



 <h1 data-bbox="272 478 722 619">Recent Developments</h1> <p data-bbox="337 737 683 783">February 8 & 9, 2022</p>	
--	--

<h2>OBJECTIVES</h2>	
<p data-bbox="277 1224 748 1297">Highlight Litigation, Policy and Legislative Developments</p> 	<p data-bbox="911 1224 1317 1297">Share Commissioner's Perspective on the Issues</p> 

Recent Developments



- Commission Quorum
- Communications
- Contributions
- Sale & Use of Contributor Information
- Use of Committee Funds
- Political Committee Status
- Contributions in the Name of Another

Commission Quorum

- Six Commissioners
- Appointed by President; Confirmed by U.S. Senate
- No more than three of same party
- Four votes required for Commission action



Commissioners – August 2019



Caroline Hunter



Matthew Petersen



Steven Walther



Ellen Weintraub

No Quorum – September 2019



Caroline Hunter



Steven Walther



Ellen Weintraub

Quorum Restored – May 2020



Caroline Hunter



Trey Trainor



Steven Walther



Ellen Weintraub

No Quorum – August 2020



Trey Trainor



Steven Walther



Ellen Weintraub



Resources:

- [Commission Directive 10: Rules of Procedure of the Federal Election Commission pursuant to 2 U.S.C. 437c\(e\)](#)
- [52 U.S.C. § 30106](#) (formerly 2 U.S.C. 437c)

UPDATES ON COMMUNICATIONS

Recent Developments



- Commission Quorum
- **Communications**
- Contributions
- Sale & Use of Contributor Information
- Use of Committee Funds
- Political Committee Status
- Contributions in the Name of Another

Communications



- **Independent Expenditures**
- **Identifying the Source of Communications**

Independent Expenditure Reporting by Non-Committees

Court invalidates IE disclosure rule for persons other than political committees – **CREW v. FEC**

- Statute requires broader disclosure than regulation
 - Identify all contributors of >\$200 in a calendar year
 - Report contributions to further “an” independent expenditure, not “the” independent expenditure



Resources:

[CREW v. FEC](#), No. 16-0259, 316 F. Supp. 3d 349 (D.D.C. 2018);

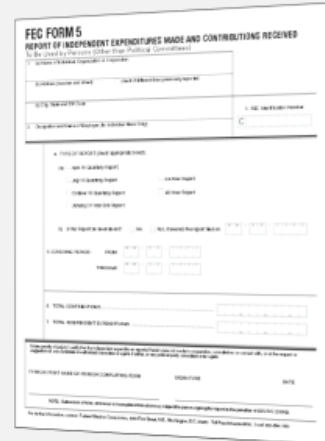
[Crossroads GPS v. CREW](#), No. 18-5261 (D.C. Cir.).

- Court vacates IE disclosure rule for persons other than political committees
- Statute requires broader disclosure than regulation
 - Identify all contributors of >\$200 in calendar year
 - Disclose contributions to further “an” independent expenditure, not “the” independent expenditure
- FEC publishes reporting guidance for filers
- On August 21, 2020, US Court of Appeals for DC Circuit affirms district court decision invalidating disclosure rule at [11 CFR 109.10\(e\)\(1\)\(vi\)](#)

FEC Guidance for Form 5 Filers

For reports due after 9/18/18, filers must:

- Identify on Schedule 5-A all non-committee contributors who gave >\$200/year
- Use memo text to indicate which contributors gave to further an independent expenditure



Resources:

- [FEC provides guidance following U.S. District Court decision in *CREW v. FEC*](#) (Press release, 10/4/2018)

Independent Expenditure Reporting by Non-Committees

Wisconsin Family Action v. FEC (21-1373)

WFA alleges Commission's interpretation unlawfully expands contributor disclosure requirements by requiring disclosure of contributions for nonpolitical and issue advocacy purposes.

Disclosure violates First Amendment rights of speech, association, and assembly by requiring public disclosure of private associations.

Exceeds Congress's power under Constitution.



Resources:

[Wisconsin Family Action v. FEC](#) (21-1373)

Complaint alleges:

- Commission's interpretation of [Section 30104\(c\)](#) of the Act unlawfully expands contributor disclosure requirements by requiring disclosure of contributions for nonpolitical and issue advocacy purposes.
- Disclosure violates First Amendment rights of speech, association, and assembly by requiring public disclosure of private associations.
- The disclosure requirement is beyond Congress's power under the Constitution.

Identifying Communication Sponsors



Use of a Candidate's Name



Internet Communication Disclaimers

Use of Candidate's Name

AO 2021-04: Corporation may post statements from Members of Congress on its digital platforms without making coordinated communications or prohibited in-kind contributions, if not placed for a fee on another person's website.

AO 2019-09: PAC may raise funds by selling T-shirts bearing the facial likenesses and names of candidates, if treated as contributions.



Resources:

- [Advisory Opinion \(AO\) 2021-04](#) (Pray.com)
- [AO 2019-09](#) (Mad Dog PAC)

Internet Communication Disclaimers

AO 2017-12 (Take Back Action Fund)

- 501(c)(4) organization must include disclaimers on paid Facebook image and video ads that expressly advocate election/defeat of clearly identified federal candidates
- Commission did not agree on rationale for its decision



Resources:


[AO 2017-12](#) (Take Back Action Fund)

- A tax-exempt 501(c)(4) organization asked whether it must include disclaimers on paid Facebook image and video advertising that expressly advocates the election or defeat of clearly identified federal candidates.
- The Commission concluded that all of the disclaimer information specified by [52 U.S.C. § 30120\(a\)](#) must be provided, but did not agree on the rationale for its conclusion.

Internet Communication Disclaimers

Rulemaking

- NPRM sought comments on changes to disclaimer rules for public communications over internet
- Public hearing - June 27-28, 2018
- Informational briefings July 26 and August 27, 2018
- Comments sought on alternative proposals - June 20, 2019



Resources:

- March 26, 2018, Commission published [Notice of Proposed Rulemaking \(NPRM\) on internet communication disclaimers and definition of “public communication.”](#) Commission received over 165,800 written comments. (83 FR 12864)
- [June 27-28, 2018, Commission held public hearing](#) on NPRM—18 witnesses testified.
- [Commissioners’ proposals](#) for Internet Ad Disclaimers Rulemaking (June 20, 2019)

Internet Communications

Anna Paulina Luna for Congress v. FEC (21-1213) alleges FEC unlawfully delayed acting on an administrative complaint that claimed Twitter made an illegal in-kind corporate contribution by verifying the accounts of other candidates in a congressional election.

MUR 7832: Commission finds no reason to believe Twitter made an in-kind contribution to Luna's primary or general election opponents.



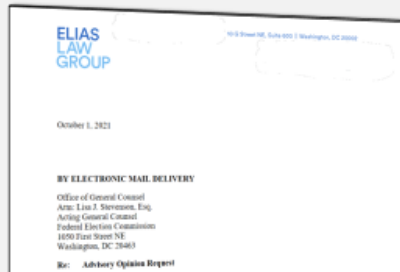
Resources:

- [Anna Paulina Luna for Congress v. FEC](#) (21-1213)
- [MUR 7832](#) (Twitter, Inc.)

Text Message Communications

AOR 2021-11 (DSCC and DCCC)

- Asked if short code text messages sent by committees are “public communications” for purposes of the Act and FEC regulations



- Public communications must include disclaimers
- No opinion issued

Resources:

[AOR 2021-11](#) (DSCC and DCCC)

- National party committees asked if short code text messages qualify as “public communications” under the Act and FEC regulations.
- Public communications must include disclaimers. [11 CFR 110.11](#)
- Commission considered three draft advisory opinions but did not approve any of the drafts by the required four affirmative votes.

UPDATES ON CONTRIBUTIONS

Recent Developments



- Commission Quorum
- Communications
- **Contributions**
- Sale & Use of Contributor Information
- Use of Committee Funds
- Political Committee Status
- Contributions in the Name of Another

Contribution Processing



AO 2021-10 (Retail Benefits, Inc.)

Use of web-based platform to make contributions to political committees

Resources:

- [AO 2021-10](#) (Retail Benefits, Inc.)

UPDATES ON SALE AND USE OF CONTRIBUTOR INFORMATION

Recent Developments



- Commission Quorum
- Communications
- Contributions
- **Sale & Use of Contributor Information**
- Use of Committee Funds
- Political Committee Status
- Contributions in the Name of Another

Sale & Use of Contributor Information

AO 2021-05: Tally Up, LLC may not aggregate individual contributions to generate Voter Segment Scores that candidates would use to solicit contributions



AOR 2021-01: Commission did not agree by four votes as to whether Aluminate, Inc., could use individual contributor data from FEC reports in providing its services to universities, colleges, and nonprofit organizations

Resources:

- [AO 2021-05](#) (Tally Up, LLC)
- [AOR 2021-01](#) (Aluminate, Inc.)

UPDATES ON USE OF COMMITTEE FUNDS

Recent Developments



- Commission Quorum
- Communications
- Contributions
- Sale & Use of Contributor Information
- **Use of Committee Funds**
- Political Committee Status
- Contributions in the Name of Another

Permissible/Impermissible Uses

- ✓ **AO 2021-03** (NRSC and NRCC): Personal security expenses
- ✓ **AO 2020-06** (Escobar): Residential security upgrades
- ✓ **AOs 2019-13** (MJ for Texas) & **2018-06** (Liuba for Congress): Childcare costs
- ✓ **AO 2017-07** (Sergeant at Arms): Install/upgrade residential security system

Resources:

Permissible/Impermissible Uses of Funds

- [AO 2021-03](#) (NRSC and NRCC): Personal security expenses
- [AO 2020-06](#) (Escobar): Residential security upgrades
- AOs [2019-13](#) (MJ for Texas) and [2018-06](#) (Liuba for Congress): Campaign funds may be used to pay for a candidate's childcare expenses that are incurred as a direct result of campaign activity.
- [AO 2017-07](#) (Sergeant at Arms): Members of Congress may spend campaign funds to install or upgrade a residential security system without those payments being considered an impermissible personal use of campaign funds.

Permissible/Impermissible Uses

- ✓ **AO 2019-02** (Bill Nelson for Senate): Donating excess recount funds to charity or national party's recount account
- ✓ **AO 2018-09** (Clements for Congress): Legal expenses for ballot access
- ✗ **AO 2018-03** (Committee to Elect Michael Gilmore): Legal expenses re: scheduling of a special election

Permissible/Impermissible Uses of Funds

- [AO 2019-02](#) (Bill Nelson for Senate): Campaign may dispose of excess recount funds by making a donation to a charity or by transferring funds to a national party committee's recount account.
- [AO 2018-09](#) (Clements for Congress): Candidate's campaign committee may pay for legal expenses incurred in seeking ballot access in his upcoming congressional election.
- [AO 2018-03](#) (Committee to Elect Michael Gilmore): Committee may not use campaign funds to pay legal expenses for a lawsuit on behalf of five registered voters in Michigan's 13th district, alleging that the failure to hold a more timely special election violated their constitutional rights. Candidate's role was as legal counsel, and any incidental benefit that the Committee might derive from victory in the lawsuit was not enough to establish that the expenses would exist irrespective of the campaign.

Candidate Salary

Candidates may receive salary from campaign funds, subject to certain limitations. Amount cannot exceed the lesser of the minimum annual salary for office sought or the candidate's earned income in the previous year.



- **AO 2021-13** (Matthew P. Hoh): Disability benefits cannot be used to calculate candidate salary because they do not constitute "earned income"

Resources:

- [AO 2021-13](#) (Matthew P. Hoh): Disability do not constitute "earned income" for candidate salary calculation. 11 CFR [100.3](#) and [113.1](#)

Candidate Salary

Rulemaking petition asks Commission to amend its candidate salary regulations to:

- Extend period during which candidate can draw salary from campaign funds;
- Establish minimum salary for candidates being paid from campaign funds; and
- Designate payment of certain healthcare costs as permissible uses of campaign funds



Resources:

- [Rulemaking Petition: Notice of Availability](#)

Application to PACs and Parties

FEC legislative recommendation seeks to extend personal use ban to all political committees

Working group studying "Scam PACs"



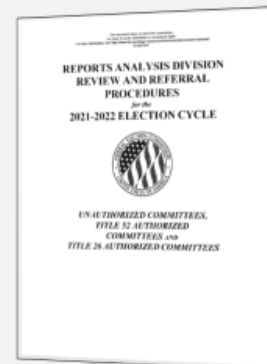
Resources:

- [Agenda Document No. 21-23-A1](#)

Dormant Committees

Since July 2018, RAD analysts have examined use of campaign funds by dormant committees

- Applies to candidates who did not campaign or hold office during previous two years for House candidates or four years for Senate and Presidential candidates.
- Analyst sends verification letter to clarify dormant committee's use of campaign funds.



Resources:

- [RAD Review and Referral Procedures](#)

Post-Election Candidate Loan Repayments



June 3, 2021:

Three-judge district court panel in **Ted Cruz for Senate et al v. FEC** finds \$250k limit on post-election repayment of candidate loans unconstitutional

June 13, 2021:

FEC appeals decision to Supreme Court

September 30, 2021:

Supreme Court postpones consideration of jurisdictional questions to hearing of case on merits

Resource:

- [*Ted Cruz for Senate, et al. v. FEC*](#)

Transfers to Party Committee

McCutcheon, et al. v. FEC

- AOR on whether \$50k of candidate's personal contributions to campaign could lawfully be transferred to Libertarian National Committee.
- AOR also asked if the former candidate could still make unlimited contributions to his campaign, then transfer those funds to the Libertarian or Republican National Committees.
- On October 19, 2020, district court denied McCutcheon's motion for preliminary injunction that would have prevented FEC enforcement action against his campaign if it made the proposed transfers.
- Notice of Dismissal (10/22/2020)

Resources:

- [AOR 2020-03](#) (McCutcheon for Freedom)
- [McCutcheon, et al. v. FEC](#) (20-2485)

Disclosing Ultimate Payee

Rulemaking petition:

Require committees and persons who make independent expenditures or electioneering communications to itemize all disbursements made on their behalf or for their benefit, whether made via an agent, independent contractor, vendor or subvendor

Comments were due October 4, 2021



Resources:

- [Rulemaking Petition: Notice of Availability](#)

Failure to Adequately Disclose

FEC v. LatPAC (21-6095): Lawsuit alleging political committee failed to disclose receipts and disbursements.

FEC v. Defend Louisiana (21-346): Lawsuit alleging group failed to disclose and adequately describe purpose of independent expenditures.

Resources:

- [FEC v. LATPAC, et al. \(21-6095\)](#)
- [FEC v. Defend Louisiana PAC, et al. \(21-346\)](#)

UPDATES ON POLITICAL COMMITTEE STATUS

Recent Developments



- Commission Quorum
- Communications
- Contributions
- Sale & Use of Contributor Information
- Use of Committee Funds
- **Political Committee Status**
- Contributions in the Name of Another

Political Committee Status



Statute: Raise/spend >\$1,000 to influence federal election

Supreme Court: Major purpose test – Buckley v. Valeo

Political Committee Status

Public Citizen v. FEC

FEC's decision not to further investigate whether Crossroads GPS violated the Act by failing to register as a political committee not subject to judicial review because it was based on an application of prosecutorial discretion (3/17/21)

CREW v. FEC (19-5161)

Court of Appeals affirms district court decision; FEC's dismissal of complaint alleging New Models failed to register as political committee was an unreviewable exercise of prosecutorial discretion (4/9/21)



Resources:

- [*Public Citizen, et al. v. FEC*](#)
- [*CREW, et al. v. FEC*](#) (18-0076/19-5161)

Political Committee Status

Interest groups have filed private actions against groups for alleged FECA violations where the Commission lacked four votes to move forward with the recommendations

- **CREW v. AAN** (18-945)
- **Campaign Legal Center v. Iowa Values** (21-389)

UPDATES ON CONTRIBUTIONS IN THE NAME OF ANOTHER

Recent Developments



- Commission Quorum
- Communications
- Contributions
- Sale & Use of Contributor Information
- Use of Committee Funds
- Political Committee Status
- **Contributions in the Name of Another**

Contributions in the Name of Another

Lawsuits to enforce ban on contributions in the name of another

- **FEC v. Johnson**

But: No secondary liability for contributions in the name of another

- **FEC v. Swallow**



Resources:

[*FEC v. Jeremy Johnson*](#), No. 2:15-0439

- In August 2020, the court entered a consent judgment reflecting an FEC settlement finding that Utah businessman Jeremy Johnson knowingly and willfully violated FECA by using straw donors to exceed the contribution limits.

[*FEC v. John Swallow*](#), 304 F. Supp. 3d 1113 (D. Utah 2018)

- In April 2018, the United States District Court for the District of Utah dismissed the Commission's case against John Swallow. The court found that FECA's language was unambiguous, limiting the prohibition on contributions in the name of another to three types of persons: first, a person who makes a contribution in the name of another; second, a person who knowingly allows his name to be used by the contributor; and finally, a candidate who knowingly accepts such a contribution. Because none of these apply to Swallow, the court stated, it granted Swallow's motion to dismiss. The court also ordered [11 CFR 110.4\(b\)\(1\)\(iii\)](#), which applies to those who "[k]nowingly help or assist any person in making a contribution in the name of another," stricken from the regulations and enjoined the Commission from enforcing it.

Contributions in the Name of Another

FEC v. Rivera

- On February 23, 2021, district court imposed a \$456,000 civil penalty against former Representative David Rivera for making nearly \$76,000 in in-kind contributions in the name of another.
- Court also entered a permanent injunction against Rivera prohibiting him from making campaign contributions in the name of another.

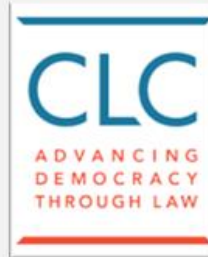
Resources:

- [*FEC v. Rivera*](#)

Contributions in the Name of Another

Campaign Legal Center, et al. v. FEC

Commission declined to investigate complaints alleging that LLCs had been used to make contributions in the name of another



[*Campaign Legal Center, et al. v. FEC, et al.*](#), 952 F.3d 352 (D.C. Cir 2020)

- The court concluded that it was reasonable for a controlling group of Commissioners not to investigate a group of closely held corporations and corporate LLCs that were alleged to have been used as straw donors to avoid disclosure of the identities of donors to various Super PACs.
- The court noted the controlling Commissioners' concerns about fair notice and that Commission precedent might have been confusing to regulated entities, and found that these concerns constituted a rational basis for the controlling Commissioners' decision to dismiss the complaints. As a result, the court concluded the dismissal of the complaints was not contrary to law.
- The court agreed that FECA's ban on contributions in the name of another applied to closely held corporations and corporate LLCs.
- The controlling statement and the court's analysis provide some notice on how some Commissioners may apply these rules going forward.

Recent Developments Topics

- ✓ **Commission Quorum**
- ✓ **Communications**
- ✓ **Contributions**
- ✓ **Sale & Use of Contributor Information**
- ✓ **Use of Committee Funds**
- ✓ **Political Committee Status**
- ✓ **Contributions in Name of Another**

Proposed Legislation



2021 Legislative Recommendations

- Electronic filing of electioneering communication reports
- Prohibit fraudulent PAC practices
- Revise prohibition on fraudulent misrepresentation of campaign authority
- Extend conversion of campaign funds prohibition to all committees
- Prohibit aiding/abetting making contributions in name of another

2021 Legislative Recommendations

- Require disclosures to contributors regarding recurring contributions
- Make the Administrative Fine Program permanent
- Increase and index for inflation registration and reporting thresholds
- Increase in-home event exemption, unreimbursed travel expense exemption for candidates and parties

Full list
available
at FEC.gov

Resources:

- [2021 Legislative Recommendations of the Federal Election Commission](#)

STAY UP TO DATE

Keep Up with the Latest

 **Live Commission Meeting Video
and Recorded Podcast** 

 **FEC Record**

Press Releases and Weekly Digest 

@FEC on Twitter 

FEC RECORD: www.fec.gov/updates/?update_type=fec-record

FEC Weekly Digest: www.fec.gov/updates/?update_type=weekly-digest

Twitter feed: @FEC

FECMail (website subscription service; email updates on topics of your choice):
public.govdelivery.com/accounts/USFEC/subscriber/new?qsp=CODE_RED

Web Site

- **Advisory Opinions:** www.fec.gov/data/legal/advisory-opinions/
- **Litigation:** www.fec.gov/legal-resources/court-cases/
- **New/current statutes:** www.fec.gov/data/legal/statutes/
- **Rulemakings:** sers.fec.gov/fosers/
- **Outreach:** www.fec.gov/help-candidates-and-committees/trainings/

Recent Developments - FEC Virtual Conference (February 8 & 9, 2022)

1. How would you rate the workshop overall?

- Excellent
- Very Good
- Good
- Moderately Good
- Poor

2. How would rate the speakers' knowledge of the subject matter?

- Excellent
- Very Good
- Good
- Moderately Good
- Poor

Help Us Help You!

Please complete an evaluation of this workshop.

FECConnect
VIRTUAL

Evaluation link: <https://www.surveymonkey.com/r/87QMTVF>