

# Record

June 1995

Federal Election Commission

Volume 21, Number 6

## Table of Contents

### Publications

- 1 FEC Issues 20-Year Report
- 3 1994 Election Results  
Compilation Released

### 800 Line

- 1 Corporate Facilitation

### 3 Advisory Opinions

### Compliance

- 8 MUR 3452: Excessive  
Contributions
- 9 MURs Released to the Public

### Statistics

- 9 PAC Giving in '94
- 10 PAC Giving by Candidate Type

### Court Cases

- 12 Branstool v. FEC
- 12 Fulani v. FEC
- 12 McIntyre v. Ohio
- 13 Wofford v. FEC

### Audits

- 14 Audit Report on '92 Herschensohn  
for U.S. Senate Committee

### 15 Index

## Publications

### FEC Issues 20-Year Report

Last month the FEC issued a 40-page report marking its 20th anniversary. The report is not so much a chronicle of the FEC's history as a current snapshot of the agency, exploring recent events, issues, trends and statistics relating to campaign finance.

"This report is an excellent publication to commemorate the Federal Election Commission's 20th anniversary," said FEC Chairman Danny L. McDonald. "It not only enhances understanding of the history surrounding the Commission's creation, but also provides insight into our mission and profiles the key issues the agency is facing."

Established in the wake of the Watergate scandal to administer and enforce the Federal Election Campaign Act, the FEC has been entrusted with "[S]afeguarding the integrity of the electoral process without . . . impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." (Excerpt from *Buckley v. Valeo*.) Highlights of the report include:

- An analysis of key issues before the Commission, including ques-
- (continued on page 3)

## 800 Line

### Corporate Facilitation v. Individual Volunteer Activity at the Work Place

This article explores the issue of when individual volunteer activity crosses the legal line and results in a prohibited corporate contribution. Under the Federal Election Campaign Act (the Act) a corporation that collects contributions or otherwise facilitates the making of contributions to a federal candidate has provided that candidate with something of value. In effect, an illegal corporate contribution has been made.

Last year, the Commission assessed Prudential Securities, Inc. (PSI) a \$550,000 civil penalty—the largest in FEC history—for its corporate facilitation activities (MUR 3540).<sup>1</sup> An FEC investigation uncovered a network of high level PSI officers who utilized their staffs and PSI facilities to collect contributions at the work place and forward them to federal candidates, and to organize fundraising events for the benefit of federal candidates. Some of these fundraisers were held at corporate facilities. PSI claimed

(continued on page 2)

<sup>1</sup> See page 2 of the January 1995 Record for a summary of this enforcement matter.



## 800 Line

(continued from page 1)

that corporate employees had merely been using corporate facilities to conduct volunteer activity. But the Commission concluded that the involvement of a number of PSI officials and employees working in concert on company time and using company facilities to collect contributions for federal candidates constituted corporate facilitation; such activities violate the Act's ban on corporate contributions and expenditures. 2 U.S.C. §441b(a).<sup>2</sup>

### The Corporate Ban and its Exemptions

Pursuant to 2 U.S.C. §441b(a), corporations may not make contributions or expenditures in connection with any federal election. This prohibition includes any services or anything of value provided to any

<sup>2</sup> Labor organizations are also banned under 2 U.S.C. §441b(a) from making contributions and expenditures in connection with federal elections.

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

800/424-9530  
202/219-3420  
202/501-3413 (Flashfax Service)  
202/219-3336 (TDD)

**Danny L. McDonald**, Chairman  
**Lee Ann Elliott**, Vice Chairman  
**Joan D. Aikens**, Commissioner  
**John Warren McGarry**,  
Commissioner  
**Trevor Potter**, Commissioner  
**Scott E. Thomas**, Commissioner

**John C. Surina**, Staff Director  
**Lawrence M. Noble**, General  
Counsel

Published by the Information  
Division

**Louise D. Wides**, Director  
**Dario Bard**, Editor

candidate in connection with any federal election.

The corporate ban is strict and all encompassing. The law, however, exempts specific activities from this ban. The exemptions are as follows:

- Corporations may set up a separate segregated fund (commonly called a PAC) and pay its operating and fundraising expenses (11 CFR 114.5(b));
- Corporate funds may be used to finance partisan communications to a corporation's restricted class<sup>3</sup> (11 CFR 114.3);
- Corporate funds may be used to finance certain types of nonpartisan communications (11 CFR 114.4);
- Corporate meeting rooms may be made available to federal political committees under certain circumstances (11 CFR 114.9 and 114.12); and
- Individual corporate employees and stockholders may undertake volunteer activity at the workplace and use corporate facilities to do so under limited circumstances (11 CFR 114.9).

All of these exemptions are narrowly defined by law. In MUR 3540, PSI's activities went beyond the scope of these exemptions. Further, the Commission found that PSI's violations of the law were knowing and willful, since in MUR 1690 PSI was found guilty of similar violations.

### Use of Corporate Facilities for Individual Volunteer Activity

A corporation's stockholders and employees may make occasional, isolated or incidental use of corporate facilities for individual volunteer activities in connection with federal elections. These activities may be undertaken during work

hours. 11 CFR 114.9(a)(1) and (b)(1). Incidental use is defined as use that does not interfere with the organization's normal activity. For example, one hour per week is considered incidental use. Using an office phone to make a few calls is considered incidental use. The individual volunteer must reimburse the corporation for any overhead or operating expenses related to incidental use, for example the cost of a long distance telephone call.

If the stockholder or employee exceeds incidental use, then he or she must reimburse the corporation for the use of its facilities at the normal commercial charge.

The individual volunteer activity exemption does not extend to collective enterprises where the top executives of a corporation direct their subordinates in fundraising projects, use the resources of the corporation, such as lists of vendors and customers, or solicit whole classes of corporate executives and employees.

In the PSI case, corporate officers instructed clerical staff to prepare letters, memos and other materials related to PSI fundraising events held for the benefit of federal candidates. For instance, in July 1990, PSI held a fundraiser in its New York offices for a U.S. Senator. The PSI CEO sent invitations to the event to the company's executives, vendors, advertisers, lawyers, banks and financial advisers. The invitation contained a solicitation for contributions to the fundraiser, with instructions to send contributions to the office of a company Vice President. The Vice President's office served as a collection point from which the contributions were forwarded to the candidate's campaign. The Vice President was assisted in this endeavor by his administrative assistant. The Commission determined that, through this activity,

<sup>3</sup> A corporation's restricted class includes its executive and administrative personnel, its stockholders, and the families of both groups.



PSI facilitated the making of a contribution to a Senate candidate, thus providing the campaign with something of value, in violation of the corporate ban.

PSI argued that this activity was exempted under the individual volunteer activity provision. However, this activity, by involving other corporate personnel and their subordinates, was neither individual nor wholly volunteer in nature. Moreover, PSI, through its CEOs and other officers, engaged in at least 14 similar fundraising events on behalf of 9 federal candidates in less than 5 years, further undermining PSI's contention that these activities fit the exemption, which requires such activities to be occasional, isolated or incidental.

PSI also sought to legitimize its activity by having the benefiting political committees reimburse it for the overhead costs of these supposedly individual volunteer activities. For example, political committees reimbursed PSI for the cost of secretarial time spent preparing solicitation materials. Far from clearing PSI of any wrongdoing, these reimbursements underscored PSI's failure to adhere to the regulations. The individual volunteer activity exemption does not apply in instances where a subordinate is instructed to undertake such activity. Nor does it allow a political committee to reimburse a corporation for increased overhead costs resulting from an employee's or stockholder's individual volunteer activity. Reimbursement must be made by the individual performing the volunteer activity, and such reimbursements are subject to the reporting requirements and contribution limitations set by law.

The circumstances of the PSI case led the Commission to conclude that PSI was facilitating contributions to federal candidates, in violation of 2 U.S.C. §441b(a). ♦

## Publications

(continued from page 1)

- tions of soft money, express advocacy, personal use of campaign funds, and contributions by foreign nationals;
- Coverage of the continuing debate over campaign finance reform, including the role of political parties and PACs, and the growing costs of campaigns; and
- Graphs and charts depicting trends in campaign finance, including the sources of contributions to candidates and their parties, the status of the Presidential matching fund program over the years and actual and inflation-adjusted figures on congressional campaign spending since 1978.

Additionally, the report describes the FEC's accomplishments in areas such as disclosure, enforcement and public service. For instance, the Commission's Reports Analysis Division reviewed almost 90,000 campaign reports in the last election cycle, and the agency entered into more than 100 conciliation agreements in 1994, with civil penalties totaling more than \$1.7 million.

Free copies of the report may be ordered by telephone. Call 800/424-9530 (and press three at the prompt) or 202/219-4140. ♦

## 1994 Election Results Compilation Released

Last month, the Federal Election Commission released *Federal Elections 94: Election Results for the U.S. Senate and the U.S. House of Representatives*. This publication is the seventh in the series of official results; the first volume covered the 1982 House and Senate elections. This year's *Federal Elections* compilation lists the general election result for every House and Senate race and, for the first time, provides primary and runoff election results as well.

For each race, the publication lists the following information, as provided by state election officials:

- The names of candidates on the ballot and any write-in candidates;
- Each candidate's party affiliation; and
- The percentage and number of votes each candidate received.

*Federal Elections 94* also includes maps showing, for example, Republican gains in the House by state and the make-up of the 1994 Senate class by candidate type.

A limited number of copies are available free of charge from the FEC's Public Records Office. Call 800/424-9530 (and press three at the prompt) or 202/219-4140. ♦

## Advisory Opinions

### AO 1995-2 Membership Organization's Solicitation of Representatives of "Member Firms"

Individuals who hold membership on the Commodities Exchange (COMEX) on behalf of their firms qualify as "members" under 11 CFR 114.1(e)(2). COMEX is a subsidiary of the New York Mercantile Exchange (NYMEX). NYMEX PAC, NYMEX's separate segregated fund, may therefore solicit the above-described individuals. This opinion is a follow-up to Advisory Opinion (AO) 1994-34.<sup>1</sup>

#### Background: AO 1994-34

AO 1994-34 determined that, following a merger between NYMEX and COMEX, an individual holding a COMEX seat could be solicited by

(continued on page 4)

<sup>1</sup> See page 7 of the March 1995 Record for a summary of AO 1994-34.



## Advisory Opinions

(continued from page 3)

NYMEX PAC because COMEX is affiliated with NYMEX and the individual fit the definition of a "member" of COMEX under 11 CFR 114.1(e)(2)(i); the individual demonstrated a significant financial attachment to the membership organization (one of three criteria by which an individual may qualify as a "member" for purposes of the Federal Election Campaign Act (the Act)).<sup>2</sup> In AO 1994-34 individual seat holders were found to have a significant financial attachment to COMEX because a COMEX seat was valued at approximately \$125,000, provided its holder with extensive trading rights, and entitled its holder to other monetary interests including "deferred cash payments." Additionally, they had voting rights in certain situations to protect their financial interests. This conclusion gave NYMEX PAC permission to solicit 507 of the 772 seat holders on the COMEX exchange.

### Member Firms and Their Representatives

AO 1995-2 addresses the "member" status of the remaining 265 seats. These seats are owned by "conferring members," individuals who hold membership on behalf of so-called member firms.

COMEX membership rules allow only individuals to hold COMEX seats. Member firms, therefore, are not themselves members and are only capable of enjoying membership privileges through an individual

who confers such privileges onto them. Typically, a firm partner enters into an agreement with the firm and sits on the exchange on behalf of the firm. The firm pays for the seat and may often cover COMEX-imposed fines, but COMEX holds the conferring individual personally liable for any fines. This individual is also subject to COMEX disciplinary actions, and shares in the financial risks the firm would face should it be suspended.

Under this arrangement, it is the conferring members, and not the member firms, who are considered solicitable members under 11 CFR 100.8(b)(4)(iv)(B)(1) and 114.1(e)(2)(i) for the following reasons:

- COMEX rules only allow individuals to be members, and therefore member firms may only enjoy membership privileges through conferring members;
- Although the conferring member's membership is dependent on the firm, the converse is also true;
- Conferring members have a significant financial attachment to COMEX because: despite the fact that the firms usually pay for the membership and fines, COMEX rules hold conferring members personally liable for these payments; the livelihood of conferring members—the commodities and futures business—relies on the success of COMEX; and conferring members are held personally responsible for their actions as COMEX members and are subject to COMEX disciplinary rules, thus placing themselves and their firms at great financial risk should the membership be suspended.

Conferring members, therefore, fit the definition of "member" under the Act and may be solicited by NYMEX PAC.

Date Issued: April 21, 1995;  
Length: 6 pages. ♦

## AO 1995-7 Candidate's Personal Liability for Bank Loan

FEC debt settlement procedures (11 CFR 116.7) do not protect a candidate from being held personally liable for a campaign loan he secured. Key Bank of Alaska is therefore not barred by FEC regulations from pursuing its claim against Mr. Pat Rodey.

According to Key Bank's advisory opinion request (AOR), Mr. Rodey secured a \$40,573 loan from Key Bank during the course of his 1992 House campaign. When Mr. Rodey defaulted under the payment terms of the loan, Key Bank filed suit against him. Mr. Rodey then raised the defense that 11 CFR 116.7 prevented him and his committee from repaying the loan until the Commission approved his committee's debt settlement plan.

The regulations at 11 CFR 116.7 prevent a committee from paying off its debts until the Commission approves the committee's debt settlement plan. This provision, however, applies only in instances where a committee reaches a settlement with its creditors over its debts. Key Bank and Mr. Rodey have not reached a settlement. Indeed, they are engaged in litigation. But even if Key Bank and Mr. Rodey had reached a settlement with respect to this debt, 11 CFR 116.7 would still not apply because bank loans are not subject to the debt settlement process.

Before addressing this issue, the Commission considered whether or not this AOR qualified for an advisory opinion. This was an issue because the request concerned the activities of a third party (Mr. Rodey) and the Commission's policy is to reject AORs concerning the activities of third parties. In the present case, however, the Commission decided to consider the AOR

<sup>2</sup>The other two criteria are: (1) the requirement to pay a specified amount of dues on a regular basis coupled with the right to vote directly either for at least one member who has voting rights on the organization's highest governing body or for those who select at least one member of that body; or (2) the right to vote directly for all those on the organization's highest governing body. 11 CFR 114.1(e)(2)(ii) and (iii).

because the third party had raised a defense based on a provision of the Act that affected Key Bank's continuing efforts to collect on the alleged claim.

Date Issued: April 6, 1995;  
Length: 4 pages. ♦

### AO 1995-8 A Committee's Rental of Candidate-Owned Office Space and Equipment

The Stupak for Congress committee may rent office space and equipment from the candidate, Bart T. Stupak, from his wife and from his incorporated law firm provided that:

- The rental charges are at the fair market rate (or else respect the contribution limits at 11 CFR 110.1(b)(1), as discussed in the section immediately following); and
- None of the property being rented includes any part of the personal residence of Mr. Stupak or his family.

Mr. Stupak's proposed arrangement with his committee raises issues with respect to the recently adopted rules governing the personal use of campaign funds, his wife's contribution limit, and the effect of the corporate ban (2 U.S.C. §441b(a)) on the committee's arrangement with his law firm.

#### The Personal Use Rules

Under the Act, campaign funds may not be converted to personal use. On April 5, 1995, new regulations governing the personal use of campaign funds became effective. (See page 1 of the March 1995 *Record* for a description of the rules, and page 1 of the May 1995 *Record* for the announcement of the effective date.) These rules permit the use of campaign funds for the rental

of property owned by the candidate or a family member provided that:

- The property is rented for campaign purposes and is not part of a personal residence;<sup>1</sup> and
- The rent is no more than the fair market value of the property. 11 CFR 113.1(g)(1)(i)(E)(1) and (2).

Since the building Mr. Stupak proposes to rent to his committee is office space and not a residence, Mr. Stupak's proposal is in accordance with the first requirement. With regard to the second requirement, rental payments above the market rental rate would result in the conversion of campaign funds to the candidate's personal use. On the other hand, payments below the market rate would result in an in-kind contribution by the candidate's wife (as discussed below).

#### His Wife's Contribution Limit

Mr. Stupak indicated that the monthly rent charged to his committee for the use of his former law firm's office building may be below the fair market rental rate. He jointly owns this building with his wife. By undercharging the committee, he and his wife, as joint owners, would each be making monthly in-kind contributions to the committee, in the amount of the fair market rent less the committee's rent payment, divided between Mr. and Mrs. Stupak.

Under the Federal Election Campaign Act (the Act), a candidate is free to give as much of his personal funds to the campaign as he wishes. 11 CFR 110.10(a). The candidate's spouse, however, is not exempted from the contribution

limit established at 11 CFR 110.1(b)(1). She may not make contributions to her husband's campaign of more than \$1,000 in the aggregate for any one election.

#### Rental of a Corporation's Equipment

Mr. Stupak proposed to rent all of the equipment of his former law firm to his committee. This equipment includes a copier, FAX machine, telephone system, computers, printers, desks and numerous other office items. Mr. Stupak's incorporated law firm planned to charge his committee \$200 per month for this equipment.

The Act prohibits corporations from making contributions in connection with a federal election. 2 U.S.C. 441b(a). If the law firm, which is a corporation, were to charge the committee a rental fee below the usual and normal charge for such equipment, it would be providing the committee with something of value and thus be making an illegal corporate contribution. Conversely, if the law firm overcharged the committee for renting the equipment, this would constitute an illegal conversion of campaign funds to personal use, since the committee's rent payments would "unduly augment the earnings of an asset owned by the candidate." See Advisory Opinion 1994-8.

If a usual and normal fee for the ensemble of equipment does not exist, the law firm should base the charge on the market rental fees of customary groupings of equipment in the office rental market.

Date Issued: April 21, 1995;  
Length: 5 pages. ♦

(Advisory Opinions continued on page 6)

<sup>1</sup> With respect to payments for personal residences, or any part thereof, this provision of the recently adopted personal use regulations supersedes the following advisory opinions: 1988-13, 1985-42, 1983-1 and 1976-53.



## Advisory Opinions

(continued from page 5)

### AO 1995-9

#### Operating a Political Committee in Cyberspace

NewtWatch (the committee), a political committee operating a World Wide Web site, may make political information publicly available and solicit and receive contributions via the Internet, provided that it complies with the guidelines summarized below.

The committee proposed posting the following information about House Speaker Newt Gingrich on its Web site: his voting record, complaints about him filed with the Ethics Committee and the FEC, contributor lists drawn from FEC reports filed by his campaign, his personal finances, and his sponsorship of commemorative bills.

#### Public Political Advertising and Disclaimers

Recent years have seen a rapid expansion of services available on the Internet, a sizable increase in the number of persons using it, the development of user-friendly access to the Net, and a decline in the costs of hardware and software needed to do so. The combination of these factors means that the committee's World Wide Web site constitutes a form of political advertising under 11 CFR 110.11. As a result, a disclaimer is required.

Under 2 U.S.C. §441d(a)(3), disclaimers on political advertisements made independently of a candidate or candidate's committee must mention who paid for the advertisement and state that it was not authorized by any candidate or candidate's committee. The proposed disclaimer—"Paid for by NewtWatch and not authorized by any candidate or candidate's committee"—fulfills this requirement. Furthermore, the committee proposed displaying the disclaimer in the same type size as much of the

body of the communication, and placing it at the end of the Web site's first page (the "home page") and immediately following the request for contributor information. This arrangement complies with the clear and conspicuous disclaimer requirement at 11 CFR 110.11(a)(1).

#### Accepting Contributions Via the Net

The committee proposed using the services of First Virtual Holding Company (FVHC) to receive contributions electronically. FVHC is a corporation specifically created to enable on-line commerce via the Net. Under the proposed arrangement, a contributor would have an account with FVHC and allow FVHC to charge contributions to a contributor's credit card. The committee could then secure, via an on-screen form, the contributor's authority to have FVHC charge the contribution to the contributor's credit card. The committee would then inform FVHC of the transaction. FVHC would then e-mail the contributor to request confirmation. FVHC would notify the committee to let it know whether the contribution had been confirmed or not. From time to time, FVHC would bill the contributor's credit card for accrued confirmed contributions and credit the committee's account with payment. In this way, the transaction would be carried out entirely over the Net.

This is an acceptable method of collecting contributions. It should be noted, though, that the Commission will consider the date the contributor sends the electronic confirmation to FVHC as the date the contribution is made, and the date on which the committee receives notice from FVHC that the contributor confirmed the contribution as the date the contribution is received.

Additionally, the committee must pay all of the FVHC charges it incurs—commission and registration costs, and transaction and

processing fees. These costs are to be reported as operating expenditures. FVHC must be compensated for these charges; otherwise it would be facilitating the committee's collection program, thus making an illegal corporate contribution, in violation of 2 U.S.C. §441b(a).

Although fees will be deducted from the contribution, thus reducing the amount the committee actually receives, the original amount will be used to determine compliance with the Federal Election Campaign Act's (the Act's) contribution limits and reporting provisions.

With respect to the record keeping provisions of the Act, the committee may maintain records in electronic form as long as they are retrievable. Records must be preserved for 3 years following the date the transaction is reported. 2 U.S.C. §432(d). The Commission suggested that the committee maintain backup copies of its records.

#### Ensuring "Best Efforts"

The Act requires committees to report, along with the date and amount of the contribution, the name and address of the contributor, and, when a contributor has given more than \$200 in a calendar year, that person's occupation and employer as well. 2 U.S.C. §§432(c)(1), (2) and (3), and 434(b)(3)(A). In instances when a contributor fails to provide the committee with this data, the committee must undertake "best efforts" to secure this information. A follow-up oral or written request in line with the requirements at 11 CFR 104.7(b)(2) suffices.

The committee proposed requesting contributor information at the time the contribution was made. Additionally, if information was omitted, a follow-up request would need to be made after the committee received the FVHC notice of donor confirmation. This request could be made by e-mail.

### Screening of Prohibited Sources

The global and unrestricted access to the World Wide Web raises concerns about the unknowing acceptance of contributions from prohibited sources. The committee proposed screening contributors by asking them to attest that they are not foreign nationals and that they are not knowingly exceeding their contribution limits, making contributions in the name of another, or making contributions from the general treasury funds of corporations, labor organizations, national banks or federal contractors. Such contributions are impermissible under 2 U.S.C. §§441b, 441f, 441e and 441a(a)(1)(A).

Under the committee's proposal, a user who can not attest to the above would receive a message that stated, "Sorry, federal law prevents us from accepting contributions from [type of impermissible source]." The Commission suggested substituting the following language instead: "Sorry, federal law prohibits [type of impermissible source] from contributing to [committee's changed name]." The new language places the emphasis on the user's ineligibility to contribute as opposed to the committee's ineligibility to accept the contribution.

Additionally, the committee may accept contributions from minors provided that they comply with the guidelines at 11 CFR 110.1(i)(2). Contributions from minors must be made knowingly and voluntarily by the minor, with the minor's own funds and not with funds controlled by someone else or provided to the minor by someone else for the purpose of financing such contributions. The committee must revise its attestation to inform potential contributors of the requirements pertaining to minors.

### Making Contributor Data Available

Contributor lists drawn from FEC reports may not be used for commercial or solicitation purposes. 2 U.S.C. §438(a)(4). The committee may make available a list of contributors to Speaker Gingrich's campaign (not including their street addresses and telephone numbers) provided that it is accompanied by a warning that it is unlawful to use this information for fundraising or commercial purposes.

### Problems with the Name NewtWatch

A committee may not use a candidate's name as its own unless it is authorized by that candidate. 2 U.S.C. §432(e)(4). This restriction includes the use of the candidate's first name when it clearly conveys the identity of the candidate. For this reason, the committee must change its name from NewtWatch.

It should be noted, however, that the candidate-name restriction does not apply to the title of an unauthorized committee's project when that title clearly shows opposition to the candidate. The committee's Web site is a committee project. The title "NewtWatch" connotes the committee's view that Speaker Gingrich is deserving of close scrutiny. Accordingly, the committee may title its Web site "NewtWatch."

Date Issued: April 21, 1995;  
Length: 9 pages. ♦

### AO 1995-10 Ownership of Committee Records

Under the Federal Election Campaign Act (the Act), financial records of the Helms for Senate Committee (the committee) are the property of the committee and not of a former treasurer who has refused to surrender them. The Act preempts North Carolina law with regard to the ownership of a federal campaign's records.

### Preemption of State Law

The former treasurer kept in her possession campaign records dating up to August 1, 1994, the date she was relieved from her post as committee treasurer. She asserted that North Carolina law supports her contention that the records belong to her. Further, she believed that she should retain the records in order to comply with the Act and to respond to any inquiry by the Commission.

The Commission determined, however, that:

- Under the Act, only the committee and its duly designated treasurer have legal title and control over all of the committee's records;
- The Act preempts North Carolina law to the extent that it would grant ownership of campaign records to any person other than the committee and its treasurer, but the Act does not compel a person to return records in his or her possession to the committee;
- The committee and its treasurer must demonstrate best efforts to retrieve the records in the former treasurer's possession in order to be in compliance with the record keeping requirements as they apply to records maintained before August 1, 1994;
- The committee's and its treasurer's lack of control over and access to the records in question will not excuse them from the obligation to file complete and accurate reports and from liability for knowingly accepting unlawful contributions; and
- Until such time as the committee acquires the records in question from its former treasurer, it should identify her on its Statement of Organization as a custodian of its records for the period of her tenure as committee treasurer.

Date Issued: April 27, 1995;  
Length: 9 pages. ♦

*(Advisory Opinions continued on page 8)*



## Advisory Opinions

(continued from page 7)

### AO 1995-11

#### Status of Limited Liability Company

The Hawthorn Group, a limited liability company under the laws of the Commonwealth of Virginia, is neither a corporation nor a partnership under the Federal Election Campaign Act (the Act). 2 U.S.C. §431(11). It is instead regarded as a "person" under the Act and may therefore make contributions in connection with federal elections provided it adheres to the Act's contribution limits. 2 U.S.C. §441a(a)(1).

#### Limited Liability Company

The Virginia Limited Liability Company Act defines a limited liability company as an entity that is an unincorporated association, without perpetual duration, having two or more members. Limited liability companies in Virginia share the limited liability of corporations. They lack, however, certain characteristics associated with corporations such as the free transferability of interests and perpetual life.

The limited liability company in this case, the Hawthorn Group, is an international public affairs company with three members. None of these members is a foreign national. The Hawthorn Group is not a federal government contractor and it is assumed for purposes of the opinion that no member of the Hawthorn Group is a federal government contractor.

Because, under Virginia law, a limited liability company is a form of business organization distinct from a corporation or a partnership, the Hawthorn Group is not considered a corporation or partnership under the Act. Instead, it is considered a "person" within the language at 2 U.S.C. §431(11)— "any other organization or group of persons."

As a person, the Hawthorn Group's contribution limits are as follows:

- No more than \$1,000 per election to any one candidate;
- No more than \$5,000 per year to the federal account of any one PAC;
- No more than \$5,000 per year, in aggregate, to the federal accounts of state and local chapters of any one state party committee; and
- No more than \$20,000 per year to the federal account of any one national party committee.

The Group is not, however, subject to the \$25,000 overall annual limit at 2 U.S.C. §441a(a)(3). This limit applies specifically to "individuals" rather than "persons." Further, contributions made by the Hawthorn Group do not count against the limits of any of its members.

#### Status as a Political Committee

Entities that make contributions in connection with a federal election may qualify as political committees under the Act and be required to file FEC reports. To determine if an entity is a political committee, the Commission considers, inter alia, whether a major purpose of the organization is making payments to influence elections to public office. It does not appear that this is a major purpose of the Hawthorn Group.<sup>1</sup>

The Commission expressed no opinion regarding the tax ramifications the Group faces for making political contributions. Such issues are outside the jurisdiction of the Commission.

Date Issued: April 27, 1995;  
Length: 6 pages. ♦

<sup>1</sup>In this regard, this advisory opinion supersedes Advisory Opinion 1978-51, which implied that the "major purpose" standard was not applicable to organizations like the Group.

## Advisory Opinion Requests

Advisory opinion requests (AORs) are available for review and comment in the Public Records Office.

### AOR 1995-14

Collecting contributions for an association's separate segregated fund at a conference attended by the association's members and members of another association. (Oral and Maxillofacial Surgery PAC; April 27, 1995; 2 pages)

### AOR 1995-15

Solicitations by PAC of U.S. corporation acquired by a foreign corporation. (Allison Engine Company; May 1, 1995; 1 page plus 5-page attachment) ♦

## Compliance

### MUR 3452

#### Receipt of Excessive Contributions Results in \$22,000 Civil Penalty

The Durant for United States Senator committee, active in a 1990 Michigan primary, and its treasurer agreed to pay a \$22,000 civil penalty for accepting \$55,250 in excessive contributions from 63 individuals and a political organization.

The committee accepted these excessive contributions during 1989 and 1990. Some of the excessive contributions were attributable to the general election effort of the candidate, W. Clark Durant III, although he lost in the primary. Pursuant to 2 U.S.C. §441a(f), a committee must not knowingly



accept contributions from an individual which, in the aggregate, exceed \$1,000. A committee that receives excessive contributions must either refund them or deposit them within 10 days. If the committee deposits them, it must obtain a redesignation or reattribution of the excess from the contributor(s) within 60 days of receipt. Only those contributions intended as joint contributions may be reattributed. Further, under 11 CFR 102.9(e)(2), a committee representing a candidate who has not advanced to the general election stage must, within 60 days, refund, redesignate or reattribute all general election contributions it received. When reattributing such contributions, the following steps must be taken:

- The committee treasurer gives the contributors the option of either reattributing the excessive amount among themselves or receiving a refund for the excessive amount; and
- Within 60 days from receipt of the contribution, the committee treasurer receives a written reattribution, signed by all contributors and indicating the amount to be attributed to each contributor. (If the amount to be attributed to each contributor is not specified, the contribution is attributed equally among all contributors.)

The committee treasurer is responsible for assuring the committee's compliance in these matters. 11 CFR 103.3(b).

In this case, the committee and its treasurer failed to refund or obtain proper reattributions for \$47,150 of the excessive contributions. Refunds for the remaining \$8,100 in excessive contributions were not made within the 60-day time period allowed by law. ♦

## MURs Released to the Public

Listed below are summaries of FEC enforcement cases (Matters Under Review or MURs) recently released for public review. This listing is based on the FEC press release of April 12. Files on closed MURs are available for review in the Public Records Office.

### MUR 1852 et al.

**Respondents:** (a) The LaRouche Campaign, Edward Spannaus, treasurer (VA); (b) Independent Democrats for LaRouche, Gerald Rose, treasurer (VA); (c) Publication and General Management, Inc. (NY); (d) Fusion Energy Foundation, Inc. (NY); (e) Campaigner Publications, Inc. (DC); (f) Caucus Distributors, Inc. (VA); (g) Citizens for Freeman, Belinda Haight, treasurer (MD); (h) Los Angeles Labor Committee (CA); and various others

**Complainant:** FEC initiated and various others

**Subject:** (a), (f) and (h) failure to use designated campaign depository; (a) and (b) improper reporting; (a) and (b) excessive contributions; (a)-(e) and (g) corporate contributions; (a)-(f) and (h) improper use of contributor information for solicitation; (f)-(h) failure to register and report; (a) misrepresenting facts for an audit; (a) and (h) failure to properly report earmarked contributions

**Disposition:** (a)-(h) probable cause to believe knowing and willful violations, but took no further action

### MUR 2594

**Respondents:** The LaRouche Campaign, Edward Spannaus, treasurer (NY)

**Complainant:** FEC initiated

**Subject:** Misrepresenting unauthorized receipts of individual contributors, providing false information for matching fund submissions

**Disposition:** Probable cause to believe knowing and willful violations, but took no further action ♦

## Statistics

### PAC Giving in '94 Remains at '92 Levels

A March 31 FEC press release reported that PAC contributions made to 1994 federal candidates totaled \$178.8 million, nearly the same as PAC support to 1992 federal candidates. By contrast, PACs gave 1992 federal candidates nearly \$30 million more than 1990 federal candidates. The 1992 increase can be partially accounted for by an unusual combination of factors, including reapportionment, redistricting and a large number of highly competitive open seat races.

Although total PAC contributions made to federal candidates during the 1994 cycle remained fairly constant when compared to the 1992 cycle, the patterns of PAC giving changed. For instance, contributions to House Democratic incumbents accounted for \$71.1 million of the \$178.8 million total, representing a 10 percent increase over PAC contributions to House Democratic incumbents in 1992. Meanwhile, PAC contributions to House Republican challengers increased by 48 percent, from \$4.4 million in 1992 to \$6.5 million in 1994. House Democratic challengers in 1994, on the other hand, received \$6.2 million in PAC contributions, a decrease of 19 percent from the \$7.7 million House Democratic challengers received in 1992.

House and Senate Democrats, collectively, received \$3.3 million less from PACs in 1994 than they did in 1992. Nevertheless, they continued to receive a greater share of PAC contributions than their Republican counterparts, a trend dating back to the early 1980s.

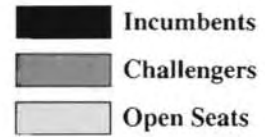
The March 31 press release has more information and statistics on PAC financial activity. To get a copy, call 800/424-9530 (and press three at the prompt) or 202/219-4140. ♦

*(Statistics continued on page 10)*



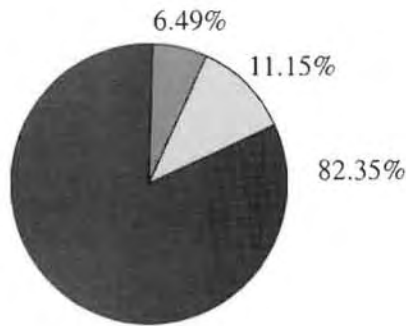
**Statistics**

(continued from page 9)



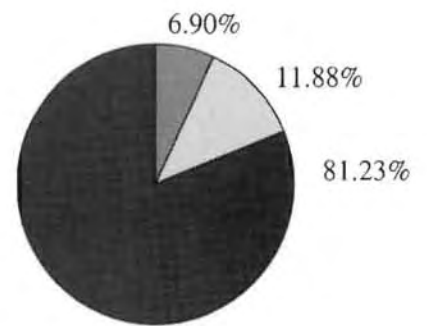
Jan. 1, 1991 –  
Aug. 31, 1992

**Democrats**



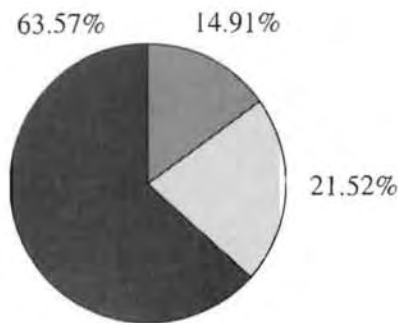
(\$59.3 million)

**Republicans**

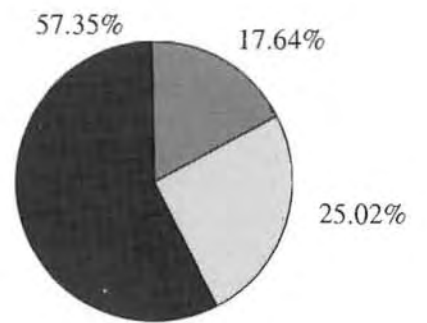


(\$26.8 million)

Sept. 1, 1992 –  
Nov. 3, 1992

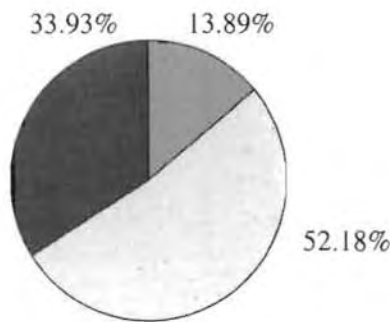


(\$26.6 million)

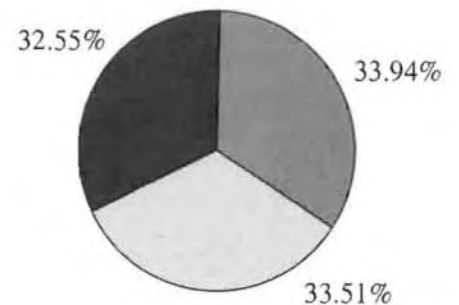


(\$15.5 million)

Nov. 4, 1992 –  
Dec. 31, 1992



(\$991,527)



(\$648,585)



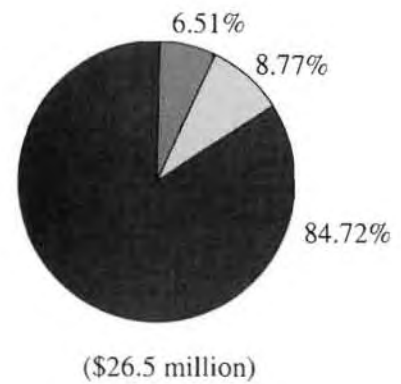
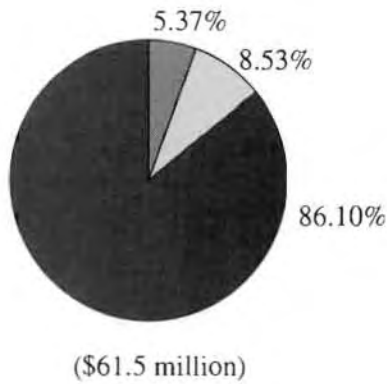
### PAC Giving by House Candidate Type

These pie charts illustrate the distribution of PAC support to different types of House candidates—incumbents, challengers, and open seats—during three different stages of the last two election cycles. The first stage depicts PAC giving prior to the start of the general election period, which is commonly considered to begin after Labor Day. The second stage depicts PAC giving during the general election period. And the last stage depicts PAC giving after the general election. This information is provided here as a supplement to the March 31 press release. ♦

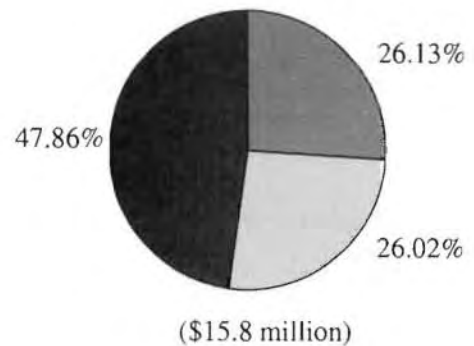
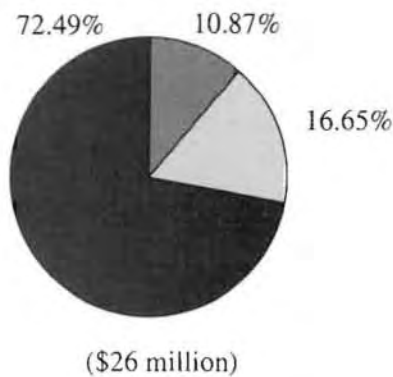
**Democrats**

**Republicans**

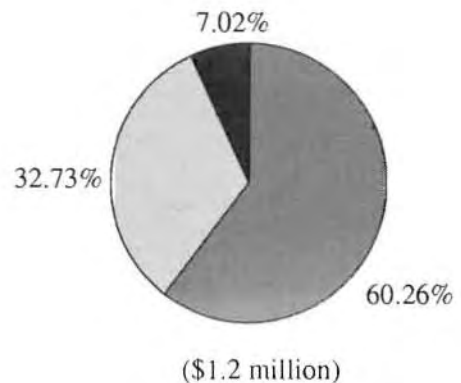
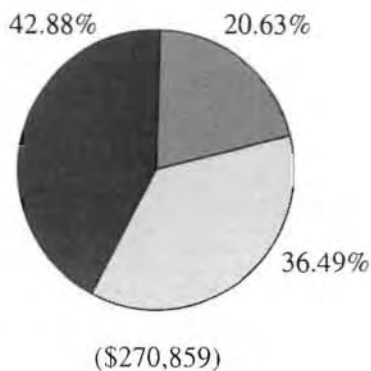
Jan. 1, 1993 –  
Aug. 31, 1994



Sept. 1, 1994 –  
Nov. 7, 1994



Nov. 8, 1994 –  
Dec. 31, 1994





## Court Cases

### Branstool, et al. v. FEC

On April 4, 1995, the U.S. District Court for the District of Columbia granted defendant's motion for summary judgment. This decision sustains the Commission's dismissal of plaintiffs' administrative complaint.

#### Background

The origins of this case are rooted in the 1988 Presidential contest between Republican candidate George Bush and Democratic candidate Michael Dukakis. In the course of the Presidential race, the National Security Political Action Committee (NSPAC) financed the production and airing of the "Willie Horton" ad. This ad attacked the Democratic candidate by blaming then Massachusetts Governor Michael Dukakis for the violent crimes committed by a convict while on furlough from a state prison.

Plaintiffs filed an administrative complaint with the FEC in May 1990, alleging that the NSPAC coordinated the production and airing of the Willie Horton ad with the Bush campaign. Under the Federal Election Campaign Act (the Act), a candidate running in a Presidential general election who accepts public funding may not accept contributions. The Bush campaign accepted public funding. If, as plaintiffs claimed, the Horton ad had been coordinated, then it would have been an in-kind contribution, in violation of 26 U.S.C. §9003(b)(2). The complaint thus hinged on the issue of whether the Horton ad was a coordinated in-kind contribution, and therefore illegal, or a permissible independent expenditure as defined under 2 U.S.C. §431(17).<sup>1</sup>

<sup>1</sup> An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office.

After examining the complaint, the Commission found reason to believe that the Bush campaign and the NSPAC had violated the Act, but after a limited investigation into the matter, the Commission deemed the evidence inconclusive and decided to take no further action on the matter. Plaintiffs' complaint was subsequently dismissed.

This led plaintiffs to file this suit in January 1992, claiming that the FEC had abused its discretion in not conducting a comprehensive investigation and had violated the Act by dismissing plaintiffs' complaint. Plaintiffs noted that among the FEC investigation's findings were a record of a June 1988 telephone conversation between the Bush campaign's chief media advisor and a NSPAC media consultant, and documentation showing that a media technician worked for both NSPAC and the Bush campaign. Plaintiffs contended that these findings were proof of coordination.

#### The Court's Decision

In addressing plaintiffs' challenge to the Commission's decision to limit the investigation into their complaint, the court saw no reason to depart from the general policy of giving broad deference to agency prosecutorial decisions.

The court held that it could set aside FEC statutory interpretations as "impermissible" only if they have no reasonable basis. The court concluded that the factual conclusions underpinning the Commission's decision were "sufficiently reasonable" to warrant the court's deference.

For instance, in dismissing the complaint, the Commission concluded that the inference of coordination created by the telephone call was rebutted by other findings. With regard to the media technician's dual employment, the Commission reasonably concluded that he performed technical tasks for the two committees and had no role in substantive or strategic decisions. ♦

### Fulani v. FEC (94-4461)

On April 12, 1995, the U.S. District Court for the Southern District of New York dismissed this case as moot.

Plaintiff had sought to restrain the FEC from taking any action in an enforcement matter because the administrative complaint that originated the case included unsworn attachments. See page 11 of the August 1994 *Record* for a summary of plaintiff's suit.

The complainant has since filed a sworn statement verifying the attachments, thus rendering moot plaintiff's arguments. ♦

### McIntyre v. Ohio

On April 19, 1995, the U.S. Supreme Court ruled that an Ohio regulation prohibiting anonymous political literature violated the First Amendment. This decision reverses the judgment of the Ohio Supreme Court.

[Although the FEC was not a party to this case, which involves state election law, the opinion is summarized here because the Court's holdings and rationale may have future relevance to aspects of federal election law.]

#### Background

In April 1988, Mrs. Margaret McIntyre distributed leaflets she produced to persons attending a public meeting to discuss a referendum on a proposed school tax levy. These leaflets expressed Mrs. McIntyre's opposition to the levy. Ohio Code, §3599.09(A), requires political literature to include the name and address of the issuer. Some of Mrs. McIntyre's leaflets were anonymous, yet she continued to distribute them even after she was made aware of §3599.09(A).

The Ohio Elections Commission fined Mrs. McIntyre \$100 for violating §3599.09(A). On review, the case climbed to the Ohio Supreme Court, which upheld the \$100 fine.



### The First Amendment and Overriding State Interests

In arriving at its decision to overturn the Ohio court's ruling, the U.S. Supreme Court first determined that anonymous political speech is protected under the First Amendment. In support of this notion, the Court stated that:

"... anonymous pamphleteering ... [has] an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. ... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation and their ideas from suppression at the hand of an intolerant society."

The Court recalled, for example, that the Federalist Papers, which favored the ratification of the Constitution, were published under fictitious names.

The Court's analysis focused on evaluating the state's interest in curbing anonymous speech. The Court cited *First National Bank of Boston v. Bellotti* as a precedent for applying the following test: A government-imposed infringement on the First Amendment is tolerable if the infringement serves an overriding public interest. Additionally, *Talley v. California* requires that laws must be narrowly tailored so as to impact only on speech that threatens the public interest.

In the case at hand, Ohio maintained that §3599.09(A) served the state's interest in preventing the dissemination of fraudulent and libelous statements.

The Court, however, found that Ohio has a number of other regulations aimed at preventing fraud and libel. While acknowledging that §3599.09(A) may help to enforce the other prohibitions against the dissemination of false political

information, the Court did not believe this justified the broad prohibition at §3599.09(A).

Ohio also argued that the regulation, by requiring political messages to include the issuer's name and address, provided voters with information on which to evaluate the message's worth. The Court dismissed this argument by noting that in the case of a leaflet written by a private citizen who is not known by the recipient, the name has no significance.

The Court thus reasoned that Ohio's interests were not sufficient to justify an infringement upon the First Amendment.

### Reconciling *McIntyre* with *Buckley v. Valeo*

In closing, the Court distinguished this case from its 1976 landmark decision in *Buckley v. Valeo*, which dealt with the constitutionality of the Federal Election Campaign Act. The Court explained that *Buckley* addressed the issue of mandatory disclosure of campaign-finance expenditures; it did not involve a prohibition of anonymous campaign literature.

The Court stated that: "Though ... mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings."

The Court pointed out that the law addressed in the *Buckley* decision is narrowly tailored to serve the public interest of campaign finance disclosure. The law regulates only candidate elections, and not referenda and other issue-based ballots. The Court stated, "In candidate elections, the government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures."

U.S. Supreme Court, No. 93-986, April 19, 1995. ♦

### Citizens for Wofford v. FEC

On April 14, 1995, plaintiff withdrew the complaint it filed against the FEC in the U.S. District Court for the District of Columbia. An FEC suit filed against plaintiff on December 20, 1994, in the U.S. District Court for the Middle District of Pennsylvania, Harrisburg Division, on December 20, 1994, is still in progress. *FEC v. Citizens for Wofford* (1:CV-94-2057).

### Background

Both cases involve an FEC enforcement action born out of the 1991 Pennsylvania special election. The major party contenders in the special election were Democratic nominee Mr. Harris Wofford and Republican nominee Mr. Richard Thornburgh. The Democrats nominated Mr. Wofford on June 1, 1991, but did not certify the nomination until September 5, 1994.

Citizens for Wofford, Mr. Wofford's principal campaign committee, regarded contributions received following the June 1 designation but prior to the September 5 certification as primary contributions.<sup>1</sup>

As a result, the Republican State Committee of Pennsylvania filed an administrative complaint with the FEC. Following an investigation, the Commission found probable cause to believe that Citizens for Wofford violated 2 U.S.C. §441a(f)—the knowing acceptance of a contribution made in violation of the Federal Election Campaign Act's

(continued on page 14)

<sup>1</sup> Counting these contributions against a contributor's primary election limit instead of against the contributor's general election limit would enable contributors to give up to twice as much to the party's nominee as they would otherwise be able to; contributors would be able to give up to their per-election limit to support Senator Wofford's primary election campaign after the fact and again to support his general election campaign.



## Court Cases

(continued from page 13)

limits. This was because contributions received after June 1, the date of the nomination, should have been counted against the contributor's general election limit. Attempts to reach a conciliation agreement with Citizens for Wofford failed. This impasse led to the filing of this case and *FEC v. Citizens for Wofford*.

U.S. District Court for the District of Columbia, No. 1:94CV02617, April 14, 1995. ♦

## Change of Address

### Political Committees

Treasurers of registered political committees automatically receive the *Record*. A change of address by a political committee (or any change to information disclosed on the Statement of Organization) must, by law, be made in writing on FEC Form 1 or by letter. The treasurer must sign the amendment and file it with the Secretary of the Senate, the Clerk of the House or the FEC (as appropriate) and with the appropriate state office.

### Other Subscribers

*Record* subscribers who are not registered political committees should include the following information when requesting a change of address:

- Subscription number (located on the upper left corner of the mailing label);
- Subscriber's name;
- Old address; and
- New address.

Subscribers (other than political committees) may correct their addresses by phone as well as by mail.

## Audits

### Audit Report on 1992 Herschensohn for U.S. Senate Committee

The FEC's final audit report on the principal campaign committee for Bruce Herschensohn, a 1992 Republican candidate for the office of U.S. Senator from California, contained the following findings:

- The committee received excessive contributions of \$130,964;
- The committee failed to itemize certain receipts;
- The committee failed to properly disclose the purpose of a number of disbursements; and
- The committee failed to file 48-hour notices for \$32,500 in contributions.

This audit was conducted pursuant to 2 U.S.C. §438(b), which authorizes the Commission to conduct audits of any political committee whose reports fail to meet the threshold level of compliance set by the Commission. Subsequent to a final audit report, the FEC may choose to pursue unresolved issues in an enforcement matter.

### Excessive Contributions

The committee had received contributions totaling \$130,964 from individuals in excess of the limits established by 2 U.S.C. §441a(a)(1)(A).

The committee took steps to resolve this infraction with respect to some of these contributions by either redesignating, reattributing or refunding \$88,565 of the excessive amount, in accordance with 11 CFR 103.3(b)(3) and (4); 110.1(b)(5);

110.1(k); 110.1(l) and 110.2(b)(5). The committee failed, however, to provide documentation demonstrating that it had acted within 60 days after its receipt of the contribution—the time limit established by law.

Because the committee did not have sufficient funds to make refunds on the remaining \$42,399, the committee complied with the audit staff's recommendation to report most of it as debts.

### Itemization of Contributions

The committee had failed to itemize a number of contributions for which itemization was required under 2 U.S.C. §§434(b) and 431(13).

These errors were the result of the committee's maintaining records of contributions on two separate data bases. The committee complied with the audit staff's recommendation and filed amended reports itemizing the receipts in question.

### Disclosure of Disbursements

The committee had failed to adequately disclose the purpose of a number of disbursements in its FEC reports, as required under 11 CFR 104.3(b)(3)(i)(A). The committee complied with the audit staff's recommendation to amend its reports accordingly.

### 48-Hour Notifications

The committee had failed to file 48-hour notices with respect to \$32,500 in contributions. Under 11 CFR 104.5(f), a candidate committee that receives a contribution of \$1,000 or more during the time period between 20 days prior to the election and 48 hours before the date of the election must disclose the amount and source of the contribution within 48 hours of receipt. ♦

## Index

The first number in each citation refers to the "number" (month) of the 1995 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, "1:4" means that the article is in the January issue on page 4.

### Advisory Opinions

- 1994-33: Calling card solicitations, 3:5
- 1994-34: Consolidating membership association PACs following a merger, 3:7
- 1994-35: Terminating reporting obligations, 5:5
- 1994-36: Solicitation of stockholders in an employee-owned company, 5:5
- 1994-37: Allocating between federal and nonfederal campaigns, 3:7
- 1994-39: Solicitation of affiliates by a membership organization, 3:8
- 1994-40: Storing records on microfilm, 3:9
- 1995-1: Respondents and the confidentiality provisions, 4:8

1995-2: Membership organization's solicitation of representatives of member firms, 6:3

1995-3: Running simultaneous Senate and Presidential campaigns, 4:8

1995-5: Use of contributor lists derived from FEC reports, 4:9

1995-7: Candidate's personal liability for bank loan, 6:4

1995-8: Committee's rental of candidate-owned office and equipment, 6:5

1995-9: Operating a political committee in cyberspace, 6:6

1995-10: Ownership of committee records, 6:7

1995-11: Status of limited liability company, 6:8

### Compliance

- \$25,000 Annual contribution limit, 4:1
- MUR 3452: Excessive contributions, 6:8
- MUR 3540: Corporate facilitation, 1:2
- MUR 3650: Loan Guarantors, 1:2

### Court Cases

- FEC v. \_\_\_\_\_
- Branstool, 6:12
- Citizens for Wofford, 6:13

- Fulani (94-4461), 6:12
- Michigan Republican State Committee, 5:4
- Montoya, 2:7; 5:4
- NRA Political Victory Fund, 2:1
- National Republican Senatorial Committee (93-1612), 4:4
- Williams, 4:5
- \_\_\_\_\_ v. FEC
- Condon, 3:5
- Democratic Senatorial Campaign Committee (93-1321), 1:10
- Democratic Senatorial Campaign Committee (95-0349), 4:8
- Freedom Republicans, 2:6
- Fulani (94-1593), 4:6
- Lytle, 1:10; 2:7
- National Republican Senatorial Committee (94-5148), 5:4
- Robertson, 4:6
- Whitmore, 2:7
- Wilson, 2:7; 5:1
- McIntyre v. Ohio, 6:12
- Rove v. Thornburgh, 4:7

### Reports

- Schedule for 1995, 1:4

### 800 Line Articles

- Administrative termination, 2:9
- Corporate facilitation, 6:1