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CRS Report for Congress

Campaign Finance: Developments in the 110th Congress

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Summary

Recent events suggest continued congressional interest in campaign finance policy. This report provides an overview and analysis of 110th Congress legislation addressed in hearings or that has passed at least one chamber. The report also discusses two policy developments: Federal Election Commission (FEC) nominations and a recent Supreme Court ruling that could affect future political advertising (*Federal Election Commission v. Wisconsin Right to Life, Inc.)* As of this writing, approximately 50 bills devoted largely to campaign finance have been introduced in the 110th Congress, but none have become law. The House has passed two bills containing campaign finance provisions. H.R. 2630 would restrict campaign and leadership political action committee (PAC) payments to candidate spouses. A provision in H.R. 3093 would prohibit spending Justice Department funds on criminal enforcement of the Bipartisan Campaign Reform Act (BCRA) "electioneering communication" provision. In the Senate, an electronic disclosure bill (S. 223) was reported from the Rules and Administration Committee but has not received floor consideration. The committee also held hearings on coordinated party expenditures (S. 1091) and congressional public financing (S. 1285) legislation. Most significantly, lobbying and ethics bill S. 1, which became law in September 2007 (P.L. 110-81), contains some campaign finance provisions. This report will be updated as events warrant throughout the 110th Congress.

Brief Historical Overview

Congress enacted major campaign finance legislation in 2002. The Bipartisan Campaign Reform Act of 2002 — also known as "BCRA" or "McCain-Feingold" for its principal Senate sponsors — constituted the first major change to the nation's campaign finance laws since 1979.[1] Among other points, BCRA banned "soft money" in federal

[1] On BCRA, see P.L. 107-155; 116 Stat. 81. For additional information, see CRS Report RL31402, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law*, by Joseph E. Cantor and L. Paige Whitaker. Cantor is now retired from CRS.
(continued...)

elections and restricted certain political advertising preceding elections. BCRA amended the Federal Election Campaign Act (FECA), enacted in 1971.[2] Major FECA amendments (in 1974, 1976, and 1979) expanded the presidential public-financing system and placed limits on campaign contributions and expenditures. The Supreme Court struck down mandatory spending limits, except those accepted voluntarily in exchange for public campaign financing, in its 1976 *Buckley v. Valeo* decision.[3]

Campaign Finance Legislation in the 110th Congress

As of this writing, approximately 50 bills affecting campaign finance have been introduced in the 110th Congress.[4] This level of activity suggests an interest in campaign finance legislation well ahead of the 109th Congress, when 51 bills were introduced during the entire two-year period.[5] The House has passed two bills that contain campaign finance provisions, but no bills devoted solely to campaign finance have become law during the 110th Congress. A new lobbying and ethics law contains some campaign finance provisions. The following discussion provides additional details on campaign finance bills that have been the subject of hearings or floor votes during the 110th Congress.

Campaign Finance Provisions in S. 1. S. 1, which became P.L. 110-81 on September 14, 2007, primarily addresses lobbying and ethics, but also contains some campaign finance provisions.[6] Most notably, the new law requires disclosure of bundling activities by registered lobbyists. "Bundling" refers to a campaign fundraising practice in which an intermediary — often a lobbyist — either receives contributions and passes them to a campaign or is credited with soliciting contributions that a campaign receives directly. Under the new law, political committees (i.e., candidate committees, political action committees, etc.) are required to report to the FEC the name, address, and employer of each Lobbying Disclosure Act (LDA)-registered lobbyist known (or "reasonably known") to have made at least two bundled contributions totaling more than $15,000 during specified six-month reporting periods.[7]

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[1] (...continued)
Contact R. Sam Garrett with questions regarding Mr. Cantor's portfolio.

[2] 2 U.S.C. 431 § et seq.

[3] See CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[4] This total is approximate because of varying ways in which "campaign finance" could be classified. The total does not include FEC appropriations bills. On that topic, see CRS Report RL33998, *Financial Services and General Government (FSGG): FY2008 Appropriations*, Garrett L. Hatch, (Coordinator).

[5] CRS Report RL33836, *Campaign Finance Legislation and Activity in the 109th Congress*, by R. Sam Garrett.

[6] Some information in this section is adapted from CRS Report RL34166, *Lobby Law and Ethics Rules Changes in the 110th Congress*, by Jack Maskell. That report provides additional discussion and analysis.

[7] S. 1 as passed by the House and Senate (hereafter, "S. 1"), Secs. 204; Sec. 601. On LDA, see (continued...)

The new law also restricts certain practices that have been seen as potential sources of campaign finance abuse in the past. S. 1 prohibits Member and Senator attendance at presidential convention events in their honor if registered lobbyists or "private entit[ies]" that hire lobbyists pay for the events.[8] S. 1 also requires additional disclosure about political committees (e.g., leadership PACs) established or controlled by lobbyists, lobbyists' campaign contributions, and lobbyists' contributions to presidential inaugural committees and presidential libraries.[9] Finally, S. 1 restricts Member travel on private, non-commercial aircraft. Senators, candidates, and staff may continue to travel on private aircraft if they reimburse the entity providing the aircraft for the "pro rata share of the fair market value" for rental or charter of a comparable aircraft (as opposed to the previous practice of reimbursement only at the rate of first-class travel). House Members, candidates, and staff are "substantially banned" from flying aboard private, non-commercial aircraft, as the law precludes reimbursements for such flights.[10]

Potential Campaign Finance Implications. Overall, S. 1 restricts some campaign-finance practices and increases disclosure, but only under specific circumstances. Forthcoming FEC regulations will likely provide more clarity about the bundling provision's impact. S. 1 requires the FEC to promulgate regulations implementing the bundling provision within six months of enactment (which would be March 2007).[11] As noted above, S. 1 only requires disclosure of bundling by registered lobbyists — not other fundraisers. Therefore, S. 1 will provide more transparency than is currently available about which lobbyists arrange certain bundled contributions. However, it does not mandate disclosure of bundled contributions that do not meet the time and monetary thresholds discussed above, bundling by non-lobbyists, or information about bundling practices generally. Similarly, although Members may not attend convention events in their honor, S. 1 does not ban the events per se, nor does it preclude *other* Members from attending such events. Finally, prior to the law's enactment, some lawmakers and President Bush expressed concern about the bill's travel provisions, particularly a possible unintended consequence of prohibitively expensive reimbursement for campaign travel aboard presidential and vice-presidential aircraft.[12] On September 24, 2007, the FEC announced that while it formulates rules that could clarify the travel issue, it "will not pursue a political committee [for enforcement action] if it operates under a reasonable interpretation of the [new] statute, even if our subsequent regulations reach a

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[7] (...continued)
2 U.S.C. § 1601 et seq.

[8] Ibid., Secs. 305; 542. Exceptions exist for presidential or vice-presidential candidates.

[9] Ibid., Sec. 203.

[10] S. 1, Sec. 544; and CRS Report RL34166, *Lobby Law and Ethics Rules Changes in the 110th Congress*, by Jack Maskell.

[11] S. 1, Sec. 204

[12] See, for example, Kenneth P. Doyle, "Supporters of Reform Organizations Fight Back Against Possible Bush Veto," *Money & Politics Report*, August 10, 2007; at [http://pubs.bna.com/NWSSTND/IP/BNA/mpr.nsf/SearchAllView/03427A0FCF51B1EE852573330000C145?Open&highlight=AIR,FORCE,ONE]. Under current regulations, "campaign travelers," whose travel must be reimbursed if flying aboard government aircraft, do not include security personnel. See 11 U.S.C. § 93(a)(3)(I) and 9004.6(b)(2).

different interpretation."[13] Congress could also choose to take legislative action to shape implementation of this or other S. 1 provisions.

House Activity on Other Campaign Finance Legislation. Although the Committee on House Administration has held no campaign finance hearings during the 110th Congress, the House has passed two bills (in addition to lobbying reform measures) containing campaign finance provisions. First, H.R. 3093, the Commerce, Justice, Science, and Related Agencies appropriations bill, contains an amendment sponsored by Representative Pence that would prohibit spending funds for criminal enforcement of BCRA's electioneering communication provision, which restricts certain political advertising ("electioneering communications") aired before elections (discussed in more detail below).[14] The amendment would not affect FEC civil enforcement or a forthcoming FEC rulemaking on electioneering communications. H.R. 3093 passed the House on July 26, 2007. A second bill, H.R. 2630 (Schiff), would prohibit candidate campaign committees and leadership PACs from paying candidate spouses for campaign work, and would require disclosure of certain payments to other family members. The bill would not affect spouses working for *other* campaigns (i.e., as political consultants). Another provision in the bill would hold candidates personally liable for violations of the new restrictions (if they knew of prohibited payments). That proposal marks a departure from existing FECA requirements, which largely hold campaign organizations and treasurers responsible for compliance.[15] H.R. 2630 passed the House on July 23, 2007.

Senate Activity on Other Campaign Finance Legislation. Other than S. 1, no campaign finance measures have passed the Senate thus far during the 110th Congress. The Rules and Administration Committee has held hearings on three bills. First, on March 28, 2007, the committee held a hearing on S. 223 (Feingold), which would require Senate campaign committees (including candidate committees, party committees, etc.) to file campaign finance disclosure reports electronically. Currently, Senate committees are the only federal political committees *not* required to do so. The bill has not received floor consideration, despite attempts to bring it up by unanimous consent. On April 18, 2007, the committee considered S. 1091 (Corker), which would lift existing limits on coordinated expenditures that political parties may make on behalf of candidate campaigns. Finally, on June 20, 2007, the committee held a hearing on S. 1285 (Durbin), which proposes a voluntary system to publicly finance Senate campaigns.[16]

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[13] Federal Election Commission, "Federal Election Commission Announces Plans to Issue New Regulations to Implement the Honest Leadership and Open Government Act of 2007," press release, September 24, 2007.

[14] H.R. 3093 as passed by the House, Sec. 711.

[15] See, 2 U.S.C. § 432; 434.

[16] CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker; and CRS Report RL33814, *Public Financing of Congressional Elections: Background and Analysis*, by R. Sam Garrett, provide additional discussion of coordinated party expenditures and public financing of congressional elections, respectively.

Other Major Recent Developments

FEC Nominations. The Senate is currently considering four FEC nominations. As discussed below, because at least four of six commissioners must agree to undertake enforcement actions or adopt policy, the number and timing of the current set of nominations have been regarded as particularly important. Nominees Robert D. Lenhard (D), Hans A. von Spakovsky (R), and Steven T. Walther (D) currently serve in recess appointments at the agency. The fourth nominee, David M. Mason (R), serves in "holdover" status following an expired term. Unlike subsequent commissioners, Mason is eligible for re-appointment. The FEC's fifth current member, Ellen L. Weintraub (D) is term-limited; she also continues to serve in holdover status.[17] The commission's sixth seat, formerly occupied by Michael Toner (R), remains vacant. The President has not made new nominations to the Weintraub and Toner seats, although media accounts have suggested that they are forthcoming.[18] No more than three commissioners may be affiliated with the same political party.[19]

Unlike the three other nominations, the von Spakovsky nomination has generated controversy. In particular, some Senators and others have debated von Spakovsky's actions on voting rights issues while serving at the Justice Department.[20] Much of a June 13, 2007, Rules and Administration Committee hearing and subsequent markup focused on von Spakovsky. On September 26, 2007, the committee reported all four nominees en bloc without recommendation.

Potential Implications. None of the five sitting FEC commissioners have been confirmed to their current terms (Mason and Weintraub were confirmed to now-expired terms). The three recess appointees' terms will expire when the Senate adjourns *sine die* at the end of the first session of the 110th Congress, which would leave only two holdover commissioners in office.[21] FECA requires that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers...shall be made by a majority vote of the members of the Commission."[22] Without affirmative votes from four of six commissioners, the commission would be unable to make regulatory or enforcement decisions. Staff and remaining commissioners could continue routine operations. In

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[17] On commission terms, see 2 U.S.C. § 437c(a)(2)(A) and 111 Stat. 1305. On "holdover" appointments, see 2 U.S.C. § 437c(a)(2)(B).

[18] See, for example, Matthew Murray, "Schumer Lawyer Expected to Get FEC Nomination," *Roll Call*, September 18, 2007, p. 11.

[19] 2 U.S.C. § 437c(a)(1)

[20] The Rules and Administration Committee posted a transcript of the hearing on its website at [http://rules.senate.gov/hearings/2007/061307correctedTranscript.pdf]. On the hearing and controversy surrounding the von Spakovsky nomination, see, for example, Kenneth P. Doyle, "Senate Rules Hearing on FEC Nominees Focuses on Von Spakovsky Role at Justice," *Money & Politics Report*, June 14, 2007, at [http://pubs.bna.com/NWSSTND/IP/BNA/mpr.nsf/SearchAllView/B62A108473E1AF06852572FA0001FB7F?Open&highlight=FOCUSES,ON,VON,SPAKOVSKY,ROLE,AT,JUSTICE].

[21] See CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue. The report also provides an overview of recess appointments generally.

[22] 2 U.S.C. § 437c(c)

summary, having at least four commissioners in office is generally seen as an important element of FEC regulatory and enforcement capacity, although some operations could continue without a majority of the six commissioners.

Electioneering Communications. On June 25, 2007, the U.S. Supreme Court issued a 5-4 decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.* [23] Also known as *WRTL II*, the case considered the application of BCRA's "electioneering communications" provision to a Wisconsin anti-abortion group's planned 2004 political advertising. BCRA defines "electioneering communications" as broadcast, cable, or satellite political advertising aired within 30 days of a primary election (or convention or caucus) or 60 days of a general election (or special or runoff election) if that advertising refers to a "clearly identified" federal candidate and is targeted to the relevant electorate.[24] Corporate or union treasury funds may not finance electioneering communications.[25] In its June 2007 ruling, the Court affirmed a lower court ruling that the electioneering communications provision was unconstitutional as applied to WRTL's ads.

Potential Implications and FEC Rulemaking. The effect of *WRTL II* decision remains to be seen, as the ruling applied to specific advertisements rather than the electioneering communication provision generally. In an August 31, 2007, notice of proposed rulemaking (NPRM), the FEC solicited comments on two alternatives for implementing *WRTL II*: one that would permit corporations and unions to fund certain electioneering communications from their treasuries, and another that would exempt certain advertisements from the definition of "electioneering communication."[26] The FEC is expected to announce final rules by mid-December 2007. Regardless of the content of those regulations, *WRTL II*'s impact will almost certainly evolve over time, as advertisers test the regulations in practice. Additional litigation, which has been common following BCRA rulemakings, is also possible.

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[23] Some information in this section is adapted from CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker. The report provides additional discussion and a legal analysis of the case.

[24] See Title II of BCRA at 116 Stat. 88; and 2 U.S.C. § 434(f)(3)(A)(I).

[25] 2 U.S.C. § 441b(b)(2).

[26] Federal Election Commission, "Electioneering Communications," 72 *Federal Register* 50271, August 31, 2007.