The New Campaign Finance Sourcebook

Chapter 2

The Current State of Campaign Finance Law

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The federal election laws were written broadly by Congress in 1971 and 1974 to cover all money spent "in connection with" or "for the purpose of influencing" federal elections. The intent of Congress was to regulate all funds which might be considered federal election-related. However, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (see chapter 4), and subsequent cases, has defined these statutory phrases to have a much more limited reach. The Court held that the activity covered by the federal election laws must be narrowly and clearly defined so as not to "chill" speech protected by the First Amendment, and to provide notice of regulation to speakers. This chapter describes the nature and extent of federal regulation of campaign finance, including provisions of the Bipartisan Campaign Reform Act of 2002 (the Reform Act). It also describes the many entities engaged in political speech and spending, from party committees to labor unions to Section 501(c)(3) and (c)(4) tax-exempt organizations.

An important *caveat*: as discussed more extensively at the end of this Chapter, numerous provisions of the Reform Act – including its core "soft money" restraints – have been challenged on constitutional grounds in consolidated litigation that has recently been heard by the U.S. Supreme Court; *see McConnell v. FEC*, 251 F.Supp.2d 176 (D.D.C. 2003). Pending a Supreme

Court decision in this case, the following summary of federal campaign finance law incorporates the new prohibitions and reporting requirements imposed by the Reform Act in their entirety.[1]

Direct Contributions to Federal Candidates and

National Committees of Political Parties

The Federal Election Campaign Act (FECA) defines "contribution" to include "anything of value" given to a federal candidate or committee. This encompasses not only direct financial contributions, loans, loan guarantees, and the like, but also in-kind contributions of office space, equipment, fundraising expenses, salaries paid to persons who assist a candidate, and the like; 2 U.S.C. sec. 431(8)(A). The act places limits on the amount individuals and other entities may contribute to candidates and federal committees, whether directly or in kind.

Individuals

As amended by the Reform Act, the FECA permits individuals to contribute up to $2,000 to a candidate per election; 2 U.S.C. sec. 441a(a)(1)(A). The term "election" under the act includes "a general, special, primary, or runoff election"; 2 U.S.C. sec. 431(1)(A). An individual can therefore contribute up to $2,000 to a candidate's primary and another $2,000 to the general election campaign. Each individual has his or her own limit, so that a couple could give $8,000 in total per election cycle to a federal candidate. Individuals are also limited in the amounts that they can contribute to other political entities. Individuals are limited to $25,000 per year in contributions to a national party committee, such as the Republican National Committee (RNC) or the Democratic National Committee (DNC); 2 U.S.C. sec. 441a(a)(1)(B). While individuals could formerly make unlimited contributions to a non-federal account of a national party committee, the Reform Act bans such “soft money” contributions; 2 U.S.C. sec. 441i(a) (the

constitutionality of the national party soft money ban and other provisions of the Reform Act are being challenged in *McConnell v. FEC*. Additionally, individual contributions are limited to $5,000 per year to any other political committee, including a political action committee (2 U.S.C. sec. 441a(a)(1)(C)), except that an individual may contribute $10,000 per year to the federal account of a state party committee; 2 U.S.C. sec. 441a(a)(1)(D).

In addition to these specific limits for contributions to various candidates and committees, individuals have an *aggregate biannual federal contribution limit* of $95,000. An individual is able to contribute no more than $37,500 in total to federal candidates over a two-year period beginning on January 1 of an odd-numbered year (*e.g.*, January 1, 2003 through December 31, 2004); 2 U.S.C. sec. 441a(a)(3)(A). During that same time period, he or she may also contribute no more than $57,500 in total to the federal accounts of all other political committees, with contributions to entities other than national party committees not to exceed $37,500; 2 U.S.C. sec. 441a(a)(3)(B). Both the limits on campaign contributions by individuals to federal candidates and national party committees and the aggregate biannual federal contribution limit for individuals will increase in odd-numbered years (starting in 2005) by a percentage equaling percentage growth in the Consumer Price Index between those years and calendar year 2001; 2 U.S.C. secs. 441a(c)(1)(B)&(C), (2)(B)(ii).

The Reform Act prohibited minors from making contributions to candidates or contributions or donations to political party committees; 2 U.S.C. sec. 441k (this prohibition is being challenged on constitutional grounds in *McConnell v. FEC*).

The FECA and the corresponding FEC regulations contain a host of exceptions from the definition of "contribution" applicable to individuals. Among the principal ones are the donation of personal time to a candidate (unless it is time paid for by someone else, such as an employer), home hospitality up to $1,000 per candidate per election, and costs of personal travel of up to $1,000 per candidate per election and up to $2,000 per year for party committees; 2 U.S.C. sec. 431(8)(B), 11 C.F.R. secs. 100.71-100.92.

Political Committees

Whether an organization is a "political committee" required to register with the FEC and subject to the federal limitations on amounts and sources of contributions is a crucial question for any entity engaged in political activity. The act defines "political committee" as:

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under [the Federal Election Campaign Act]; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definitions of contribution or expenditure as defined [by the act] aggregating in excess of $5,000 during a

calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year; 2 U.S.C. sec. 431(4).

Whether or not an organization is a political committee (and thus subject to federal limitations on amounts and sources of contributions) has been the subject of much litigation. The debate has centered on what types of an organization's receipts or spending constitute "contributions" or "expenditures," whether an organization that makes $1,000 in "contributions" or "expenditures" must also be primarily engaged in political activity to be considered a political committee, and if so, how to assess an organization's primary purpose.[2] The current legal standards are unclear, as a result of conflicting court decisions and a lack of consensus at the FEC. This is a crucial issue for the coverage of the election laws and will likely continue to be hard fought, because groups that can successfully avoid qualifying as a federal political committee may be able to spend unlimited sums, raised without restriction and or disclosure to the FEC, for activities designed to influence federal elections (see discussion below of "527 Organizations").

Different forms of federal political committees face differing contribution limits. Political action committees are political committees that may qualify for *multicandidate committee* status. To so qualify, a PAC must demonstrate that it has been registered with the FEC for six months, receive contributions from at least fifty-one persons, and contribute to at least five federal candidates; 11 C.F.R. sec. 100.5(e)(3). A multicandidate committee may contribute up to $5,000 to a candidate per election, and up to $5,000 to other separate PACs each year. Additionally, a multicandidate

committee can contribute up to $15,000 per year to a national party committee and has a combined limit of $5,000 per year to local and state party committees.

A PAC that does not qualify for multicandidate committee status is limited to contributions of $2,000 per candidate per election but may still contribute up to $5,000 to another PAC per year. Such PACs may contribute up to $25,000 per year to national party committees (more than multicandidate committees can) and $10,000 per year to state party committees.

There are two types of noncandidate political committees: nonconnected (or independent) committees; and corporate or labor PACs, formally called separate segregated funds. Corporations and labor unions may pay all the administrative and solicitation costs of their committees, while nonconnected PACs must pay such costs out of the funds they raise. Corporate and labor PACs, however, have strict rules on who they may solicit, while nonconnected committees may solicit the general public.

Leadership PACs and Joint Fundraising Committees

Beginning in the 1980s, a number of political committees were established that had an "association" with a member of the congressional leadership. These "leadership PACs" usually use the name of a member of Congress in an honorific capacity such as "honorary chair," and the committee treasurer is a close associate of the congressional member (sometimes an employee of the congressional office). Members of Congress often personally solicit contributions to "their"

leadership PACs, and the news media report contributions and expenditures by the committees as if they were a component of the member's campaign apparatus.

The advantage of leadership PACs for members of Congress is twofold. Such committees may qualify as "multicandidate" committees and accept contributions of up to $5,000 from individuals (as opposed to $2,000 for a candidate's campaign committee). In addition, since leadership PACs are not considered affiliated with their campaign accounts, members of Congress may obtain contributions from the same sources for both committees (so that a single PAC could give $20,000 in an election cycle: $5,000 each for the primary and general elections to the campaign committee and $5,000 per year to the leadership PAC). Members of Congress also in some instances established *state* leadership PACs or *unregistered* leadership PACs, which were not covered by any of the federal contribution limits or FEC disclosure requirements. Such accounts were another form of soft money (*i.e.*, in addition to political party soft money), as they could often accept contributions of corporate or labor funds, and unlimited personal funds, otherwise banned by federal election law.

Leadership PACs have been used by legislative leaders to contribute to the campaigns of other members of Congress as a way of gaining a party majority and earning the gratitude of their colleagues. Leadership PACs may not expend more than $5,000 to elect or defeat a federal candidate (including their "honorary chair"). However, these committees may not be subject to the FEC's personal use rules (which prohibit the conversion of campaign funds for a candidate's personal expenses) and have served as a source for travel and other expenses of a political nature, including expenses for consultants and polling. This development is the latest in the

forty-year cycle of regulating "office accounts" (pejoratively known as "slush funds"). Office accounts have historically allowed supporters of candidates to provide funds that can be used for a candidate's personal expenses related to political activity (member travel, and the care and feeding of supporters, potential donors, and constituents). House and Senate rules both now ban "unofficial office accounts" but exempt political committees from that ban.

Likewise, state or unregistered leadership PACs – also known as soft money leadership PACs – became an increasingly significant source of political funding for members of Congress. Federal officeholders used soft money leadership PACs to finance events and entertainment, contributions to state and local parties and candidates, fundraising and administrative costs with a non-federal component (the hard money leadership PAC account pays the federal share, while the soft money leadership PAC account pays the non-federal share), soft money contributions to national party committees, payments to consultants, and expenses for partisan get-out-the-vote efforts.[3]

Various reformers had urged the FEC to find leadership PACs to be under the control of the members of Congress with whom they are associated. The federal election laws state that all contributions made by committees "established," "maintained," or "controlled" by any person "shall be considered to have been made by a single political committee," because the committees are legally affiliated; 2 U.S.C. sec. 441a(a)(5). Thus, argued reformers, any contribution to a leadership PAC should also be considered a contribution to the candidates' campaign committee, subject to a common limit.

The new campaign finance law partially fulfills the goals of reformers on this front. The Reform Act states that entities "directly or indirectly established, financed, maintained or controlled" by federal officeholders or candidates may not receive funds in connection with elections that exceed the federal source prohibitions and contribution limits; 2 U.S.C. sec. 441i(e). This prohibits federal candidates and officeholders from having leadership PACs which receive corporate or labor treasury funds, or contributions from individuals or federal PACs in excess of $5,000 per year. Furthermore, the Federal Election Commission recently sought public comment on proposals to ban or limit hard money leadership PACs. If adopted, these proposals would either require federal candidates to finance their political activities exclusively with hard money contributions to their principal campaign committees subject to the particular limits for such contributions, or at least pay for a larger share of such activities with campaign committee funds.

Joint party/candidate fundraising committees were another recent innovation aimed at both maximizing party resources and enabling federal candidates to raise soft money directly to support their own campaigns. Under this arrangement, a candidate and a national party committee set up a joint fundraising committee, which receives donations solicited by the candidate that may exceed federal amount limitations or come from such prohibited sources as labor or corporate treasury accounts. The candidate's authorized campaign account takes any portion of a donation that complies with federal amount and source limitations for contributions to candidates. The remainder (the "soft money" portion) is forwarded to the national party committee, which spends it itself or transfers it to state parties for expenditure (transfer to state parties is common, given that FEC allocation rules have given state parties greater latitude to spend soft money on activities affecting federal elections). By arrangement and understanding,

the soft money is spent to benefit the candidate that raised it, often through state party "issue advocacy" promoting that candidate or attacking his or her opponent. A July 29, 2002, *Washington Post* article listed 38 Senate joint fundraising committees, and House Members had begun creating their own counterparts. The Reform Act erects numerous obstacles to the prevailing practice, by banning national party committees from soliciting or receiving soft money, preventing state parties from spending soft money on general public political advertising promoting or attacking clearly identified federal candidates and other "Federal election activities," and restraining soft money fundraising by federal officeholders and candidates; 2 U.S.C. sec. 441i.

Party Committees

FEC regulations define a party committee as "a political committee which represents a political party and is part of the official party structure at the national, state, or local level"; 11 C.F.R. sec. 100.5(e)(4). A party committee's contribution limits are the same as a multicandidate political committee's, with three major exceptions:

- For federal election law purposes (but not necessarily state law), party committees can transfer unlimited funds to other party committees, without such transfers being treated as contributions (though the Reform Act restricts party committees from using such transferred funds for certain purposes).

- A national party committee and the national senatorial committee may together contribute up to $35,000 to a candidate for U.S. Senate. This $35,000 limit is for the entire election cycle, rather than for each separate election within the cycle; 11 C.F.R. sec. 110.2(e).

- National and state party committees may spend an inflation-adjusted amount for coordinated spending supporting the party's House and Senate candidates (the amount for Senate races differs by state depending on its voting age population).

In 1979, Congress amended the Federal Election Campaign Act to exempt from the definitions of "contribution" and "expenditure" party spending on certain state party-building or volunteer activity, *provided* that it was paid for with funds raised under the act ("hard" or "federal" money) by state and local parties, and not from soft money or funds transferred from the national party committees. These exempted activities include yard signs, bumper stickers and pins, get-out-the-vote programs, and volunteer mailings, but not broadcast advertising or certain activities by paid staff. These exemptions have generated years of FEC enforcement investigations and litigation—what is "volunteer" activity? what is a "mass mailing?" when is it paid for by a transfer of funds from a national party committee, using which accounting principles?—because such activity provides an important avenue for parties to support their federal candidates in priority races.

The FEC interpreted the 1979 amendments to FECA to permit state and local parties to finance so-called "exempt activities" undertaken in conjunction with federal and nonfederal races (*e.g.*,

slate cards mentioning federal and nonfederal candidates) with a mixture of federally permissible contributions and soft money donations to their nonfederal accounts. The particulars of a given state's law determined permissible sources and amounts of such soft money donations. Partly because a number of states do not impose particularly strict source or amount limitations on soft money donations to state and local parties, the Reform Act generally requires state and local parties to finance voter registration activity closely proximate to federal elections, get-out-the-vote activity and generic campaign activity undertaken in connection with an election where a federal candidate appears on the ballot, and general public political advertising promoting or attacking clearly identified federal candidates exclusively with hard money (in certain instances, use of a mixture of hard money and limited soft money donations to state or local party nonfederal accounts is permissible); 2 U.S.C. secs. 441i(b), 431(20)(A). These requirements will clearly have an impact on the manner in which state and local parties finance some of the "exempt activities" (For a more detailed discussion of the rationale and effect of this 1979 volunteer and party-building exemptions and the impact of the Reform Act, please see chapter 6).

Expenditures

The act defines an *expenditure* to include "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an

expenditure"; 2 U.S.C. sec. 431(9). "Expenditure" thus encompasses virtually every payment made in connection with the federal election, including contributions. However, expenditures are only considered contributions when there is some connection with the recipient committee. This concept is explained more fully below in the section discussing "independent expenditures."

Party Committee Expenditures

Under the act, the national and state party committees may expend additional limited amounts for "coordinated" expenditures on behalf of their federal candidates. The amount is based on the population of the state (or, in the case of House candidates for states with more than one representative, is a fixed dollar amount adjusted for inflation). These expenditures may be made at any time, but only for the benefit of general election candidates; *see* 2 U.S.C. sec. 441a(d).

These expenditures can pay for goods and services for candidates, but payments cannot be made directly to the candidates' campaigns—that is, the party committees may not simply give a candidate money. However, it is important to understand that these expenditures are coordinated with the candidate: these are payments candidates can specifically request and direct. Where a committee makes expenditures independent of a candidate, they are not subject to limits, as explained below.

Independent Expenditures

"Independent expenditures" are just that—expenditures by individuals and political committees involving elections for federal office that are not coordinated with the candidates seeking office. There are no dollar limitations on independent expenditures, as *Buckley v. Valeo* established that the First Amendment protects the right of individuals and political committees to spend unlimited amounts of their own money on an independent basis to participate in the election process. Independent expenditures, however, must be publicly disclosed through the Federal Election Commission.

At one time, the Federal Election Commission presumed that party committees were incapable of making independent expenditures, reasoning that parties and their candidates were so intertwined that there could be no truly uncoordinated expenditures. However, in the first *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (*Colorado I*), the Supreme Court ruled that party committees had the same right to make independent expenditures in congressional elections as other committees, if the factual record demonstrates the actual independence of the activity. While *Colorado I* did not determine whether party committees had a right to make independent expenditures in connection with the general election campaigns of publicly-financed presidential candidates, the FEC has recently adopted new regulations permitting them to do so; 11 C.F.R. sec 109.36.

In the second *Colorado Republican* decision, 533 U.S. 431 (2001) (*Colorado II*), the Court considered the remaining issue in that case: whether party committees may constitutionally be restricted in the amount they may spend on a *coordinated* basis to elect their candidates. The Court proceeded to uphold the party coordinated expenditure limits, on the grounds that they

help prevent circumvention of limits on contributions by individuals to candidates (who, absent party coordinated spending limits, could readily arrange for the parties to serve as conduits for contributions in excess of the amounts individuals may give directly to candidates).

Starting in the 2003-04 election cycle, party committees must choose between making independent expenditures and coordinated expenditures on behalf of a candidate following the candidate's nomination by a party. For example, if a party makes an independent expenditure with respect to a candidate following his or her nomination, it may not subsequently make a coordinated expenditure for that candidate through Election Day (and vice-versa); 2 U.S.C. 441a(d)(4). This reflects a congressional judgment that a party cannot reasonably claim to be operating both independently from a candidate *and* in coordination with that candidate within the period following his or her nomination.

The definition of what constitutes a "coordinated" expenditure has long been a controversial topic. Over the years, there have been several criteria to which the FEC looked in determining coordination. For instance, inside knowledge of a candidate's strategy, plans, or needs, consultation with a candidate or his or her agents about the expenditure, distribution of candidate-prepared material, or using vendors also used by a candidate were considered by the FEC as evidence of coordination; *see* former 11 C.F.R. sec. 109.1(d) (campaign literature), FEC Advisory Opinions 1982-30 and 1979-80. Based on the U.S. District Court for the District of Columbia's decision in *FEC v. Christian Coalition*, 53 F.Supp. 2d 45 (D.D.C. 1999), the FEC issued regulations in December of 2000 redefining when general public political communications made by outside groups would be considered coordinated with candidates or

parties. These regulations would have found coordination only when there was party or candidate control of the communication or "substantial discussion" between the communication's sponsors and a party or candidate resulting in "collaboration or agreement"; *see* former 11 C.F.R. secs. 109.1(b)(4) and 100.23.

Congress considered the FEC's coordination definition insufficiently comprehensive and, in the Reform Act, rescinded it. The Reform Act mandated that the FEC promulgate a new regulation defining coordination between outside groups and parties or candidates which addresses a number of factors and, most importantly, does not require "agreement" or "formal collaboration" to establish coordination. The coordination regulation recently adopted by the FEC in response to this mandate, however, allows candidates to request or suggest that outside groups spend soft money on so-called "issue advocacy" promoting them or attacking their opponents, if aired prior to 120 days before a general or primary election; 11 C.F.R. sec. 109.21(c). The regulations also permit candidates to coordinate with political parties financing these advertisements (assumedly with hard money) without triggering application of the party coordinated spending limits; 11 C.F.R. sec. 109.37(a)(2). Litigation has been filed challenging this FEC regulation as contrary to law on account of its narrow scope; *see Shays v. FEC*, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2002). For a discussion of the legal implications of coordinating issue advocacy advertising with candidates and parties, see chapter 8.

Prohibited Contributions and Expenditures

While most individuals and organizations are limited in their ability to make contributions in connection with federal elections, others are entirely prohibited by law from making contributions or expenditures. The Federal Election Campaign Act has four such prohibitions.

National Banks, Corporations, and Labor Organizations Prohibition

Section 441b of the act makes it unlawful for any national bank or any corporation organized by authority of any law of Congress, any other corporation, or any labor organization to make contributions in connection with a federal election, or for anyone to accept such contributions. Thus, corporations and unions cannot contribute their general treasury funds to a federal candidate (PAC funds, contributed voluntarily by individuals for these purposes, are not covered by this provision). This broad prohibition is subject to three significant exceptions.

Nonprofit issue-advocacy groups exemption. The Supreme Court has held that certain small, ideologically based nonprofit corporations should be exempt from the prohibition on independent expenditures by corporations in connection with federal elections; *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*) (see document 7.4).

The FEC has adopted regulations containing criteria required for a corporation to be exempt under *MCFL*. According to the FEC, such a corporation:

(1) [must have as its only express purpose the promotion of political ideas];[4]

(2) cannot engage in business activities [other than fund-raising expressly describing the intended political use of donations];

(3) [can have:]

(i) No shareholders or other persons, other than employees and creditors with no ownership interest, affiliated in any way that could allow them to make a claim on the [corporation's] assets or earnings; and

(ii) No persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue;[5]

(4) . . . [cannot be] established by a business corporation or labor organization [or accept anything of value from business corporations or labor organizations].[6]

If these criteria are satisfied, the corporation may make unlimited *independent expenditures* in connection with a federal election; 11 C.F.R. sec. 114.10.

If a qualified *MCFL* corporation makes independent expenditures aggregating more than $250 in a single year, it must report that expenditure to the FEC, as with any other independent expenditure; 11 C.F.R. sec. 114.10(e)(2)(i). For *MCFL* corporations, this also involves filing a certification with the FEC that the corporation meets the qualifying criteria for the *MCFL* exemption; 11 C.F.R sec. 114.10(e)(1)(i).

The press exemption. The second major exception exempts certain press activities from the act's definition of expenditure; 2 U.S.C. sec. 431(9)(B)(i). The section provides that the term "expenditure" does not include " (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." According to the legislative history of this section, Congress included the provision to indicate that it did not intend the Act "to limit or burden in any way the first amendment freedoms of the press" and to assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns"; H.R. Rep. No. 1239, 93rd Cong., 2d Sess., at 4.

Thus, any qualifying media organization can make expenditures in connection with federal elections provided the organization falls within the bounds of the exemption. However, exactly what is within the statute's protection remains unclear. The FEC has indicated that media entities may present debates or cablecast editorials, but the agency successfully challenged in federal district court the distribution of printed materials endorsing a candidate as part of a cable company's billing process. *Federal Election Commission v. Multimedia Cablevision, Inc.*, No. 94-1520-MLB (D. Kan. 1995). However, the FEC closed the matter before a circuit court ruled on the appeal, causing the circuit court to vacate the district court decision as moot.

Internal communications exemption. All corporations are permitted to communicate with their *restricted class* whenever they so choose, and labor unions may likewise communicate with their members. A corporation's restricted class is defined as its stockholders and its executive or

administrative personnel and their families; 11 C.F.R. sec. 114.3(a). Thus, a corporation can send mailings to its restricted class, endorsing a particular candidate. Similarly, a corporation could invite a candidate to appear before its restricted class and endorse the candidate in connection with the event. However, the corporation must take steps to ensure that only its restricted class receive such communications. Communications with the restricted class are not generally regulated by the FEC, but internal communications of over $2,000 per election expressly advocating the election or defeat of a candidate must be reported; 2 U.S.C. sec. 431(9)(B)(iii).

The exemption for communications with members has been used by labor unions for voter registration drives, telephone banks to turn out the vote on election day, and candidate endorsements. Such communications may be expressly partisan in nature but can only be made to the union's members or to the corporation's restricted class, not to the general public (see the discussion of general public issue advocacy below and in chapter 8).

Foreign Contribution Prohibition

For many years there was no ban on foreign contributions. In 1938, in the face of evidence of Nazi German money spent to influence the U.S. political debate, Congress passed the Foreign Agents Registration Act. This law required agents of foreign entities engaged in publishing political "propaganda" to register and disclose their activities, but it did not regulate political contributions. In 1966, after congressional hearings in 1962-63 had revealed campaign contributions to federal candidates by Philippine sugar producers and agents of Nicaraguan

president Luis Somoza, Congress moved to prohibit political contributions in *any* U.S. election by any foreign government, political party, corporation, or individual (except foreign nationals who are permanent residents of the United States).

Prior to enactment of the Reform Act, the FECA prohibited foreign nationals, either directly or indirectly, from making "contributions" in connection with any election to political office, including state and local elections as well as federal; 2 U.S.C. sec. 441e.[7] The act defines "foreign national" as:

(1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or[8]

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.[9]

This prohibition also operated to prevent domestic subsidiaries of foreign corporations from establishing PACs if the foreign parent finances the PAC's establishment, administration, or solicitation costs, or if individual foreign nationals within the corporation make decisions for the PAC, participate in its operation, or serve as its officers; 11 C.F.R. secs. 110.20(h) and (i). Similarly, foreign nationals may not participate in the selection of the individuals who run the PAC.

These provisions were at the heart of much of the controversy about fund-raising activity in the 1996 election. One issue was whether this foreign national prohibition applied to the donation of "soft" or nonfederal money to a national party committee. The Department of Justice's stated view on this question has varied, though it did argue in cases arising out of the 1996 foreign money scandals that foreign soft money contributions were covered by this prohibition.[10] In turn, courts divided on the question of whether the exclusive use of the term “contribution” in this prohibition limited its scope to “hard” or federal money. Additionally, the matter is probably fact specific: can the funds donated be said to have been used "in connection" with any election to political office, whether federal, state, or local, or were they only used for nonelection activities?

The Reform Act clarified that the foreign contribution prohibition covers soft money donations as well as hard money contributions. It prohibits foreign nationals from making a “contribution *or donation of money or other thing of value*” in connection with a federal, State or local election, a “contribution *or donation* to a committee of a political party,” or an expenditure, independent expenditure, or disbursement for an electioneering communication; 2 U.S.C. sec. 441e(a)(1) (emphasis added). The Reform Act also prohibits any person from soliciting, accepting, or receiving such a contribution or donation from a foreign national; 2 U.S.C. sec. 441e(a)(2).

Federal Contractors Prohibition

The FECA prohibits anyone who contracts with the United States or any of its departments or agencies to make any contribution to any political party, committee, or candidate for public office, nor may such a contribution be solicited from any person between the time of the negotiations and completion of the contract. However, federal contractors that are corporations can establish federal PACs; 2 U.S.C. sec. 441c.

Contributions in the Name of Another Prohibition

The FECA also provides that "no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person"; 2 U.S.C. sec. 441f. This section is often enforced in connection with other prohibitions. For example, where a foreign national gives money to a U.S. citizen to be contributed by such person to a federal candidate, there is both a violation of sec. 441e (foreign contributions) and sec. 441f (a contribution in the name of another).

The Presidential System

"Major" Parties (Democrats and Republicans)

The contribution and expenditure limits described above apply to all federal elections other than presidential campaigns. Presidential elections are partially publicly funded. That is, once a major party presidential candidate meets certain requirements, the general election campaign may choose to receive full U.S. government funding from the Treasury accounts funded from the $3 voluntary taxpayer checkoff.

Presidential primaries. Presidential primaries are funded through a combination of public and private funding. The partial public funding is provided in matching funds, public funds matching up to $250 of a single individual's contributions. To qualify for such matching funds, the candidate must demonstrate nationwide support through raising at least $5,000 in individual contributions of up to $250 each in at least twenty separate states. Candidates must also agree, among other things, to:

- Limit primary spending to an inflation-adjusted amount---approximately $31 million in 1996 and $40.5 million in 2000;

- Limit spending in each primary state to a specific amount (which increases with population); and

- Limit spending of personal funds to $50,000.

Once these requirements are met or agreed to, the candidate can receive matching payments; *see generally* 11 C.F.R. sec. 9033.1.

Private contributions for presidential candidates are still limited as in other federal elections. Individuals may contribute up to $2,000 to a presidential primary campaign committee, and qualified multicandidate PACs can contribute up to $5,000.

The general election. Once a candidate becomes the nominee for a major party, he or she becomes eligible for a public grant (which was $61.82 million per candidate in 1996 and $67.56 million in 2000). To receive these funds, however, the candidate must agree to spend no more than the grant received and must not accept private contributions.[11] Additionally, the two major party national committees may each spend a voting-age population adjusted amount ($12 million in 1996 and $13.7 million in 2000) in coordination with their presidential candidates; 2 U.S.C. sec. 441a(d)(2). This amount is separate from any voter registration and get-out-the-vote activities state and local parties conduct; 2 U.S.C. sec. 431(9)(B)(ix). As noted below, the Republican and Democratic National Committees also did not consider their "issue advocacy" advertising to be subject to this limit (even if thoroughly coordinated with their presidential candidates).

Candidates not accepting public funds. Candidates are not required to accept public funds in either the primary or general elections. Candidates refusing such funds are permitted to spend as much of their own money in support of their campaigns as they wish. As a result, a candidate refusing public funding would have no per state spending limit or overall spending limit in the

primary campaign (Steve Forbes in 1996 or George W. Bush in 2000) and no spending limit in the general election campaign (Ross Perot in 1992). Such a candidate could still accept private contributions in both the primary and general election campaigns, subject to the standard $2,000 per election contribution limit for individuals.

Convention funding. Each of the major parties' nominating conventions may also be paid for, in part, by public funding; *see* 26 U.S.C. sec. 9008. Each major party received a grant of $12.36 million in 1996 and $13.51 million in 2000 to finance its nominating convention. Minor parties may qualify for convention funding based on its presidential candidate's share of the popular vote in the preceding election. The Reform Party received $2.5 million in convention funding in 2000.

Political parties accepting convention funding may spend in connection with the convention only the amount of public funds they receive. However, the host city and other sponsors support conventions in a variety of ways. The city, through its host committee (a federally registered committee created to support convention activities) may spend money promoting itself as a convention location, pay for the convention hall, and provide local transportation and related services to the convention; *see* 11 C.F.R. 9008.52. Additionally, the host city itself may directly accept cash and in-kind contributions from "local businesses" (the FEC has broadly construed what constitutes a "local business"), which are often received by a tax-deductible entity; *see* 11 C.F.R. 9008.53. In some circumstances, corporations can also provide goods (such as automobiles) free to the conventions as part of a promotional program. These exemptions, as interpreted by the FEC, have in practice resulted in extensive convention-related fund-raising by

the host city and the political parties, usually raising individual, corporate, and labor funds for the convention far greater in total than the federal grant. In a recent rulemaking detailing the Reform Act's implications for convention funding, the FEC indicated that host committees could continue to finance convention-related costs with unlimited contributions from individuals, corporations and unions, though national parties may no longer solicit such unlimited funds for host committees; *see* 2 U.S.C. sec. 441i(a)(1).

"Third" and Minor Party Presidential Candidates

Minor parties (those which have received at least 5 percent but no more than 25 percent of the popular vote in the preceding presidential election) and new parties (a party that is not a major or minor party) may also receive partial public funding for the general election, in some instances. New and minor party candidates may accept private contributions, but only within the general limits on such contributions ($2,000 per election from individuals, and no corporate or labor contributions).

A candidate who agrees to abide by the restrictions applicable to publicly funded presidential candidates (including an FEC audit, and a $50,000 limit on the use of personal funds) and who then meets a threshold of 5 percent of the general election vote will receive public funding based on his or her share of the vote, but not until *after* the election; *see* 11 C.F.R. sec. 9004.3. Days after the 1980 general election, independent John Anderson became the first such candidate to receive "retroactive" funding, based on unofficial vote totals showing that he had received nearly 7 percent of the popular vote. In subsequent elections, an individual who has received 5 percent

or more of the vote in a previous general election – or the nominee of a minor party whose candidate received 5 percent of more of the vote in a previous general election -- may be eligible to receive general election funding *before* the election; *see* 11 C.F.R. sec. 9004.2. The most prominent example is Ross Perot, who ran as an independent in 1992, then appeared on most state ballots as the nominee of the Reform Party in 1996. Even though Perot had not run under the Reform Party banner in 1992, he received general election public funding in 1996 based on his 1992 general election vote total. Likewise, Pat Buchanan – judged to be the Reform Party nominee in 2000 in the wake of party infighting -- received $12.6 million in general election public funding based on Perot's 8 percent general election showing in 1996.

Additionally, minor party candidates may be eligible for primary funding as well. Examples include Lyndon H. LaRouche, who appeared on the ballot in several states as the candidate of the U.S. Labor Party in 1976 but failed to qualify for public funding in that year's general election. Beginning in 1980, however, LaRouche sought the Democratic Party's nomination for president several times. He secured matching funds for most of those primary campaigns by receiving the necessary individual contributions to meet the statutory criteria for "nationwide support." Similarly, Lenora Fulani received matching funds when she sought the New Alliance Party nomination in 1988 and 1992. However, because of the 5 percent threshold, she failed to qualify for general election funding in either of those two years. In the 2000 presidential elections, Green Party, Reform Party, and Natural Law party candidates received primary funding.

Once the FEC certifies a minor party or new party as a "national" party, then the party may contribute to its presidential candidate's campaign, subject to the same types of contribution limits that the major parties face. During the 1996 election, the Libertarian, Natural Law, and Taxpayers parties all had national recognition from the FEC. The Reform Party received no such recognition, in part because Ross Perot argued that the national organization was merely a collection of state parties. Without the national party designation, Perot could avoid federal limits in the personal funding he could provide for the Reform Party's convention. However, he could still only contribute a maximum of $50,000 to his own general election campaign because he accepted federal funding. Before and after the 1996 election, Reform Party members opposed to Perot sought federal recognition of state party organizations they controlled, both to limit Perot's influence and to gain control of the subsequent federal funding guaranteed by Perot's 8 percent showing in 1996. Had Perot not been the Reform Party's nominee in 1996, the party's presidential candidate would have had to meet the 5 percent vote threshold in the 1996 election before receiving any federal funding.

The spending limits imposed on presidential candidates as a condition of receiving public funding were undermined by soft money and a lack of enforcement by the Federal Election Commission and the Justice Department. The parties supplemented the public subsidy to their presidential candidates and their own hard money spending in coordination with such candidates by spending soft money on get-out-the-vote drives and “issue advocacy” touting the policies and positions of their presidential candidates (or attacking those of opposing candidates). They also served as instrumentalities for the presidential campaigns themselves to spend in excess of the public funding limits. During the 1996 presidential race, both major party presidential

campaigns spent soft money through their respective national parties on “issue advocacy” ads clearly designed to support their candidates, with agents of the campaigns raising some of the soft money used to finance these ads. That practice continued unabated in the 2000 presidential campaign.

As discussed above and below, the Reform Act imposes significant prohibitions on the raising and spending of soft money by national and state parties and Federal officeholders and requires the FEC to adopt more stringent coordination rules. For example, national parties may not raise or spend any soft money under the Reform Act; 2 U.S.C. sec. 441i(a). Moreover, state parties must use exclusively hard money to finance federal candidate-specific “issue advocacy”; 2 U.S.C. secs. 441i(b)(1) and 431(20)(A)(iii). These provisions would seem at least to prevent recurrence of the presidential soft money “issue advocacy” schemes of 1996 and 2000. However, their effectiveness still turns on FEC interpretation and enforcement.

Party "Soft Money"

The Federal Election Campaign Act prohibited party committees from accepting contributions in excess of individual or PAC limits, or from impermissible sources (corporations, unions, foreign nationals). In a series of Advisory Opinions, the FEC allowed state and national party committees to accept funds from some sources and in amounts otherwise prohibited by federal election law, provided such funds were placed in separate "nonfederal" accounts and not used for federal election purposes. Those "soft money" accounts are discussed in detail in chapter 6.

The FEC created a complex system of allocation formulas regulating the proportions of hard and soft money that party committees could use for generic party activity (administrative, overhead, get-out-the-vote drives that do not mention specific candidates, "issue ads," and the like), fundraising, and "exempt activities" mentioning federal and nonfederal candidates (sample ballots, slate cards, bumper stickers, and the like). National party committees (but not state or local) were also required to disclose soft money donations to the FEC. While proponents of the "allocation" approach believed it accorded with principles of federalism and was essential to the vitality of political parties, reformers and others disputed these notions and criticized the allocation formulas for failing to prevent the expenditure of "soft money" on activities affecting federal elections and protect the integrity of the federal political process.

As discussed in chapter 6, the Reform Act outlaws many of the soft money practices sanctioned over the years by the FEC. It prohibits national party committees from receiving, soliciting or spending funds not subject to FECA's limits, prohibitions, and reporting requirements; 2 U.S.C. sec. 441i(a)(1). This provision serves to ban corporate and labor treasury contributions to national party committees and limit individual and PAC contributions to $25,000 and $15,000 per national party committee per year respectively. The Reform Act's national party soft money ban extends also to entities "directly or indirectly established, financed, maintained or controlled" by a national party committee, as well as officers and agents acting on behalf of a national party committee; 2 U.S.C. sec. 441i(a)(2).

The Reform Act also generally requires state, local and district party committees to use exclusively hard money to finance voter registration activity within 120 days of a regularly

scheduled federal election, get-out-the-vote/voter identification/generic campaign activity in connection with an election in which a Federal candidate appears on the ballot, and general public political advertising promoting or attacking clearly identified Federal candidates (not limited to advertisements containing "express advocacy"); 2 U.S.C. sec. 441i(b)(1). A narrow exception permits these party committees to spend $10,000 of each donor's permissible non-federal contribution per year (known as "Levin funds," named after the U.S. Senator who authored this exception) in combination with hard money on voter drive activities that do not mention federal candidates, subject to a number of strict conditions relating to the solicitation and receipt of these federal and nonfederal funds; 2 U.S.C. sec. 441i(b)(2). Moreover, the Reform Act prohibits state and local parties from transferring funds (including soft money) to, or soliciting funds for, 501(c) tax-exempt organizations that engage in activities in connection with federal elections (though they may continue to donate hard money to the federal PACs of such organizations); 2 U.S.C. sec. 441i(d).

The national and state party soft money prohibitions and restrictions of the Reform Act are being challenged on constitutional grounds in the pending *McConnell v. FEC* case.

Restrictions on Political Fund-raising by Members of Congress, Executive Branch Officials, and Political Parties

There are several statutes that regulate the location and form of political fund-raising. Most of these are designed to protect federal employees from pressure to contribute to federal candidates and parties, but one simply prohibits any solicitation or receipt of a federal contribution in a

federal workplace. These statutes carry criminal or civil penalties, and their intricacies have been the focus of much attention as a result of reported fund-raising activities at the White House during the 1996 election.

A series of criminal provisions makes it unlawful to attempt to obtain a political contribution from a government employee by means of threats of firing (18 U.S.C. sec. 601); for a candidate for Congress or federal employee or officer to solicit a campaign contribution from any other federal employee or officer (18 U.S.C. sec. 602); for a federal officer or employee to contribute to his or her employer's campaign (18 U.S.C. sec. 603); for any person to solicit a political contribution from someone known to be entitled to funds for federal "work relief" (18 U.S.C. sec. 604); or to demote or threaten to demote a federal employee for giving or withholding a political contribution (18 U.S.C. sec. 606).

Moreover, prior to amendment by the Reform Act, 18 U.S.C. sec. 607 made it a criminal offense (subject to a fine or three years in jail or both) to "solicit or receive any contribution . . . in any room or building occupied in the discharge of official duties" by any federal officer or employee. The Reform Act revised this prohibition to cover the solicitation or receipt of "a donation of money or other thing of value in connection with a Federal, State or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States." Likewise, the amended statute prohibits federal officers and employees from soliciting or receiving such funds or items of value while located in a room or building occupied in the discharge of official federal government duties. Congress is specifically exempted from the receipt portion of this provision, provided that any funds received are

transferred within seven days to a federal political committee, and that the contributors were not told to send or deliver the money to the federal office building.

"Soft Money"

Until enactment of the Reform Act, an unintentional limitation constrained the scope of each of these solicitation provisions. In 1979, Congress amended each of these sections to replace language referring to "contributions for any political purpose" or "to be applied to the promotion of any political object" with the more precise "contribution" as "within the meaning of section 301(8) of the Federal Election Campaign Act of 1971." The result was that this new definition only reached contributions "for the purpose of influencing" federal elections, thereby arguably leaving solicitations for nonfederal ("soft money") donations beyond the reach of the solicitation ban. (See chapter 6 for a definition and discussion of soft money.)

Thus, a key question for federal prosecutors became whether the money being solicited was hard or soft (a distinction unknown to Congress when the new definition of "contribution" was inserted in these laws in 1979) and whether the intent behind the solicitation was relevant (*e.g.*, if donated funds were deposited in a party's hard money account, did it matter that the federal officer or employee soliciting such funds believed he or she was soliciting soft money?).

As indicated above, the Reform Act amended 18 U.S.C. sec. 607 to cover "a donation of money or other thing of value in connection with a Federal, state or local election" instead of merely a "contribution within the meaning of Section 301(8) of Federal Election Campaign Act of 1971."

It is accordingly clear that the prohibition on fundraising on federal property covers solicitations for soft money.

Additional issues raised by 1996 events include which areas of the White House are exempt from the solicitation ban because they are not used "in the discharge of official duties". In 1979, the Department of Justice issued an opinion to President Jimmy Carter that a luncheon with Democratic party fund-raisers held in the White House family quarters fell within the "private residence" exemption "implicit" in the law. Indeed, former Attorney General Janet Reno rejected calls to appoint an independent counsel to investigate fundraising calls made by President Clinton from the White House because those calls were made from the building's residential areas. Questions had also been raised about whether the prohibition on solicitation applies when the solicitation occurs through a phone call from a federal office but the recipient of the conversation is not in a federal building. The Reform Act's amendments to 18 U.S.C. 607 appear to resolve that question, expressly prohibiting *both* solicitations directed at those located in federal offices and solicitations by federal officers while in federal offices. An additional interpretive issue is whether there is an exemption from the ban on "receiving" a contribution for "ministerial" acts (such as taking an envelope containing a contribution and delivering it to an authorized representative of a political committee).

The Reform Act also more generally restrains soft money fundraising by federal officeholders, candidates, entities they establish or control, and their agents – wherever they or a prospective donor may be located. These individuals and entities may not solicit, direct, receive, transfer or spend soft money in connection with federal elections, including for general public political

advertising promoting or attacking federal candidates or get-out-the-vote drives (they would be limited to soliciting hard money in these instances); 2 U.S.C. sec. 441i(e)(1)(A). In soliciting funds solely for state and local elections, federal officeholders and candidates may seek donations only from permissible hard money donors in amounts that correspond to the hard money contribution limits (*e.g.*, a federal officeholder could suggest that an individual contribute $2,000 to the general election campaign of a gubernatorial candidate but could not ask for corporate or labor treasury contributions to that candidate); 2 U.S.C. sec. 441i(e)(1)(B). In addition to these general rules, the Reform Act provides more specific guidance as to permissible solicitations by federal officeholders and candidates on behalf of 501(c) tax-exempt organizations (*see below*); 2 U.S.C. sec. 441i(e)(4). It also indicates that federal officeholders and candidates may attend and speak at state and local party fundraising events; 2 U.S.C. sec. 441i(e)(3).

The Reform Act also prohibits national parties from soliciting soft money, and prohibits national and state parties from soliciting any funds for 501(c) tax-exempt organizations engaged in activities in connection with federal elections (though they may solicit hard money contributions to the PACs of such organizations); 2 U.S.C. secs. 441i(a) and 441i(d). Furthermore, state parties may not jointly solicit "Levin non-federal funds" to be used in combination with hard money to finance certain types of "Federal election activities"; 2 U.S.C. sec. 441i(b)(2)(C)(ii).

Congress

As noted above, the prohibition on receiving contributions in a federal building does not apply to Congress, as long as certain conditions are met. However, the ban on solicitations from a federal workplace does apply to Congress.

The Committee on Standards of Official Conduct has reminded House members that, entirely aside from the criminal statute, the Rules of the House also regulate political fund-raising and "are quite specific, and quite restrictive"; "April 25, 1997 Memorandum for All Members, Officers and Employees." Under House rules, *"Members and staff may not solicit political contributions in their office or elsewhere in the House buildings, whether in person, over the telephone, or otherwise"* [emphasis in original]. Added the Committee, "The rule bars *all* political solicitations in these House buildings. Thus, a telephone solicitation would not be permissible merely because, for example, the call is billed to the credit card of a political organization or to an outside telephone number, or it is made using a cellphone in the hallway." Nor may House telephone numbers be left for a return call if the purpose is the solicitation of a political contribution, according to the Committee. This advice responds to claims that members of Congress were using cellular telephones in their offices, or fund-raising in the Capitol, instead of using the cubicles set aside for fund-raising telephone calls in office buildings near the Capitol owned by the Democratic and Republican campaign committees.

The Senate also has rules regulating campaign activity in Senate buildings and the Capitol and restricting the number of members of a Senator's staff who may handle campaign contributions.[12]

The Hatch Act

The Hatch Act, first passed by Congress in 1939 during President Franklin Roosevelt's second administration to protect federal employees from political pressure, bans all Executive Branch federal employees from knowingly soliciting, accepting, or receiving a political contribution from any person (see introduction to chapter 2); 5 U.S.C. sec. 7322. Although "political contribution" is broadly defined as "any gift . . . made for any political purpose," the penalty for violations of the Hatch Act is either thirty days' suspension without pay or removal of the employee's position. The Hatch Act has no criminal penalties.

Issue Advocacy

As discussed in detail in chapter 8, issue advocacy is speech that does not "expressly advocate" the election or defeat of a federal candidate and therefore has not been subject to any of the limits, prohibitions, or disclosure provisions of the federal election laws. As a result, corporations, unions, advocacy groups, and party committees had been able to raise and spend funds for such speech without limit, and (except for party committees) without disclosure of sources or amounts. Two issues concerning issue advocacy are the focus of legal attention:

- When does spending on "issue advocacy" independent of candidates or parties become "express advocacy" or otherwise properly subject to federal source prohibitions and reporting requirements?; and

- When is it "coordinated" with a candidate or a party so as to make it a "contribution" subject to federal source prohibitions, amount limitations, and reporting requirements?

The Reform Act contains a number of provisions addressing both of these issues. In general, it prohibits unions and corporations (including incorporated non-profits, except for the *MCFL* corporations discussed above) from spending their treasury funds on broadcast, cable or satellite communications referring to federal candidates, aired closely proximate to federal elections and targeted at an identified candidate's electorate; 2 U.S.C. secs. 441b(b)(2), (c)(1) and (3). Corporations or unions would be able to finance these "electioneering communications" through their separate segregated funds (commonly known as "political action committees" or "PACs"), however. Other persons or entities (*e.g.*, individuals, unincorporated associations) could not use funds donated from corporate or union treasury accounts to finance "electioneering communications" and would have to disclose their spending on these advertisements; 2 U.S.C. sec. 434(f). Likewise, the new law states expressly that spending on "electioneering communications" that is coordinated with candidates or parties amounts to a contribution to the candidate or party, and is thus subject to federal source prohibitions, amount limitations, and reporting requirements; 2 U.S.C. sec. 441a(a)(7)(C). Finally, the Reform Act required the FEC to issue a new regulation generally defining what constitutes "coordination" by individuals or outside groups with candidates or parties. The resulting regulation treated as "coordinated" some non-express advocacy communications financed by outside groups in concert or cooperation with candidates or parties, but exempted "issue advocacy" aired prior to 120 days before a general or primary election; 11 C.F.R. sec. 109.21(c). In general, the Reform Act's

provisions relating to "issue advocacy" are among its most contentious components. They are being challenged on constitutional grounds in *McConnell v. FEC*.

The Internet

As discussed in detail in Chapter 10, the Internet and e-mail are relatively new but increasingly important platforms for campaign activity relating to federal elections and the expression of political opinion. Like businesses and media outlets, party committees, candidates, and issue groups are attracted to the Internet because it enables them to transmit information in desired formats, quickly, to either broad or highly targeted audiences, at relatively low cost. Indeed, campaigns have used e-mail and the Internet to solicit political contributions, mobilize voters and recruit volunteers, among other things. The Internet also facilitates the receipt of information from voters. Unsurprisingly, campaign websites now offer the ability to accept donations paid by credit card.[13]

The FEC has had to consider the applicability of the FECA – written long before the cyber-age – to Internet and e-mail communications. Its deliberations in this regard have stood to affect not only parties and candidates but also private citizens and outside groups. For example, what if a private citizen operating his or her own website posts an express advocacy message ("Vote for Candidate [X]") on the site? Is that an "independent expenditure" under the FECA, subject to reporting requirements? Is it a "contribution" to the promoted candidate? What if a union provides a link to the website of a candidate it happens to endorse for election – is that an illegal labor "soft money" contribution to a candidate?

For some time, the FEC appeared to be proceeding in a piecemeal manner in this area – resolving discrete questions through advisory opinions. The FEC's advisory opinions on on-line campaigning have on some occasions found Internet communications to trigger restrictions or reporting requirements under FECA, though the trend has been towards resisting regulation of on-line campaigning. For example, the FEC ruled in 1998 that if an individual creates a website expressly advocating the election of a federal candidate, the costs of that website (*e.g.*, the fee to secure registration of the domain name) must be reported as an independent expenditure if greater than $250 per year. Moreover, the website would have to contain a disclaimer indicating who paid for the advertisement and whether it was authorized by a candidate or the candidate's committee; FEC Advisory Opinion 1998-22. However, the Commission has more recently held that the costs of websites or emails supporting a campaign prepared by campaign volunteers using their home computers (including the republication of candidate materials) would not result in a contribution to a campaign; FEC Advisory Opinion 1999-17. Along these lines, websites (including those of corporations) that provide candidate-related content that is non-partisan in nature would not be considered to have made an expenditure or contribution to mentioned candidates; FEC Advisory Opinions 1999-7, 1999-24 and 1999-25.

Recently adopting a more sweeping deregulatory approach to on-line campaigning, the FEC exempted Internet and e-mail communications from many of its regulations to implement provisions of the Reform Act. For example, the FEC regulations implementing the Reform Act's command that state and local parties use exclusively hard money to finance general public political advertising that promotes or attacks clearly identified Federal candidates exempt

Internet communications – thereby allowing these party committees to use soft money to help pay the costs of candidate-specific Internet webpage and widely distributed e-mail “issue advocacy” communications; 11 C.F.R. sec. 100.26. Two of the congressional sponsors of the Reform Act have filed a lawsuit challenging the legality of this particular FEC exemption; *see Shays v. FEC*, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2002).

Other Players in the Arena

In addition to those who contribute under the laws established by the act, there are other significant entities that play roles in political campaigns.

Unions

Although the act and FEC regulations treat corporate and union funds similarly, other considerations have made unions unique in the political landscape. Like corporations, they may not contribute directly to federal candidates. However, they may create and administer a PAC. Furthermore, prior to enactment of the Reform Act, they were able to contribute to the nonfederal accounts of political parties and engage in unlimited "issue" advertising to the general public. Under the Reform Act, however, unions may no longer contribute to the nonfederal accounts of national party committees, and they must use their PACs to finance “issue advocacy” that falls within the new law’s definition of an “electioneering communication.”

As membership organizations, unions may also communicate with their members (numbering in the millions) on any subject (including urging them to vote for specific candidates or parties) and may use union treasury fund to do so. However, in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court determined that under the National Labor Relations Act, nonunion employees could prevent union use of their agency fees (sometimes required as a condition of employment) for political activity. As a result, nonunion employees in closed-shop states cannot be required to fund political spending as a condition of their employment.

The *Beck* decision has not reduced the political use of agency fees paid to unions by non-members to the extent desired and anticipated by union critics. Among other things, they attribute this to alleged inadequacies in the notice provided to non-members regarding their "*Beck* rights." Under *Beck* and subsequent National Labor Relations Board decisions, unions must provide notice of "*Beck* rights" to non-members. However, successive presidential administrations have alternated positions on whether to require government contractors also to inform employees of their "*Beck* rights."

Indeed, on April 13, 1992, President George Bush issued Executive Order 12800, which required government contractors to post notices informing their nonunion employees that they could object to use of their union dues for political purposes. On February 1, 1993, however, President Bill Clinton issued Executive Order 12836, rescinding Executive Order 12800, and referred the issue to the National Labor Relations Board for further consideration. On Feburary 17, 2001,

President George W. Bush issued an executive order requiring federal contractors again to post notices informing nonunion employees of their "*Beck* rights." However, the U.S. District Court for the District of Columbia struck down the order on the grounds that it was inconsistent with the National Labor Relations Act (NLRA); *see UAW-Labor Employment and Training Corp. v. Chao*, Civ. A. No. 01-00950, 2002 U.S. Dist. LEXIS 50 (D.D.C. Jan. 2, 2002). In April of 2003, the U.S. Court of Appeals for the D.C Circuit overturned the District Court decision, disputing the notion that the NLRA preempted enforcement of the President's Executive Order; *see UAW-Labor Employment and Training Corp. v. Chao*, No. 02-5080 (D.C. Cir. Apr. 22, 2003), *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200304/02-5080a.pdf.

The broader question concerning the use of dues from union members themselves for political activity was not addressed in *Beck*. Republican party leaders have argued that union members should be given some mechanism for authorizing or restricting the use of their dues for political purposes, claiming that a substantial number of union members disagree with the political choices made by union leaders. Proposals to implement this idea are commonly known as "paycheck protection." Democrats and unions have responded that union leaders are freely elected by the membership and are thus only exercising their representative authority. Besides, they add, corporate shareholders do not vote on whether to approve corporate political spending on political activity. Member dues in any case provide only a portion of the funds available to unions for such communications, so union leaders could probably use other funds for these activities if necessary. During consideration of the Reform Act in the Senate in 2001, a "paycheck protection" amendment was soundly defeated.

In 1996, the AFL-CIO announced a groundbreaking $35 million television advertising campaign, which ran in dozens of congressional districts with vulnerable Republican incumbents, attacking the members' congressional voting records on issues such as Social Security, Medicare, and federal funding for education. These "issue" advertisements were paid for with union treasury funds, on the grounds that they did not "expressly advocate" the election or defeat of the member of Congress, but instead had endings such as "tell your representatives to stop cutting Medicare." This spending was in addition to direct union PAC contributions to Democratic candidates and party committees, and the use of union organizers in congressional districts. Additionally, unions engaged in traditional voter registration activity and election day get-out-the-vote telephone banks directed to union members, and reportedly assigned paid organizers to some congressional districts to coordinate communications activities. The FEC conducted an investigation as to whether illegal coordination occurred between the AFL-CIO and the Democratic Party in the 1996 elections but ultimately voted to dismiss the case, in significant part due to the exceedingly narrow scope of the Commission's coordination regulations at the time. Unions maintained a high level of political activism in the 2000 elections, spending $45 million in hard money contributions to candidates, hard and soft money contributions to parties, "issue advocacy," independent expenditures, and internal communications in federal races.[14]

Corporations

Corporations have been prohibited from contributing to federal candidates since the beginning of this century, when the first federal campaign finance restrictions were enacted by Congress (see

chapter 1 for a detailed description of the history of this ban). However, like unions, corporations still participate in the political process in a variety of ways.

Most visibly, corporations may establish and pay the administrative costs of separate segregated funds, known as PACs, and may encourage employees and stockholders to contribute personal funds to those committees. Additionally, corporations may communicate with their executives and management personnel, urging them to support and contribute to specific parties or candidates, and may host visits by candidates at corporate facilities, subject to FEC rules. The most important aspect of such internal corporate activity is the ability of corporate executives and PACs to raise funds for federal candidates. The FEC has issued complicated regulations governing such corporate political activity, but fund-raising by corporate executives under these rules remains a substantial source of money for federal candidates.

Corporations have also been able to pay for "issue advocacy" advertising, either directly or through donations to other groups, such as industry associations (501(c)(6) tax-exempt organizations such as the U.S. Chamber of Commerce or Americans for Job Security) or issue-oriented 501(c)(4)s that are engaged in public advertising programs. Because issue advertising has not been defined as a campaign "expenditure," it has not been subject to disclosure requirements, making it difficult to identify the sources or amounts of such spending. In 1996, "The Coalition" was formed by a group of business associations, including the U.S. Chamber of Commerce, to respond in kind to the labor unions' televised “issue advocacy” ads. The Coalition was reported to have raised some $3.5 million from corporations for this activity. It was subject to investigation by the FEC for illegal coordination with the Republican Party in the 1996

election cycle, but the Commissioners voted to dismiss the charges (again largely due to the narrow scope of the Commission's coordination regulations at the time). In the 2000 election cycle, Citizens for a Better Medicare, created and funded by pharmaceutical companies, spent about $50 million on television advertising. Corporate expenditures for "issue advocacy" qualifying as electioneering communications are now proscribed by the Reform Act. Additionally, corporations have contributed substantial sums of "soft money" to the nonfederal accounts of the national party committees and state parties (where permitted by state law), though the Reform Act now prohibits them from making such contributions to national party committees.

Finally, the Supreme Court has held that it is unconstitutional to prohibit corporations from spending funds to campaign for and against state ballot measures; *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); document 3.2. In reaching this conclusion, the Supreme Court distinguished its jurisprudence upholding limitations and disclosure requirements with respect to the financing of candidate elections, viewing no comparable threat of actual or apparent corruption of elected representatives in the facts presented by *Bellotti*.

501(c)(4) Organizations

Section 501(c)(4) of the Tax Code provides for the establishment of "social welfare organizations" exempt from federal income tax. While these organizations must be operated exclusively for the promotion of the public social welfare and cannot be for profit, they still can engage in political activities, so long as these activities do not become their primary purpose.

The Internal Revenue Service (IRS) interprets this restriction to allow 501(c)(4) organizations to participate in an election by doing such things as rating candidates on a partisan basis; Rev. Rul. 67-368, 1967-2 Cumulative Bulletin 194 (July 1967). They also may promote legislation; Rev. Rul. 71-530, 1971-2 Cumulative Bulletin 237 (July 1971); Rev. Rul. 67-293, 1967-2 Cumulative Bulletin 185 (July 1967). As long as its political activities do not become an organization's primary activity, a 501(c)(4) entity can engage in any activity consistent with state and federal laws. Under FEC regulations, incorporated 501(c)(4)s that qualify as *MCFL* issue advocacy corporations (as discussed above and in document 7.4) may engage in independent political expenditures and electioneering communications. However, just as in the case of other corporations, FECA prohibits incorporated 501(c)(4)'s from making contributions to federal candidates; *see also Beaumont v. FEC*, 539 U.S. __, 123 S.Ct. 2200 (2003).

As the public became more aware of politically active 501(c)(4) organizations, there were calls for limits on such activities by tax-exempt entities. For instance, the Christian Coalition, an entity which has long sought 501(c)(4) status, has at times played a highly visible role in state and national Republican party politics, going so far as to claim credit for the Republican success in the 1994 elections and to create a multimillion-dollar war room at the 1996 Republican National Convention. The FEC sued the group, claiming it illegally coordinated its activities (particularly its "voter guide" activities) with federal candidates, resulting in prohibited and unreported contributions to such candidates. In a 1999 decision, the U.S. District Court for the District of Columbia largely dismissed the FEC's enforcement action against the Christian Coalition, on the grounds that the interactions between the Coalition and federal candidates did

not rise to the level of "coordination" that could be regulated by federal campaign finance law; *see FEC v. Christian Coalition*, 53 F.Supp. 2d 45 (D.D.C. 1999). Republicans have argued that many other groups engage in similar (if smaller-scale) activities on behalf of Democrats.

Additionally, the IRS has occasionally questioned whether some groups can become so partisan in nature or purpose that they advance a narrow private or partisan purpose, rather than the general social welfare, and thus are not entitled to a tax exemption. Indeed, the IRS denied tax-exempt status under section 501(c)(4) to the Christian Coalition apparently on the grounds that it engaged in excessive partisan political activity (the organization reorganized as a for-profit corporation known as Christian Coalition International). Likewise, the IRS denied tax-exempt status to the National Policy Forum, headed by former RNC Chairman Haley Barbour, on that basis. Both major parties have traditionally benefited from such organizations: the Democratic Leadership Council (DLC) is a 501(c)(4) organization that obtained its exemption in the 1980s and was once headed by former President Clinton.

Another feature of the 1996 election year was the contribution of substantial sums by party committees to sympathetic 501(c)(4) organizations, which then reportedly used those funds for issue advocacy activities and targeted voter drives. Party committees transferred these funds so that the activity in question could be financed entirely with soft money (if the activity were done by the party entity, only 35 percent of it could be paid for with soft money, under FEC allocation regulations discussed above and in chapter 6). With respect to the financing of generic voter drives, the FEC cracked down on this practice – requiring that a party transfer of funds to an outside group to help finance such a voter drive (potentially targeted at the party's core voters)

must include a hard money component that corresponds to the hard money allocation ratio for the activity if it were undertaken by the party itself. Following this clarification from the FEC, the Reform Act proceeded to prohibit party committees from transferring funds to, or soliciting funds for, 501(c) organizations engaged in activities in connection with Federal elections, so as to prevent political parties from readily evading the FECA's disclosure and allocation requirements; 2 U.S.C. sec. 441i(d)(1).

501(c)(3) Organizations

Section 501(c)(3) organizations are tax-exempt entities organized for charitable and other similar purposes and are ostensibly prohibited from intervening in any political campaigns; sec. 501(c)(3) of the Tax Code. Thus, these organizations cannot endorse candidates, contribute to campaigns, or organize a political action committee. However, they can conduct nonpartisan voter registration and get-out-the-vote efforts in accord with FEC regulations. *See* 11 C.F.R. sec. 114.4. Additionally, they may sponsor candidate forums on issues of public concern; Rev. Rul. 86-95, 1986-2 Cumulative Bulletin 73 (August 18, 1986).

Candidates and party committees had been able to raise money to help such organizations to perform their "nonpartisan" tasks. As noted above, however, the Reform Act prohibits party committees from soliciting or transferring funds (either hard or soft money) for or to 501(c) tax-exempt organizations that engage in activities in connection with federal elections, including nonpartisan get-out-the-vote and voter registration efforts; 2 U.S.C. sec. 441i(d)(1). The new

law does not restrict federal officeholders and candidates from raising funds for non-electoral purposes on behalf of any 501(c) tax-exempt organizations which are not principally engaged in election activity. However, if a 501(c) tax-exempt organization is principally engaged in such activity, or the solicitation is for get-out-the-vote or voter registration activity, the federal officeholder may raise funds only from individuals in limited amounts; 2 U.S.C. sec. 441i(e)(4). A federal officeholder may not raise funds for a 501(c) tax-exempt organization to finance public communications promoting, supporting, attacking or opposing federal candidates (regardless of whether such communications expressly advocate an election result).

Many well-known think tanks are 501(c)(3) organizations, including Brookings, the American Enterprise Institute, Heritage, Cato, the Family Research Council (Gary Bauer's group), and the Progressive Policy Institute (associated with the DLC). Some are genuinely nonpartisan, while others appear close to one party or group of candidates. Additionally, many organizations maintain a collection of entities under one umbrella, such as the Sierra Club (which has a 501(c)(3), a 501(c)(4), a PAC) and the Club for Growth (which has a 501(c)(4), a PAC, and a 527 organization). Many of the ethics charges against former House Speaker Newt Gingrich related to his use of just such a collection of organizations, including charitable and educational groups, for political purposes.

The Reform Act's restrictions on the expenditure of corporate treasury funds on "electioneering communications" appear on their face to apply to spending on such communications by incorporated 501(c)(3) organizations. Nonetheless, during the Reform Act rulemakings, the FEC exempted spending by 501(c)(3) organizations from the Act's funding source prohibitions and

disclosure requirements relating to "electioneering communications"; 11 C.F.R. sec. 100.29(c)(6). The Commissioners who supported this carve-out argued that Internal Revenue Service rules already prevent 501(c)(3) organizations from engaging in partisan campaign activities. Dissenting Commissioners were skeptical of relying on IRS regulations and enforcement in this area.

"527 Organizations"

As discussed above, the IRS has sometimes denied 501(c) tax-exempt status to certain organizations on account of their partisan political activity. Furthermore, large donations to 501(c)(4)'s may be subject to a gift tax. Accordingly, some entities intending to engage in substantial amounts of electioneering have instead organized under Section 527 of the Internal Revenue Code. Section 527 provides beneficial tax treatment (*i.e.*, taxation only of investment income) for "political organizations" – defined as organizations formed primarily for "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors"; 26 U.S.C. sec. 527(e)(2).

One example of a "527 organization" is a federal political committee (see discussion above). However, because the IRS has held that the definition of a 527 organization encompasses not only entities that make contributions to federal candidates or engage in express advocacy but

also those primarily engaged in electioneering “issue advocacy” (without undertaking express advocacy or contributions to federal candidates), certain organizations have been able to enjoy the tax benefits of 527 status without having to register as federal political committees. This “mismatch” between prevailing interpretations of the Internal Revenue Code and the FECA has spurred the creation of 527 organizations (sometimes registered at the state level, though not always) that raise unlimited soft money donations and spend them on candidate-specific “issue advocacy” clearly designed to affect federal races. 527 organizations involved in federal elections included the soft money accounts of federal officeholder leadership PACs (see discussion above) and 527’s not closely associated with any particular federal politician. The leading non-politician 527s active in federal politics received $67.3 million in contributions from July 1, 2000 to December 31, 2001. There are prominent and well-funded 527’s on both ends of the ideological spectrum, ranging from Planned Parenthood Votes and the New Democratic Network on the left to the Club for Growth and Republican Majority Issues Committee on the right.[15]

Prior to 2000, the Internal Revenue Code did not require 527 organizations to disclose their contributors and spending. Accordingly, organizations that avoided federal political committee status by engaging solely in electioneering “issue advocacy” were not subject to meaningful disclosure requirements. Congress intervened and passed legislation requiring 527 organizations (with exceptions for federal political committees, state candidate committees, organizations with less than $25,000 in estimated gross receipts, and certain other organizations) to disclose to the IRS the names of those who contributed at least $200 to the organization per year, as well as their disbursements to a single person over $500 per year; 26 U.S.C. sec. 527(j). The enactment

of these requirements reportedly caused certain 527 organizations – such as Citizens for a Better Medicare – to switch to 501(c)(4) tax-exempt status to avoid disclosure.

The IRS's implementation of the 527 disclosure law as originally constructed was subject to criticism. Among other things, the IRS website which posts the required disclosures by 527 organizations is not easily searchable. Moreover, the 527 law itself came under attack from various observers for being either too narrow or too broad. On the one hand, certain public interest groups believed the law should be strengthened to require that the purpose of each expenditure over the $500 threshold be given and to impose an electronic filing requirement on 527 organizations receiving or spending $50,000 or more per year. On the other hand, some members of Congress and state-level advocacy groups expressed interest in exempting from IRS contributor and expenditure disclosure requirements state PACs focused exclusively on state-level elections and which disclose their contributions and expenditures to state election oversight agencies. Congress amended the 527 law in late 2002 to address these and other concerns. At roughly the same time, an Alabama federal district court struck down portions of the 527 disclosure law on constitutional grounds – a decision which has been appealed by the federal government; *see Mobile Republican Assembly v. U.S.*, 2002 WL 31236222 (S.D. Ala. 2002).

Enforcement

The Federal Election Commission

The federal campaign finance laws are enforced by the FEC in the case of civil violations, and by the Department of Justice when a criminal violation is charged. The FEC itself has no independent authority to impose penalties except for administrative fines for reporting violations. 2 U.S.C. sec. 437g(a)(4)(A)&(C). If, after an investigation, alleged violators of federal campaign finance law are unwilling to sign a settlement agreement and pay a monetary penalty to the U.S. Treasury, then the FEC can vote to sue the offender in federal court, present the evidence to a judge, and ask the court to find a violation and impose a fine. 2 U.S.C. sec. 437g(6).

Penalties sought by the FEC in court range from a few hundred dollars to many thousands of dollars, depending on the size and nature of the violation. The act restricts civil penalties to $5,000 per violation, or the amount at issue, whichever is larger (and generally doubles these sums in the case of knowing and willful violations); *id*. For a detailed discussion of the FEC, see chapter 9.

Standing Issues---What if the FEC Deadlocks or Fails To Act?

The act contains a provision allowing parties whose complaints have been dismissed or otherwise not acted upon by the FEC to file suit against the FEC in federal court alleging that the FEC's failure to act was arbitrary and capricious. If successful, the party can obtain a court order requiring the FEC to act in accord with FECA on the complaint. If the FEC does not follow the court order within thirty days, the party may sue the alleged campaign law violator directly; 2 U.S.C. sec. 437g(a)(8). This provision of the act has almost never been used.

The statutory right to challenge FEC action or nonaction is an unusual provision and has served as the basis for a number of successful challenges to FEC enforcement decisions in the past. However, this right to seek judicial review of FEC actions requires a high standard of proof (that the FEC decision was "arbitrary and capricious") and has in any case been limited by the federal courts. As recent D.C. Circuit Court decisions make clear, complainants seeking judicial review of FEC action or nonaction must meet federal standing (right to file suit) requirements under Article III of the Constitution. In particular, they must suffer an "injury-in-fact" caused by the FEC's action (or failure to act) that may be redressed by the court's order. In *FEC v. Akins*, 524 U.S. 11 (1998), the Supreme Court held that if the FEC's failure to bring an enforcement action in a particular case deprived complainants, as voters, of information about campaign-related activities that is *legally required* to be disclosed, this is a sufficient injury to confer standing under FECA (even though the harm may be widely shared). However, the assertion that the FEC's acts deprived voters of information generally is not sufficient to convey standing; *Common Cause v. Federal Election Commission*, 108 F.3d 413 (D.C. Cir. 1997). In that case, Common Cause was denied the right to challenge the FEC's conclusion of an investigation of Republican party spending in Montana, even though Common Cause had filed the original complaint with the FEC. The D.C. Circuit held that Common Cause could not secure standing by alleging that it was deprived of knowledge as to whether a violation of FECA had occurred, for FECA does not require that such information concerning violations as such be disclosed to the public; *id.* at 418. Similarly, in *Wertheimer v. FEC*, No. 00-5371 (D.C. Cir. Oct. 28, 2001), http://www.ll.georgetown.edu/Fed-ct/circuit/dc/opinions/00-5371a.html, the D.C Circuit rejected arguments from various reform groups that the FEC's failure to identify party spending that was

coordinated with presidential candidates as "contributions" and "expenditures" gave them standing. The Court noted that the transactions in question were reported in some form and that appellants were actually seeking a "legal conclusion" rather than disclosure of additional facts.

The FEC may not make public "any notification or investigation" without the consent of the person receiving such notification or under investigation; 2 U.S.C. sec. 437g(a)(12). The FEC interpreted this confidentiality provision to allow it publicly to include exhibits pertaining to an ongoing investigation in a subpoena enforcement action, as well as to permit it to make public enforcement action files upon the termination of a case. Both interpretations have been under attack in the courts. Indeed, the D.C. Circuit ruled in *In re: Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001), that documents relating to an ongoing FEC enforcement case must remain under seal, even when the FEC institutes a court action to enforce a subpoena. The FEC voted unanimously not to appeal the D.C. Circuit's ruling and instead to adopt the court's position on this issue. In *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), the U.S. District Court for the District of Columbia overturned the FEC's practice of making case files public upon termination of a case. The court found that the text of 2 U.S.C. sec. 437g(a)(12) did not support the idea that the confidentiality requirement lapsed once the FEC terminated an investigation and suggested that case file disclosure could chill the free exercise of political speech. On appeal, the U.S. Circuit Court of Appeals for the District of Columbia Circuit disagreed with the district court's analysis of 2 U.S.C. sec. 437g(a)(12), concluding that the FEC's practice of making case files public at the termination of a case was a permissible interpretation of that statutory provision. However, the D.C. Circuit nonetheless struck down the Commission's "blanket" approach to case file disclosure on the grounds that it was not properly tailored to avoid unnecessary First

Amendment burdens; see *AFL-CIO v. FEC*, No. 02-5069 (D.C. Cir, decided Jun. 20, 2003). The appeals court decision did leave open the possibility that the FEC could release investigative files relating to closed cases under a revised disclosure policy which accounts better for First Amendment concerns. It is unclear whether the FEC will appeal the D.C. Circuit decision in *AFL-CIO v. FEC* to the Supreme Court.

The Justice Department---Criminal Prosecutions

The Justice Department pursues criminal violations of the campaign finance laws either after referral from the FEC or upon independent discovery. U.S. Attorneys or the Department's Public Integrity Section may investigate alleged violations, using FBI assistance and grand juries. Cases are tried in federal court, and allegations may include ancillary mail fraud/wire fraud or conspiracy violations. Penalties may include jail terms and substantial monetary penalties.

Prior to enactment of the Reform Act, aggravated and intentional campaign finance crimes were prosecuted either as misdemeanor violations of the FECA or as felonies under the conspiracy and false statement provisions; 2 U.S.C. sec. 437g(d); 18 U.S.C. sec. 371, 1001.[16] Prosecution under the mail or wire fraud statutes was also available in some cases; *see* 18 U.S.C. secs. 1341, 1343, and 1346; *United States v. Sun-Diamond*, 138 F.3d 961 (D.C. Cir. 1998) (scheme involving name partner's fraudulent use of a firm's office to funnel illegal contributions to a political candidate could be pursued under 18 U.S.C. 1346, given that it was reasonably foreseeable that disclosure of the scheme would cause substantial economic harm to the firm).

The Department of Justice pursued campaign finance crimes involving $10,000 and under as FECA misdemeanors and considered for felony prosecution only those involving more than $10,000.[17]

Criminal prosecution of federal election law violations has been pursued in cases demonstrating "willful violation of a core" FECA provision, involving "a substantial sum of money" ($2,000 or more) and resulting "in the reporting of false campaign information to the FEC."[18] The core provisions of FECA include the following:

- The contribution limits;
- The ban on corporation and labor contributions;
- The ban on contributions from federal contractors;
- The ban on contributions from foreign nationals;
- The prohibition against making contributions in the name of another; and
- The avoidance of FEC disclosure requirements.

Defendants convicted of FECA misdemeanors could receive sentences of imprisonment -- *see United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992) (ninety days) -- and corporate defendants could receive large fines for misdemeanor FECA violations; *United States v. Fugi Medical Systems*, C.R. No. 90-288 (S.D.N.Y., sentencing proceedings, August 15, 1990).

Significant sentences have been applied to felony campaign finance crimes prosecuted under sec. 371 (conspiracy to obstruct the lawful functioning of a government agency) or 1001 (submitting

false information to a federal agency). The theory behind conspiracy prosecutions is explained in the Justice Department's handbook on election law crimes: "A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties."[19] To obtain a conviction under sec. 371, the evidence must show that the defendant intended to disrupt and impede the lawful functioning of the FEC (such as by causing false information to be provided to the FEC by the recipient committee, thereby "misleading the public as to the actual source of the contribution"). Causing another person to submit false information to the FEC may be prosecuted as a violation of 18 U.S.C. secs. 1001 and 2(b), which taken together criminalize acts that cause another person (that is, a campaign treasurer) to submit false information to the FEC; *see United States v. Curran*, 20 F.3d 560 (3d Cir. 1994). Successful prosecution under these statutes requires that the government prove that the defendant knew that the statements were false and intentionally caused such statements to be made by another. Thus, acting as a conduit or using others as conduits in making contributions to political committees violates 18 U.S.C. secs. 1001 and 2(b), where the committees identify the conduit as the source of funds contributed (even if the defendant is not using the conduit scheme to funnel his or her own money to a committee); *see United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999); *United States v. Kanchanalak,* 192 F.3d 1037 (D.C. Cir. 1999).

The Reform Act made some changes to the criminal enforcement regime for federal campaign finance law, though it did not amend the basic requirement that a violation have been “knowingly and willfully” committed for criminal prosecution to be a possibility. In addition to increasing the criminal statute of limitations for violations of federal campaign finance law (*see*

below), the Reform Act provided specific criminal penalties for violations of the longstanding ban on contributions knowingly and willfully made in the name of another person. Furthermore, it established felony penalties under FECA for knowing and willful federal campaign finance law violations involving amounts aggregating more than $25,000 in a calendar year and directed the U.S. Sentencing Commission to issue a specific sentencing guideline for federal campaign finance offenses (previously, there was no specific sentencing guideline for theses offenses, and some were dealt with under the general fraud guideline). In turn, the U.S. Sentencing Commission recently approved a new guideline specific to violations of provisions of federal campaign finance law.

Statute of Limitations Issues

Prior to the enactment of the Reform Act, the FECA contained a three-year statute of limitation, which applied to prosecutions for criminal violations of Title 2. By comparison, the statute of limitations for campaign finance violations prosecuted under 18 U.S.C. sec. 371 or 1001 has been five years; *see* 18 U.S.C. sec. 3282. The Justice Department could accordingly prosecute under these ancillary criminal provisions (conspiracy, fraud, and so on) even though the three-year FECA statute of limitations had run, if the five-year statute applicable to the federal criminal statutes had not yet passed. The Reform Act obviates the need for that tactic, as it amends the FECA to provide a five-year statute of limitation for prosecutions of criminal violations; 2 U.S.C sec. 455(a). However, the FECA (even following passage of the Reform Act) does not specify the statute of limitations for *civil* enforcement actions. A number of courts have concluded that the general federal default five-year statute of limitations applies to these

civil actions; *Federal Election Commission v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *Federal Election Commission v. National Right to Work Committee*, 916 F. Supp. 10 (D.D.C. 1996); *Federal Election Commission v. National Republican Senatorial Committee*, 877 F. Supp. 15 (D.D.C. 1995).

Some courts have found that the statute of limitations period commences when the violation is committed. In *Williams*, the Court rejected the FEC's argument that the period should be "tolled" (with the clock not started) until the violation is discovered; *Williams*, 104 F.3d at 240. The FEC also contended that the period should be tolled or frozen under the doctrine of "equitable tolling" for fraudulent concealment. Tolling a limit under this theory requires a showing that the defendant fraudulently concealed operative facts, that the FEC failed to discover the facts in the limitations period, and that the FEC pursued the facts diligently until discovery of the facts. The court rejected this argument also, determining that the FEC had the facts it needed in FECA reports filed by recipient committees to discover the operative facts; *Williams*, 104 F.3d at 241. The practical effect of these decisions is to make it significantly more difficult for the FEC to pursue allegations of campaign finance violations, and to cause the Commission to close a number of high-profile investigations that were past or near the five-year limit. Especially in the case of presidential campaigns, which undergo a multiyear audit before the Commission even authorizes the opening of an enforcement matter, the combination of the FEC's current capabilities and the five-year statute of limitations means that many investigations will as a practical matter be aborted without a resolution.

Table 2-1

Campaign Finance Law: A Summary

Contributors	May contribute to federal candidates	May contribute to party committees	May engage in independent expenditures	May engage in unlimited "issue advocacy"
Individuals	Yes, $2,000 per election to candidates (subject to aggregate limit)	Yes, $25,000 per year to national committees, $10,000 hard money per year to state committees (subject to aggregate limit)	Yes	Yes
Foreign Nationals	No	No	No	No if an "electioneering communication" or otherwise for elections
Corporations	No	No, in the case of national committees, state committee hard money accounts; state law governs contributions to state committee nonfederal accounts	No (except to "restricted class")	No if an "electioneering communication" or coordinated; yes otherwise
Unions	No	No, in the case of national committees, state committee hard money accounts; state law governs contributions to state committee nonfederal accounts	No (except to members)	No if an "electioneering communication" or coordinated; yes otherwise
PACs (including corporate and union)	Yes, generally $5,000	Yes, $15,000 per year to national committees; $5,000 hard money per year to state committees	Yes	Yes

PACs (including corporate and union)	Yes, generally $5,000	Yes, $15,000 per year to national committees; $5,000 hard money per year to state committees	Yes	Yes
Party Committees	Yes, variable limits	Unlimited hard money transfers between committees	Yes, with hard money	Yes, with hard money
501(c)(4)s	No	No in the case of national committees, state committee hard money accounts; state law governs contributions to state committee nonfederal accounts	In some cases	No if an "electioneering communication" (unless *MCFL* exception applies); yes otherwise
501(c)(3)s	No	No	No	Some IRS restrictions (FEC regulations exempt 501(c)(3)s)

McConnell v. FEC

In *McConnell v. FEC,* roughly 80 plaintiffs challenged substantial portions of the Bipartisan Campaign Reform Act of 2002 on constitutional grounds. In this litigation, the Act's constitutionality was defended by the U.S. Government (the FEC and the U.S. Department of Justice) and, as intervenors, its principal congressional sponsors. Following a "paper trial" and oral argument by attorneys for the plaintiffs and defendants before a special three-judge panel of

the U.S. District Court for the District of Columbia, the court issued a decision in early May of 2003; see *McConnell v. FEC*, 251 F.Supp.2d 176 (D.D.C. 2003).

With respect to the Reform Act's provisions on **soft money**, the court:

- **upheld** the provision forbidding federal candidates or officeholders (or any entities they directly or indirectly establish, finance, maintain or control) from raising or spending soft money (*i.e.*, unlimited political contributions from individuals, or contributions from corporate or union treasuries);

- **upheld** language prohibiting national, state and local parties from spending soft money on public communications that attack, oppose, promote or support a clearly identified federal candidate (even if they do not expressly advocate an election result);

- **struck down** language prohibiting national, state, and local parties from raising and spending soft money for generic campaign activities (*e.g.*, get-out-the-vote or voter registration efforts that promote a political party, but do not mention particular federal candidates); and

- **struck down** the provision prohibiting national, state and local parties from soliciting funds for, or making donations to, tax-exempt organizations that spend funds in connection with federal elections.

Regarding the Reform Act's provisions on **"electioneering communications,"** or "issue advocacy," the court:

- **struck down** the law's primary restriction on independent corporate or labor spending, which forbade the use of their treasury funds to finance broadcast, cable or satellite communications mentioning a clearly identified federal candidate within 30 days of a primary or 60 days of a general election and targeted at the candidate's electorate; and

- **upheld** part of the law's "backup" restriction on independent corporate or labor spending, resulting in a prohibition on the use of their treasury funds to finance broadcast, cable or satellite communications that promote, support, attack or oppose a federal candidate at any time (and likewise upheld FEC disclosure requirements for spending by individuals and organizations on these advertisements).

The court also struck down the Reform Act's prohibition on political contributions by minors while upholding the statutory standard defining "coordination." It declined to review the FEC's new coordination regulations, however, deeming them non-justiciable at this time. Likewise, it did not rule on the constitutionality of the Act's provisions increasing the "hard money" contribution limits, indicating that the litigants challenging those provisions lacked standing.

The decision was immediately appealed to the Supreme Court by both the plaintiffs and defendants, and the district court ultimately decided to stay the entirety of its judgment (leaving the Reform Act as a whole in effect until the Supreme Court issues a final ruling in the case).

The Supreme Court heard oral argument in *McConnell v. FEC* on September 8, 2003. The Court's decision in this case will decide the fate of the Reform Act and may also have broad implications for other regulatory approaches and endeavors in the campaign finance field.

[1] Among other things, the Reform Act is currently in full effect, as implemented by regulations issued by the Federal Election Commission. Although the three-judge district court panel charged with hearing *McConnell v. FEC* (prior to Supreme Court review) invalidated certain provisions of the Reform Act (while upholding others), it decided to stay its judgment pending Supreme Court review.

[2] The Federal Election Commission has required that a "committee, club, association, or other group of persons" as defined by section A of 2 U.S.C. § 431(4) have the "influencing of federal elections" as a major purpose in order to be considered a "political committee," based on the FEC's reading of Supreme Court rulings. The D.C. Circuit disagreed with the FEC on the precise applicability of the "major purpose" test, believing that the test is applicable only if the group makes exclusively expenditures (as opposed to making contributions as well). The Supreme Court avoided ruling on this particular issue despite granting *certiorari* in the case. *Akins v. FEC,* 101 F.3d 371 (D.C. Cir. 1997) (*en banc*), *vacated by* 524 U.S. 11 (1998). In March of 2001, the FEC published an Advance Notice of Proposed Rulemaking on "whether to revise the definition of 'political committee' contained in its regulations to include more explicit descriptions of activities that will result in those funds being considered contributions or expenditures" and "examine whether and how to incorporate the concept of 'major purpose' into the definition of 'political committee.'" Definition of Political Committee, 66 Fed. Reg. 13,681, 13,682 (proposed March 7, 2001). This rulemaking was held in abeyance as of September 27, 2001.

[3] According to a February 2002 report by Public Citizen, virtually every congressional leader had his or her own soft money leadership PAC, and 63 members of Congress had their own soft money leadership PACs. *Source*: Public Citizen. "Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills." Report. February 2002. Available at www.citizen.org.

[4] "Promotion of political ideas" is defined as "issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization's political goals"; 11 C.F.R. § 114.10(b)(1).

[5] Examples of such benefits are credit cards, insurance policies, savings plans, or training, education, or business information supplied by the corporation; 11 C.F.R. § 114.10(c)(3)(ii)(A) and (B).

[6] A nonprofit corporation can show through its accounting records that this criterion is satisfied, or will meet this requirement if it is a qualified 501(c)(4) corporation and has a written policy against accepting donations from business corporations or labor organizations; 11 C.F.R. § 114.10(c)(4)(iii).

[7] Donations to a building fund of a national or state political party committee had been specifically exempted from treatment as a "contribution" under the FECA. 2 U.S.C. §

431(8)(B)(viii), and thus seemed likely not to be covered by the foreign money prohibition. The statute stated: "any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party [is not a contribution if it is] specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." However, the Reform Act deleted this exception for donations to a national party building fund and, as discussed above, amended the foreign national prohibition to cover not merely a "contribution" but also a "donation of money or other thing of value . . . in connection with a Federal, state or local election" and a "contribution or donation to a committee of a political party." 2 U.S.C. secs. 441e(a)(1)(A) and (B). As such, foreign nationals may no longer make donations to a building fund of a national or state political party committee.

[8] 22 U.S.C. § 611(b) provides: (b) The term "foreign principal" includes (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

[9] 8 U.S.C. § 1101(a)(20) provides: (20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

[10] In her testimony before the Senate Judiciary Committee on April 30, 1997, former U.S. Attorney General Janet Reno indicated that the Department of Justice was interpreting Section 441e to prohibit soft money contributions to party committees from foreign nationals. See Hearing of the Senate Judiciary Committee, "Department of Justice Oversight," Federal News Service, April 30, 1997 (responses to questions from Senator Fred Thompson). U.S. Senator Fred Thompson (R-TN) asserted in his questioning of Attorney General Reno that her interpretation that "soft money" was never a "contribution" under the act would make acceptance of soft money contributions from foreign sources legal. The attorney general disagreed, stating that "441e prohibits contributions from foreign nationals in connection with all elections, state and federal, and thus they can't use soft money from foreign sources for issue ads by political parties."

[11] Individuals may still contribute to a special fund campaign committees may establish under FECA limits/restrictions to pay for legal and accounting compliance expenses.

[12] See Select Committee on Ethics, U.S. Senate, Senate Ethics Manual, S. Pub. 106-40 (September 2000), pp. 139-47.

[13] In fact, the FEC permits matching of credit card contributions received by presidential primary

candidates. 11 CFR secs. 9034.2, 9034.3; FEC Advisory Opinion 1999-36.

[14] David B. Magelby, ELECTION ADVOCACY: SOFT MONEY AND ISSUE ADVOCACY IN THE 2000 CONGRESSIONAL ELECTIONS 26 (2000).

[15] *See* Public Citizen, "Déjà vu Soft Money: Outlawed Contributions Likely to Flow to Shadowy 527 Groups that Skirt Flawed Disclosure System" (April 2002), available at www.publiccitizen.org.

[16] See generally Laura A. Ingersoll, ed., Federal Prosecution of Election Offenses, 6th ed. (Department of Justice, January 1995), pp. 133-35.

[17] Ingersoll, Federal Prosecution of Election Offenses, p. 115.

[18] Ingersoll, Federal Prosecution of Election Offenses, p. 93.

[19] Ingersoll, Federal Prosecution of Election Offenses, p. 109.