

# Record

November 2005

Federal Election Commission

Volume 31, Number 11

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## New Litigation

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

On September 19, 2005, the Federal Election Commission asked the U.S. District Court for the District of Columbia to find that Club for Growth, Inc. (“Club”) violated the Federal Election Campaign Act (the Act) by failing to register with the Commission after meeting both the statutory definition of “political committee” and the “major purpose” test established by the Supreme Court.

#### Background

The Act requires groups that receive contributions or make expenditures in excess of \$1,000 during a calendar year, to register as a political committee. 2 U.S.C. § 433. In its landmark *Buckley v. Valeo* decision, the Supreme Court further defined the term “political committee” to include groups whose major purpose is to influence the election of candidates to office. 424 U.S. 1, 79 (1976).

This matter was initiated by an administrative complaint filed with the Commission by the Democratic

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## Advisory Opinions

### AO 2005-11

#### Use of Campaign Funds to Pay for Legal Expenses

Representative Randall “Duke” Cunningham may use campaign funds for expenses incurred in connection with a grand jury investigation related to his campaign activities and his duties as a federal officeholder.

#### Background

Representative Cunningham is the U.S. Representative from the 50<sup>th</sup> Congressional District of California and is a member of the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee. The U.S. Attorney for the Southern District of California convened a grand jury to investigate Representative Cunningham’s conduct in office and his campaign fundraising activities. The investigation appears to be based upon two principal allegations:

- In November 2003, Mitchell Wade, founder and president of federal defense contractor MZM,

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## New Litigation

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Senatorial Campaign Committee (DSCC) alleging, among other things, that the Club, a Virginia Corporation registered with the Internal Revenue Service (IRS) as a political organization under Section 527 of the Internal Revenue Code, had improperly failed to register with the FEC as a political committee.

On October 19, 2004, after finding reason to believe that the Club accepted contributions and made expenditures in excess of the \$1,000 registration threshold, the Commission authorized an administrative investigation. Based on the results of that investigation, the Commission's General Counsel notified the Club on April 25, 2005, that he was prepared to recommend

that the Commission find probable cause to believe the Club violated the Act by failing to register as a political committee. The Club filed a response on May 31, 2005.

On July 19, 2005, the Commission voted to find probable cause to believe that the Club violated the Act and approved a proposed conciliation agreement. The Commission was unable to secure an acceptable conciliation agreement with the Club, prompting this suit.

### Court Complaint

According to the Commission's complaint, the Club was formed primarily to help elect candidates to Congress who would vote for and implement its policy views. In fact, in its registration statement with the IRS, the Club describes itself as primarily dedicated to helping elect pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns.

Based on its investigation, the Commission determined that the Club met the threshold for registration as a political committee by spending millions of dollars on federal campaign activity during the 2000, 2002, and 2004 election cycles, and by soliciting funds from donors indicating their funds would be spent to help elect or defeat specific federal candidates. The Club encouraged large donations from federally-prohibited sources, and accepted many contributions from individuals that exceed the Act's \$5,000 per year contribution limit on contributions to political committees. Some of the Club's solicitations clearly indicated that the funds received would be used to support or oppose specific federal candidates. As a result, those contributions apply towards the political committee registration

threshold. See *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995).

The Commission found that the largest component of the Club's expenditures during the last three election cycles was political advertising, and that many of its ads contained messages that expressly advocated the election or defeat of clearly identified federal candidates. Based on those ads alone, the Commission alleges that the Club triggered political committee status in August 2000, at the latest.

### Request for Relief

The Commission asks that the District Court find that the Club:

- Failed to register as a political committee and as a result, failed to file periodic reports of its receipts and disbursement with the Commission;
- Knowingly accepted prohibited corporate contributions and contributions exceeding the limitations established by the Act; and
- Alternatively, made prohibited corporate expenditures.

Additionally, the Commission asks the Court to permanently enjoin the Club from violating the Act; order the Club to register and file disclosure reports with the FEC until it terminates its status as a political committee; order the Club to disgorge all excessive and prohibited contributions it has received since it became a political committee; and assess an appropriate civil penalty.

U.S. District Court for the District of Columbia, [case # 1:05cv01851].

—Elizabeth Kurland

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## Advisory Opinions

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Inc., purchased a house owned by Representative Cunningham allegedly at a price that was above market value, allegedly in order to support MZM's efforts to secure defense contracts; and

- Mr. Wade allegedly allowed Representative Cunningham to live rent-free on his yacht for 13 months.

Representative Cunningham and his campaign committee intend to use campaign funds to pay for:

- Legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings arising from the investigation; and
- Legal fees and expenses involved in responding to the press regarding the matter.

### Legal Analysis

The Act and Commission regulations generally prohibit the conversion of campaign funds to "personal use," which occurs when funds are used for expenses that would exist "irrespective" of the candidate's campaign or duties as a federal officeholder. 11 CFR 113.1(g). Permissible uses of campaign funds include:

- Expenditures in connection with a candidate's campaign for federal office; and
- Ordinary and necessary expenses incurred in connection with a federal officeholder's duties.

The question of whether the payment of legal fees constitutes personal use is dealt with on a case-by-case basis. In previous advisory opinions, the Commission has concluded that legal fees and expenses incurred in legal proceedings involving allegations that relate to a candidate's campaign

activities or duties as a federal officeholder pass the "irrespective" test and therefore may be paid with campaign funds. (See AOs 2003-17, 1998-1, 1997-12, 1996-24 and 1995-23).

Based on the representations in the request, the Commission concluded that legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham's campaign activities and federal officeholder duties. Accordingly, the Commission determined that he may use campaign funds to pay for the legal fees and expenses incurred in connection with the investigation and any legal proceedings stemming from the investigation. If at some point the grand jury investigation involves allegations not related to Representative Cunningham's campaign activities or officeholder duties, the use of campaign funds to pay for those legal expenses would constitute impermissible "personal use" of campaign funds.

Similarly, Representative Cunningham may use campaign funds to pay for legal fees and expenses incurred in responding to the press regarding allegations that relate to his campaign activities or officeholder duties because such fees and expenses would not exist irrespective of those activities and duties. (See AOs 1998-1 and 1997-12). However, in keeping with previous advisory opinions, the Commission cautioned that if the grand jury investigation involves allegations that are not related to Representative Cunningham's candidate or officeholder activities, then campaign funds can cover 100% of legal fees and expenses incurred in preparing press releases, press conferences or

talking with reporters, and cover 50% of other press-related legal expenses. The campaign must maintain appropriate documentation of any disbursements made for legal fees in connection with the investigation, legal proceedings or press responses, and the committee must disclose these disbursements as "operating expenditures" on its regular reports filed with the FEC.

—Gary Mullen

## AO 2005-12

### Fundraising and Spending by a Federal Candidate/Officeholder for his Nonfederal Exploratory Committee

U.S. Representative Fattah may raise and spend funds for his potential mayoral campaign that exceed the Act's contribution limits. The funds must only be raised and spent for activities that refer to his candidacy for mayor of Philadelphia and/or others seeking that office and the amounts and sources of the funds must be consistent with state law.

### Background

Generally, under the Act, federal candidates and officeholders, their agents and any entities directly or indirectly established, financed, maintained or controlled by a federal candidate/officeholder can only solicit, receive, direct, transfer, spend or disburse funds in connection with a nonfederal election if those funds are consistent with the limits and prohibitions of the Act and also comply with state law. However, the Act provides a limited exception from this requirement for federal candidates and officeholders who are also state or local candidates

## Advisory Opinions

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and are raising and spending funds solely in connection with their own nonfederal campaigns. 2 U.S.C. §§441i(e)(1)(B) and 441i(e)(2); 11 CFR 300.62 and 300.63.

### Analysis

Representative Fattah is both a federal officeholder and a federal candidate seeking re-election to the House from the Second Congressional District of Pennsylvania in 2006. Although Representative Fattah does not plan to formally announce his candidacy for mayor until after the November 2006 Congressional election, he does intend to establish an exploratory committee for the mayoral election prior to that time. As part of that exploratory effort, he intends to raise and spend funds that are in excess of the amount limits contained in the Act. The funds would be raised and spent “exclusively in connection with his potential candidacy for mayor and would not, in any way, be used in connection with any candidacy for federal office” nor used “in any way to influence any election other than that of Representative Fattah’s potential candidacy for mayor of Philadelphia.”

Representative Fattah and his exploratory committee’s fundraising are covered by the exception contained in 2 U.S.C. §441i(e)(2). Accordingly, once his mayoral exploratory committee is established, Representative Fattah and his exploratory committee may raise and spend funds in excess of the amount limits contained in the Act exclusively in connection with his candidacy

for mayor of Philadelphia, so long as their activities refer only to Representative Fattah as a candidate for mayor of Philadelphia, to other candidates for that same office, or both, and so long as the amounts and sources of the funds are consistent with state law. See AO 2003-32, 2005-2 and 2005-5.

Date issued: September 22, 2005;  
Length: 5 pages

—Kathy Carothers

## Advisory Opinion Requests

### AOR 2005-16

Application of the press exception to a network of websites established and maintained by a limited liability company (Fired UP! LLC, September 14, 2005).

### AOR 2005-17

Growers association’s status as trade association, possible affiliation with related cooperative, and ability of cooperative to solicit solicitable class of growers association’s corporate members for contributions to cooperative’s SSF (American Crystal Sugar Company and Red River Valley Sugarbeet Growers Association, Inc., September 21, 2005)

### AOR 2005-18

Weekly radio show featuring Congressman and paid for his campaign committee (Silvestre Reyes, September 21)

## Court Cases

### Wisconsin Right to Life v. FEC

On September 27, 2005, the Supreme Court agreed to hear Wisconsin Right to Life’s challenge to the ban on corporate financing of electioneering communications. The plaintiff has asked the Court to find the ban unconstitutional as applied to certain grass-roots lobbying activities. Earlier this year, a three-judge panel of the U.S. District Court for the District of Columbia had dismissed this case, with prejudice, finding that the Supreme Court’s decision in *McConnell v. FEC* precluded the plaintiff’s challenge. See the July 2005 *Record*, page 1.

## Reports

### FEC Forms and Instructions Revised

The Commission has made technical revisions to several forms and instructions to reflect a change in the law and to eliminate duplicative reporting. The modifications include:

- Revising FEC Form 5 (Report of Independent Expenditures by Individuals and Other Persons/Entities) and its instructions to eliminate references to pre- and post-election reports (no longer required by the law).
- Revising FEC Form 10 (24-Hour Notice of Expenditure from Candidate’s Personal Funds) and the instructions to both FEC Form 10 and FEC Form 6 (48 Hour Notice of Contributions/Loans Received) to explain the limited



circumstances in which a campaign affected by the “Millionaires’ Amendment” may submit FEC Form 10 in lieu of FEC Form 6 when reporting a last-minute loan or contribution from the candidate.

The revised forms and instructions were transmitted to Congress on September 14, 2005, and became effective on October 17, 2005. As of that date, older versions of these forms and instructions are obsolete and should not be used. The revised forms and instructions are available on the FEC web site at <http://www.fec.gov/info/forms.shtml> or by calling, toll-free, 1-800/424-9530 (press 3).

—Dorothy Yeager

## Administrative Fine Program

### Procedural Changes for Admin Fines

Later this year, the mailing address for administrative fine payments will change, and new processing procedures will take effect.

Committees that have filed reports late or failed to file will send payments for the resulting administrative fines to one of two new mailing addresses. If the committee sends its check or money order by regular U.S. mail, it should be addressed to:

Federal Election Commission  
PO Box 979058  
St. Louis, MO 63197-9000

If the committee chooses to send its payment by courier or overnight delivery, it should be addressed to:

US Bank – Government Lockbox  
FEC # 979058  
1005 Convention Plaza  
Attn: Government Lockbox,  
SL-MO-C2GL  
St. Louis, MO 63101

In addition, the Treasury Department has announced the following new procedures for processing payments sent to the administrative fines lockbox: “Personal checks will be converted into electronic funds transfers (EFTs). Your account will be electronically debited for the amount on the check, usually within 24 hours, and the debit will appear on your regular statement. We will destroy your original check and keep a copy of it. In case the EFT cannot be processed for technical reasons, you authorize us to process the copy in lieu of the original check. Should the EFT not be completed because of insufficient funds, we may try to make the transfer twice.”

Committees involved in the administrative fines process will receive specific instructions in mailgram notifications.

## Outreach

### Seminar for Nonconnected Political Action Committees

On November 16, 2005, the Commission will hold a one-day seminar for nonconnected committees (i.e., PACs not sponsored by a corporation, union, trade association or incorporated membership organization) at its headquarters at 999 E Street, N.W. in Washington D.C. This seminar is recommended for:

- Treasurers of leadership PACs, partnership PACs and other non-connected PACs;
- Staff of the above organizations who have responsibility for compliance with federal campaign finance laws;
- Attorneys, accountants and consultants who have clients that are nonconnected PACs or unregistered section 527 organizations (under tax law); and
- Anyone who wants to gain in-depth knowledge of federal campaign finance law as it applies to nonconnected PACs and unregistered section 527 organizations.

The seminar will address issues such as fundraising and reporting, as well as the FEC’s rules on when section 527 organizations trigger federal reporting requirements. Commissioners and experienced FEC staff will specifically discuss recent changes to the campaign finance law, such as new allocation rules for nonconnected PACs.

The registration fee for this seminar is \$100 per attendee, which covers the cost of the seminar, materials, a reception and refreshments. Payment is required prior to the seminar. A full refund will be made for all cancellations received before November 14. Complete registration information is available on the FEC web site at [http://www.fec.gov/info/conference\\_materials/nonconn\\_seminar.shtml](http://www.fec.gov/info/conference_materials/nonconn_seminar.shtml), along with the seminar agenda and a list of hotels located near the FEC. Further questions about the seminar should be directed to the Information Division by phone at 1-800/424-9530 (press 6), or locally at 202/694-1100, or via e-mail to [Conferences@fec.gov](mailto:Conferences@fec.gov).

## Outreach

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### FEC Campaign Finance Law Conferences Scheduled for 2006

Each year the Federal Election Commission sponsors training conferences for the regulated community where Commissioners and experienced staff conduct a variety of technical workshops on federal campaign finance law. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. The schedule in the box below lists the dates, target audiences and locations for FEC conferences to be held in 2006. Information on conference registration will be available later this year and early in 2006 online at <http://www.fec.gov/info/outreach.shtml#conferences> and in future issues of the Record.

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; e-mail: [tonis@sylvestermanagement.com](mailto:tonis@sylvestermanagement.com)). For questions about the conference program, or to receive e-mail notification when registration begins, call the FEC's Information Division at 1-800/424-9530 (press 6) (locally at 202/694-1100), or send an e-mail to [Conferences@fec.gov](mailto:Conferences@fec.gov).

### Upcoming 2006 Conferences

#### Conference for Campaigns, Parties and Corporate/Labor/Trade Assn. PACs

February 1-2, 2006  
Wyndham Harbour Island  
Tampa, FL

#### Conference for House and Senate Campaigns and Political Party Committees

March 14-15, 2006  
Omni Shoreham  
Washington, D.C.

#### Conference for Corporations and their PACs

April 2006 (tentative)  
Washington, D.C.

#### Conference for Trade Associations, Labor Organizations, Membership Organizations and their PACs

May 25-26, 2006  
Hyatt Regency on Capitol Hill  
Washington, D.C.

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