Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress

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Summary

During the 110th Congress, the House and Senate's campaign finance work has overlapped in three areas. First and most significantly, a lobbying and ethics law enacted in September 2007, the Honest Leadership and Open Government Act (HLOGA; P.L. 110-81, which was S. 1), contains some campaign finance provisions. Second, P.L. 110-433 (H.R. 6296) will extend the Federal Election Commission's (FEC) Administrative Fine Program (AFP) until 2013. Third, the Committee on House Administration and the Senate Rules and Administration Committee have held hearings on automated political telephone calls (also known as "robo calls" or "auto calls"), a subject that is related to campaign finance.

Otherwise, the House and Senate have largely focused on different campaign finance issues. Specifically, the House has passed three bills, not passed by the Senate, containing campaign finance provisions. First, H.R. 3032 would allow candidates to designate an individual to disburse remaining campaign funds if the candidate dies. Second, H.R. 2630 would restrict campaign and leadership political action committee (PAC) payments to candidate spouses. Third, a provision in the House-passed version of an appropriations bill (H.R. 3093) would have prohibited spending Justice Department funds on criminal enforcement of the Bipartisan Campaign Reform Act (BCRA) "electioneering communication" provision. However, the language was not included in the FY2008 consolidated appropriations law (P.L. 110-161).

Similarly, the Senate has largely considered legislation not considered in the House. The Senate's campaign finance activity has also been confined largely to hearings. S. 223, which would require electronic filing of campaign disclosure reports was reported from the Rules and Administration Committee but has not received floor consideration. During the spring and summer of 2007, the committee also held hearings on coordinated party expenditures (S. 1091) and congressional public financing legislation (S. 1285).

Non-legislative items are also noteworthy. Following a Senate impasse over four nominees to the Federal Election Commission (FEC) during the first session of the 110th Congress, the Commission lacked the quorum necessary to make major policy decisions between January and June 2008. Senate confirmations of five nominees on June 24, 2008, restored the FEC to full capacity. FEC rulemakings are ongoing or expected in response to legislative activity, and Supreme Court rulings addressing electioneering communications (*Federal Election Commission v. Wisconsin Right to Life, Inc.)* and the "Millionaire's Amendment" (*Davis v. Federal Election Commission*).

This report will be updated in the event of other significant legislative or policy developments in the 110th Congress.

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Brief Historical Overview

Federal campaign finance law emphasizes limits on contributions, restrictions on funding sources, and public disclosure of information about fundraising and spending. These goals and others are embodied in the 1971 Federal Election Campaign Act (FECA), which remains the cornerstone of the nation's campaign finance law.[1] Major FECA amendments (in 1974, 1976, and 1979) expanded the presidential public-financing system and placed limits on campaign contributions and expenditures.[2]

After these post-Watergate efforts to reduce the risk or appearance of corruption, campaign finance received relatively little legislative attention until the late 1990s. 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.[3] Among other points, BCRA banned large corporate and union donations to political parties (soft money) in federal elections and restricted certain political advertising preceding elections (electioneering communications). Much of the policy activity since that time has emphasized implementing BCRA, particularly at the FEC and in the courts.

FEC Nominations and the Commission's Operating Status

Due to the loss of its quorum between January and June 2008, the FEC was unable to execute some of its core functions, including rulemaking to implement campaign finance law.[4] On June 24, 2008, the Senate confirmed five nominations to the agency.[5] Together with a sixth commissioner who continues to serve in holdover status, the FEC is now back at full strength. The new Commission held its first open meeting on July 10, 2008. At that meeting, Donald McGahn was unanimously elected chairman. Steven Walther was unanimously elected vice chairman.

Pending issues facing the Commission include rulemaking to implement portions of the Honest Leadership and Open Government Act of 2007 (HLOGA, discussed later in this report), pending enforcement cases and advisory opinion requests, and administering the presidential public campaign financing program.[6] The Commission may also need to respond to ongoing litigation surrounding BCRA.

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[1] 2 U.S.C. 431 § et seq.

[2] 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. See CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by (name redacted).

[3] 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 (name redacted) and (name red acted). Cantor is now retired from CRS. Contact (name redacted) with questions regarding Mr. Cantor's portfolio.

[4] For additional discussion, see CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by (name redacted).

[5] "Confirmations," *Congressional Record*, daily edition, vol. 154 (June 24, 2008), p. S6096.

[6] For additional information on presidential public financing, see CRS Report RL34534, *Public Financing of* (continued...)

Overview of the Nominations Dispute

During the first session of the 110th Congress, the Senate considered four nominations—those of Robert D. Lenhard (D), David M. Mason (R), Steven T. Walther (D), and Hans A. von Spakovsky (R)—to the six-seat FEC. Mason originally began serving at the Commission in 1998 and had been re-nominated. Lenhard, Walther, and von Spakovsky were serving in recess-appointments at the agency. Amid controversy surrounding the von Spakovsky nomination in particular, and over whether the nominations should be considered separately or as a group, the Senate declined to confirm or reject any of the nominations.

The three recess appointees' terms subsequently expired at the end of the first session of the 110th Congress, leaving the agency with just two sitting commissioners (Mason (R) and Ellen L. Weintraub (D)).

The stalemate over FEC nominations continued with few developments between January and April of 2008. In April, Lenhard requested that his nomination be withdrawn.[7] In May 2008, in addition to withdrawing Lenhard's nomination, President Bush withdrew the Mason and von Spakovsky nominations.[8] This series of events left the Walther nomination pending and Weintraub in holdover status.

Also in April 2008, the President nominated Cynthia L. Bauerly (D), Caroline C. Hunter (R), and Donald F. McGahn II (R) to the Commission. The Senate Rules and Administration Committee held a confirmation hearing on the Bauerly, Hunter, and McGahn nominations on May 21, 2008. The committee favorably reported all three nominations on May 22, 2008. Also on May 22, the White House announced the President's intention to nominate Matthew S. Petersen (R) to the Commission.[9] The Rules and Administration Committee did not hold a confirmation hearing on Petersen (a staffer on the committee).

On June 24, 2008, the Senate confirmed Bauerly, Hunter, McGahn, Petersen, and Walther. The five new commissioners joined Ellen Weintraub, who continues to serve at the FEC in holdover status. McGahn was elected the Commission's chairman.

Between January and June 2008, the FEC's operating status was significant because, under FECA, at least four Commissioners must vote affirmatively to approve, among other things, agency rules, enforcement decisions, and advisory opinions.[10] The Commission also could not implement legislation without at least four Commissioners in office.[11]

(...continued)

Presidential Campaigns: Overview and Analysis, coordinated by (name redacted). On convention financing, which is an element of the presidential public financing program, see CRS Report RL34630, *Federal Funding of Presidential Nominating Conventions: Overview and Policy Options*, by (name redacted) and (name redacted).

[7] Matthew Murray, "Democratic FEC Nominee Withdraws; Reid Blasts White House," *Roll Call*, April 14, 2008, at http://www.rollcall.com/issues/1_1/breakingnews/ 22987-1.html?type=pf.

[8] On von Spakovsky, see, for example, Matthew Murray, "FEC May Be Back in Business Soon," *Roll Call*, May 19, 2008, p. A1.

[9] White House, Office of the Press Secretary, "Personnel Announcement," May 22, 2008, at http://www.whitehouse.gov/news/releases/2008/05/20080522-9.html.

[10] CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by (name redacted).

[11] This assumes that at least four Commissioners could reach agreement.

Campaign Finance Legislation in the 110th Congress

Legislative activity regarding campaign finance has occurred on two fronts during the 110th Congress. First, and most notably, the Honest Leadership and Open Government Act (HLOGA) contains some campaign finance provisions, but the law is primarily devoted to lobbying and ethics. HLOGA and the AFP extension were the only legislation changing campaign financing policy to become law during the 110th Congress. Second, various other bills that emphasize campaign finance have been the subject of committee or floor action, but none have become law. Overall, approximately 50 bills that would affect campaign finance policy have been introduced in the 110th Congress.[12] The following discussion provides additional details on campaign finance bills that have been the subject of committee action or floor votes during the 110th Congress.

Campaign Finance Provisions in HLOGA

S. 1, which became P.L. 110-81 on September 14, 2007, contains two significant campaign finance provisions: one related to bundling and another related to travel aboard private aircraft.[13] Both were seen as sources of potential abuse in the past. The law also prohibits Member attendance at presidential convention events in their honor if registered lobbyists or "private entit[ies]" that hire lobbyists pay for the events.[14] It also requires additional disclosure about lobbyists' contributions (exceeding $200) to political committees, presidential inaugural committees, and presidential libraries.[15]

FEC rulemaking (discussed below) is required to implement the bundling and campaign travel portions of HLOGA (sections 204 and 601 respectively). Although the *travel* section took effect upon the bill's enactment, the FEC in late 2007 adopted rules providing its interpretation of the law. HLOGA requires the FEC to promulgate regulations implementing the *bundling* provision within six months of enactment (March 14, 2008), although the lack of a quorum prevented the agency from doing so.[16]

Bundling

"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. Before HLOGA became law, although FEC regulations on "earmarked" contributions technically restricted bundling, they were viewed as largely inapplicable to designated campaign fundraisers, including certain lobbyists. In response, HLOGA requires disclosure of bundling activities by registered lobbyists. Specifically, political committees (candidate committees, party committees, and PACs) must report to the FEC

[12] This total is approximate because of varying ways in which "campaign finance" could be classified. The total does not include FEC appropriations legislation. On that topic, see the FEC portion of CRS Report RL33998, *Financial Services and General Government (FSGG): FY2008 Appropriations*, by (name redacted) et al.

[13] See also CRS Report RL34166, *Lobbying Law and Ethics Rules Changes in the 110th Congress*, by (name redacted). That report provides additional discussion and analysis.

[14] 121 Stat. 753; 121 Stat. 767. Exceptions exist for presidential or vice-presidential candidates.

[15] 121 Stat. 743.

[16] 121 Stat. 744-121 Stat. 745.

the name, address, and employer of each Lobbying Disclosure Act (LDA)-registered lobbyist "reasonably known" to have made at least two bundled contributions totaling more than $15,000 during specified six-month reporting periods.[17] HLOGA only requires disclosure of bundling by registered lobbyists—not other fundraisers. Therefore, HLOGA will provide more transparency than was previously available about which lobbyists arrange bundled contributions. However, it does not mandate disclosure of bundled contributions that do not meet the time and monetary thresholds discussed above or require information about bundling by non-lobbyists.

FEC Rulemaking

The FEC issued a notice of proposed rulemaking (NPRM) on the bundling issue on October 30, 2007.[18] Most notably, and consistent with HLOGA, the FEC's proposed rules would require political committees to report bundled contributions if the same source arranged or was credited with arranging two or more contributions totaling at least $15,000 during a six-month period. (The FEC also solicited comments about an alternative proposal for quarterly reporting.)[19] The proposed rules would also add the term "lobbyist/registrant PACs"—those committees "established or controlled" by registered lobbyists—to existing examples of political committees subject to FECA regulation and bundling disclosure.[20]

Despite some specificity, the NPRM did not address how all reporting issues would be resolved. Rather, throughout the document, the Commission posed several questions about a range of issues, such as how widely disclosure requirements should apply and how committees should determine whether contributions were bundled.[21] Parts of the NPRM suggested that bundling disclosure could apply beyond lobbyists per se. Specifically, the FEC asked whether Congress intended for bundling disclosure to apply only to contributions arranged by registered lobbyists (who would be known as "lobbyist/registrants" under proposed rules), or also to fundraising by other actors. The latter could include non-lobbyist employees at lobbying organizations or hosts of fundraisers at which bundling occurs.[22] Several interested parties, including Members of Congress, submitted comments responding to the NPRM.

A September 17, 2008, FEC hearing explored many of the issues raised in the NPRM. In particular, discussion and debate among Commissioners and witnesses (election lawyers and interest-group representatives) addressed how bundling activities should be reported to the FEC, which activities should be reported, and how fundraising should be reported if several individuals are involved in fundraising at a single event. The FEC has yet to announce final bundling rules. As noted previously, HLOGA requires the FEC to issue bundling rules within six months of the law's enactment (the relevant deadline would have been March 14, 2008). However, the agency was unable to act between January and June 2008 due to the loss of its quorum. On July 28, 2008, FEC Chairman Donald F. McGahn reportedly stated that bundling regulations could not

[17] 121 Stat. 744. On LDA, see 2 U.S.C. § 1601 et seq.

[18] Federal Election Commission, "Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants," 72 *Federal Register* 62600, November 6, 2007. Although the Commission approved the NPRM on October 30, it was not published in the *Federal Register* until November 6, 2007.

[19] Ibid., pp. 62606-62607.

[20] Ibid.

[21] Ibid., pp. 62603-62604.

[22] Ibid., pp. 62602-62603.

realistically be promulgated in time to affect the 2008 elections.[23] If it chose to do so, Congress could legislate bundling-disclosure details that would normally be left to the FEC.

Campaign Travel

HLOGA restricts campaign travel on private, non-commercial aircraft. Before HLOGA became law, political committees were permitted to reimburse those providing private aircraft at the rate of first-class travel as long as commensurate first-class commercial service were available for the route flown.[24] Reimbursement at non-discounted coach or charter rates was required if commensurate first-class service were unavailable on that route. Under the new law, Senators, candidates, and staff may continue to travel on private aircraft only 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. Those amounts could be well above the old first-class rate that applied to most flights before the law took effect. Unlike their Senate counterparts, House Members, candidates, and staff are "substantially banned" from flying aboard private, non-commercial aircraft, as the law precludes reimbursements for such flights.[25]

FEC Rulemaking

Under rules adopted by the FEC on December 14, 2007, all Senate, presidential, and vice-presidential campaign travel must be reimbursed at the "pro-rata share" of the charter rate, regardless of the route flown.[26] Consistent with HLOGA, political committees related to House of Representatives candidates are prohibited from making reimbursements for campaign travel aboard private aircraft, which essentially bans such travel. The "pro-rata share" reimbursement standard for Senate, presidential, and vice-presidential travel is based on the number of candidate committees (i.e., candidate campaigns) represented on a flight. If more than one candidate is represented on a flight, reimbursement would be shared among the relevant candidate committees.

Specifically, political committees must provide reimbursement for all campaign travelers' shares of the "normal and usual charter fare or rental charge for travel on a comparable aircraft or comparable size."[27] These requirements also apply to travel on behalf of PACs, including leadership PACs, and party committees, although candidate committees represented on the flight would be responsible for covering costs for those travelers.[28] Travel aboard government aircraft

[23] Kenneth P. Doyle, "Already Too Late to Act on 'Bundling' Rule Affecting 2008 Contest, FEC Chairman Says" *Daily Report for Executives*, July 29, 2008, p. A-6.

[24] Campaigns must reimburse service-providers for travel (or other services) so that vendors do not make, or campaigns do not receive, prohibited "in-kind" contributions that are excessively expensive, come from prohibited sources, or both.

[25] 121 Stat. 774; and CRS Report RL34166, *Lobbying Law and Ethics Rules Changes in the 110th Congress*, by (name redacted).

[26] The new rules have not been published in the *Federal Register*. The rules are available on the Commission's website. See "Draft Final Rule on Campaign Travel," FEC open meeting agenda document no. 07-94, at http://www.fec.gov/agenda/2007/mtgdoc07-94.pdf.

[27] On the quoted material see FEC, "Draft Final Rule on Campaign Travel," p. 7.

[28] The FEC reportedly chose this arrangement out of concern that party and PAC officials providing travel reimbursement could indirectly subsidize candidate travel, which HLOGA sought to restrict (telephone consultation between Duane Pugh, Deputy Director, Congressional Affairs, FEC, and (name redacted), January 10, 2008). Conversely, under the new rules, candidates are arguably subsidizing party or PAC travel. The FEC could clarify this (continued...)

must also be reimbursed at the per-person charter rate or at the rate the government entity providing the aircraft specifies for "private travel."[29] Certain exceptions exist for travel aboard aircraft owned or leased by a candidate or an immediate family member, but reimbursement for campaign travel is nonetheless required.[30]

Before publishing the final travel rules in the *Federal Register*, the Commission must approve an "explanation and justification" (E&J) document summarizing the public comments the FEC received and the agency's reasoning in interpreting the law. These documents typically provide additional information about how the Commission intends to enforce the new rules and what those rules mean in practice. Although the FEC approved final travel rules in December 2007, it did not formally consider an E&J document. That document cannot be approved without affirmative votes from at least four Commissioners. The matter remains pending.

The Administrative Fine Program

P.L. 110-433, which originated as H.R. 6296 (Brady), will extend until 2013 the FEC's authority to conduct the Administrative Fine Program (AFP). The House passed the bill on July 15, 2008, under suspension of the rules and by voice vote. The Senate passed the bill by unanimous consent on October 2, 2008. President George W. Bush signed the bill into law on October 16, 2008.

The AFP sets standard penalties for routine financial-reporting violations and requires fewer resources than the Commission's full enforcement process. Since the program's inception in FY2000, the FEC has processed more than 1,600 enforcement cases, and assessed more than $3.1 million in fines, through the AFP.[31] Revenues from the program are deposited into the U.S. Treasury and do not directly benefit the FEC.

Congress first granted authority for the AFP in the Treasury and General Government Appropriations Act of 2000 and has extended the program three times.[32] Because AFP legislative language has always included a "sunset" date, the program is not permanent. The previous authorization to conduct the AFP would have expired on December 31, 2008.[33] Although AFP extensions have been traditionally handled through the appropriations process, H.R. 6296 was a stand-alone measure that amended FECA.

Senate Activity on Other Campaign Finance Legislation

Other than HLOGA and H.R. 6296, no campaign finance measures have passed the Senate during the 110th Congress. However, the Rules and Administration Committee has held hearings on four

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issue when it considers a related "explanation and justification" document, which is discussed in the text of this report.

[29] FEC, "Draft Final Rule on Campaign Travel," pp. 8-9.

[30] Ibid., pp. 9-10.

[31] The precise numbers as of May 2008 were 1,629 and $3,157,682, respectively. The FEC and Treasury Department have been unable to collect the full amount due in some cases. This information comes from a telephone consultation between the author and Duane Pugh, director, legislative affairs, FEC, June 5, 2008.

[32] On the program's creation, see P.L. 106-58; 113 Stat. 476. Extensions occurred in 2001 (115 Stat. 555), 2004 (118 Stat. 359), and 2005 (119 Stat. 2493-2494).

[33] 119 Stat. 2493-2494. See also 2 U.S.C. § 437g(a)(4)(C).

bills. First, on March 28, 2007, the committee held a hearing on S. 223 (Feingold), which would require Senate campaign committees (including candidate committees and party committees) to file campaign finance disclosure reports electronically. Currently, Senate campaign 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. Second, 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. S. 1091 remains in committee. Third, on June 20, 2007, the committee held a hearing on S. 1285 (Durbin), which proposes a voluntary system to publicly finance Senate campaigns.[34] That bill also has not been subject to additional legislative action. Finally, the committee considered S. 2624 (Feinstein) at a February 27, 2008, hearing on automated political telephone calls. That topic is discussed below in more detail. The bill has not been subject to additional legislative action.

House Activity on Other Campaign Finance Legislation

The House has passed three bills (in addition to lobbying reform measures and H.R. 6296) containing campaign finance provisions. First, H.R. 3093, the House version of the FY2008 Commerce, Justice, Science, and Related Agencies appropriations bill, contained an amendment sponsored by Representative Pence that would have prohibited spending funds for criminal enforcement of BCRA's electioneering communication provision (discussed below).[35] However, the measure was not included in companion Senate legislation or the FY2008 consolidated appropriations law.[36]

A second House bill, H.R. 2630 (Schiff), would prohibit candidate campaign committees and leadership PACs from paying candidate spouses for campaign work. The bill would also require disclosure of certain payments to other family members. It would not affect spouses working for other campaigns (e.g., as political consultants). Another provision in the bill would hold candidates personally liable for violations of the new restrictions (if they knew violations occurred). That proposal marks a departure from existing FECA requirements, which largely hold campaign organizations and treasurers (not candidates) responsible for compliance.[37] H.R. 2630 passed the House on July 23, 2007, without a committee hearing. It has not been considered in the Senate.

Third, the House passed H.R. 3032 (Jones, NC) on July 15, 2008, under suspension of the rules and by voice vote. The bill would permit candidates to designate to the FEC an individual (or a backup) to spend campaign funds if the candidate dies. Upon the candidate's death, only the designee would have authority to disburse campaign funds. Currently, campaign treasurers have authority over campaign funds, as is discussed below. The bill would not relieve treasurers from FEC reporting responsibilities. The bill could alleviate the potential for asset disputes following candidate deaths, provided that designees would be more faithful to candidates' wishes than

[34] CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by (name redacted) and (name redacted); and CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by (name redacted), provide additional discussion of coordinated party expenditures and public financing of congressional elections, respectively.

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

[36] The consolidated appropriations bill is H.R. 2764, which became P.L. 110-161.

[37] 2 U.S.C. § 432; 434.

would be treasurers. To that end, H.R. 3032 also permits candidates to provide instructions for disbursing campaign funds in the event of their death.

H.R. 3032 would provide more candidate control over campaign assets than currently exists. FECA is largely silent on candidate responsibility for campaign operations, including spending. In fact, treasurers—not candidates—are legally responsible for disbursing campaign funds (and for most FEC compliance) regardless of whether the candidate is living or dead.[38] FECA also does not specify a role for candidates in campaign financial decisions. Accordingly, although H.R. 3032 would provide a legal mechanism for circumventing the treasurer after a candidate dies, the bill would not provide additional remedies for such action while the candidate is living. This may be a minor distinction due to candidates' *de facto* influence over their campaigns, despite FECA's general silence on the issue. Nonetheless, if Congress chose to enact H.R. 3032 and felt it were important to create parity in candidates' abilities to direct campaign spending in life and after death, it could amend FECA to create a clearer candidate role over campaign funds regardless of whether the candidate is living or dead. Congress might also provide explicit permission in FECA for candidates to hire and fire campaign treasurers.

Hearings on Automated Political Calls

Also during the 110th Congress, House and Senate committees have held hearings on automated political telephone calls (also known as "robo calls" or "auto calls"). This issue is related to campaign finance because FEC reporting and disclaimer requirements apply to many such calls. Legislation aimed at restricting automated political calls also often references or would amend FECA. Another CRS report provides additional detail.[39] Several bills introduced in the 110th Congress would address automated political calls in some way, but none has been reported from committee or received floor consideration.

The Committee on House Administration, Subcommittee on Elections, held an oversight hearing on automated political calls on December 6, 2007. In addition to providing background information about automated calls practices, Members and witnesses at the hearing considered whether, or if, automated calls could be constitutionally restricted. Some Members also emphasized the value of official (franked) automated calls to arrange telephone-based town hall meetings. The Senate Rules and Administration Committee also held a hearing on the calls, and related bill S. 2624 (Feinstein), on February 27, 2008. Discussion at that hearing emphasized voter and candidate frustration with the calls, and whether the calls could be constitutionally restricted.

[38] See, for example, 2 U.S.C. § 432(a).

[39] CRS Report RL34361, *Automated Political Telephone Calls ("Robo Calls") in Federal Campaigns: Overview and Policy Options*, by (name redacted) and (name redacted).

Other Recent Developments

Electioneering Communications

BCRA prohibits corporate and union treasury funds from financing political advertising known as electioneering communications.[40] Under BCRA, electioneering communications are 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) that refers to a "clearly identified" federal candidate and is targeted to the relevant electorate.[41] Before BCRA became law, such advertising was often viewed as thinly veiled electioneering by corporations and unions, although some observers contended that the advertising reflected sponsors' policy positions.

On June 25, 2007, the U.S. Supreme Court issued a 5-4 decision in *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL II)*.[42] In brief, the case considered whether the electioneering communication provision prohibited the group Wisconsin Right to Life (WRTL) from paying for advertising, mentioning a Senate candidate, it intended to run during the 2004 election cycle. The Court held that the electioneering communication provision was unconstitutional as applied to the WRTL ads. Shortly thereafter, the FEC announced that it would revise its electioneering communications rules.

FEC Rulemaking

The FEC held hearings on its electioneering communications rulemaking on October 17-18, 2007.[43] The Commission approved final rules in December 2007.[44] Although corporate and union treasury funds are generally prohibited in federal elections, the new rules allow payments for certain electioneering communications that focus on public policy issues rather than electing or defeating federal candidates.[45] As with other electioneering communications, certain information about spending on, and donations received for, these advertisements must be reported to the

[40] 2 U.S.C. § 441b(b)(2).

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

[42] For additional detail and a legal analysis of the case, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by (name red acted).

[43] The hearings focused on two alternative rules: one that would have allowed corporate and union-funded electioneering communications but would have maintained FEC reporting and disclaimer requirements, and another that would have exempted corporate and union-funded electioneering communications from FEC reporting and disclaimer requirements. On the two alternative proposals, see Federal Election Commission, "Electioneering Communications," 72 *Federal Register* 50271, August 31, 2007. The hearings also addressed whether revisions to the electioneering communications rules required changes to the Commission's regulations on "express advocacy," which explicitly calls for election or defeat of federal candidates. In particular, debate focused on 11 C.F.R. 100.22(b).

[44] Federal Election Commission, "Electioneering Communications," 72 *Federal Register* 50271, December 26, 2007, p. 72899.

[45] Under the new rules, advertising funded by corporate and union treasury funds must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate," the same standard the Court articulated in *WRTL II*. See ibid., p. 72914.

FEC.[46] The advertisements must also contain disclaimers identifying the person or organization responsible for the electioneering communication.[47]

The new rules also require that electioneering communications paid for with corporate or union treasury funds must meet three "safe harbor" criteria intended to ensure that the advertising is not directly aimed at electing or defeating candidates. Specifically, the advertising may not: (1) mention "any election, candidacy, political party, opposing candidate, or voting by the general public" or (2) take a position on a candidate's "character, qualifications, or fitness for office." Third, the advertisement must either "[focus] on a legislative, executive or judicial matter or issue," such as urging the public or candidates to adopt a policy position, or propose "a commercial transaction" (e.g., an advertisement for a candidate's business).[48]

Overall, the new rules permit corporations and unions to fund issue-oriented advertising in ways that were prohibited by BCRA. For those who view issue advertising as thinly veiled electoral advocacy, the rules could be seen as a loophole that allows otherwise prohibited corporate and union money to influence elections—the same concern that motivated BCRA's electioneering communications provision that was held unconstitutional as applied to the WRTL ads. On the other hand, the FEC's explanatory statement accompanying the new rules suggests that even general references to elections or candidates (e.g., election dates or a party name) could void the safe harbor protection for corporate and union spending.[49] If the Commission reaches such a determination in future enforcement cases, electioneering communications funded by corporate or union treasury funds would have to be strictly related to public policy issues, although they could be aired during election periods. Precise implications of the new rules are likely to become clearer over time, as advertisers test the rules during the 2008 election cycle and beyond and as the FEC considers future advisory opinions and enforcement cases. Additional litigation, which has been common following BCRA rulemakings, is also possible.

"Millionaire's Amendment"

On June 26, 2008, a 5-4 majority of the U.S. Supreme Court declared the "Millionaire's Amendment" unconstitutional in *Davis v. Federal Election Commission*.[50] (Another CRS product provides a legal analysis of the case.[51]) The Millionaire's Amendment, which was enacted in BCRA, permitted congressional candidates facing certain self-financed opponents to receive larger campaign contributions than would normally be permitted. In some cases, political parties

[46] Ibid., pp. 72900-72901; pp. 72911-72913. Under the rules, spending on electioneering communications that exceeds $10,000 in a calendar year must be reported to the FEC. Donations exceeding $1,000 to fund such advertising, received since the start of the year preceding the reporting period, must also be reported.

[47] Ibid., pp. 72900-72901; see also 11 C.F.R. 110.11(a). The word "disclaimer" appears as a term of art in FEC regulations, although its definition in that context generally differs from the literal one. Rather than renouncing responsibility (as the literal definition of "disclaimer" implies), disclaimers required by FEC regulations generally signal that the sponsoring committee was, in fact, responsible for a communication. On the other hand, disclaimers on communications that are not authorized by principal campaign must note that candidates were not responsible for the communication.

[48] Ibid., p. 72903; p. 72914.

[49] Ibid., p. 72903.

[50] 554 U.S. ___ (2008); see 2 U.S.C. § 441a-1 and 2 U.S.C. § 441a(I).

[51] CRS Report RS22920, *Campaign Finance Law and the Constitutionality of the "Millionaire's Amendment": An Analysis of Davis v. Federal Election Commission*, by (name redacted).

could also make unlimited coordinated expenditures on behalf of campaigns facing self-financed opponents.

The FEC issued a public statement on July 25, 2008, noting that the "Court's analysis in *Davis* precludes enforcement of the House provision of the [Millionaire's Amendment] and effectively precludes enforcement of the Senate provision as well."[52] Accordingly, the amendment's reporting requirements and increased contribution limits no longer apply. The Commission will initiate a rulemaking to comport with the ruling, but "will no longer enforce the Amendment."[53]

On October 2, 2008, the Commission approved a notice of proposed rulemaking in light of *Davis*.[54] Essentially, the FEC proposes to repeal its rules originally promulgated to implement the Millionaire's Amendment language in BCRA (particularly rules currently at 11 C.F.R. § 400). Repealing these and other relevant rules would clarify that the Millionaire's Amendment is no longer applicable in House and Senate elections. Such a repeal would be consistent with the Commission's stated practice of no longer enforcing the Amendment. The public comment period on the proposed repeal of the FEC's Millionaire's Amendment rules will close on November 21, 2008.

Conclusion and Analysis

HLOGA represents the most significant legislative development related to campaign finance during the 110th Congress. More than 50 other campaign finance bills have been introduced in the 110th Congress, but few have received major legislative attention. Other significant campaign finance developments have occurred away from Capitol Hill, particularly at the FEC and in the federal courts.

FEC activity has focused on rulemakings in response to recent congressional activity, particularly regarding HLOGA. The campaign travel rules are relatively straightforward and consistent with the new lobbying and ethics law. Those rules, however, could be clarified by an E&J statement that has yet to be considered. The bundling and electioneering communications rulemakings (the latter was undertaken in response to the Supreme Court's ruling in *WRTL II*) are more complicated and, in some cases, less clear. Although the proposed bundling rules are consistent with HLOGA's content, the many questions and regulatory alternatives posed in the NPRM and at the September 2008 FEC hearing suggest that the agency is still considering how to implement that section of the law. Similarly, although the Commission has already adopted final electioneering communications rules, what those rules mean in practice will depend on how the FEC decides to pursue future enforcement and advisory cases. These issues could also be revisited now that additional Commissioners are in office.

The long-term effect of the FEC's inability to consider major policy questions between January and June 2008 remains to be seen.[55] It is clear, however, that the agency faces a substantial

[52] Federal Election Commission," Public Statement on the Supreme Court's Decision in *Davis v. FEC*," press release July 25, 008, at http://www.fec.gov/press/press2008/220080725millionaire.shtml.

[53] Ibid.

[54] Federal Election Commission, "Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-financed Candidates," 73 *Federal Register* 62224, October 20, 2008.

[55] As noted previously, two Commissioners did remain in office during the 2008 "shutdown," and staff continued doing (continued...)

rulemaking and enforcement backlog in the short term. The fact that four of six Commissioners are new to the agency could also delay some activities.

The HLOGA rulemaking is perhaps the most prominent one now facing the FEC. The absence of bundling rules means that certain disclosure required under HLOGA is not occurring, nor can it occur until the agency tells political committees how to report their bundled contributions. The schedule set forth in HLOGA would have facilitated partial reporting for the 2008 cycle. It now appears, however, that bundling disclosure as envisioned in HLOGA will not take effect until the 2010 cycle.

Even if bundling-disclosure rules were in place now, however, they would not necessarily alter fundraising practices. Indeed, as was discussed at the September 17 FEC hearing, HLOGA requires more transparency about bundling, but does not restrict the practice. In addition, and as noted previously, although the HLOGA travel rules also have yet to be finalized via publication in the *Federal Register*, implementation of those rules is perhaps a less pressing matter because the relevant portion of the law took effect upon enactment, whereas the FEC bundling-disclosure provisions in HLOGA require Commission action to take effect.

Overall, recent changes in campaign finance policy have been incremental, as has been the case since FECA became law in the 1970s. Congress generally did not focus on campaign finance legislation in the immediate aftermath of FECA and BCRA, perhaps because passing those laws had required substantial momentum that was difficult to replicate in the short term. That pattern could also hold following HLOGA, although most of that bill was related to lobbying and ethics rather than campaign finance. Even if Congress decides not to undertake major *legislative* activity on campaign finance in the near future, non-legislative activity is likely to keep campaign finance before the public and lawmakers. This is particularly true given the high-profile 2008 elections and heavy spending that has and will accompany those contests. Litigation, and the FEC's response, is also likely to continue shaping the policy environment. These events demonstrate that the evolution of campaign finance policy occurs not only in Congress, but also at the FEC, in the courts, in other federal agencies, and, perhaps most of all, in campaigns themselves. As long as those campaigns continue, Congress will be faced with questions about how to regulate political money.

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work that did not require Commission approval.