



The State of Campaign Finance Policy: Recent Developments and Issues for Congress

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Summary

For decades, Congress, regulatory agencies, and courts have emphasized the need to reduce potential corruption by providing public disclosure of information about campaign contributions and expenditures. Preventing corruption and enhancing transparency remain prominent themes in campaign finance policy, but what those goals mean and how they should be accomplished appears to be in flux.

Minor and major changes have occurred in campaign finance policy since 2002, when Congress substantially amended campaign finance law via the Bipartisan Campaign Reform Act (BCRA). The Supreme Court's 2010 ruling in *Citizens United v. FEC* and a related lower-court decision, *SpeechNow.org v. FEC*, arguably represent the most fundamental changes to campaign finance law in decades. During the 111th Congress, the House responded by enacting the DISCLOSE Act (H.R. 5175; S. 3295; S. 3628). The Senate declined to do so.

During the 112th Congress, the House has passed legislation (H.R. 359; H.R. 3463) that would repeal the presidential public financing program. (See also H.R. 408; H.R. 2434; and S. 194.) The House and Senate have held hearings on two campaign finance issues. First, S. 750 (see also S. 749 and H.R. 1404) is the latest version of the Fair Elections Now Act (FENA), which would publicly finance Senate campaigns. The Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights held a hearing on the bill in April 2011. Second, amid reports of a possible Obama Administration executive order that would require additional disclosure of government contractors' spending surrounding elections, the House Committee on Oversight and Government Reform and Committee on Small Business held a joint hearing in May 2011. Amendments to unrelated bills (H.R. 1540; H.R. 2017; H.R. 2354) that passed the House in May, June, and July 2011, respectively, contain provisions reportedly developed in response to the possible draft executive order. The FY2012 Consolidated Appropriations Act (H.R. 2055) and the National Defense Authorization Act (H.R. 1540), which became law in December 2012, both contain provisions prohibiting disclosure of certain political spending by federal contractors. In addition, the Committee on House Administration, Subcommittee on Elections, held an April 2011 hearing on H.R. 672. That measure proposes to eliminate the Election Assistance Commission (EAC) and transfer some functions to the Federal Election Commission (FEC). Finally, in June 2011, the Supreme Court issued a decision in *Arizona Free Enterprise Club's Freedom Club PAC et al. v. Bennett*. The Court invalidated Arizona's use of matching funds for publicly financed candidates. The opinion is most relevant for state public financing programs but may shape federal policy options.

Fundraising and spending in the 2010 election cycle suggest that previously prohibited sources and amounts of funds will continue to be a factor in federal elections. Activities by independent-expenditure-only political action committees (*super PACs*) and tax-exempt organizations that are typically not political committees (e.g., Internal Revenue Code 501(c) and 527 organizations) may be particularly prominent.

Despite recent changes, some aspects of campaign finance policy remain unchanged. Presidential public financing and the FEC may require congressional attention regardless of more recent developments. As Congress decides whether to revisit law surrounding political campaigns, it may be appropriate to take stock of the current landscape and to examine what has changed, what has not, and what policy options might be relevant. This report provides a starting point for doing so. It also provides comments on how those events might affect future policy considerations.

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Introduction

Federal law has regulated money in elections for more than a century.¹ Concerns about limiting the potential for corruption and informing voters have been at the heart of that law and related regulations and judicial decisions. Restrictions on private money in campaigns, particularly large contributions, have been a common theme throughout the history of federal campaign finance law. The roles of corporations, unions, interest groups, and private funding from individuals have attracted consistent regulatory attention. Congress has also required that certain information about campaigns' financial transactions be made public. Collectively, three principles embodied in this regulatory tradition—limits on sources of funds, limits on contributions, and disclosure of information about these funds—constitute ongoing themes in federal campaign finance policy.

Throughout most of the 20th century, campaign finance policy was marked by broad legislation enacted sporadically. Major legislative action on campaign finance issues remains rare. Since the 1990s, however, momentum on federal campaign finance policy, including regulatory and judicial action, has arguably increased. Congress last enacted major campaign finance legislation in 2002. The Bipartisan Campaign Reform Act (BCRA) largely banned unregulated *soft money*² in federal elections and restricted funding sources for pre-election broadcast advertising known as *electioneering communications*. As BCRA was implemented, regulatory developments at the Federal Election Commission (FEC), and some court cases, stirred controversy and renewed popular and congressional attention to campaign finance issues. Since BCRA, Congress has also continued to explore legislative options and has made comparatively minor amendments to the nation's campaign finance law.

In one of the most recent major developments, on January 21, 2010, the Supreme Court of the United States issued its decision in *Citizens United v. Federal Election Commission*.³ Arguably

¹ The 1907 Tillman Act (34 Stat. 864), which prohibited federal contributions from nationally chartered banks and corporations, is generally regarded as the first major federal campaign finance law. The 1925 Federal Corrupt Practices Act (43 Stat. 1070) was arguably the first federal statute combining multiple campaign finance provisions, particularly disclosure requirements first enacted in 1910 and 1911 (36 Stat. 822 and 37 Stat. 25). An 1867 statute barred requiring political contributions from naval yard workers (14 Stat. 489 (March 2, 1867)). This appears to be the first federal law concerning campaign finance. The Pendleton Act (22 Stat. 403), which created the civil service system is also sometimes cited as an early campaign finance measure because it banned receiving a public office in exchange for a political contributions (see 22 Stat. 404). For additional historical discussion of the evolution of campaign finance law and policy, see Anthony Corrado et al., *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press, 2005), pp. 7-47. See also, for example, Kurt Hohenstein, *Coining Corruption: The Making of the American Campaign Finance System* (DeKalb, IL: Northern Illinois University Press, 2007), Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988), Raymond J. La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Ann Arbor, MI: University of Michigan Press, 2008), pp. 43-80, and *Money and Politics*, ed. Paula Baker (University Park, PA: The Pennsylvania State University Press, 2002).

² *Soft money* is a term of art referring to funds generally believed to influence federal elections but not regulated under federal election law. Soft money stands in contrast to *hard money*. The latter is a term of art referring to funds that are generally subject to regulation under federal election law, such as restrictions on funding sources and contribution amounts. These terms are not defined in federal election law. For an overview, see, for example, David B. Magleby, "Outside Money in the 2002 Congressional Elections," in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections*, ed. David B. Magleby and J. Quin Monson (Washington: Brookings Institution Press, 2004), pp. 10-13.

³ 130 S. Ct. 876 (2010). For legal analyses of the case, see CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker; and CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, (continued...)

one of the most highly anticipated decisions from the Court on campaign finance since the 1970s, the ruling, among other things, lifted the long-standing Federal Election Campaign Act (FECA) prohibition on corporations—and, implicitly, unions—using their general treasury funds for political advertisements known as *independent expenditures* and *electioneering communications*. *Independent expenditures* explicitly call for election or defeat of political candidates (known as *express advocacy*), may occur at any time, and are usually (but not always) broadcast advertisements. They must also be uncoordinated with the campaign in question.⁴ *Electioneering communications* are defined only as broadcast advertising, are aired during specific pre-election windows, and might discuss a candidate, but do not explicitly call for election or defeat (known as *issue advocacy*).⁵ Additional discussion appears later in this report.

The *Citizens United* ruling was the most prominent campaign finance issue of 2010, spurring substantial legislative action during the 111th Congress.⁶ The ruling was, however, only the latest—albeit perhaps the most monumental—shift in federal campaign finance policy to occur in recent years. In another 2010 decision, *SpeechNow.org v. Federal Election Commission*, the U.S. Court of Appeals for the District of Columbia held that contributions to political action committees (PACs) that make only independent expenditures cannot be limited.⁷ Campaigns, parties, and other groups must adapt to these new realities, just as Congress and federal agencies must decide how or whether to respond. In addition, Congress, courts (including the Supreme Court in a state-level public financing case), the FEC, and other administrative agencies continue to examine various other campaign finance policy matters.

As Congress considers how to proceed, it may be appropriate to take stock of the current landscape and to examine what has changed, what has not, and which policy issues and options might be relevant. This report provides a resource for beginning that discussion. It includes an overview of selected recent events in campaign finance policy and comments on how those events might affect future policy considerations. The most prominent issues are directly related to *Citizens United* and *SpeechNow*. Others, such as public financing and FEC matters, would be timely regardless of recent litigation. Historical themes of limiting potential corruption and promoting transparency underlie the debate on each of these issues and on campaign finance policy as a whole.

Before proceeding, explaining the report's boundaries may help readers. This report is intended to provide an accessible overview of major policy issues facing Congress. Citations to other CRS products, which provide additional information, appear where relevant. The report discusses selected litigation to demonstrate how those events have changed the campaign finance landscape and affected the policy issues that may confront Congress, but it is not a constitutional or legal analysis. Finally, campaign finance data appear throughout the report. The data were collected and analyzed as described in the text.

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by L. Paige Whitaker et al.

⁴ On the definition of *independent expenditures*, see 2 U.S.C. 431 §17.

⁵ On the definition of *electioneering communications*, see 2 U.S.C. 434 §(f)(3).

⁶ For additional discussion, see CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett; and CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.

⁷ For additional discussion of *SpeechNow*, see CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

Development of Modern Campaign Finance Law

Policy Background

Dozens or hundreds of campaign finance bills have been introduced in each Congress since the 1970s. In fact, approximately 900 campaign finance measures have been introduced since the 93rd Congress (1973-1974).⁸ Nonetheless, major changes in campaign finance law have been rare. A generation passed between FECA and BCRA, the two most prominent campaign finance statutes of the past 40 years. Federal courts and the FEC played active roles in interpreting and implementing both statutes and others. The *Citizens United* and *SpeechNow* decisions appear to represent the next chapter in campaign finance policy and are the focus of recent attention in Congress and elsewhere.

Over time and in all facets of the policy process, anti-corruption themes have been consistently evident. Specifically, federal campaign finance law seeks to limit corruption or apparent corruption in the lawmaking process that might result from monetary contributions. Campaign finance law also seeks to inform voters about sources and amounts of contributions. In general, Congress has attempted to limit potential corruption and increase voter information through two major policy approaches:

- limiting sources and amounts of financial contributions and
- requiring disclosure about contributions and expenditures.

Another hallmark of the nation's campaign finance policy concerns spending restrictions. Congress has occasionally placed restrictions on the amount candidates can spend, as it did initially through FECA. Today, as discussed later in this report, candidates and political committees can generally spend unlimited amounts on their campaigns, as long as those funds are not coordinated with other parties or candidates.⁹

The Federal Election Campaign Act (FECA)

Modern campaign finance law was largely shaped in the 1970s, particularly through FECA.¹⁰ First enacted in 1971 and substantially amended in 1974, 1976, and 1979, FECA remains the foundation of the nation's campaign finance law.¹¹ As originally enacted, FECA subsumed

⁸ This figure is a CRS estimate and may understate the total number of relevant bills. This estimate is based on a search of the Legislative Information System (LIS) for bills introduced between the 93rd and 111th Congresses that included the terms "campaign finance" or "Federal Election Campaign Act" in the bill title or summary. The search was limited to measures referred to the Committee on House Administration or Senate Committee on Rules and Administration. Other bills not reflected here may also be relevant, just as some of the bills included here are not principally related to campaign finance. The bills are also not all unique; some include identical legislative language introduced in multiple Congresses and in both chambers.

⁹ *Political committees* include candidate committees, party committees, and PACs. See 2 U.S.C. §431(4).

¹⁰ FECA is 2 U.S.C. §431 *et seq.* Congress first addressed modern campaign finance issues in the 1970s through the 1971 Revenue Act, which established the presidential public financing program. The 1970s are primarily remembered, however, for enactment of and amendments to FECA. For additional discussion of presidential public financing, including an initial 1960s public financing program that was quickly repealed, see CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by R. Sam Garrett

¹¹ On the 1971 FECA, see P.L. 92-225. On the 1974, 1976, and 1979 amendments, see P.L. 93-443, P.L. 94-283, and (continued...)

previous campaign finance statutes, such as the 1925 Corrupt Practices Act, which, by the 1970s, were largely regarded as ineffective, antiquated, or both.¹² The 1971 FECA principally mandated reporting requirements similar to those in place today, such as quarterly reporting of a political committee's receipts and contributions. Subsequent amendments to FECA played a major role in shaping campaign finance policy as it is understood today. In brief:

- Among other requirements, the 1974 amendments, enacted in response to the Watergate scandal, placed contribution and spending limits on campaigns. The 1974 amendments also established the FEC.
- After the 1974 amendments were enacted, the first in a series of prominent legal challenges (most of which are beyond the scope of this report) came before the Supreme Court of the United States.¹³ In its landmark *Buckley v. Valeo* (1976) ruling, the Court declared mandatory spending limits unconstitutional (except for publicly financed presidential candidates) and invalidated the original appointment structure for the FEC.
- Congress responded to *Buckley* through the 1976 FECA amendments, which reconstituted the FEC, established new contribution limits, and addressed various PAC and presidential public financing issues.
- The 1979 amendments simplified reporting requirements for some political committees and individuals.

To summarize, the 1970s were devoted primarily to establishing and testing limits on contributions and expenditures, creating a disclosure regime, and constructing the FEC to administer the nation's campaign finance laws.

Despite minor amendments, FECA remained essentially uninterrupted for the next 20 years. Although there were relatively narrow legislative changes of FECA and other statutes, such as the 1986 repeal¹⁴ of tax credits for political contributions, much of the debate during the 1980s and early 1990s focused on the role of interest groups, especially PACs.¹⁵

The Bipartisan Campaign Reform Act (BCRA) and Beyond

By the 1990s, attention began to shift to perceived loopholes in FECA. Two issues—soft money and issue advocacy (issue advertising)—were especially prominent. *Soft money* is a term of art referring to funds generally perceived to influence elections but not regulated by campaign finance law. At the federal level before BCRA, soft money came principally in the form of large contributions from otherwise prohibited sources, and went to party committees for “party-

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P.L. 96-187 respectively.

¹² The Corrupt Practices Act, which FECA generally supersedes, is 43 Stat. 1070.

¹³ For additional discussion, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

¹⁴ See P.L. 99-514 §112. Congress repealed a tax deduction for political contributions in 1978. See P.L. 95-600 §113.

¹⁵ See, for example, Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988); and *Risky Business? PAC Decisionmaking in Congressional Elections*, ed. Robert Biersack, Clyde S. Wilcox, and Paul S. Herrnson (Armonk, NY: M.E. Sharpe, 1994).

building” activities that indirectly supported elections. Similarly, *issue advocacy* traditionally fell outside FECA regulation because these advertisements praised or criticized a federal candidate—often by urging voters to contact the candidate—but did not explicitly call for election or defeat of the candidate (which would be *express advocacy*).

In response to these and other concerns, BCRA specified several reforms.¹⁶ Among other provisions, the act banned national parties, federal candidates, and officeholders from raising soft money in federal elections; increased most contribution limits; and placed additional restrictions on pre-election issue advocacy. Specifically, the act’s *electioneering communications* provision prohibited corporations and unions from using their treasury funds to air broadcast ads referring to clearly identified federal candidates within 60 days of a general election or 30 days of a primary election or caucus.

After Congress enacted BCRA, momentum on federal campaign finance policy issues arguably shifted to the FEC and the courts. Implementing and interpreting BCRA were especially prominent issues. Noteworthy post-BCRA events include the following:

- The Supreme Court upheld most of BCRA’s provisions in a 2003 facial challenge (*McConnell v. Federal Election Commission*).¹⁷
- Over time, the Court held aspects of BCRA unconstitutional as applied to specific circumstances. These included a 2008 ruling related to additional fundraising permitted for congressional candidates facing self-financed opponents (the “Millionaire’s Amendment,” *Davis v. Federal Election Commission*) and a 2007 ruling on the electioneering communication provision’s restrictions on advertising by a 501(c)(4) advocacy organization (*Wisconsin Right to Life v. Federal Election Commission*).¹⁸
- Since 2002, the FEC has undertaken several rulemakings related to BCRA and other topics. Complicated subject matter, protracted debate among commissioners, and litigation have made some rulemakings lengthy and controversial.¹⁹
- Congress has also enacted some additional amendments to campaign finance law since BCRA. Most notably, the 2007 Honest Leadership and Open Government Act (HLOGA) placed new disclosure requirements on lobbyists’ campaign contributions (certain bundled contributions) and restricted campaign travel aboard private aircraft.²⁰

¹⁶ BCRA is P.L. 107-155; 116 Stat. 81. BCRA amended FECA, which appears at 2 U.S.C. §431 *et seq.* BCRA is also known as *McCain-Feingold*.

¹⁷ For additional discussion, see CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in McConnell v. FEC*, by L. Paige Whitaker; and CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

¹⁸ For additional discussion, see CRS Report RS22920, *Campaign Finance Law and the Constitutionality of the “Millionaire’s Amendment”*: An Analysis of *Davis v. Federal Election Commission*, by L. Paige Whitaker; 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; and CRS Report RL34324, *Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress*, by R. Sam Garrett.

¹⁹ For example, rulemakings on various BCRA provisions resulted in a series of at least three lawsuits covering six years. These are the *Shays and Meehan v. Federal Election Commission* cases.

²⁰ For additional discussion, see CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for* (continued...)

What Has Changed Most Recently and What Has Not?

Congress most recently considered major campaign finance legislation in response to the 2010 *Citizens United* decision. The Senate declined to amend federal campaign finance law in response to the decision, although the DISCLOSE Act passed the House (discussed below). As of this writing, the FEC has not yet issued new rules to implement the 2010 *SpeechNow* and *Citizens United* decisions.

After disagreement throughout 2011, in December 2011 commissioners approved a notice of proposed rulemaking (NPRM) posing questions about some aspects of what form post-*Citizens United* rules should take.²¹ Among other points, the agency essentially asks how broadly new rules should define permissible corporate and union independent expenditures and electioneering communications. In particular, should corporations and unions be permitted to coordinate their expenditures with political committees or candidates? Other questions the FEC might consider during rulemaking, as noted in the NPRM, concern corporate or labor participation in voter-registration drives. Agency hearings are expected in March 2012. A final rulemaking calendar is unclear. Whatever the rulemaking outcome, *Citizens United* makes clear that corporations and unions may now make unlimited IEs supporting or opposing particular candidates and ECs that refer to those candidates during pre-election periods.

In addition, in July 2010, the FEC approved two relevant advisory opinions (AOs). Afterward, some corporations and other organizations began making previously prohibited expenditures or raising previously prohibited funds for electioneering communications or independent expenditures.²²

Following these developments (especially *Citizens United*), some have suggested that campaign finance policy has been fundamentally altered. As the following discussion shows, some major historical provisions have been invalidated, but other hallmarks of campaign finance policy remain unchanged.

What Has Changed

Unlimited Corporate and Union Spending on Independent Expenditures and Electioneering Communications

In January 2010, the Supreme Court issued a 5-4 decision in *Citizens United v. Federal Election Commission*.²³ In brief, the opinion invalidated FECA's prohibitions on corporate and union

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the 111th Congress, by R. Sam Garrett. HLOGA is primarily an ethics and lobbying statute. For additional discussion, see, for example, CRS Report R40245, *Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007*, by Jacob R. Straus.

²¹ Federal Election Commission, "Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations," 248 *Federal Register* 80803, December 27, 2011.

²² The AOs are 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). AOs provide an opportunity to pose questions about how the Commission interprets the applicability of FECA or FEC regulations to a specific situation (e.g., a planned campaign expenditure). AOs apply only to the requester and within specific circumstances, but can provide general guidance for those in similar situations. See 2 U.S.C. §437f.

²³ 130 S. Ct. 876 (2010). For additional discussion, see CRS Report R41054, *Campaign Finance Policy After Citizens* (continued...)

treasury funding of independent expenditures and electioneering communications.²⁴ As a consequence of *Citizens United*, corporations and unions are now free to use their treasury funds to air political advertisements explicitly calling for election or defeat of federal or state candidates (independent expenditures) or advertisements that refer to those candidates during pre-election periods, but do not necessarily explicitly call for their election or defeat (electioneering communications). Previously, such advertising would generally have had to be financed through voluntary contributions raised by PACs affiliated with unions or corporations.

In the 111th Congress, the House and Senate considered various legislation designed to increase public availability of information (*disclosure*) about corporate and union spending following *Citizens United*. Most congressional attention responding to the ruling has focused on the DISCLOSE Act (H.R. 5175; S. 3295; S. 3628). The House of Representatives passed H.R. 5175, with amendments, on June 24, 2010, by a 219-206 vote. By a 57-41 vote, the Senate declined to invoke cloture on companion bill, S. 3628, on July 27, 2010.²⁵ A second cloture vote failed (59-39) on September 23, 2010.²⁶ No additional action on the bill occurred during the 111th Congress.

Unlimited Contributions to Independent-Expenditure-Only Political Action Committees (Super PACs)

Another notable development concerns contributions to a new category of PACs. In brief, on March 26, 2010, the U.S. Court of Appeals for the District of Columbia held in *SpeechNow.org v. Federal Election Commission*²⁷ that contributions to PACs that make only independent expenditures—but not contributions—could not be constitutionally limited. As a result, these entities, commonly called *super PACs*, may accept previously prohibited amounts and sources of funds, including large corporate, union, or individual contributions used to advocate for election or defeat of federal candidates. Existing reporting requirements for PACs appear to apply to super PACs, meaning that contributions and expenditures would have to be disclosed to the FEC. Additional discussion of super PACs appears in another CRS product.²⁸

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United v. Federal Election Commission: Issues and Options for Congress, by R. Sam Garrett; CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker; CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, by L. Paige Whitaker et al.; and CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.

²⁴ As noted elsewhere in this report, BCRA instituted the electioneering communication provision. BCRA amended FECA. See CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

²⁵ “DISCLOSE Act—Motion to Proceed,” Senate vote 220, *Congressional Record*, daily edition, vol. 156 (July 27, 2010), p. S6285.

²⁶ “DISCLOSE Act—Motion to Proceed—Resumed,” Senate vote 240, *Congressional Record*, daily edition, vol. 156 (September 23, 2010), p. S7388.

²⁷ 599 F.3d 686 (D.C. Cir. 2010).

²⁸ See CRS Report R42042, *“Super PACs” in Federal Elections: Overview and Issues for Congress*, by R. Sam Garrett.

Unlimited Contributions to Certain Non-Connected Political Action Committees (PACs)

As the ramifications of *Citizens United* and *SpeechNow* continue to unfold, other forms of unlimited fundraising have also been permitted. In October 2011 the FEC announced that, in response to an agreement reached in a case brought after *SpeechNow* (*Carey v. FEC*²⁹), the agency would permit *nonconnected* PACs—those that are unaffiliated with corporations or unions—to accept unlimited contributions for use in independent expenditures. The agency directed PACs choosing to do so to keep the independent expenditure contributions in a separate bank account from the one used to make contributions to federal candidates.³⁰ As such, nonconnected PACs that want to raise unlimited sums for independent expenditures are now able to create a separate bank account and meet additional reporting obligations rather than forming a separate super PAC. Super PACs will, nonetheless, likely continue to be an important force in American politics because only some traditional PACs would qualify for the *Carey* exemption to fundraising limits.³¹ As of January 2012, 11 nonconnected PACs have filed notice with the FEC that they plan to raise unlimited funds.³²

Some Funding for Publicly Financed State-Level Candidates

On June 27, 2011, the Supreme Court of the United States issued a 5-4 opinion in the consolidated case *Arizona Free Enterprise Club's Freedom Club PAC et al. v. Bennett* and *McComish v. Bennett*.³³ The decision invalidated portions of Arizona's public financing program for state-level candidates.³⁴ The majority opinion, authored by Chief Justice Roberts, held that the state's use of matching funds (also called *trigger funds*, *rescue funds*, or *escape hatch funds*) unconstitutionally burdened privately financed candidates' free speech and did not meet a compelling state interest.³⁵

The decision appears to be most relevant for state-level public financing programs, as a similar matching fund system does not operate at the federal level. It could, however, affect policy options for reforming the presidential public financing program or proposals to publicly finance House and Senate campaigns. Additional discussion appears in the "Public Financing Issues" section below.

²⁹ Civ. No. 11-259-RMC (D.D.C. 2011).

³⁰ Federal Election Commission, "FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account," press release, October 5, 2011, <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

³¹ In particular, the exemption only applies to nonconnected PACs (i.e., those that exist independently as PACs and are not affiliated with a parent organization, such as an interest group or labor union).

³² This information is available on the FEC website at <http://www.fec.gov/press/press2011/2012PoliticalCommitteeswithNon-ContributionAccounts.shtml>.

³³ 564 U.S. ___ (2011). The slip opinion is available at <http://www.supremecourt.gov/opinions/10pdf/10-238.pdf>.

³⁴ For additional discussion of state-level public financing, see the "State Experiences with Public Financing" section of CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett.

³⁵ For a discussion of Court treatment of campaign finance issues since *Buckley*, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

What Has Not Changed

Federal Ban on Corporate and Union Treasury Contributions

Corporations and unions are still banned from making contributions in federal elections.³⁶ PACs affiliated with, but legally separate from, those corporations and unions may continue to contribute to candidates, parties, and other PACs. As noted elsewhere in this report, corporations and unions may now use their treasury funds to make electioneering communications, independent expenditures, or both, but this spending is not considered a *contribution* under FECA.³⁷

Federal Ban on Soft Money Contributions to Political Parties

The prohibition on using soft money in federal elections remains in effect. This includes prohibiting the pre-BCRA practice of large, generally unregulated contributions to national party committees for generic “party building” activities.

Most Contribution Limits Remain Intact

Pre-existing limits on contributions to campaigns, parties, and PACs generally remain in effect. Despite *Citizens United's* implications for independent expenditures and electioneering communications, the ruling did not affect the prohibition on corporate and union treasury contributions in federal campaigns. As noted above, *SpeechNow* permitted unlimited contributions to independent-expenditure-only PACs (*super PACs*). The FEC has not yet issued rules regarding super PACs per se. In July 2011, however, the commission issued an advisory opinion stating that federal candidates (including officeholders) and party officials could solicit funds for super PACs, but that those solicitations were subject to the limits established in FECA and discussed below.³⁸ Also as noted above, the FEC announced in October 2011, per an agreement reached in *Carey v. FEC*, nonconnected PACs would be permitted to raise unlimited amounts for independent expenditures if those funds are kept in a separate bank account.

In BCRA, Congress required that most contribution limits be biennially adjusted for inflation. However, Congress chose *not* to require adjustment of the PAC limits for inflation. Limits for the 2012 election cycle appear in **Table 1**.

³⁶ 2 U.S.C. §441b.

³⁷ On the definition of *contribution*, see, in particular, 2 U.S.C. §431(8)(A) and 2 U.S.C. §441(b)(b)(2).

³⁸ This matter was AO 2011-12 (Majority PAC and House Majority PAC). Majority PAC was formerly known as Commonsense Ten, noted above.

Table I. Federal Contribution Limits, 2011-2012

(additional limits appear in the table notes)

Contributor	Recipient			
	Principal campaign committee	Multicandidate Committee (most PACs, including leadership PACs)	National Party Committee (DSCC; NRCC, etc.)	State, District, Local Party Committee
Individual	\$2,500 per election*	\$5,000 per year	\$30,800 per year*	\$10,000 per year (combined limit)
Principal Campaign Committee	\$2,000 per election	\$5,000 per year	Unlimited transfers to party committees	Unlimited transfers to party committees
Multicandidate Committee (most PACs, including leadership PACs) ^a	\$5,000 per election	\$5,000 per year	\$15,000 per year	\$5,000 per year (combined limit)
State, District, Local Party Committee	\$5,000 per election (combined limit)	\$5,000 per year (combined limit)	Unlimited transfers to party committees	Unlimited transfers to party committees
National Party Committee	\$5,000 per election	\$5,000 per year	Unlimited transfers to party committees	Unlimited transfers to party committees

Source: CRS adaptation from FEC, “Contribution Limits for 2011-2012,” <http://www.fec.gov/info/contriblimits1112.pdf>.

Notes: The table assumes that leadership PACs would qualify for multicandidate status. The original source, noted above, includes additional information and addresses non-multicandidate PACs (which are relatively rare). Limits marked with an asterisk (*) are adjusted biennially for inflation. The table does not include the following notes regarding additional limitations: (1) For individuals, a special biennial limit of \$117,000 (\$46,200 to all candidate committees and \$70,800 to party and PAC committees) also applies. These amounts are adjusted biennially for inflation; (2) Contributions to independent-expenditure-only PACs are unlimited; (3) The national party committee and the national party Senate committee (e.g., the DNC and DSCC or RNC and NRSC) share a combined per-campaign limit of \$43,100, which is adjusted biennially for inflation.

a. *Multicandidate committees* are those that have been registered with the FEC (or, for Senate committees, the Secretary of the Senate) for at least six months; have received federal contributions from more than 50 people; and (except for state parties) have made contributions to at least five federal candidates. See 11 C.F.R. §100.5(e)(3). In practice, most PACs attain this status automatically over time.

Reporting Requirements

Disclosure requirements enacted in FECA and BCRA remain intact.³⁹ In general, political committees must regularly⁴⁰ file reports with the FEC⁴¹ providing information about

³⁹ This excludes requirements that were subsequently invalidated, such as reporting associated with the now-defunct Millionaire’s Amendment (which required additional reporting for self-funding above certain levels and for receipt of contributions in response to such funding). For additional discussion, see CRS Report RS22920, *Campaign Finance Law and the Constitutionality of the “Millionaire’s Amendment”: An Analysis of Davis v. Federal Election Commission*, by L. Paige Whitaker; and CRS Report RL34324, *Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress*, by R. Sam Garrett.

⁴⁰ Reporting typically occurs quarterly. Pre- and post-election reports must also be filed. Non-candidate committees (continued...)

- receipts and expenditures, particularly those exceeding an aggregate of \$200;
- the identity of those making contributions of more than \$200, or receiving more than \$200, in campaign expenditures per election cycle; and
- the purpose of expenses.

Those making independent expenditures or electioneering communications, such as party committees and PACs, have additional reporting obligations. Among other requirements:

- Independent expenditures aggregating at least \$10,000 must be reported to the FEC within 48 hours; 24-hour reports for independent expenditures of at least \$1,000 must be made during periods immediately preceding elections.⁴²
- The existing disclosure requirements concerning electioneering communications mandate 24-hour reporting of communications aggregating at least \$10,000.⁴³ Donor information must be included for those who designated at least \$200 toward the independent expenditure, or \$1,000 for electioneering communications.⁴⁴
- If 501(c) or 527⁴⁵ organizations make independent expenditures or electioneering communications, those activities would be reported to the FEC.⁴⁶

Potential Policy Considerations for Congress

Thus far during the 112th Congress, there have been no major changes in law directly related to recent changes in campaign finance policy. As noted below and elsewhere in this report, the House has, however, passed measures that could affect campaign finance policy. First, H.R. 359 and H.R. 3463 would repeal the presidential public financing program. Second, amendments

(...continued)

may also file monthly reports. See, for example, 2 U.S.C. §434 and the FEC's *Campaign Guide* series for additional discussion of reporting requirements.

⁴¹ Unlike other political committees, Senate political committees (e.g., a Senator's principal campaign committee) file reports with the Secretary of the Senate, who transmits them to the FEC. See 2 U.S.C. §432(g).

⁴² See, for example, 2 U.S.C. §434(g).

⁴³ 2 U.S.C. §434(f).

⁴⁴ Higher thresholds apply if the expenditures are made from a designated account. For additional summary information, see Table 1 in CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder. Donor information is reported in regularly filed financial reports rather than in independent expenditure reports.

⁴⁵ As the term is commonly used, 527 refers to groups registered with the Internal Revenue Service (IRS) as political organizations that seemingly intend to influence federal elections. By contrast, political committees (which include candidate committees, party committees, and political action committees) are regulated by the FEC and federal election law. There is a debate regarding which 527s are required to register with the FEC as political committees. For additional discussion, see CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

⁴⁶ For additional discussion of these groups, see CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika K. Lunder; CRS Report R40183, *501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker; and CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

adopted during consideration of unrelated bills (H.R. 1540, H.R. 2017, H.R. 2219, H.R. 2055, and H.R. 2354)⁴⁷ have implications for the contracting-disclosure debate. As of this writing, two bills containing restrictions on contractor disclosure have become law during the 112th Congress (H.R. 1540 and H.R. 2055).⁴⁸ In addition, hearings have been held to oversee the FEC; and on legislation to publicly finance congressional campaigns; abolish the EAC and transfer some functions to the FEC; and on a draft executive order that might require additional disclosure of government contractors' political spending.

Regulatory and other developments also appear to be under consideration during the 112th Congress, as briefly noted below.

- Much of the regulatory action responding to recent developments falls to the FEC. The agency continues to consider proposed rules regarding *Citizens United* and *SpeechNow*, but, as of this writing, no new rules have been adopted. In addition, in April 2011, Representative Van Hollen sued the FEC in an effort to require additional disclosure surrounding contributions to organizations that engage in electioneering (e.g., corporate contributions to trade associations). Representative Van Hollen also filed a related petition for rulemaking with the agency.
- In July 2010, citing *Citizens United*, the Securities and Exchange Commission (SEC) issued new “pay-to-play” rules—which are otherwise beyond the scope of this report—to prohibit investment advisers from seeking business from municipalities if the adviser made political contributions to elected officials responsible for awarding contracts for advisory services.⁴⁹ At least thus far, the rules do not appear to have significantly affected federal campaign finance policy.
- As in the 111th Congress, some Members have proposed providing additional information to shareholders if the companies in which they hold stock choose to make electioneering communications or independent expenditures. In particular, in the 112th Congress, H.R. 2517 (Capuano) and S. 1360 (Menendez), introduced in July 2011, would require publicly held companies to obtain shareholder approval before making ECs or IEs. Shareholders would also have to approve companies' payments to trade associations if the payments (e.g., dues) “are, or could reasonably be anticipated to be” used for independent expenditures or electioneering communications.
- During the spring of 2011, media reports indicated that the Obama Administration was considering a draft executive order to require additional disclosure of government contractors' political spending.⁵⁰ Implications of such an order would depend on final contents, if the order is issued. A draft of the order, however, generated attention in Congress and beyond. The House Committee on Oversight and Government Reform and Committee on Small

⁴⁷ See §§823, 713, 10015, 743, and 624 of the bills respectively.

⁴⁸ See §§ 823 and 743 respectively.

⁴⁹ See Securities and Exchange Commission, “Political Contributions by Certain Investment Advisers,” *75 Federal Register* 41018-41071, July 14, 2010.

⁵⁰ See, for example, Kenneth P. Doyle, “Anticipated Obama Order Would Require Disclosure of Contractors' Political Money,” *Daily Report for Executives*, April 21, 2011, pp. A-6.

Business held a joint hearing on the topic on May 12, 2011. In May and June 2011, as reports of a possible executive order remained ongoing, the House passed two bills otherwise unrelated to campaign finance, H.R. 1540 and H.R. 2017. Throughout the spring and summer of 2011, various appropriations and authorization bills were amended to include language restricting additional disclosure of contractors' political spending; stand-alone measures were also introduced.⁵¹ Apparently seeking to limit additional contractor disclosure if an executive order were issued, Congress eventually enacted two measures containing relevant prohibitions. The President signed the bills in late 2011. H.R. 1540 (the National Defense Authorization Act (NDAA), which has no public law number as of this writing) and the 2012 Consolidated Appropriations bill (H.R. 2055; P.L. 112-74) contain different language, but both state that executive agencies "may not require" disclosure of expenditures, independent expenditures, electioneering communications, or political contributions as a condition of contracting with the federal government.⁵²

Elements of contracting law that are beyond the scope of this report may also be relevant for assessing the contractor-disclosure issue. From a campaign finance perspective, however, FECA and FEC regulations do not place disclosure requirements on government contractors in particular.⁵³ Contractors would, however, already be required to disclose their activities that triggered existing reporting obligations (e.g., applicable IEs or ECs).

Given the developments since BCRA, especially the major events of *Citizens United* and *SpeechNow*, federal campaign finance policy is potentially at a crossroads. The historic goals of limiting corruption and promoting transparency remain relevant, but the policy options for accomplishing those goals are, perhaps, less clearly defined than they once were. Specifically, defining corruption and transparency may be in flux now that decades-old prohibitions against corporate and union spending, and unlimited contributions to some PACs, have been invalidated. As Congress considers how or whether to respond, a preliminary question is whether the previous and remaining elements of the campaign finance regulatory structure are still valid and what changes might be necessary.

Various issues might be relevant for those deliberations. The following section comments on issues that appear to be particularly noteworthy. As the discussion notes, fundraising and spending in federal elections has consistently risen over time. Options to restrict spending appear limited, but disclosure presents alternatives, as do options for providing parties or others with additional funds. Even if Congress decides not to respond to the most recent developments of *Citizens United*, *SpeechNow*, or even BCRA, ongoing issues related to public financing and the FEC may warrant attention.

⁵¹ As of this writing, relevant appropriations legislation includes H.R. 2219 and S. 1254 (Defense); H.R. 2354 (Energy and Water); and H.R. 2434 (Financial Services and General Government). Other measures include S. 1253 (Defense authorization), and stand-alone bills H.R. 1906 (Cole), H.R. 2008 (Issa), and S. 1100 (Collins).

⁵² See Sections 823 in the enrolled version of H.R. 1540 and 743 in H.R. 2055.

⁵³ FECA prohibits contributions from contractors between the beginning contract negotiations and terminating those negotiations or completing the contract (whichever is later). Knowingly soliciting contributions from contractors is also prohibited. See 2 U.S.C. §441c.

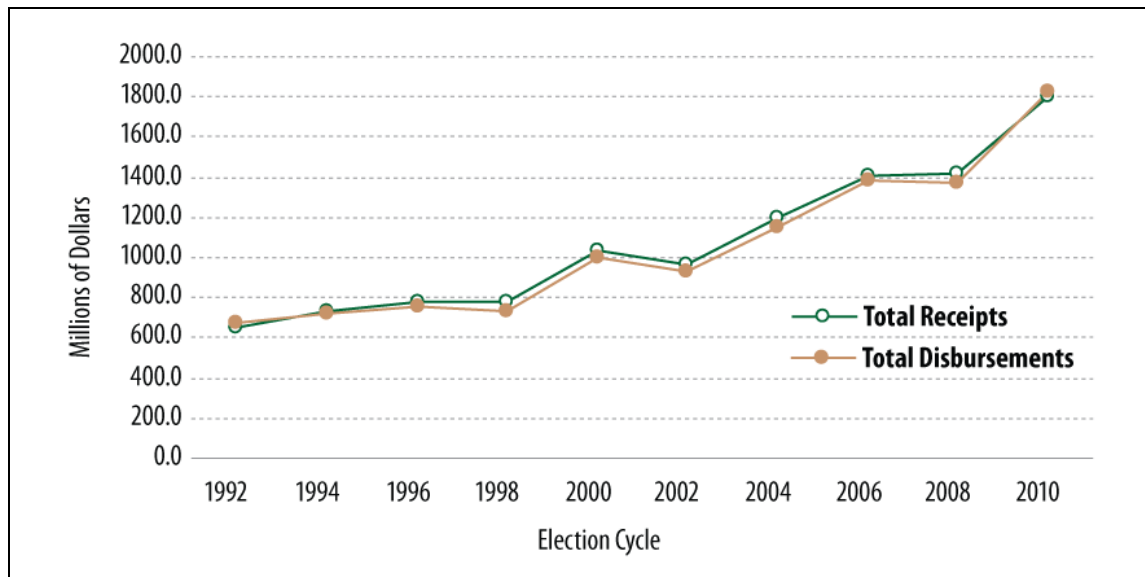
Recent Fundraising, Spending, and Assessing the Need for Policy Changes

As Congress determines whether or how to revisit campaign finance policy, a natural question may be what effect recent events have had on political fundraising and spending. This issue is likely to be a long-term concern, but is particularly noteworthy following *Citizens United* and *SpeechNow*.

Congressional Campaign Fundraising and Spending Continue to Increase

As **Figure 1** below shows, House and Senate campaigns' fundraising and spending have generally increased steadily since the early 1990s. Specifically, receipts more than doubled, from \$654.1 million in 1992 to approximately \$1.8 billion in 2010. Disbursements⁵⁴ rose similarly, from \$675.1 million to approximately \$1.8 billion. Despite the steady increase in spending and fundraising overall, there were slight decreases between some election cycles, such as 1996-1998 and 2000-2002.⁵⁵

Figure 1. U.S. House and Senate Campaigns: Total Receipts and Disbursements, 1992-2010



Source: CRS analysis of Federal Election Commission data in “Historical Comparison for All Campaigns 1992-2008” (the “2historyall” file) at <http://www.fec.gov/press/press2009/2009Dec29Cong/2009Dec29Cong.shtml> (for 1992-2008) and the “Candidate Summary” file at <http://fec.gov/data/> (for 2010). Graphic produced by CRS.

Notes: The data in the figure include Democratic and Republican candidates for the House or Senate and rely on total receipts and disbursements.

⁵⁴ As used here, *receipts* include all funding sources. *Disbursements* include all expenditures.

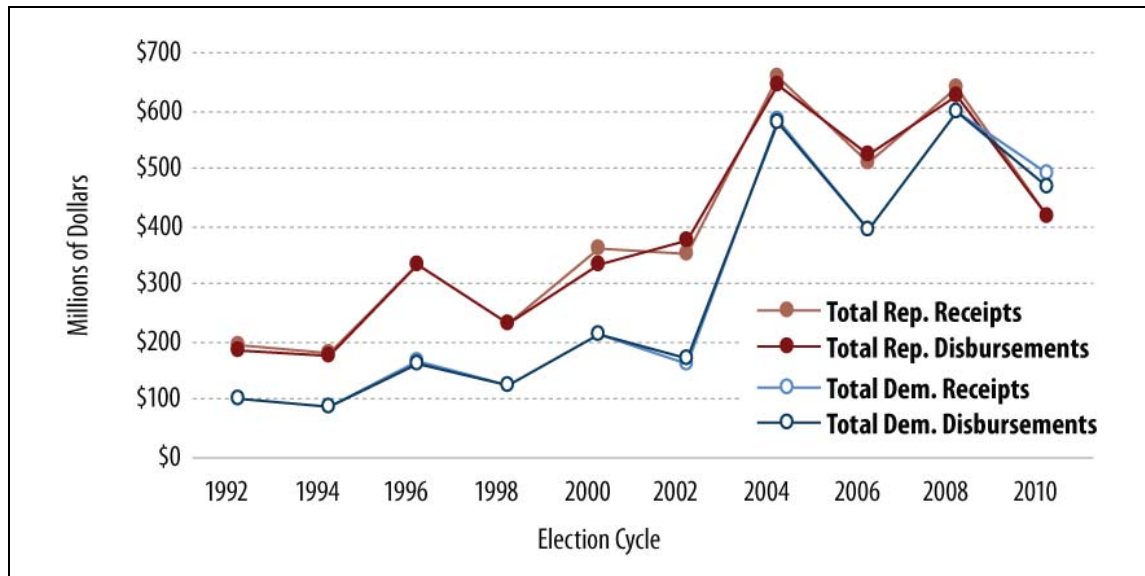
⁵⁵ Although not shown here, fundraising and spending in presidential campaigns has also steadily increased. For additional discussion, see CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by R. Sam Garrett.

Party Funding Generally Remains Robust

As noted previously, BCRA prohibited soft-money contributions to national party committees. Before BCRA became law, some contended that the soft-money ban would hinder political parties' financial resources. The national parties have, nonetheless, generally maintained robust fundraising operations.⁵⁶ In fact, as **Figure 2** below shows, national party receipts and expenditures rose sharply in 2004, the first cycle when BCRA was in effect.

For Democratic party-committees, total receipts increased more than 260% between 2002 and 2004, from \$162.3 million to \$586.2 million. Republican party-committee receipts increased less dramatically, but still sharply (by more than 86%), from \$352.9 million to \$657.1 million. Spending rose by similar increments, from \$170.1 million to \$586.2 million for Democrats, and from \$377.2 million to \$646.1 million for Republicans.

Figure 2. National Party Committees: Receipts and Disbursements, 1992-2010



Source: CRS analysis of Federal Election Commission data in “Party Financial Activity Summarized for the 2008 Election Cycle” (the “1_DemParty08” and “2_RepParty08” files) at <http://www.fec.gov/press/press2009/05282009Party/20090528Party.shtml> (for 1992-2008); and the “Committee Summary” file at <http://fec.gov/data/> (for 2010). Graphic produced by CRS.

Notes: Data in the figure include total federal campaign activity for the Democratic National Committee, Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, Republican National Committee, National Republican Congressional Committee, and the National Republican Senatorial Committee. Data include total federal receipts and total federal disbursements only.

Party committees appear to continue to be major financial players in elections. During the 2010 election cycle, the three national Democratic committees⁵⁷ reported receiving a total of \$491.1

⁵⁶ Both parties appear to have adapted their fundraising strategies to reemphasize small contributions and a wider circle of donors following BCRA. See, for example, Anthony Corrado, “Party Finance in the Wake of BCRA,” in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act*, ed. Michael J. Malbin (Lanham, MD: Rowman and Littlefield Publishers, 2006), pp. 19-37.

⁵⁷ This includes the Democratic Congressional Campaign Committee (DCCC), the Democratic Senatorial Campaign Committee (DSCC), and the Democratic National Committee (DNC).

million and spending \$470.4 million. The three national Republican committees⁵⁸ reported raising \$417.6 million and spending \$415.9 million.⁵⁹

Some have suggested, however, that even with robust fundraising and spending, parties face unnecessary competition with interest groups, such as 527 organizations (and, now, 501(c)s, corporations, or unions) for funding and influence. In addition, some state parties do not remain as financially healthy as their national counterparts.⁶⁰ Following *Citizens United* and *SpeechNow*, it is also possible that tax-exempt organizations, corporations, or unions will rival or overshadow parties' financial prowess in the long term. In addition, despite fundraising successes, party committees (and some other political committees) routinely assume debt to fund campaign operations. Ultimately, however, money is only one measure of the health of political parties.⁶¹ One option for strengthening the role of parties in elections could be to lift the existing caps on party coordinated expenditures. The "Revisiting Contribution Limits" section of this report provides additional detail.

***Citizens United* and *SpeechNow* Appear to Have Encouraged Additional Fundraising and Spending**

At least some groups chose to take advantage of the *Citizens United* and *SpeechNow* decisions. For example, a Campaign Finance Institute study issued in November 2010 found that non-party independent expenditures and electioneering communications increased approximately 130% between 2008 and 2010, from \$119.9 million to \$280 million.⁶² Independent-expenditure-only PACs (super PACs) also emerged quickly following *Citizens United* and *SpeechNow*. Specifically, as CRS has noted elsewhere, almost 80 super PACs spent more than \$60 million calling for election or defeat of federal candidates.⁶³ This sum is perhaps notable not only for its size,⁶⁴ but

⁵⁸ This includes the National Republican Congressional Committee (NRCC), the National Republican Senatorial Committee (NRSC), and the Republican National Committee (RNC).

⁵⁹ These amounts include federal funds only. CRS obtained this figure from analysis of the FEC's "committee summary file" at <http://fec.gov/data/CommitteeSummary.do?format=html>.

⁶⁰ See, for example, Raymond J. La Raja, "Back to the Future? Campaign-Finance Reform and the Declining Importance of the National Party Organization," in *The State of the Parties: The Changing Role of Contemporary American Parties*, ed. John C. Green and Daniel J. Coffey (Lanham, MD: Rowman and Littlefield Publishers, 2011), pp. 205-222.

⁶¹ For additional discussion, see, for example, *The State of the Parties: The Changing Role of Contemporary American Political Parties*, ed. John C. Green and Daniel J. Coffey, 6th ed. (Lanham, MD: Rowman & Littlefield Publishers, 2011). Some alternative measures of party strength assess what functions parties fulfill versus those that are assigned to political consultants. See, for example, David A. Dulio and R. Sam Garrett, "Organizational Strength and Campaign Professionalism in State Parties," in *The State of the Parties: The Changing Role of Contemporary American Parties*, ed. John C. Green and Daniel J. Coffey, 5th ed. (Lanham, MD: Rowman and Littlefield Publishers, 2007), pp. 199-216.

⁶² Campaign Finance Institute, "Nonparty Spending Doubled in 2010 But Did Not Dictate Results," press release, November 5, 2010, http://www.cfinst.org/Press/PRelases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx. Party independent spending, however, fell by almost \$40 million, from \$225.2 million to \$181.6 million. The additional spending that occurred in 2010 did not necessarily determine electoral outcomes.

⁶³ See CRS Report R42042, "*Super PACs*" in *Federal Elections: Overview and Issues for Congress*, by R. Sam Garrett.

⁶⁴ To provide some perspective, the entire general election grant for publicly financed presidential candidates in 2008 was approximately \$84.1 million. (Additional spending is permitted to cover legal and accounting fees.) Spending by super PACs during a congressional-election year is, of course, not the same as spending by a publicly financed presidential candidate. In addition, spending by these groups can be for and against candidates. Nonetheless, the point here is that, in at least one area of post-*Citizens United* spending, several new groups quickly amassed substantial sums (continued...)

also because most of these organizations did not emerge until the summer of 2010.⁶⁵ Super PAC influence was also heavily concentrated among a small number of groups. Ten super PACs accounted for almost 75% of all super PAC spending in 2010.⁶⁶ These data suggest that super PACs may plan an even more active role in 2012 and beyond.

Group Funding, Organization, and Disclosure: A Brief Case Study

As noted previously, although super PACs are one new development, *Citizens United* and *SpeechNow* could affect fundraising and spending by various types of organizations. A brief example of specific groups illustrates how different organizations might allocate funds, and what their reporting obligations would be, post-*Citizens United*. American Crossroads, a super PAC, spent approximately \$21.5 million in independent expenditures in 2010.⁶⁷ PAC spending is not new to 2010, but some of the amounts and sources of contributions American Crossroads received would have been prohibited previously. Because American Crossroads is a political committee, its receipts and expenditures must be reported to the FEC.

A related group, Crossroads Grassroots Policy Strategies (GPS), is a 501(c)(4) tax-exempt organization. Crossroads GPS reported to the FEC that it made approximately \$16.0 million in independent expenditures and \$1.1 million in electioneering communications.⁶⁸ Other types of spending would presumably not be reported to the FEC. Even in FEC reports, donors need not be reported unless their funds were intended to support independent expenditures or electioneering communications.

To summarize, American Crossroads could have existed as a PAC before *Citizens United*, but the decision permitted corporations to make expenditures supporting express advocacy. Some corporations chose to do so by making contributions to American Crossroads. *SpeechNow* permitted the PAC to accept unlimited contributions provided that it only engages in independent expenditures.⁶⁹ Crossroads GPS could have previously accepted unlimited contributions, but as an incorporated entity, could not have made independent expenditures or electioneering communications. American Crossroads and Crossroads GPS were prominent examples of new groups operating in 2010; but they are, by no means, the only such groups. American Crossroads and Crossroads GPS supported Republican candidates and opposed Democrats, but opposing

(...continued)

consistent with those that major national candidates might spend. Whether or not such spending will compete with, or overshadow, party or candidate spending over time is unclear, but the issue may be of interest to Congress as it considers policy options.

⁶⁵ The FEC provided CRS with data on spending by individual committees. CRS aggregated the totals listed in the text. In the absence of additional regulations concerning registration for super PACs, it is not clear that all organizations are reflected in the figures in the text. Accordingly, these data should be treated as estimates.

⁶⁶ Ibid.

⁶⁷ This figure is based on CRS analysis of independent expenditure reports filed with the FEC and available as of December 7, 2010. This figure excludes amounts not reported on independent expenditure reports (e.g., operating expenditures).

⁶⁸ These figures are based on CRS analysis of independent expenditure and electioneering communication reports filed with the FEC and as of December 7, 2010. These figures exclude amounts not reported on independent expenditure- or electioneering communication reports.

⁶⁹ For example, CRS identified contributions to the PAC of as much as \$2 million—obviously well above the \$5,000 limit that applies to traditional contributions. American Crossroads also received contributions from incorporated entities, which would have previously been prohibited.

organizations were also in operation.⁷⁰ Other super PACs believed to support Democratic and Republican candidates for the 2012 election cycle emerged shortly after the conclusion of the 2010 elections.⁷¹

These examples suggest that new donors and groups with access to previously restricted funds may be a potent force in future campaigns. As noted elsewhere in this report, key questions for Congress may be whether sufficient information exists about these groups' financial activities, whether they should be permitted to raise and spend funds explicitly influencing elections, or both. Given *Citizens United*, limiting fundraising or spending by the groups could be challenging. Disclosure could provide additional sources of information about their fundraising and spending, although some may object to requiring tax-exempt organizations—whose primary purpose cannot be election-related—to report additional information.⁷²

What Recent Financial Developments Might Mean for the Future

History suggests that when additional sources of political money become available, they endure and flourish in the long term. Recent developments appear to be no different. In particular:

- The 2010 elections show that, at least in some cases, when given greater flexibility to spend money to influence elections, corporations, unions, tax-exempt organizations, and individuals are willing to do so. Nonetheless, some corporations and other organizations chose not to make such expenditures.⁷³
- Spending and fundraising will likely increase in 2012, as is typically the case in presidential elections compared with congressional cycles.
- Elections since 2004 suggest that national political parties' financial capabilities remain stable post-BCRA. Nonetheless, parties might choose (or be forced) to adjust their spending over time as “outside” organizations become more proficient at allocating their own resources to independent expenditure campaigns (which could either complement or complicate direct party assistance).
- Finally, it is important to note that all new spending in 2010 did not necessarily result from *Citizens United* or *SpeechNow*. High levels of spending would be expected any time a large number of congressional seats were in play, as was the case in 2010.

⁷⁰ For example, Commonsense Ten, an independent-expenditure-only PAC, supported Democratic candidates. American Crossroads and Crossroads GPS came to light during 2010 largely because of media coverage. Under currently available information, the relationship between a political committee and a related 501(c) or 527 group (assuming that the latter were not political committees) would not be readily available unless the organizations publicized the information or the media did so.

⁷¹ For example, Democratic group American Bridge is reportedly designed to counter American Crossroads. See Michael Luo, “Effort to Set Up Liberal Counterweight to G.O.P. Groups Begins,” *The New York Times*, November 23, 2010, p. A18, late edition-final. CRS research using the FEC disclosure database suggests that American Bridge was organized in November 2010 and continues operations.

⁷² For additional discussion, see CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by Erika K. Lunder.

⁷³ For example, the Coalition for Accountability in Political Spending, founded by New York City Public Advocate Bill de Blasio and other public officials after *Citizens United*, tracks reported corporate political spending decisions at http://saveourelections.com/?page_id=16.

Recent financial developments could encourage both sides in the campaign finance debate. Parties' abilities to flourish (at least financially) after BCRA suggests that additional financial restrictions do not necessarily reduce competition. This could be promising for those favoring regulation. Conversely, those favoring deregulation might argue that parties have flourished in spite of BCRA, while the law also provided incentives for tax-exempt organizations to play a more active role surrounding elections. For some, these organizations embody an alleged loophole in federal campaign finance law that needs to be closed. For others, they signal diverse and robust political participation. Therefore, a challenge facing those who desire more regulation is how to construct constitutionally permissible barriers to political fundraising and spending. Although constitutional analysis is beyond the scope of this report, recent developments suggest that regulating independent spending on historic anti-corruption grounds may become increasingly difficult. Disclosure, discussed below, may present additional options.

Revisiting Disclosure Requirements

Historically, disclosure aimed at reducing the threat of real or apparent conflicts of interest and corruption have received bipartisan support. In fact, disclosure typically has been regarded as one of the least controversial aspects of an otherwise often-contentious debate over the nation's campaign finance policy. Disclosure, then, could yield opportunities for cooperation among members of both major parties and across both chambers. On the other hand, some recent disclosure efforts have generated controversy. Particularly during 111th Congress consideration of the DISCLOSE Act, some lawmakers raised concerns about whether the legislation applied fairly to various kinds of organizations (e.g., corporations versus unions) and how much information those airing independent messages rather than making direct candidate contributions should be required to report to the FEC.

Other key questions could be which type of disclosure should be required, if any, and of whom should that disclosure be required. Congress might also consider a "disclosure-only" measure, as some have advocated following the controversy surrounding the DISCLOSE Act (which also proposes spending restrictions) seen in the 111th Congress. Particularly for those organizations that do not typically have to report to the FEC (e.g., 527s or for-profit corporations), the House and Senate could require parity across all those receiving and spending funds affecting elections—even if those entities are not political committees or explicitly engaging in calls to elect or defeat candidates. Such an approach could be consistent with the historical emphasis on transparency in modern campaign finance policy, as noted throughout this report. Requiring additional reporting, however, could also raise questions about which entities should be regulated as political committees subject to federal election law—questions that have been controversial in the past.

Additional disclosure poses the advantage of making it easier to track the flow of political money. Disclosure, however, does not guarantee complete information, nor does it necessarily guard against all forms of potential corruption. For example, current requirements generally make it possible to identify which people or organizations were involved in a political transaction. This information promotes partial transparency, but does not, in and of itself, provide detailed information about what motivates those transactions or, in some cases, where the funds in question originated. Additional disclosure requirements from Congress, the FEC, or the IRS could provide additional clarity.

The Current Disclosure Process: How Reporting and Data Could Affect Policy Options and Considerations

Due in part to the disclosure requirements discussed above, some information about 2010 (or any other election cycle's) fundraising and spending will presumably remain publicly unavailable. A variety of practical ramifications resulting from those requirements also affect availability of campaign finance information. If Congress chooses to revisit transparency in campaign funding and spending, attention to how these requirements operate in practice can shed light on which information is available, which is not, and why. The following selected ramifications, and others, of the current disclosure process could be relevant as Congress considers what policy problems exist and whether or how those problems should be addressed.

- Unless meeting the criteria for disclosure,⁷⁴ corporate or union funds given to an intermediary (such as a trade association) do not have to be publicly reported. Accordingly, the total sources or amounts of corporate or union funds in federal elections remains unknown.
- Details about campaign spending are often unclear. For example, although campaign finance reports must contain itemized data providing general information about the nature of authorized committees' expenses greater than \$200, political committees have wide latitude to characterize the expenses as long as the descriptions are not overly vague.⁷⁵
- Political committees that file regular reports with the FEC do not have to provide information on spending in the final weeks of the campaign until 30 days after the general election. Some expenses might carry over to year-end reports. After reports are filed, additional time is required for the commission or outside researchers to adjust the data for amended filings and conduct analysis, particularly concerning individual transactions and fundraising and spending patterns. In some cases, "final" data are unavailable for several weeks or months. Paper filing of Senate reports, discussed elsewhere in this report, can also foster delay (although summary information is generally available within a few days).
- Recent initiatives to enhance the FEC website have made some campaign finance data far easier to access and analyze (especially for 2010). However, accessing historical data can remain challenging. In particular, the FEC's new Disclosure Data Catalog⁷⁶ provides easier access to data and more complete documentation than in the past. By contrast, much of the pre-2010 data have not yet been converted to the new formats and can require substantial time and technical expertise to access and interpret.
- Estimates (such as those appearing in some media accounts) that rely on partial data can be valuable and often provide more timely information than complete filings. However, estimates also require making assumptions that do not

⁷⁴ For additional discussion, see CRS Report R40183, *501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.

⁷⁵ For example, listing the purpose of disbursement as "polling" is acceptable, but "outside services" is insufficient. See 11 C.F.R. §104.3(b)(3); 11 C.F.R. §104.3(b)(4). "Polling," in and of itself, however, does not explain the nature of the poll, whether the payee conducted the poll, analyzed the data, etc.

⁷⁶ The catalog is available at <http://www.fec.gov/data/>.

necessarily reflect technical distinctions in the data and among organizations. These differences may be unimportant for general summaries about which parties or groups raised or spent funds. More complete data, however, may be more likely to reflect important legal or regulatory distinctions among groups, account for amended filings, or address the details of particular transactions, including transfers among various organizations.

- Estimates sometimes report corporate and union activity differently. In particular, estimates about union spending might or might not report communications to members versus independent expenditures or electioneering communications. Similarly, estimates about corporate spending often include “corporations” as the term is commonly understood, but do not necessarily include incorporated tax-exempt organizations or political committees.
- In general, fundraising and spending that is devoted only to issue advocacy is not publicly disclosed. As such, issue advocacy that arguably affects elections is often excluded from financial estimates. On the other hand, estimates that mix issue advocacy and express advocacy can inflate the amount of fundraising or spending that is truly dedicated to electoral politics.
- Currently, unlike all other federal political committees (except those raising or spending less than \$50,000 annually), Senate campaign committees, party committees, and PACs are not required to file campaign finance reports electronically.⁷⁷ The lack of electronic filing leads to additional delay and cost in making complete Senate data publicly available. Electronic filing per se is generally non-controversial, although, in recent Congresses, there has been debate about whether “stand alone” electronic disclosure measures should be advanced or whether they should also address other issues.⁷⁸ Requiring electronic filing of Senate campaign finance reports might be an area of potential agreement in disclosure policy. The issue precedes *Citizens United* and other recent developments. As such, it is arguably a narrower policy concern, but also potentially a comparatively modest reform.

Each of the preceding points could be addressed as individual policy questions (e.g., through targeted legislation), but may also be a factor in any campaign finance proposal that would broadly affect disclosure policy. In either case, a potential policy question for Congress is whether the implications of the current reporting requirements represent “loopholes” that should be closed or whether existing requirements are sufficient. If additional information is desired, Congress, the FEC, IRS, or all three could revisit campaign finance law or regulation to require greater clarity about financial transactions that affect campaigns. As with disclosure generally, the decision to revisit specific reporting requirements will likely be affected by how much detail is deemed necessary to prevent corruption or accomplish other goals.

⁷⁷ 11 C.F.R. §104.18(a).

⁷⁸ See, for example, CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by R. Sam Garrett.

Revisiting Contribution Limits

After *Citizens United*, one potential concern is how candidates will be able to field competitive campaigns amid potentially unlimited corporate or union expenditures. One option for providing additional financial resources to candidates, parties, or both, would be to raise or eliminate contribution limits. However, particularly if contribution limits were eliminated, corruption concerns that motivated FECA and BCRA could reemerge. Raising contribution limits does not appear to have been actively considered in Congress since BCRA. Another option, which Congress has occasionally considered in recent years, would be to raise or eliminate current limits on coordinated party expenditures.⁷⁹ Coordinated expenditures allow parties to buy goods or services on behalf of a campaign—in limited amounts—and to discuss those expenditures with the campaign.⁸⁰

In a post-*Citizens United* environment, additional party-coordinated expenditures could provide campaigns facing increased outside advertising with additional resources to respond. Permitting parties to provide additional coordinated expenditures may also strengthen parties as institutions by increasing their relevance for candidates and the electorate. A potential drawback of this approach is that some campaigns may feel compelled to adopt party strategies at odds with the campaign's wishes in order to receive the benefits of coordinated expenditures.⁸¹ Those concerned with the influence of money in politics may object to any attempt to increase contribution limits or coordinated party expenditures, even if those limits were raised in an effort to respond to labor- or corporate-funded advertising. Additional funding in some form, however, may be attractive to those who feel that greater resources will be necessary to compete in a post-*Citizens United* environment, or perhaps to those who support increased contribution limits as a step toward campaign deregulation.

Public Financing Issues

Some supporters of publicly financed elections have suggested that this option could be a response to *Citizens United*. Regardless of whether public financing is pursued as a *Citizens United* or *SpeechNow* response, the presidential public financing program is widely regarded as needing restructuring before the 2012 election cycle if the system is to remain viable.⁸² At the federal level, public financing is limited to presidential campaigns.⁸³ As discussed below, in

⁷⁹ This option would not provide campaigns with additional funding per se, but it could ease the financial burden on campaigns for those purchases that parties make on the campaign's behalf.

⁸⁰ Coordinated party expenditures are subject to limits based on office sought, state, and voting-age population (VAP). Exact amounts are determined by formula and updated annually by the FEC. For additional discussion, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker; and CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett.

⁸¹ The long-running debate about relationships between parties and candidates is well documented. For a brief overview, see, for example, Marjorie Randon Hershey, *Party Politics in America*, 12th ed., pp. 65-83; and Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington*, 4th ed., pp. 86-128.

⁸² For additional discussion of proposals to publicly finance congressional campaigns, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett.

⁸³ See CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by R. Sam Garrett; and CRS Report RL34630, *Federal Funding of Presidential Nominating Conventions: Overview and Policy Options*, by R. Sam Garrett and Shawn Reese. Ongoing litigation, which is beyond the scope of this report, has placed some aspects of state-level programs in question.

January 2011, the House passed a bill (H.R. 359) to repeal the presidential public financing program. Almost a year later, on December 1, 2011, the House again passed legislation (H.R. 3463) to end the public financing program. The latter bill combined the approach first passed in H.R. 359 with proposals to terminate the Election Assistance Commission (EAC), which is beyond the scope of this report but noted briefly below.

Congress enacted the current presidential public financing program in 1971 and substantially amended it in 1974. Through the 2000 elections, the program was popular among Democratic and Republican candidates, but is generally considered to be in decline today. Even supporters of the public financing program have argued that the current program is antiquated. As explained below, without an additional infusion of funds, the program might not have sufficient resources to cover the future election cycles.

As of December 2011, approximately \$199.1 million remained in the Presidential Election Campaign Fund (PECF), the U.S. Treasury Account that funds the public financing program.⁸⁴ Two \$17.7 million grants for the Democratic and Republican presidential nominating conventions were distributed in the summer and fall of 2011. The FEC has not yet set other 2012 public financing rates, but, because adjustments are based on inflation, they will presumably be similar to amounts provided in 2008. In 2008, the PECF made \$135.7 million in net disbursements for convention grants for the two major parties, a general-election grant for Republican nominee John McCain, and matching funds for eight Democratic and Republican primary candidates.

Additional checkoff designations will continue to replenish the fund before the 2012 elections, so it is possible that there will be more than sufficient resources to cover 2012 costs. However, the current balance in the PECF is arguably artificially high because then-candidate Barack Obama chose not to accept an \$84.1 million general-election grant in 2008. If multiple competitive candidates chose to accept public funds in 2012, available resources might be insufficient.

A related question is whether the public financing program, even when fully funded, provides sufficient resources to wage competitive campaigns. Some observers have suggested that then-Senator Obama's decision to opt out of public financing, combined with the other challenges discussed above, marks the death knell of the program. Others contend that the public financing program can work well again if reformed.

Two bills to revamp the presidential public financing system were introduced in the 111th Congress. Neither measure, H.R. 6061 (Price, NC) nor S. 3681 (Feingold), was the subject of additional action. Companion measure H.R. 414 has been introduced in the 112th Congress. Those bills, like other recent reform efforts, proposed substantial changes. Among other provisions, these would include increasing the match rate for primary contributions from the current 100% to 400% (or 500% in the 112th Congress) of small contributions. These and similar proposals could provide substantially greater resources to publicly financed candidates. This approach assumes that sufficient funds would be available in the PECF to cover the additional match, and that candidates would be willing to participate. Recent debate has also focused on whether or how the public financing program should maximize small contributions (e.g., those of less than \$200).

⁸⁴ The Financial Management Service of the U.S. Treasury Department provided this information to CRS, November 2011. CRS rounded the amount provided.

Congress could also renew the focus on small contributions by permitting publicly financed campaigns to spend larger (or unlimited) amounts of these funds. However, focusing on small contributions would not necessarily contain campaign costs (another program goal), particularly for those candidates who were able to raise and spend virtually unlimited amounts. In fact, if spending limits were eliminated, public financing could become an additional, but potentially unnecessary, funding source for those already able to raise substantial private funds.

In addition, presidential public financing could be repealed. This approach would largely or entirely (depending on specifics) eliminate taxpayer funds in presidential campaigns. On January 26, 2011, the House passed H.R. 359 (Cole), which would repeal the public financing program entirely and return already designated sums to the U.S. Treasury. A companion measure (S. 194; see also S. 178) has been introduced in the Senate. As noted previously, H.R. 3463 proposes to terminate the public financing program and transfer remaining amounts to the general fund of the U.S. Treasury for use in deficit reduction. (As noted previously, approximately \$199 million is available in the PECF as of December 2011.) H.R. 3463 passed the House on December 1, 2011. In addition, Section 620 of the FY2012 Financial Services and General Government appropriations bill, H.R. 2434, contains a provision that would prohibit spending funds to administer the public financing program for the fiscal year.

In the 111th Congress, Representative Cole introduced H.R. 2992 to repeal public financing for presidential nominating conventions. In the 110th Congress, two bills (H.R. 72 (Bartlett), H.R. 484 (Doolittle)) would have repealed parts of the program or the entire program. Neither bill advanced beyond committee referral.

Finally, other public financing issues may also be on the horizon during the 112th Congress. The Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights held a hearing on S. 750 (Durbin) in April 2011.⁸⁵ (Despite the Judiciary Subcommittee hearing, the bill was referred to the Senate Committee on Rules and Administration.) The bill is the latest version of the Fair Elections Now Act (FENA), which would publicly finance Senate campaigns. S. 749 (Durbin) is a related measure that would fund the proposed public financing program through a tax on certain government contacts. Representative Larson has introduced a companion measure, H.R. 1404, in the House.

In addition, in March 2011, the Supreme Court of the United States heard oral arguments in two consolidated cases (*Arizona Free Enterprise Club's Freedom Club PAC et al. v. Bennett* and *McComish v. Bennett*) addressing whether portions of Arizona's state-level public financing program are constitutional. The Court issued a 5-4 decision in the case on June 27, 2011. Among other points, the Court invalidated Arizona's use of matching funds for publicly financed state-level candidates.

Use of the term *matching funds* varies by jurisdiction. In Arizona and some states, *matching funds* (also called *rescue funds*, *trigger funds*, and *escape hatch funds*) refers to additional public funds provided to publicly financed candidates facing privately financed opponents or interest groups that spend certain amounts above the initial public financing allocation. In *Bennett*, the Court held that Arizona's matching fund system was unconstitutional.⁸⁶

⁸⁵ For additional discussion, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett.

⁸⁶ 564 U.S. __ (2011).

The opinion is most relevant for state public financing programs in Arizona and elsewhere.⁸⁷ The presidential public financing program, which uses matching funds but does not base their award on opponents’ or outside groups’ spending, was not an issue in *Bennett*. The opinion suggests that policy mechanisms that attempt to “level the playing field” (a historic goal in some public financing proposals) could be unfeasible. Although some recent congressional public financing proposals have included funding based on opponents’ activities, the legislation pending in the 112th Congress (discussed above) would award matching funds—at the presidential and congressional levels—based only on the publicly financed candidate’s fundraising.

FEC Issues

Two FEC issues may be relevant for congressional oversight in the short term, as might various long-term issues. First, in addition to other outstanding rulemaking issues, the commission is charged with implementing changes in federal campaign finance law. Most recently and notably, this includes revising its regulations to implement *Citizens United* and *SpeechNow*. The commission has issued ad hoc guidance and advisory opinions about the rulings, but, as of this writing, it has not agreed on notices of proposed rulemaking (NPRM). Even after the NPRM are approved, the commission must finalize rules and issue an explanatory statement. Each of these steps requires agreement from at least four of six commissioners, something that has been difficult for the current commission on some recent, high-profile issues.

The second short-term issue facing Congress could be FEC nominations. As of April 30, 2011, five of six commissioners’ terms expired (see **Table 2**).⁸⁸ Expired terms are not, in and of themselves, necessarily a policy concern because commissioners may remain in office until replaced.⁸⁹ But, if the commission fell below four members, as it did in 2008, it would lose its policymaking quorum.⁹⁰

Table 2. Current Members of the Federal Election Commission

Commissioner	Term Expires	Date Confirmed	Party Affiliation
Cynthia L. Bauerly	04/30/2011 (remains in holdover status)	06/24/2008	Democrat
Caroline C. Hunter	04/30/2013	06/24/2008	Republican
Donald F. McGahn	04/30/2009 (remains in holdover status)	06/24/2008	Republican
Matthew S. Petersen	04/30/2011 (remains in holdover status)	06/24/2008	Republican

⁸⁷ See CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett. This report does not attempt to determine *Bennett*’s applicability in other states.

⁸⁸ Commissioners may serve only a single six-year term. See 2 U.S.C. §437c(2)(A).

⁸⁹ A Commissioner may remain in office after the expiration of his or her term unless or until: (1) the President nominates, and the Senate confirms, a replacement; or (2) the President, as conditions permit, makes a recess appointment to the position. For additional discussion of recess appointments generally, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; and CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

⁹⁰ CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

Commissioner	Term Expires	Date Confirmed	Party Affiliation
Steven T. Walther	04/30/2009 (remains in holdover status)	06/24/2008	Independent
Ellen L. Weintraub	04/30/2007 (remains in holdover status)	03/12/2003	Democrat

Source: Legislative Information System nominations database. Legislative Information System nominations database. CRS added party affiliation based on the seating chart distributed at FEC meetings.

A longer-term policy question surrounding the FEC is the status of the agency itself. Questions about the commission’s structure and effectiveness have long been a topic of debate. In the 111th Congress, for example, S. 1648 (Feingold) would replace the FEC with a proposed Federal Election Administration (FEA).⁹¹ Major provisions of the bill would establish a three-member governing body with enhanced enforcement powers. Longer-term issues also include the scheduled 2013 expiration of the commission’s Administrative Fine Program. Finally, the commission most recently made legislative recommendations to Congress in 2009. At that time, the agency urged Congress to require electronic filing of Senate campaign finance reports, and requested clearer prohibitions on personal use of campaign funds, among other issues.⁹²

In November 2011, the Committee on House Administration, Subcommittee on Elections, held an FEC oversight hearing—the first in almost a decade. Much of the questioning from Members emphasized transparency issues at the agency.⁹³ In particular, committee members questioned the six sitting commissioners—all of whom testified or answered questions—about the FEC’s enforcement procedures. Elections Subcommittee Chairman Gregg Harper noted that the subcommittee had twice previously requested the agency’s “enforcement manual,” and stated that a subpoena would be issued if necessary. Commissioners generally responded that they agreed enforcement information should be (or already is) transparent, although some raised concerns about releasing the entire manual. In written comments for the hearing record, the FEC explained that “[b]ecause the enforcement manual is outdated, and was intended only as an internal guide for agency staff, it is not available to the public, and it would not be appropriate to release it to the public.”⁹⁴ At the Subcommittee on Elections hearing and recent FEC meetings, commissioners have noted that the agency released an enforcement guidebook in December 2009 providing general information.⁹⁵ Commissioners also noted that the enforcement process can vary because FECA requires the agency to attempt to negotiate with the respondent before pursuing other enforcement options.⁹⁶

Transparency in FEC enforcement has been a recent subject of debate at the commission and beyond. Some members of the “regulated community” and their attorneys argue that those facing

⁹¹ Some public financing bills also propose to revamp certain aspects of the FEC. See CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by R. Sam Garrett, for additional discussion.

⁹² Federal Election Commission, *Legislative Recommendations 2009*, Washington, DC, March 19, 2009, <http://www.fec.gov/law/legrec2009.pdf>.

⁹³ Information in this section, unless otherwise noted, comes from author observations at the hearing.

⁹⁴ Federal Election Commission, *Responses to Questions from the Committee on House Administration*, Washington, DC, July 29, 2011, p. 26, http://cha.house.gov/sites/republicans.cha.house.gov/files/documents/hearing_docs/111103_fec_responses.pdf.

⁹⁵ Federal Election Commission, *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, Washington, DC, December 2009, http://www.fec.gov/em/respondent_guide.pdf.

⁹⁶ 2 U.S.C. §437g(a)(4)(A).

civil penalties, such as fines, should be entitled to full information about how the agency makes enforcement decisions. Among other points, they suggest that doing so would promote greater clarity about how seemingly similar enforcement matters may result in different penalties and could encourage better voluntary compliance with FECA.⁹⁷ Although some commissioners appear to agree with that sentiment, discussion at the November 2011 hearing suggested that commissioners disagreed about which portions of the enforcement manual, if any, should be released. Historically, there has also been debate about whether publishing specific penalty methodologies would hinder the commission's ability to take individual circumstances into account when assessing penalties, and whether publicizing penalty amounts might permit would-be violators to determine in advance whether they were essentially willing to pay a set amount to break the law.⁹⁸

Finally, it is possible that ongoing consideration of Election Assistance Commission issues could affect the FEC.⁹⁹ The Committee on House Administration, Subcommittee on Elections, held an April 2011 hearing on H.R. 672; it was reported in June 2011. The measure, which is not primarily a campaign finance bill, proposes to eliminate the EAC and transfer some functions to FEC. FEC Chairwoman Cynthia Bauerly has stated that the commission could assume proposed new duties to maintain a clearinghouse of state election experiences if directed by Congress and provided sufficient appropriations.¹⁰⁰ These issues were also discussed at the November 2011 Committee on House Administration, Subcommittee on Elections, FEC oversight hearing.

Conclusion

Some elements of federal campaign finance policy have substantially changed in recent years; others have remained unchanged. Enactment of BCRA in 2002 marked the culmination of efforts to limit soft money in federal elections and place additional regulations on political advertising airing before elections. BCRA was an extension of efforts begun in the 1970s, with enactment of FECA, to regulate and document the flow of money in federal elections. BCRA's soft-money ban and some other provisions remain in effect; but *Citizens United*, *SpeechNow*, and other litigation since BCRA have reversed major elements of modern campaign finance law. In particular, corporate and union spending that is now permissible has not previously been allowed in modern elections.

The changes discussed in this report suggest that the nation's campaign finance policy may be a continuing issue for Congress. Disclosure requirements, a hallmark of federal campaign finance

⁹⁷ See, for example, Letter from Robert Kelner, Chairman, Election Law and Political Practice Group, Covington and Burling LLP, to Hon. Gregg Harper, Chairman, Subcommittee on Elections, Committee on House Administration, October 31, 2011, http://cha.house.gov/sites/republicans.cha.house.gov/files/documents/hearing_docs/111103_kelner_letter.PDF.

⁹⁸ The Administrative Fine Program already makes some penalty amounts public, although this program addresses routine late filings rather than complex matters under review. On debate over making the penalty methodology public, see, for example, Federal Election Commission, *Public Hearing on Agency Practices and Procedures*, hearing transcript, Washington, DC, January 14-15, 2009, pp. 8-10, <http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf>.

⁹⁹ EAC issues are beyond the scope of this report. For additional discussion, see CRS Report RS20898, *The Help America Vote Act and Elections Reform: Overview and Issues*, by Kevin J. Coleman and Eric A. Fischer.

¹⁰⁰ This information is contained in a March 16, 2011, letter from Bauerly to Committee on House Administration Ranking Member Robert Brady. The FEC provided a copy of the letter to CRS.

policy, remain unchanged. Additional information would be required to fully document the sources and rationales behind all political expenditures. For some, such disclosure would improve transparency and discourage corruption. For others, additional disclosure might be viewed with suspicion and as a potential sign of government intrusion. Fundraising, spending, and reporting questions have been at the forefront of recent debates in campaign finance policy, but they are not the only issues that may warrant attention. Even if no legislative changes are made, additional regulation and litigation are likely, as is the constant debate over the role of money in politics. Although some of the specifics are new, these themes discussed throughout this report have been present in campaign finance policy for decades.

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