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Soft and Hard Money in Contemporary Elections: What Federal Law Does and Does Not Regulate

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Summary

Financial activity in federal elections is governed by federal statutes, which have evolved under the influence of various court rulings. The Federal Election Campaign Act (FECA) of 1971, as amended, imposes limitations and prohibitions on money from certain sources and requires public disclosure of money raised and spent in federal elections. Based on the Supreme Court's 1976 *Buckley v. Valeo* ruling, federal law generally does not impose mandatory limits on campaign spending by candidates or groups.¹ While federal law regulates some types and sources of campaign money, other types and sources are exempt from coverage. Also, there are wide differences in what federal law allows in federal elections and what 50 state statutes allow in state elections. Money that is outside the federal regulatory framework, but raised and spent in a manner suggesting possible intent to affect federal elections, is known as soft money. The omissions from federal regulation and disparities between federal and state laws have created confusion about current practices. This report examines the major types of financial activity in elections and what are often labeled as loopholes in federal law.

Activity Regulated by Federal Law: Hard Money

Only money raised and spent according to the requirements and restrictions of federal law (*hard money*) may be used in connection with an election for federal office. While the law does not clearly define what is meant by influencing a federal election, a standard of *express advocacy*, based on court decisions, has gained wide acceptance in evaluating expenditures on voter communications. Federal Election Commission (FEC) regulations offer the following definition, as the standard for a communication's treatment as "in connection with a federal election," hence triggering the provisions of the FECA:

¹ Although such limits exist in presidential races (and in some states and localities), these limits are accepted *voluntarily* by candidates, usually in exchange for public funds or benefits.

Expressly advocating means any communication that . . . uses phrases such as “vote for the President,” “reelect your Congressman,” . . . “Smith for Congress,” “Bill McKay in ‘94,” . . . “defeat” accompanied by a picture of one or more candidate(s), . . . or communications . . . which in context can have no other meaning than to urge the election or defeat of one or more clearly identified candidate(s) ²

Key features of FECA regulation include:

- ! *Prohibited Sources*—Unions and corporations are prohibited from making contributions or expenditures in federal elections. The corporate ban was first enacted in 1907, the labor ban in 1943. While union treasury and corporate money may not be used in federal elections, a separate segregated fund—*i.e.*, political action committee (PAC)—may raise voluntary contributions from designated classes of individuals, to give or spend in federal elections. [2 U.S.C.§441b]
- ! *Source Limitations*—Contributions to candidates, parties, and PACs in federal elections are limited, *e.g.*, for an individual—\$1,000 per candidate, per election; \$5,000 per year to a PAC; and an aggregate of \$25,000 per year to all federal candidates, parties, and PACs. Most PACs and party committees may give a candidate \$5,000 per election. Parties may also make *coordinated expenditures* to pay for campaign services or ads for and with the cooperation of a candidate, subject to formula-based limits, indexed for inflation. [2 U.S.C.§441a]
- ! *Disclosure*—Candidates, PACs, and parties involved in federal elections must register with the FEC and file periodic reports on receipts and expenditures, itemizing for amounts over \$200. [2 U.S.C.§432-437]

Money Outside the Candidate’s Control: Independent Expenditures.

Federal law recognizes a particular type of campaign expenditure, wherein an individual or group communicates a message to voters without coordination with any candidate. 2 U.S.C.§431(17) defines *independent expenditure* as an expenditure:

by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Such expenditures have typically been undertaken by a small number of PACs to support or oppose candidates to a greater extent than permitted as direct contributions. Because

² 11 C.F.R.§100.22; these 1995 regulations also contain a second part, derived from a 1987 Ninth Circuit ruling in *FEC v. Furgatch*, which defines “express advocacy” in broader terms, allowing for reasonable interpretation of a communication “taken as a whole.” While this section remains on the books, it was declared unconstitutional by a federal district court in 1996, a ruling since upheld by a federal appeals court. It remains in limbo, due to conflicting judicial decisions; if ultimately upheld by further rulings, it would greatly affect campaign finance regulation. For a discussion of the constitutional issues, see: CRS Report 98-282, *Campaign Finance Reform: A Legal Analysis of Issue and Express Advocacy*, by L. Paige Whitaker.

independent expenditures use express advocacy, *hard money* is required: activity is disclosed, and funds must be from federally-permissible sources and amounts. (This is different from *issue advocacy*, as will be discussed below.)

As an *expenditure* (not a contribution), total spending is not limited, per the *Buckley v. Valeo* ruling (see below). Hence, independent expenditures are sometimes viewed as loopholes in current law. But again, while spending is not subject to limits, contribution limits and reporting requirements fully apply. (If an expenditure were made with the knowledge or cooperation of a candidate, it would be deemed an in-kind contribution to the candidate, subject to FECA limits.) In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* [116 S. Ct. 2309 (1996)], the Supreme Court ruled that parties, like PACs and other groups, may engage in this form of spending.

Buckley v. Valeo Ruling

Many court cases have affected federal campaign finance law, but the Supreme Court's *Buckley v. Valeo* decision [424 U.S. 1 (1976)] has played a paramount role in shaping both the law and reform efforts. Essentially, the Court declared that both contribution and expenditure limits restricted certain First Amendment rights. However, the Court said that reasonable contribution limits could be justified by a countervailing governmental interest, in protecting the integrity of the electoral system from real or apparent corruption, arising from donations to or activity coordinated with candidates. The Court saw no such justification for spending limits, as it saw no inherent corruption from large expenditures of money by candidates or outside groups.³ Hence, the Court struck down prior limits on expenditures, whether by a campaign committee, a candidate from personal funds, or an independent group appealing directly to voters. Only voluntary limits, such as in the presidential public funding system, were sanctioned by the Court.

Activity Outside of Federal Regulation: Soft Money

The concept of soft money was developed by labor unions, after the 1943 ban (made permanent in 1947) on union money in federal elections. Labor responded most notably with PACs, to raise voluntary donations from members. Unions also found ways to use their treasury money to influence public policy (aside from union PAC contributions in federal races), *e.g.*, state and local candidate donations, and “nonpartisan” education, get-out-the-vote, and registration drives.⁴ Three major soft money types are discussed below.

Labor/Corporate Exempt Activity. While banning direct corporate and union money in federal elections, 2 U.S.C. § 441b(b)(2) exempts three types of spending from its “contribution” and “expenditure” definitions, if aimed only at certain “restricted classes:” for a union, its members, officials, and families; for a corporation, its executive and administrative personnel, stockholders, and families. The exempt activities are:

- ! Establishing, administering, and soliciting money for a PAC;
- ! Nonpartisan get-out-the-vote and registration drives; and
- ! Internal communications with members on any subject.

³ The Court distinguished (as does the law) between a contribution, where authority to spend money to influence voters is transferred from donor to candidate (or committee), and an expenditure, where the source pays directly for a communication with voters.

⁴ Alexander Heard, *The Costs of Democracy* (Chapel Hill: Univ. of N.C. Press, 1960), p. 177-178.

The last category—internal communications—may involve express advocacy, which is permitted only because of the restricted class receiving the communication. Also, as exempt activities, sources and recipients of funds are generally not disclosed; the one exception is for internal express advocacy communications exceeding \$2,000 per election.

In the absence of solid data, it is generally believed that exempt activities are a more important tool for unions than for corporations, because union restricted classes may be more easily and effectively mobilized. Also, while the FECA addresses exempt activities regarding federal elections, unions and corporations may contribute in state or local elections to the extent allowed therein (some 41 states allow union money and 30 allow corporate money in their elections); this discrepancy between federal and state law—and the generally less restrictive state standards—has an impact on the next category.

Party Soft Money. Party soft money is raised by the national parties from sources and in amounts prohibited in federal elections and typically transferred to state parties to the extent allowed under particular state laws. Money raised in this manner is generally from unions and corporations, or from individuals who have reached their aggregate federal limit (\$25,000 a year). The funds are kept in “non-federal” bank accounts (thus separate from money in “federal” accounts, which must be raised solely from federally-permissible sources and amounts). These funds are largely transferred from non-federal accounts to state parties for grassroots and party-building activities (although some of it is used by the national party for a portion of administrative costs and issue advocacy). Party soft money has played a notable role in presidential elections since 1980, as party and campaign officials and party nominees have increasingly been involved in raising it.

Party soft money was propelled by: (1) the 1979 FECA Amendments, which allowed a greater role for state and local parties by exempting certain grassroots, registration, and voter drives, and generic party-building activities from FECA limits; and (2) FEC Advisory Opinions (*e.g.*, AO 1978-10), which allowed a share of corporate and union money in financing these efforts. But while the law allowed state and local parties to use soft money on activities which helped their entire candidate slate, the law still prohibited money that was not federally-permissible from benefitting federal candidates. This concept of *mixed activities*, which benefit federal, state, and local candidates, gave rise to a requirement for careful bookkeeping so that the share of such activities benefitting federal races uses only hard money. FEC regulations in 1991 (11 C.F.R. §102, 104, and 106) required political committees with both federal and non-federal accounts and that engage in mixed activities to allocate their expenditures according to specified formulae. These regulations required disclosure of all national, state, and local party finances from federal accounts and of transfers from non-federal accounts for a share of mixed activities.

Nearly complete data for the 2000 elections show receipts of \$487.5 million by the major national parties’ non-federal accounts (\$243.1 million for Democrats and \$244.4 million for Republicans),⁵ up nearly 100% over the \$262.1 million raised in 1996 (\$123.9 million by Democrats and \$138.2 million by Republicans).⁶

Issue Advocacy. Since the 1996 national elections, attention has increasingly focused on broadcast communications by both major parties and interest groups across the political spectrum which discuss candidates’ merits in conjunction with particular issue

⁵ US F.E.C., *Party Fundraising Escalates*, Jan. 12, 2001.

⁶ US F.E.C., *FEC Reports on Political Party Activity for 1997-98*, Apr. 9, 1999.

positions; while technically not meeting FECA criteria for election-related activity, these ads have been widely viewed as intending to influence federal races. As public policy messages without explicit election advocacy, such activities are labeled *issue advocacy*. By not explicitly urging the defeat or election of clearly identified candidates, groups can present information to the public which encourages more positive or negative views of public officials who also are candidates. Not only can these communications be paid for with funds from any source, in any amount, but, with one notable exception (see below), they are not uniformly disclosed. (This contrasts with independent expenditures, with which issue advocacy is often confused; while both are purported to be *independent*, only *independent expenditures* meet FECA criteria as *expenditures*, as interpreted in court rulings limiting the extent to which the law can regulate political spending.)

Highly visible “issue spending” in the last three elections has reinforced perceptions of a major loophole by which politically interested groups circumvent federal election law. Lack of disclosure leads to reliance on estimates of its extent. The Annenberg Public Policy Center estimated that some \$135 million was spent on broadcast issue advocacy in 1996, between \$275 and \$340 million in 1998, and \$509 million in 2000.⁷

A Brennan Center for Justice study of political broadcast ads in the top 75 media markets found that, in 1998, two-thirds of ads examined were sponsored by parties, not interest groups, and only 4% of candidate ads used express advocacy language, suggesting that “magic words” may not constitute a meaningful boundary between campaign-related and protected issue advocacy speech.⁸ Its 2000 study found that the national parties spent more on TV to boost their presidential nominees than did the Gore and Bush campaigns.⁹

Besides broadcast ads, another form of issue advocacy, used by groups from unions to the Christian Coalition, is distribution of voter guides, which present candidates’ stands on issues in a way that arguably affects voters’ views of specific candidates.

Tax-Exempt Organizations. Raising particular concerns has been the use of issue advocacy by groups that are tax-exempt under the Internal Revenue Code, through section 501(c), which otherwise bans involvement in political campaigns, or section 527, which allows significant activity by “political organizations” as defined. In 2000, Congress, in P.L. 106-230, required periodic IRS disclosure by 527s (not already filing at the FEC).¹⁰

⁷ Annenberg Public Policy Center, *Issue Ads@AAPC: An Online Tracking Study of Issue Advocacy Advertising*, [<http://appcpenn.org/issueads/index.html>] (visited Feb 2, 2001).

⁸ Brennan Center for Justice, *Buying Time: Television Advertising in the 1998 Congressional Elections*, [<http://www.buyingtime.org>] (visited Jan. 19, 2001).

⁹ *Ibid.*, [<http://www.brennancenter.org/tvads2000.html>] (visited Jan. 19, 2001).

¹⁰ For a discussion of issues surrounding 527s, see: CRS Report RL30582, *527 Organizations: How the Differences in Tax and Election Laws Permit Certain Organizations to Engage in Issue Advocacy without Public Disclosure and Proposals for Change*, by Marie B. Morris.

Hard Versus Soft Money: Summary of Key Features

Hard Money	Soft Money
In general	
Raised and spent for use in federal elections, per restrictions and regulation of federal election law	Raised and spent for use in state and local elections, per restrictions and regulation of state laws, or in non-election advocacy; would not be permitted if spent in federal elections (often raised and spent in way that suggests intent to indirectly influence federal races)
Must be used for <i>express advocacy</i> in federal election (“vote for/ against” candidate), aimed at general public (includes contributions to or coordinated with federal candidates)	May NOT be used for <i>express advocacy</i> in federal elections if aimed at general public (unions and corporations may use express advocacy to restricted classes)
Sources	
<ul style="list-style-type: none"> - Individuals, PACs, and parties (subject to contribution limits) - Candidates, from personal funds (not subject to limits) 	Generally restricted only to extent of state laws; common sources: unions; corporations; individuals above \$25,000 in a year
Disclosure	
All receipts and expenditures must be disclosed periodically to FEC, with itemization of amounts raised and spent above \$200	<ul style="list-style-type: none"> - Non-federal accounts of national parties and of state/local parties for spending on mixed activities—to FEC - Union and corporate internal communications over \$2,000—to FEC - IRC sec. 527 tax-exempt political organizations—to IRS - Some activities may be disclosed in states
Common Forms	
Receipts and expenditures by: federal candidates; PACs (federal accounts); and party committees (federal accounts; through contributions and coordinated expenditures)	<i>Party soft money</i> —raised by national parties through non-federal accounts and transferred to state parties for use in generic, party-building, and voter operations; also used for a share of issue ads and administrative costs
	<i>Labor/Corporate Exempt Activities</i> — treasury money allowed for spending aimed at restricted classes on setting up and running a PAC; get-out-the-vote and registration drives; and internal communications (<i>i.e.</i> , express advocacy)
<i>Independent Expenditures</i> —for express advocacy of election or defeat of federal candidate, not coordinated with federal candidate (no limit on spending, but amounts must be disclosed; cannot be from prohibited sources or in amounts beyond contribution limits)	<i>Issue Advocacy</i> —by not using express advocacy language, groups and parties may use soft money for public issue messages, independent of a candidate (not federally regulated; generally not disclosed)
Mixed Activities	
Operations of parties (and some PACs) that benefit candidates at both federal and state/local levels; subject to allocation requirements to insure only hard money is spent in federal elections; hence, a certain percentage of expenditures by committees at any level must come from hard money, the rest from soft money	