director of the organization an unreasonable amount of compensation. The guide also addresses political activity and legislative activity by non-501(c)(3) organizations, explaining that such organizations may engage in political activity so long as it is not an organization's primary activity, and that an unlimited amount of legislative activity related to an organization's mission is permissible.

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Supreme Court Poised to Rule on Corporate and Non-Profit Independent Expenditures

Citizens United Decision Will Have a Significant Impact on Political Activity

In a case that started as a challenge to the "electioneering communications" provisions of BCRA, the Supreme Court now appears poised to issue a ruling that could have profound implications for corporate and non-profit spending on political activity at the federal, state and local levels.

Citizens United, a conservative activist group, produced a documentary called "Hillary the Movie." This documentary was a full length movie, and Citizens United intended to make it available through Video-On-Demand and at select movie theaters, and wanted to air 10 and 30 second commercials promoting the movie. While the movie itself did not contain any "magic words" of express advocacy, there were a number of negative statements about Hillary Clinton in the movie.

A 3-judge panel of the federal district court in Washington, DC denied a preliminary injunction in 2008, and held unanimously that under the Supreme Court's opinion in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (WRTL II), that the movie was the "functional equivalent of express advocacy." The denial of preliminary injunction was appealed to the Supreme Court, which dismissed the appeal. Subsequently, summary judgment was entered in favor of the FEC.

In the first round at the Supreme Court, two questions about electioneering communications were at issue. The first question was about whether the "electioneering communications" rules could constitutionally limit corporate funded broadcasts offered through video on demand, and the second was whether the "electioneering communications" disclosure requirements are constitutional for communications that might be something other than an appeal to vote for or against a candidate. The argument was expected to focus on these two narrow issues, but during the course of

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Contact Information

Virginia Office:

Please Note New Address

45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808 (p)
(540) 341-8809 (f)

Jill Holtzman Vogel
Alex Vogel
Jason Torchinsky
Cathleen West
Michael Bayes
Karen Blackistone

New York Office:

1177 Avenue of the Americas
19th Floor
New York, NY 10036
(212) 938-6403 (p)
(212) 938-3878 (f)

Larry Levy

Washington, DC Office:

1341 G Street, NW
Suite 1100
Washington, DC 20005
(202) 737-8808 (p)

Jill Holtzman Vogel
Alex Vogel
Tom Josefiak
Jason Torchinsky
Michael Bayes

www.holtzmanlaw.net

D.C. Circuit Shakes Up Campaign Finance World

Will Obama Administration Appeal To Supreme Court?

In September, a three-judge panel of the District of Columbia Circuit Court of Appeals ruling in *EMILY's List v. FEC* (opinion here - http://www.holtzmanlaw.net/upload_files/EMILY's%20List%20v.%20FEC.pdf) struck down three FEC regulations that arose in the aftermath of the FEC's deliberations about regulating so-called 527 organizations in 2004-2005. In the process, the court declared that most FEC restrictions on the political activities of independent, nonprofit organizations are unconstitutional. The FEC did not appeal the decision to the full D.C. Circuit, which could have heard the case *en banc* with all of its judges sitting, after splitting 3-3 along party lines on the question of appealing (Commissioner statements here - [http://www.holtzmanlaw.net/upload_files/EmilysList20091022%20\(Republican%20Statement\).pdf](http://www.holtzmanlaw.net/upload_files/EmilysList20091022%20(Republican%20Statement).pdf), [http://www.holtzmanlaw.net/upload_files/EmilysList2009-10-22%20\(Baurely,%20Weintraub\).pdf](http://www.holtzmanlaw.net/upload_files/EmilysList2009-10-22%20(Baurely,%20Weintraub).pdf), and [http://www.holtzmanlaw.net/upload_files/emilyslist10092009%20\(Walther\).pdf](http://www.holtzmanlaw.net/upload_files/emilyslist10092009%20(Walther).pdf)). The Solicitor General now has until December 17 to seek

review of the case by the Supreme Court.

In 2005, EMILY's List – a 527 organization that supports pro-choice, Democratic women candidates – challenged three of the FEC's "political committee" regulations. Specifically, 11 C.F.R. § 106.6(c) required nonconnected committees (i.e., independent PACs) to use at least 50% federal funds (i.e., funds raised in compliance with federal amount limitations and source restrictions) to pay costs associated with administration and overhead, voter drives, and public communications referring to political parties. 11 C.F.R. § 106.6(f) required non-connected committees to use 100% federal funds for any public communications or voter drives that referred to a federal candidate. Finally, 11 C.F.R. § 100.57 governed how nonconnected committees could raise funds, specifying that any solicitation indicating that donated funds would be used to support or oppose a federal candidate must be treated as federal funds

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FEC Proposes New Coordination Rules

New Regulations Will Broaden the Standards for "Coordinated Communications"

On October 21, the Federal Election Commission (FEC) issued a Notice of Proposed Rulemaking (NPRM) to revise its coordination rules. The current rules were invalidated by the D.C. Circuit Court of Appeals in June 2008, in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (also known as the "Shays III Appeal") (http://www.fec.gov/law/litigation/shays_3_appeals_opinion.pdf), but have remained in effect until the FEC implements new regulations. Interested parties have until January 19, 2010 to submit written comments on the FEC's various proposals. Public hearings will also be held, although dates have not yet been announced.

The Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold) instructed the FEC to rewrite its coordination regulations (to make them broader), but gave virtually no guidance on how to do this. Primarily, Congress told the FEC that it must "address" certain subjects. The FEC's attempts to do so have been the subject of ongoing litigation since late-2003.

In response to BCRA's mandate, the FEC created a complex system for regulating coordinated communications. One standard applies all year round: if a person other than a candidate or political party pays for a public communication which either

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FEC Approves New Candidate Travel Rule

New Rule Will Implement Provisions of the HLOGA

On November 19, the Federal Election Commission (FEC) approved a new rule governing candidate travel aboard aircraft. The new rule implements provisions of the Honest Leadership and Open Government Act of 2007 (HLOGA) which generally banned candidates for the House of Representatives from traveling aboard non-commercial, privately-owned aircraft, and required Presidential, Vice Presidential, and Senate candidates to pay the full charter rate when traveling on non-commercial, privately-owned aircraft.

In 2003, the FEC adopted a travel rule that allowed all candidates to travel on non-commercial airplanes so long as they reimbursed the provider at either the first-class ticket rate for an equivalent flight, or the applicable charter rate, depending on the circumstances. This rule also applied to representatives of political party committees, Leadership PACs, and other political committees.

The new rule revises the 2003 reimbursement struc-

ture for candidates and their campaign workers, but leaves in place the old reimbursement structure for persons traveling on behalf of political parties, Leadership PACs, and other political committees. (The FEC adopted a travel rule in 2007 just before several Commissioners' terms expired, but that rule never went into effect because no accompanying Explanation and Justification was written. New Commissioners were appointed in 2008. These Commissioners split 3-3 on the 2007 rule on November 19, 2009, and then adopted the new rule on a 4-2 vote.)

Highlights of the New Rule

Candidates for the House of Representatives, or anyone traveling on the candidate's behalf, or for purposes related to the candidate's Leadership PAC, may only fly on commercial aircraft or aircraft provided by federal, state, or local government. The candidate must pay fair market value for his travel ticket. Limited exceptions and reimbursement rules exist for

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FEC Proposes New "FEA" Rules

Revised Definitions Will Impact Use of "Hard" Dollars

The Federal Election Commission (FEC) published a Notice of Proposed Rulemaking (http://www.fec.gov/pdf/nprm/fea_definition/2009/notice_2009-22.pdf) on October 20, 2009, containing proposed new definitions of "voter registration activity" and "get-out-the-vote activity." These definitions are important to state and local political party committees because they directly impact on what sorts of activities must be paid for with federal (or "hard") dollars.

Both "voter registration activity" and "get-out-the-vote activity" are types of "Federal election activity," meaning they must be paid for with either Federal funds, or a mixture of Federal and Levin funds. By contrast, activities that are not considered "Federal election activity" may be paid for with nonfederal funds (or state-raised "soft money"), or a mixture of federal and nonfederal funds.

A 2008 D.C. Circuit Court of Appeals decision, *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (also known as the "Shays III Appeal") (http://www.fec.gov/law/litigation/shays_3_appeals_opinion.pdf) determined

that the FEC's regulatory definitions of "voter registration activity" and "get-out-the-vote activity" were too narrow. The FEC's definitions of both terms included requirements that individualized assistance be given to voters. More general efforts to register voters and get-out-the-vote were excluded. The court found that the exclusion of more generalized efforts "allow[ed] the use of soft money for many efforts that influence federal elections."

The FEC's new proposal would define "voter registration activity" as "encouraging or assisting potential voters in registering to vote," while "get-out-the-vote activity" would be defined as "encouraging or assisting potential voters to vote." The "individualized assistance" requirements for both activities would be eliminated. The FEC's proposal also includes a number of examples to help party committees understand and comply with the proposed new rules.

Written comments may be submitted to the FEC until November 20. A public hearing will be held on December 17.

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and is designed to supplement our newsletter.**

Growing Pains for the Office of Congressional Ethics

House Ethics Committee Report Criticizes OCE's Methods and Conclusions

On October 29, the House of Representatives Committee on Standards of Official Conduct, which is better known as the House Ethics Committee, issued a final report in a matter involving an alleged ethical violation by Representative Sam Graves. The Office of Congressional Ethics ("OCE") – which was created in 2008 (largely at the behest of Speaker Pelosi) to screen potential ethics violations and make recommendations to the House Ethics Committee – recommended that the Ethics Committee make further review of the Sam Graves matter. The Ethics Committee responded with a scathing public report criticizing OCE's methods and conclusions.

The next day, the *Washington Post* reported (<http://www.washingtonpost.com/wp-dyn/content/article/2009/10/29/AR2009102904597.html?hpid=topnews&sid=ST2009102904609>) that thirty Representatives and several aides were under OCE review after a confidential committee report leaked out through what has been called a "security breach." By design, OCE's initial reviews are supposed to be highly confidential. Following the leak, the names of those under review trickled out over the next few days, triggering angry statements by Members of Congress and calls for committee hearings.

While the leaked document received far more media coverage, the Graves report is the more substantively significant matter. The case involved the selection of a friend of Representative Graves to testify as a

witness at a Small Business Committee hearing on the renewable fuels industry. The witness "held investments in the same renewable fuel cooperatives as Representative Graves' wife." Thus, a question of a potential conflict of interest was raised.

In reviewing the matter, OCE analyzed the conflict of interest issue under House Rule 3, which states that "Every member . . . shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question." OCE also noted that the House Rule 23 requires that "A member . . . shall adhere to the spirit and the letter of the Rules of the House." The Ethics Committee, however, determined that House Rule 3 was inapplicable because it "applies in one situation only – when a Member is voting on the House floor." Furthermore, "because House Rule 3 was inapplicable to Representative Graves' conduct, the 'spirit' of House Rule 3 was equally inapplicable."

In reaching its conclusions regarding conflicts of interest under House Rule 3, OCE referred to certain guidance contained in the *House Ethics Manual*, and noted that "there is substantial reason to believe that Representative Graves' invitation to [the witness] created an appearance of a conflict of interest."

The Ethics Committee's response to OCE's reliance on the *House Ethics Manual* has raised serious

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New York Steps Up Enforcement of Ethics Laws

Service of Meals and Beverages to NYS Officials at Events Could Come with a Huge Penalty

This September the New York State Commission on Public Integrity charged three lobbying entities with giving illegal gifts for which they can be fined up to \$25,000 for each violation. Associations representing fire fighters, police and lawyers in New York invited public officials and employees to receptions at which food and refreshments in excess of "nominal value" were provided.

Public Officers Law §73, as modified by the Public Employee Ethics Reform Act of 2007, defines "nominal value" to be no more than the cost of an ordinary cup of coffee. Specifically, the law prohibits the service of meals or alcoholic beverages because they are greater than nominal value. Limited exceptions exist for programs such as widely attended events when a state agency finds that attendance will further the programs and operations of the agency as long as the sponsoring entity is not a prohibited source.

Former FEC Chairman Brad Smith referred to these investigations as the Commission's "cheese and cracker crusade" in a recent *New York Post* column (http://www.nypost.com/p/news/opinion/opedcolumnists/chasing_ethics_out_of_new_york_5wBusVIBois51tdnW1IX4L). Despite this description, with civil penalties in New York law of up to \$25,000 and potential for criminal investigations, these moves by the Commission indicate that what could be viewed as ordinary hospitality can turn into a government investigation and enforcement actions.

Before inviting New York State officers or employees to an event, especially if the sponsor is a lobbyist or lobbying entity, you should consult an attorney knowledgeable in these rules or seek an advisory opinion from the New York State Commission on Public Integrity.

States Take Steps Toward Further Regulation of Political Activity on the Internet

California and Florida Consider Enhancing Current Regulatory Practices

As more and more political activity shifts to the Internet, states are asking whether their regulatory regimes are behind the times.

Earlier this month, California's Fair Political Practices Commission, which administers California's campaign finance laws, announced the creation of a subcommittee to study whether additional regulation of political activity on the Internet is needed. Specifically, the subcommittee will study "the current state of the disclosure of the sources and financing of Internet political activity; whether voters are subject to false or misleading information regarding the source and funding of Internet political activities; the need, if any, to enhance and protect political activity on the Internet; and

the need, if any, for legislative or regulatory actions."

Public hearings are planned for 2010, and the subcommittee will accept public comments through its website. In 2003, the Bipartisan California Commission on Internet Political Activity issued a report concluding that further regulation of the Internet was unwise and unnecessary. The Fair Political Practices Commission's subcommittee is tasked with "updating" the 2003 report.

An ongoing dispute in Florida over placing disclaimers on Internet ads illustrates the issues faced by elections regulators. Scott Wagman, a mayoral candidate in Florida, purchased advertising on Google in which

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Disclosure of Referendum Petition Signers at Issue Before the Supreme Court

Supporters of Referendum Fear Harassment

On May 18, 2009, the governor of Washington State signed into law SB 5688, a bill that expanded all of the rights and responsibilities of marriage to domestic partnerships, except the term "marriage." An organization known as Protect Marriage Washington (PMW) sought to repeal SB 5688 by referendum and gathered the signatures necessary to place the question on the ballot.

Under Washington's Public Record Act, referendum petitions are public records that may be requested by the public and that must be released by the Secretary of State. Opponents of the referendum planned to request the petitions and post the names and addresses of those who signed the petition on the internet.

In November 2008, California voted on Proposition 8, to amend the state constitution to define marriage as between a man and woman. Opponents of Prop 8 organized boycotts and allegedly engaged in harassment and intimidation of donors to Prop 8. Fearing a similar consequence, supporters of the referendum opposed the release of the petitions with the names and addresses of the signers.

The Supreme Court stayed the Ninth Circuit's decision to order the release of the petitions without ruling on the merits of the case. The Supreme Court is currently deciding whether to grant cert in this case.

Military and Overseas Voting Empowerment Act

New Laws Will Take Effect for 2010 Elections

As a part of the 2010 Defense Authorization Act, Congress passed new protections that would ease existing barriers to voting by military members serving overseas. These changes, originally introduced as part of the Military and Overseas Voting Empowerment Act, will take effect for the 2010 elections.

The new law requires state and local jurisdictions to send ballots to military and overseas voters no later than 45 days prior to a regularly scheduled federal election and, in most cases, will allow ballots mailed on or before Election Day to be counted so long as they are received within 10 days of an election. In addition, ballot and voter registration materials submitted by overseas military voters will be exempt from

certain technical requirements, such as notarization requirements or the size, weight or color of paper that a ballot is printed on.

States are now required to make ballots, voter registration materials and information about candidates available to military and overseas voters over the internet or by fax.

This legislation also places an emphasis on education. One new education initiative will require that military members preparing for deployment be given information and assistance on voter registration and requesting an absentee ballot.

Federal Election Commission – 2010 Reporting Dates

2009 Year-End Report

Note: All federal committees file this report.

<u>Report</u>	<u>Close of Books</u>	<u>Filing Date</u> ¹
Year-End	December 31, 2009	January 31, 2010*

2010 Monthly Reports

Note: All national party committees and any state, district or local party committee that engages in “federal election activity” (FEA) must file monthly reports. PACs may choose to file monthly or quarterly reports.

<u>Report</u>	<u>Period Covered</u>	<u>Filing Date</u> ¹
February	January 1-31, 2010	February 20, 2010*
March	February 1-28, 2010	March 20, 2010*
April	March 1-31, 2010	April 20, 2010
May	April 1-30, 2010	May 20, 2010
June	May 1-31, 2010	June 20, 2010
July	June 1-30, 2010	July 20, 2010*
August	July 1-31, 2010	August 20, 2010
September	August 1-31, 2010	September 20, 2010
October	September 1-30, 2010	October 20, 2010
November	October 1-31, 2010	November 20, 2010*
December	November 1-30, 2010	December 20, 2010
Year-End	December 1-31, 2010	January 31, 2011

2010 Quarterly Reports

Note: All Congressional campaign committees must file on a quarterly schedule. Presidential committees may choose to file quarterly, rather than monthly, in non-election years. PACs may choose to file quarterly or monthly reports.

<u>Report</u>	<u>Period Covered</u>	<u>Filing Date</u> ¹
April Quarterly	January 1 - March 31, 2010	April 15, 2010
July Quarterly	April 1 - June 30, 2010	July 15, 2010
October Quarterly	July 1 - September 30, 2010	October 15, 2010
Year-End	October 1 - December 31, 2010	January 31, 2011

2010 Pre- and Post-General Election Reports

Note: All monthly-filing PACs, national party committees, and any state, district or local party committee that engages in “federal election activity” (FEA) must file pre- and post-general election reports. A quarterly-filing PAC/ Party is required to file a pre-general election report only if the committee makes contributions or expenditures in connection with an election during the reporting period. Post-general election reports are required for all PACs/ Parties.

<u>Report</u>	<u>Period Covered</u>	<u>Filing Date</u> ¹
Pre-General	October 1 – 13, 2010	October 21, 2010
Post-General	October 14 – November 22, 2010	December 2, 2010

2010 Pre-Primary Election Reports

Candidate committees, political parties and PACs are required to file pre-primary election reports. The filing dates for these reports are specific to the primary, convention and runoff election dates in each state. The [FEC will provide a detailed listing](#) when these dates are determined. Note: Monthly filers are not required to file pre-primary election reports.

¹ Reports sent by registered or certified mail, by Express or Priority Mail with delivery confirmation or by overnight delivery service with an online tracking system must be postmarked, or deposited with the mailing service, by the filing deadline. Reports sent by other means—including first class mail—must be received 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).

* Note that this filing date falls on a weekend. Filing dates are not extended for weekends or federal holidays. 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 the last business day before the deadline.

New IRS Compliance Guides

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The compliance guide for non-501(c)(3) organizations also includes a useful section on recordkeeping, reporting and disclosure. The guide does not include a section devoted to corporate governance considerations, although the guide for 501(c)(3) public charities does include a section addressing these issues.

In the updated "Compliance Guide for 501(c)(3) Public Charities", the Service incorporated changes related to the redesigned form 990, information about the elimination of the advanced ruling period and other pertinent information for charities. The guide also highlights the types of activities which could jeopardize an organization's tax-exempt status, and includes sections addressing recordkeeping, reporting and disclosure by public charities. There is a section dedicated to corporate governance considerations which is useful, particularly in light of the redesigned form 990 which now includes an entire section of questions shedding light on an organization's corporate governance. The guide discusses governance procedures and practices that an organization should consider adopting such as policies related to executive compensation, conflicts of interest, fundraising and document retention. Such information should prove useful to charities and other organizations for the foreseeable future.

Supreme Court Poised to Rule on *Citizens United*

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the oral argument the lawyer for the government – Deputy Solicitor General Malcolm Stewart – argued that the government has the constitutional authority to regulate or even ban books depending on their content and funding source. This argument did not appear to sit well with several members of the Supreme Court.

In June, instead of issuing an opinion, the Supreme Court ordered additional briefing and an additional round of oral arguments. Specifically, the Court ordered the parties to brief this: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. FEC* which addresses the facial validity of Section 203 of BCRA." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), held that the government could impose limits

or even prohibitions on corporate independent expenditures. (*McConnell* upheld BCRA's electioneering communication provision.) *Citizens United* had become a case about some of the basic underpinnings of modern campaign finance law.

The September re-argument was the first oral argument for Justice Sotomayor and for newly confirmed Solicitor General Elana Kagan. Not surprisingly, *Citizens United* (represented by Supreme Court veteran Ted Olson) argued that *Austin* should be overruled, saying "When the government of the United States of America claims the authority to ban books because of their political speech something has gone terribly wrong and it is as sure a sign as any that a return to first principles is in order." The government, also not surprisingly, argued that there is no basis to overrule *Austin* and that this case was an inappropriate one to reconsider *Austin*.

At oral argument, Justice Ginsberg offered the government an opportunity to change its position on the government's authority to ban books. The Solicitor General's response was two-fold. First, she argued that this would make for a good "as applied" challenge to the statute limiting corporate expenditures. Second, she argued that "the FEC has never applied this statute to a book." (note that some believe a 2004 investigation involving a book authored by George Soros makes this representation by the Solicitor General not wholly accurate - <http://campaignfreedom.org/blog/detail/will-sg-correct-the-governments-book-banning-mistake>). The Chief Justice, during an exchange with the Solicitor General on her second point, retorted, "We don't put our First Amendment rights in the hands of FEC bureaucrats."

While it is impossible to predict for certain where the Court will come out in advance of the actual ruling, most observers expect a decision that allows more corporate political activity. Many also expect that the Court will overturn *Austin* – and thereby permitting corporate independent expenditures. This anticipated ruling will impact all sorts of entities – and the government's ability to regulate or restrict independent expenditures. Non-profit groups including advocacy groups, 527s, trade associations and labor unions, and for-profit companies will need to carefully examine this ruling – no matter how it comes out – to determine how it will impact their plans as the 2010 elections approach.

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EMILY's List

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(meaning all such contributions are limited to \$5,000 per year).

The court deemed these regulations to be limits on “how much non-profits such as EMILY's List could raise and spend,” and found all three regulations unconstitutional, because “[n]on-profits – like individual citizens – *are entitled to spend and raise unlimited money*” to pay for “expenditures such as advertisements, get-out-the-vote efforts, and voter registration drives” (emphasis added). The court also found that the regulations exceeded the FEC's statutory authority, noting that “[w]hen enacting BCRA in 2002, Congress did not authorize the FEC to restrict donations to or spending by non-profits – even though Congress was aware that BCRA's restrictions on political parties meant that independent non-profit groups would become more influential in the electoral process.”

There has been considerable debate about what exactly the *EMILY's List* decision means. While two judges agreed that groups like EMILY's List are constitutionally free to raise and spend funds independent of candidates and parties, the third judge argued that the regulations should only have been invalidated on statutory grounds, stating that it was unnecessary to consider broader constitutional questions. It is unclear at this time whether *EMILY's List* simply invalidated three FEC regulations, or whether it announced a new constitutional principle that substantially frees independent, non-profit organizations from FEC regulation.

Fortunately, we may not have to wait long for this question to be answered. A separate case, brought by SpeechNow.org, will be heard by the full D.C. Circuit Court of Appeals on January 27, 2010. The *SpeechNow.org* case directly raises the constitutional issues discussed in *EMILY's List*, meaning that *SpeechNow.org* will likely clarify the meaning of *EMILY's List*. At the end of the day, however, the Supreme Court will probably have the last word in either or both cases.

FEC Proposes New Coordination Rules

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(1) constitutes an electioneering communication, (2) contains express advocacy, or (3) republishes campaign materials, *after* engaging in certain collaborative activity with the candidate or party committee, the public communication is treated as an in-kind contribution *to* the candidate or political party *from* the person who paid for the communication.

A second, stricter standard applies during periods close to elections. If the public communication in question merely refers to a House or Senate candidate and is distributed to that candidate's voters within 90 days of an election, and certain collaborative activity occurred, then the public communication satisfies the coordination rules and is treated as an in-kind contribution. With respect to a Presidential or Vice Presidential candidate, the period begins 120 days before a primary and continues through the day of the general election. (Similar rules apply to communications containing references to political parties.)

The D.C. Circuit held that these regulations are not strict enough because they “regulate only ads containing express advocacy outside the 90/120-day windows,” and this “lax standard,” which is “functionally meaningless,” “allows candidates to evade – almost completely – BCRA's restrictions on the use of soft money.” In other words, the court feared that “candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words [of express advocacy].” (The court neglected to note that express advocacy is broader than the so-called “magic words” test, or that electioneering communications and republished campaign materials may also be deemed coordinated communications outside the 90/120-day windows.)

Thus, the court tasked the FEC with writing a new regulation that more extensively captures coordinated, election-related communications outside the 90/120-day windows.

The FEC's New Proposals

The FEC's rulemaking retains the 90/120-day window standards. To comply with the court's ruling, the Commissioners put forth several proposals for broadening the range of communications that can be treated as “coordinated communications” *outside* of the 90/120-day windows.

Under one proposal, the “express advocacy” standard would be replaced with a “promote, attack, support, or oppose” (PASO) standard. Outside the 90/120-day windows, “coordinated communications” would not be limited to express advocacy, but would extend further to include communications that also “promote, attack, support, or oppose” a federal candidate or political party. The FEC's rulemaking includes two different proposed definitions of “promote, attack, support, or oppose.”

Under another proposal, the “express advocacy” standard would be supplemented with the test formulated in the recent Supreme Court decision *Wisconsin Right to Life v. FEC*, which authorized the

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FEC Proposes New Coordination Rules

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government to regulate communications that are the “functional equivalent of express advocacy.” Under this proposal, both “express advocacy” and communications susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate could be treated as “coordinated” outside of the 90/120-day windows.

A third proposal would not actually change the existing coordination regulation, but would make clear to the D.C. Circuit Court of Appeals that “express advocacy” does not include only “magic words” of electoral advocacy, but also words that can only be interpreted by a reasonable person as containing advocacy of the election or defeat of a clearly identified candidate, and which contain an unmistakable and unambiguous electoral portion. In terms of practical effect, the “functional equivalent” and “reasonable person” tests would likely capture the same scope of activity.

A fourth proposal would treat as “coordinated” any public communication that is distributed pursuant to an “explicit agreement” (either formal or informal) between a candidate or party and an outside organization or person.

Whichever proposal the FEC adopts will have an impact on the relationships between federal candidates, political parties, outside vendors, nonprofit organizations, and so-called “527” organizations. While many believe the threat of coordination is more imagined than real, and actual FEC findings of coordination are few and far between, any new regulations will require candidates and political parties to re-evaluate their contacts with outside entities to ensure compliance with the FEC’s rules

FEC Approves New Candidate Travel Rule

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travel on aircraft owned or leased by the candidate or the candidate’s immediate family.

House candidates may travel on non-commercial aircraft if they are traveling on behalf of a Presidential or Senate candidate, political party committee, or other political committee. In this situation, the Presidential or Senate candidate, political party committee, or other political committee, is responsible for paying for the House candidate’s travel, and may pay (reimburse) under the 2003 reimbursement structure.

Candidates for President, Vice President, or the Senate may travel on commercial aircraft or aircraft

provided by the federal, state, or local government. These candidates may also travel on non-commercial, privately-owned aircraft when traveling for purposes of their own campaigns. In this situation, they must pay (reimburse) the travel provider for their *pro rata* share of an equivalent flight’s charter rate. The *pro rata* share is determined by the number of candidates *represented* on the flight, either by the candidate himself or a campaign worker. Thus, if Candidate A travels on a private jet with the campaign manager of Candidate B, the two campaigns must each pay one-half of the cost of an equivalent chartered flight.

Candidates for President, Vice President, or Senate may fly on non-commercial aircraft when traveling on behalf of a Leadership PAC, political party committee, or other political committee. In this situation, the Leadership PAC, political party committee, or other political committee is responsible for paying for the candidate’s travel, and may pay (reimburse) under the 2003 reimbursement structure.

Political party officials and representatives, and other political committee representatives, may continue to travel on non-commercial aircraft subject to the 2003 reimbursement rules.

The new rule prescribes detailed record keeping requirements for candidate travel.

Given the complexity of these new rules, any federal candidate contemplating traveling aboard any private aircraft is advised to consult with counsel beforehand.

Office of Congressional Ethics Criticized

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questions about the value of the guidance in the *Manual*.

According to the Ethics Committee, “The *House Ethics Manual* provides guidance to assist Members, officers, and staff in complying with the Code of Official Conduct or any law, rule, regulation, or other standard applicable to their conduct in the performance of their duties or the discharge of their responsibilities. The *House Ethics Manual* does not create independent duties outside of the rules and other standards discussed therein.” To the extent that the *House Ethics Manual* was once viewed as akin to federal agency regulations or an authoritative restatement of the ethics rules, that view may no longer be warranted. The Ethics Committee concluded that “no relevant House Rule or other standard of conduct prohibits creation of an *appearance* of a conflict of interest when selecting witnesses for a committee hearing.” The Ethics Committee was also highly

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Office of Congressional Ethics Criticized

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critical of OCE's investigative process.

The combination of the *Washington Post* story, followed almost immediately by the release of the Graves report, was a black eye for the Office of Congressional Ethics. OCE's relevance going forward likely will be determined by whether it can gain, or regain, Congressional support.

Regulation of Political Activity on the Internet

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an ad for his campaign web site would appear whenever someone searched for one of his opponents. The small ads allowed for only 70 characters, which prevented Wagman from including a "paid for by" disclaimer. Clicking on the ad routed the user to Wagman's campaign website. One of Wagman's opponents filed a complaint with the Florida Elections Commission, and Wagman indicated that he would fight the case. The matter is pending with the Florida Elections Commission. Meanwhile, a Florida state legislator announced he would introduce a bill to clarify the disclaimer law.

If Florida follows the Federal Elections Commission's (FEC) lead, it may determine that disclaimers are not required on electronic advertisements in which limited characters are available. The FEC determined in 2002 that federal candidates did not need to include a "paid for by" disclaimer in text messages in a case involving text messages that were limited to 160 characters. More recently, though, the FEC adopted a regulation requiring disclaimers on all federal committee paid Internet advertisements, such as Mr. Wagman's Google ads. Questions have arisen from time to time whether a disclaimer exemption exists for very small ads, but the FEC has not issued any formal opinion on the subject.