Application of Campaign Finance Law to Indian Tribes

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Summary

Under the Federal Election Campaign Act (FECA), Indian tribes are subject to contribution limits applicable to "persons," as defined by the act. For the 2008 election cycle, these limits include $2,300 per election to a candidate, $28,500 per year to a political party's national committee, and $5,000 per year to a political action committee (PAC). The Federal Election Commission (FEC) has found, however, that FECA's $108,200 election cycle aggregate limit applicable to "individuals," as defined by the act, does not apply to Indian tribes (similar to FECA's treatment of other interest groups that operate through PACs and are also not subject to an aggregate limit). In addition, as most Indian tribes are unincorporated, they are not subject to the FECA ban on use of corporate treasury funds for contributions and expenditures in connection with federal elections. Hence, unlike corporations, most Indian tribes are not required to establish PACs in order to participate in federal elections. As the result of an FEC ruling, unlike PACs, Indian tribes are also not required to disclose the amounts and recipients of any contributions they make. With regard to unregulated soft money, Indian tribes may spend unlimited amounts of money on issue advocacy communications.

The Bipartisan Campaign Reform Act (BCRA) of 2002 made several significant changes to FECA, including increasing certain contribution limits from their previous levels. BCRA also prohibited any "person," which includes Indian tribes, from making soft money donations to political parties. While FECA prohibits corporations and unions from paying for broadcast issue advertisements that refer to federal candidates within 30 days of a primary or 60 days of a general election, labeled by BCRA as "electioneering communications," unincorporated Indian tribes are not subject to such a prohibition. However, if an Indian tribe sponsors an electioneering communication, regardless of its incorporation status, it is subject to disclosure requirements, including the identification of disbursements and donors over certain dollar amounts.

Application of Campaign Finance Law to Indian Tribes

Activity Fully Regulated by Federal Law: Hard Money

The Federal Election Campaign Act (FECA)[1] regulates contributions and expenditures for federal election campaigns. The term "hard money," which is not statutorily defined, typically refers to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of FECA.[2] Unlike soft money, which will be discussed in the next section, hard money may be used "in connection with" or "for the purpose of influencing" federal elections.

Under FECA, hard money restrictions apply to contributions from and expenditures by any "person," as defined to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons," but not including the federal government.[3] FECA provides that a "person" is limited to contributing no more than

- $2,000 per candidate, per election[4] (adjusted for inflation to $2,300 for the 2007-2008 election cycle);
- $25,000 per year to a national committee of a political party[5] (adjusted for inflation to $28,500 for the 2007-2008 election cycle); and
- $5,000 per year to PACs[6] (limits on contributions by and to PACs are not adjusted for inflation).

FECA further provides that an "individual" is subject to an aggregate limit on all contributions per two-year election cycle (encompassing all contributions to federally registered candidates, parties, and PACs): $95,000 per two-year election cycle, with sub-limits: (a) $37,500 to all candidates and (b) $57,500 to all PACs and parties (no more than $37,500 of which is to state and local parties and PACs).[7] As indexed for inflation, the 2007-2008 election cycle limit is $108,200, with sub-limits: (a) $42,700 to all candidates and (b) $65,500 to all PACs and parties (no more than $42,700 of which is to state and local parties and PACs).

In interpreting such statutory provisions, the Federal Election Commission (FEC) has consistently found that the act's definition of "person" includes unincorporated Indian tribes, thereby subjecting tribes to the $2,300 per candidate per election limit, the $28,500 per year limit to a national party, and the $5,000 per year limit to PACs.[8] On May 15, 2000, however, the FEC found that whereas an unincorporated Indian tribe is considered a "person" under FECA, it is not considered an "individual" and therefore is not subject to the aggregate election-cycle limit.[9] As a

[1] 2 U.S.C. § 431 *et seq.*

[2] *See* 2 U.S.C. §§ 441a, 441b(a).

[3] 2 U.S.C. § 431(11).

[4] 2 U.S.C. § 441a(a)(1)(A).

[5] 2 U.S.C. § 441a(a)(1)(B).

[6] 2 U.S.C. § 441a(a)(1)(C).

[7] 2 U.S.C. § 441a(a)(3).

[8] *See* Federal Election Commission Advisory Opinion, AO 2000-05 (May 15, 2000), *citing* AO 1978-51, 1999-32, and 1993-12 (where the Commission found that, as "persons," unincorporated Indian tribes were subject to the prohibition on contributions by persons with Federal contracts if they are engaged in such contracts).

[9] Federal Election Commission Advisory Opinion, AO 2000-05 (May 15, 2000) .

result of that ruling, it appears that an Indian tribe, by making, for example, an unlimited number of $2,300, $28,500, and $5,000 contributions, could significantly exceed the $108,200 aggregate election-cycle limit applicable to "individuals."[10]

FECA also prohibits corporations, labor unions, and national banks from using their treasury funds to make contributions and expenditures in connection with federal elections.[11] Such entities may, however, participate in financing federal elections by establishing separate segregated funds, also known as political action committees (PACs), which are permitted to raise voluntary contributions for use in federal elections.[12] PAC contributions are subject to limitations under FECA, as are contributions from individual citizens and political parties.

Generally, as most Indian tribes are unincorporated, they are not subject to the FECA ban on the use of corporate treasury funds for contributions and expenditures in connection with federal elections. Accordingly, most tribes may make contributions in federal elections directly from their tribal funds, without establishing a PAC. This appears to facilitate the ability of Indian tribes to make federal election contributions. That is, while current law limits contributions to a PAC to $5,000 per year from any source,[13] a tribe may acquire a large amount of funds for use in federal elections more directly (i.e., from its own tribal funds, including, for example, income from tribal enterprises, so long as those enterprises are neither incorporated nor government contractors).

In one key respect, the FEC treats Indian tribes differently than PACs. Although a 1978 FEC ruling had required Indian tribes making contributions to comply with the periodic reporting requirements of FECA,[14] this requirement was explicitly superceded by a 1995 agency ruling.[15] Although contributions from tribes must be reported by recipients, one must view the FEC filings of candidates, PACs, and parties in order to track the funds given by an Indian tribe, as well as the IRS filings by section 527 political organizations. *PoliticalMoneyLine* found that some $25 million was donated for 2000-20005 federal elections by 212 federally recognized Indian tribes, and that the reporting was made under almost 2,000 different variations of their names.[16] Thus, the ability to track the flow of election-related money from Indian tribes is more difficult than it is for other large entities.

Several observations may be made about the ability of Indian tribes to spend money in federal elections compared with that of other interest groups, which typically operate through PACs. Like other interest groups, Indian tribes are subject to no aggregate limit on their total federal election contributions (only individual citizens are subject to this limit). Unlike an interest group PAC, however, an Indian tribe may have a more readily available pool of funds that could be used in federal elections, that is, its own tribal funds, as opposed to a fund solely comprised of

[10] For example, one commentator estimated that without the aggregate limit, an Indian tribe in 2000 could contribute: $240,000 during a two-year election cycle to the two major national parties and their affiliated House and Senate campaign committees; up to $1 million during an election cycle to the 100 state party committees; and distribute as much as $1,872,000 to every candidate running for the House and Senate from the two major political parties. Edward Zuckerman, *FEC Lets Indian Tribes Convert Government Funds to Political Contributions*, Political Finance & Lobby Reporter, vol. 21, June 14, 2000.

[11] 2 U.S.C. § 441b(a).

[12] 2 U.S.C. § 441b(b)(2)(C).

[13] 2 U.S.C. § 441a(a)(1)(C).

[14] Federal Election Commission Advisory Opinion, AO 1978-51 (Sept. 1, 1978).

[15] Federal Election Commission Advisory Opinion, AO 1995-11 (Apr. 28, 1995), footnote 10.

[16] *PoliticalMoneyLine* Home Page Update, Jan. 28, 2006.

contributions that are subject to limitations and source restrictions. This advantage, however, may be somewhat offset by the $5,000 per candidate, per election limit applicable to a PAC, which typically qualifies as a "multicandidate committee,"[17] compared with the $2,300 per candidate, per election limit applicable to all other persons, including Indian tribes. (In one apparent anomaly in FECA, a multicandidate committee may only contribute $15,000 per year to the national committee of a political party, whereas any other person, including an Indian tribe, may contribute $25,000,[18] or $28,500 in the 2007-2008 election cycle, adjusted for inflation.)

Activity Not Fully Regulated by Federal Law: Soft Money

While "soft money" is not expressly defined in federal election law and regulation, strictly speaking, it refers to funds that are not regulated by FECA (i.e., hard money). It may refer to corporate and labor treasury funds that cannot legally be used in connection with federal elections, but can be used for other specified purposes. Sometimes referred to as nonfederal funds, prior to the enactment of the Bipartisan Campaign Reform Act (BCRA) of 2002 (P.L. 107-155; March 27, 2002), "soft money" often referred to non-FECA funds raised by the national committees of the two major political parties. BCRA put an end to this practice by prohibiting national parties from raising funds not subject to FECA, whether from individual citizens, corporations, labor unions, or Indian tribes.[19]

Even after the enactment of BCRA, however, spending on issue advocacy communications remains a prominent soft money activity. Issue advocacy communications are generally paid for by a group, such as a for-profit or nonprofit corporation or labor union, for advertisements (typically broadcast on radio or television) that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. Prior to BCRA, issue advocacy communications were generally unregulated by FECA.[20] Therefore, Indian tribes (like corporations, labor unions, and individuals) could spend unlimited amounts of money on such communications.

With the enactment of BCRA, *certain* issue ads are now regulated. BCRA created a new term in federal election law, "electioneering communication," which describes a political ad that "refers" to a clearly identified federal candidate, is broadcast within 30 days of a primary or 60 days of a general election, and if for House and Senate elections, is "targeted to the relevant electorate,"

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[17] 2 U.S.C. § 441a(a)(2)(A). A multicandidate committee is defined in 2 U.S.C. § 441a(a)(4) as a political committee that has been registered for at least six months, has received contributions from more than 50 persons, and, except for state party committees, has made contributions to five or more federal candidates.

[18] 2 U.S.C. §§ 441a(a)(2)(B), 441a(a)(1)(B).

[19] 2 U.S.C. § 441i(a).

[20] Prior to the Supreme Court upholding the constitutionality of BCRA's regulation of electioneering communications in *McConnell v. FEC*, 540 U.S. 93 (2003), the prevailing view of the U.S. appellate courts was that Supreme Court precedent (specifically, *Buckley v. Valeo,* 424 U.S. 1 (1976)) mandated that a communication contain *express* words advocating the election or defeat of a clearly identified candidate in order for it to be constitutionally regulated. If a communication did not contain such express words, most courts determined that it could not be regulated. Effectively overturning such lower court rulings, the Supreme Court in *McConnell* held that neither the First Amendment nor *Buckley* prohibits BCRA's regulation of "electioneering communications," even though electioneering communications, by definition, do not necessarily contain express advocacy. The Court determined that when the *Buckley* Court distinguished between express and issue advocacy, it did so as a matter of statutory interpretation, not constitutional command. Moreover, the Court announced that, by narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, it "did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." McConnell, 540 U.S. at 189-194.

(i.e., is received by 50,000 or more persons in the state or district where the respective House or Senate election is occurring).[21] BCRA prohibits the financing of such communications with union or certain corporate funds.[22] Furthermore, for permissible "electioneering communications," federal election law requires disclosure of disbursements over $10,000 for such communications, including identification of each donor of $1,000 or more.[23] Therefore, while corporations and labor unions are prohibited from engaging in "electioneering communications," it appears that most Indian tribes, as unincorporated entities, may continue to finance such communications, subject to the disclosure requirements.

Table 1. Treatment of Indian Tribes Versus Most Interest Groups and Individual Citizens under Federal Election Law

Individual Citizens	Indian Tribes	Most Interest Groups
HARD MONEY		
Contributions		
	Treated as persons:	*Activity through PACs:*
• $2,300 to a candidate[a]	• $2,300 to a candidate[a]	• $5,000 to a candidate
• $28,500 to national party[a]	• $28,500 to national party[a]	• $15,000 to a national party
• Aggregate limit per 2-year election cycle: $108,200, with various sub-limits[b]	• No aggregate limit per election cycle	• No aggregate limit per election cycle
Receipts (sources of funds used for contributions)		
Personal funds of individuals who are U.S. citizens or permanent resident aliens	Tribal funds (but may contain no funds from incorporated businesses or government contractors)	Only amounts donated to the PAC ($5,000 per year from an individual)
Disclosure		
Individuals have no reporting requirements for contributions made, under FECA	As nonpolitical committees, Tribes have no filing requirements, per FEC ruling	PACs are required by FECA to register and submit periodic reports of receipts and expenditures
SOFT MONEY		
Issue Ads		
Permitted to run "electioneering communications," but must disclose amounts spent	Permitted to run "electioneering communications" (as Indian tribes are unincorporated entities), but must disclose amounts spent and $1000+ donors	No corporate- or union-funded electioneering ads (broadcast within last 30/60 days before primary/general elections)

[21] 2 U.S.C. §§434(f)(3)(A), (C).

[22] 2 U.S.C. §441b(b)(2). This prohibition does not appear to apply to broadcast ads that would otherwise be considered "electioneering communications" under BCRA, if they are paid for by Internal Revenue Code (IRC) §527 or §501(c) organizations that are unincorporated. Although 2 U.S.C. §441b(c)(2) exempts from the prohibition IRC §527 and §501(c)(4) corporations that pay for ads exclusively with funds provided by individuals who are U.S. citizens or nationals or who are lawfully admitted for permanent residence, §441b(c)(6) subsequently appears to nullify that exemption by providing that the exception does not apply if the communication is "targeted."

[23] 2 U.S.C. §434(f).

Individual Citizens	Indian Tribes	Most Interest Groups
Donations to Parties		
N/A (individuals may contribute to extent permitted by FECA, subject to per committee and aggregate cycle limits)	BCRA prohibited soft money (i.e., unlimited) donations to a party committee	BCRA prohibited soft money (i.e., unlimited) donations to a party committee

a. Under BCRA, these limits are required to be adjusted for inflation at the start of each election cycle. The amounts shown here are the limits set for the 2007-2008 election cycle.

b. Individual citizens, in contrast with Indian tribes and other interest groups via their PACs, are subject to an aggregate limit on all contributions to federal candidates, PACs, and parties (through federal accounts), currently $108,200 per two-year cycle, with sub-limits: (a) $42,700 to all candidates; and (b) $65,500 to all PACs and parties (no more than $42,700 of which is to state and local parties and PACs), all indexed.

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