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# Campaign Contribution Limits: Selected Questions About *McCutcheon* and Policy Issues for Congress

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## Summary

Recently invalidated aggregate limits on federal campaign contributions capped the total amount that one can give to all candidates, parties, or political action committees (PACs). For the 2014 election cycle, the aggregate limit for individual contributions was \$123,200. The Supreme Court of the United States struck down the aggregate limits on April 2, 2014. Alabama contributor Shaun McCutcheon and the Republican National Committee (RNC) brought the case, *McCutcheon v. FEC*, after the aggregate limits prevented McCutcheon from contributing as desired to federal candidates and parties during the 2012 election cycle. The decision does not affect “base limits” that individuals may contribute to particular candidates or parties. Instead, *McCutcheon* permits individuals to give limited contributions to an unlimited number of candidates, political parties, and political action committees.

This report offers a preliminary analysis of major policy issues and potential implications that appear to be most relevant as the House and Senate decide whether or how to respond to *McCutcheon*. With the aggregate limits relaxed, additional funds might flow to candidate committees, party committees, or PACs. Joint fundraising committees and leadership PACs might expand as tools to funnel large contributions to multiple candidate committees, parties, or PACs. Disclosure of contributors who exceed the current aggregate limits might also be a policy concern. It is important to note that whether these possibilities will occur is unclear at this time.

This report will be updated to reflect major developments. This version of the report supersedes previous versions.

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## Scope of the Report

This report is intended to respond to Congress's ongoing interest in campaign finance policy following the Supreme Court's April 2014 *McCutcheon* decision.<sup>1</sup> The report relies on a question-and-answer format designed to highlight key information in a brief and accessible way. This report offers a preliminary analysis of major policy issues and potential implications that appear to be most relevant as the House and Senate assess the ruling and consider whether or how to respond. The report discusses possible implications of the case for campaign fundraising or disclosure to illustrate policy issues that might be relevant for congressional consideration. This report does not provide a legal analysis of the case or of legal issues that might affect the policy matters discussed here. Other CRS products provide additional information about various policy and legal issues.<sup>2</sup>

The parties in *McCutcheon* and those filing *amicus* briefs make numerous arguments for and against the existing contribution limits. This report does not attempt to address all those arguments. It also does not address various arguments surrounding legal matters in the case, such as which level of constitutional scrutiny courts should apply or whether courts should defer to Congress to establish contribution limits.

This report will be updated to reflect major developments and as policy implications become clearer.

## What are the major public policy issues surrounding the *McCutcheon* case?

*McCutcheon v. FEC* involves a challenge to the aggregate amount (discussed below) that an individual can contribute to federal candidates, political parties, and political action committees (PACs). During the 2012 election cycle, Alabama donor Shaun McCutcheon wished to contribute more than the existing aggregate limits to candidates and the Republican National Committee (RNC). Prohibited from making and receiving the contributions, McCutcheon and the RNC filed suit against the Federal Election Commission (FEC), which enforces the Federal Election Campaign Act (FECA) contribution limits.<sup>3</sup> In September 2012, a three-judge panel of the U.S. District Court for the District of Columbia upheld the aggregate limits. Through a review process

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<sup>1</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (slip op.), [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf).

<sup>2</sup> On campaign finance policy generally, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by (name redacted). On campaign finance law generally, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by (name redacted). For additional discussion of legal issues surrounding *McCutcheon*, see CRS Report WSLG873, *Supreme Court Strikes Overall Limits on Campaign Contributions in McCutcheon*, by (name redacted); CRS Report WSLG842, *McCutcheon and Its Potential Impact on Campaign Finance Law*, by (name redacted); CRS Report WSLG546, *Supreme Court To Hear Constitutional Challenge To Aggregate Contribution Limits*, by (name redacted); and CRS Report WSLG363, *The Supreme Court, Citizens United, and Further Challenges to Campaign Finance Law: Aggregate Contribution Limits*, by (name redacted).

<sup>3</sup> FECA is 2 U.S.C. §431 *et seq.*

specified in the Bipartisan Campaign Reform Act (BCRA), the case was then appealed to the Supreme Court.<sup>4</sup> On October 8, 2013, the Court heard oral argument.

On April 2, 2014, the Court issued a plurality opinion striking down the aggregate limits on constitutional grounds. The decision does not affect base limits (discussed below) that individuals may contribute to particular candidates or parties. Instead, *McCutcheon* permits individuals to give limited contributions to an unlimited number of candidates, political parties, and political action committees. For example, both before and after *McCutcheon*, an individual could give a total of \$5,200 to a congressional candidate during the 2014 election cycle. After *McCutcheon*, that individual contributor can contribute to up to \$5,200 to as many candidates as he or she chooses. Before the decision, the aggregate limits would have functionally capped the number of candidates, parties, or PACs a contributor could support.

## What are the existing contribution limits? Which ones does *McCutcheon* affect?

FECA, as amended, specifies two different kinds of contribution limits. The first are *individual limits*. These limits, sometimes also called *base limits*, place a ceiling on the amount that an individual, party, or PAC can contribute to a single candidate, party, or PAC during a single election. Second, FECA limits the *aggregate amount* an individual can contribute to all candidates, parties, or PACs. The aggregate limit on individual contributions appears to be most relevant for *McCutcheon*.

**Table 1** below summarizes the relevant individual and aggregate limits for 2013-2014.<sup>5</sup> As the table shows, individuals can contribute up to

- \$2,600 per candidate, per election (for a total of \$5,200 for both the primary and general elections, or the complete 2014 election cycle),<sup>6</sup>
- \$5,000 annually to PACs; and
- \$32,400 annually to national parties.

*McCutcheon* does not affect these limits.

The aggregate limits set overall caps on the amount an individual can contribute. For 2013-2014, pre-*McCutcheon*, individual contributions could total no more than \$123,200. Of that amount, \$48,600 could go to candidates, with the remaining \$74,600 to parties and PACs. The PAC limits do not apply to super PACs or other political committees (i.e., *Carey* committees) that can accept

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<sup>4</sup> For additional discussion, see CRS Report WSLG546, *Supreme Court To Hear Constitutional Challenge To Aggregate Contribution Limits*, by (name redacted). BCRA is P.L. 107-155; 116 Stat. 81. BCRA amended FECA.

<sup>5</sup> Because *McCutcheon* concerns contributions made during the 2012 election cycle, limits subject to inflation adjustments for that cycle were slightly less than those noted in the table. For example, the individual contribution limit for contributions per candidate, per election, was \$2,500 rather than \$2,600.

<sup>6</sup> If a runoff election were held, individuals could contribute an additional \$2,600.

unlimited contributions for use in independent expenditures.<sup>7</sup> As **Table 1** shows, the plurality decision in *McCutcheon* invalidated these aggregate limits.

**Table 1. Selected Federal Contribution Limits, 2013-2014**

Limits marked with an asterisk (\*) are adjusted biennially for inflation.

Contribution Type or Limit Type	Recipient			
	Principal Campaign Committee	Multicandidate Committee (most PACs, including leadership PACs, but not super PACs)	National Party Committee (DSCC; NRCC, etc.)	State, District, Local Party Committee
Individual Contributions	\$2,600 per election*	\$5,000 per year	\$32,400 per year*	\$10,000 per year (combined limit)
<b>Unaffected by McCutcheon</b>				
Aggregate Limit on Individual Contributions	\$48,600 to all candidates*	\$74,600 to all PACs and parties*	\$74,600 to all PACs and parties*	\$48,600* of the \$74,600* limit (see left) may go to state/local parties and PACs.
<b>Invalidated by McCutcheon</b>				
Overall Biennial Limit on Individual Contributions			\$123,200*	
<b>Invalidated by McCutcheon</b>				

**Source:** CRS adaptation from FEC, “Contribution Limits for 2013-2014,” <http://www.fec.gov/info/contriblimitschart1314.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). *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. Contributions to super PACs are unlimited, as are those to PACs employing the *Carey* exemption for independent expenditures. For additional discussion, see CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).

## Why were the existing limits in place?

Contribution limits have been a hallmark of campaign finance policy and law for decades. Congress established most of the current contribution limits in the 1970s when it enacted and amended FECA.<sup>8</sup> Most recently, Congress updated all but the PAC contribution limits with the

<sup>7</sup> Independent expenditures (IEs) are disbursements used to call for election or defeat of federal candidates. On the definition of *independent expenditures*, see 2 U.S.C. §431(17). For additional discussion of super PACs, see CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).

<sup>8</sup> Previous limits originated in the early 1900s, although at the time FECA was enacted, the existing campaign finance (continued...)

2002 enactment of BCRA. BCRA also adjusted most contribution limits for inflation and reaffirmed congressional support for an overall aggregate limit.<sup>9</sup>

Contribution limits are generally justified as a way to avoid real or perceived *quid pro quo* corruption (e.g., “vote-buying”).<sup>10</sup> Essentially, Congress established the existing individual limits at a threshold at which it believed struck a balance between permitting donors to support their favored candidates while also limiting potential corruption. Support for the aggregate limits generally rests with a concept known as the “anti-circumvention rationale,” which holds that an overall limit is necessary to protect the individual limits. Supporters generally argue that if a contributor were permitted to make an unlimited number of contributions, it would make little difference that each individual contribution were capped. Such donors might still enjoy outsized influence in elections and policymaking, therefore potentially corrupting both.<sup>11</sup>

Opponents of the aggregate limits contend that the limits cap the amount of political speech or association a contributor can exercise. As CRS has noted elsewhere, appellants (McCutcheon and the RNC) in the case argued that unlike base limits, the aggregate contribution limits act as a spending limit by unconstitutionally restricting the number of candidates, parties, and PACs that an individual can support.<sup>12</sup> More specifically, some contend that the aggregate contribution limits set an arbitrary threshold, beyond which additional contributions allegedly become corrupt. Opponents also generally argue that aggregate contributions, and contributions to parties and PACs generally, carry a lower risk of corruption than contributions to individual candidates.<sup>13</sup> Opponents of the existing limits also suggest that provisions in FECA, FEC regulations, or both already sufficiently protect against circumvention of the individual contribution limits through limits on coordination, coordinated party expenditures, and earmarking.<sup>14</sup> Finally, some contend that limits on contributions to parties force donors to contribute to arguably less-accountable “outside” groups—which are not subject to limits—such as super PACs or 501(c) organizations.<sup>15</sup>

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(...continued)

regulatory structure was generally considered to be ineffective. For additional historical discussion, see, for example, Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988); and Raymond J. La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Ann Arbor, MI: University of Michigan Press, 2008).

<sup>9</sup> See §307, P.L. 107-155; 116 Stat. 102-103.

<sup>10</sup> The *McCutcheon* plurality opinion and dissent address varying governmental interests justifying campaign finance contribution limits. For additional discussion, see CRS Report WSLG873, *Supreme Court Strikes Overall Limits on Campaign Contributions in McCutcheon*, by (name redacted).

<sup>11</sup> See, for example, *Brief of Democratic Members of the United States House of Representatives as Amici Curiae in Support of Appellee*, [http://fec.gov/law/litigation/mccutcheon\\_sc\\_house\\_amici\\_brief.pdf](http://fec.gov/law/litigation/mccutcheon_sc_house_amici_brief.pdf), p. 20-22.

<sup>12</sup> CRS Report WSLG546, *Supreme Court To Hear Constitutional Challenge To Aggregate Contribution Limits*, by (name redacted).

<sup>13</sup> See, for example, *Brief for Appellant Shaun McCutcheon*, [http://fec.gov/law/litigation/mccutcheon\\_sc\\_mcc\\_brief.pdf](http://fec.gov/law/litigation/mccutcheon_sc_mcc_brief.pdf), pp. 18-23; 45-50.

<sup>14</sup> See the “Which policy issues might Congress consider?” section of this report for additional discussion. In brief, all three provisions are designed to limit the potential for evading contribution limits. The coordination concept largely concerns the financial value of in-kind contributions or services, such as the polling data transmitted from a party to a campaign. Political parties may make expenditures (coordinated party expenditures) in consultation with candidates subject to limits. Earmark rules specify that even if candidate contributions are routed through another source, they are attributed to the original donor. See, in particular, 11 C.F.R. §109.20; 11 C.F.R. §109.32; and 11 C.F.R. §110.6 respectively.

<sup>15</sup> The PAC contribution limit does not apply to super PACs and “Carey committees” accepting contributions to separate accounts maintained only for independent expenditures. For additional discussion, see CRS Report R42042, (continued...)

## Which policy issues might Congress consider?

It is unclear precisely how the campaign environment, and the need for related legislation or oversight, might be affected by the *McCutcheon* decision. This section briefly discusses some of the more prominent implications that could arise.

Developments thus far suggest that debate will continue about whether existing provisions in law or regulation sufficiently guard against a single contributor amassing potentially corrupting influence or whether new law or regulation is necessary. For some, existing restrictions on earmarking<sup>16</sup> contributions, and the fact that party committees, joint fundraising committees, or PACs are legally separate entities from candidate campaigns, limit the potential for abuse. In fact, the plurality opinion in *McCutcheon* rejects various hypotheticals involving outsized donor influence as “either illegal under current campaign finance laws or implausible.”<sup>17</sup> For others (including the *McCutcheon* dissenting opinion), aggregate contributions exceeding current limits could violate the spirit of the individual limits and inherently create the potential for corrupting influence. Those favoring additional regulation might also raise concerns about whether larger aggregate contributions could allow candidates to circumvent the base limits by using joint fundraising committees, leadership PACs, or both.

### Individual Campaigns and Individual Donors

- Post-*McCutcheon*, donors may contribute amounts above the previous aggregate limits if they chose to do so. The ability of individual political committees to attract donors who are able to “max out” (as reaching the aggregate threshold is often described) will likely vary considerably.<sup>18</sup> Those who wish to invest large sums in campaigns—albeit through spending rather than contributions—were already permitted to do so pre-*McCutcheon* by making independent expenditures or contributing to super PACs.<sup>19</sup> Eliminating the cap on aggregate contributions could lead to more money in elections overall, as donors add more contributions to their existing spending. It is also possible that donors will instead reallocate their existing independent spending toward more contributions to candidates, parties, or PACs.

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(...continued)

*Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).

<sup>16</sup> As noted previously, earmarking concerns identifying the original source of a contribution passed through another entity (a “conduit,” such as a political party). See chapter 6 in Federal Election Commission, *Federal Election Commission Campaign Guide: Political Party Committees*, Washington, DC, August 2013, <http://www.fec.gov/pdf/partygui.pdf>.

<sup>17</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (slip op.); p. 4.

<sup>18</sup> Although some social science research has studied why political contributors give money, there is relatively little empirical data about why people give the amounts they do (particularly why they choose to “max out”). On existing research, see, for example, Bertram N. Johnson, *Political Giving: Making Sense of Individual Campaign Contributions* (Boulder, CO: First Forum Press, 2013); and Peter L. Francia, et al., *The Financiers of Congressional Elections: Investors, Ideologues, and Intimates* (New York: Columbia University Press, 2003).

<sup>19</sup> For additional discussion, see CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).



- Observers have posed a variety of hypothetical scenarios about how donors might react to the opportunity to make unlimited aggregate contributions. To take one example, in the absence of aggregate limits, a donor might give \$5,200 to a candidate in every congressional race in the 2014 cycle. That amount could total approximately \$2.3 million in House races and \$171,600 in Senate contests.<sup>20</sup> The same contributor might also be able to contribute to political party committees, PACs, or both. Various other scenarios have also been proposed, including in Justice Breyer's dissenting opinion.<sup>21</sup> In Justice Breyer's scenarios, using a variety of methods, an individual donor might give as much as \$3.6 million to candidates and parties. At least one estimate suggests that a single contributor could give as much as \$5.9 million, although this analysis assumes a proliferation of giving to parties and leadership PACs generally not assumed in other estimates.<sup>22</sup> When assessing these and other estimates, it is important to note that they could vary substantially from actual outcomes. Although it is certainly possible that a donor might be able to make a contribution in every race, donors would not necessarily choose to do so, nor would every race be contested.
- It is unclear how many donors the decision might affect. A 2013 Center for Responsive Politics analysis found that 646 donors gave the maximum permissible amount of \$117,000 during the 2012 election cycle.<sup>23</sup> Exact numbers are unknown because existing disclosure requirements do not guarantee that donors who "max out" will be identified. Although political committees must make their best efforts to report to the FEC the name, address, occupation, and employer of contributors who give more than \$200,<sup>24</sup> political committees would not necessarily know about a donor's contributions to other political committees. Practically speaking, this means that those who wish to determine whether a donor has exceeded aggregate limits must either ask the donor or compare FEC reports that itemize donor identity. Even then, typographical errors and inconsistencies (e.g., varying use of middle initials) can make it difficult to determine whether donors with similar names or other identifying information are, in fact, the same person. If Congress wished to make identifying particular donors easier, requiring a consistent donor identification number could be an option. Such an option could have the advantage of making tracking individual donor activity (including whether someone exceeded the aggregate limits) easier. However, this approach might raise donor-privacy concerns, as well as the logistical challenge of how and when a donor number would be issued.

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<sup>20</sup> This scenario assumes that a donor could give \$2,600 for both the primary and general elections (totaling \$5,200 for the entire election cycle) and that there would be 435 House and 33 Senate contests (excluding delegate races and assuming that a contributor gave to one candidate in each race).

<sup>21</sup> J. Breyer, *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (slip op.); see especially pp. 14-20 and Appendix B.

<sup>22</sup> Public Citizen, *Beware of a Naive Perspective: A Prebuttal to U.S. Supreme Court Rulings in McCutcheon v. Federal Election Commission*, report, part 1 of 2, Washington, DC, January 7, 2014, pp. 6-10, <http://www.citizen.org/documents/mccutcheon-campaign-finance-analysis-report.pdf>.

<sup>23</sup> Bob Biersack, *McCutcheon's Multiplying Effect: Why An Overall Limit Matters*, Center for Responsive Politics, blog posting, September 17, 2013, <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html>.

<sup>24</sup> 2 U.S.C. §434(b)(3)(A).

## Fundraising and Relationships Among Non-Candidate Committees

### Joint Fundraising Committees

- During Supreme Court oral argument in *McCutcheon*, much of the discussion emphasized entities known as “joint fundraising committees” (JFCs). These political committees essentially serve as a clearinghouse for contributions. JFCs often receive contributions that, if treated as a single contribution, would exceed individual limits. JFCs route the contributions, in permissible amounts, to multiple political committees (e.g., several candidate and party committees) based on a pre-determined allocation formula. The large initial contributions are thus treated, for compliance purposes, as multiple contributions.<sup>25</sup> Although sometimes controversial, JFCs are a common fundraising method among both major parties and have existed since the late 1970s.<sup>26</sup> During Supreme Court oral argument, some of the discussion emphasized hypothetical scenarios in which a single contributor might be able to give approximately \$3.5 million to a party joint fundraising committee for disbursement to other party committees and candidates.<sup>27</sup> Some might also raise concerns about the composition of JFCs, particularly if they were perceived to provide outsized influence to one candidate or donors who helped route funds to other candidates. As noted elsewhere in this report, these scenarios might or might not develop, and might or might not be unique to a post-*McCutcheon* environment.

### Contributions to Parties

- Traditional contributions to parties could also be affected. In the absence of aggregate limits to national parties, contributions might be directed to at least three arms of each party: the national party committee and the two legislative campaign committees. For example, a contributor who wished to support the “national” Democratic Party could give to the Democratic National Committee (DNC), the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC). In this scenario, one contributor might give \$97,200 rather than the current (2014) annual limit of \$32,400.<sup>28</sup> The same is true for counterpart Republican committees. The current federal limit on combined contributions to district, local, and state parties is \$10,000 per year. Here, too, in the absence of aggregate limits, any number of

<sup>25</sup> On JFC regulations generally, see 11 C.F.R. §102.17.

<sup>26</sup> For additional discussion, particularly concerning allocation and reporting requirements, see Appendix B in Federal Election Commission, *Federal Election Commission Campaign Guide: Political Party Committees*, Washington, DC, August 2013, <http://www.fec.gov/pdf/partygui.pdf>. For a contemporary example of joint fundraising, see Anthony Corrado, “Fundraising Strategies in the 2012 Campaign,” in *Campaigns and Elections American Style*, ed. James A. Thurber and Candice J. Nelson, 4<sup>th</sup> ed. (Boulder, CO: Westview, 2014), pp. 103-104. JFCs developed through a series of FEC advisory opinions (AOs). See, for example, AOs 1977-14; 1977-20; and 1979-35.

<sup>27</sup> Discussion of this and similar figures appears throughout the oral-argument transcript, [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-536\\_7148.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_7148.pdf). See especially pp. 20-25. See also Bob Biersack, *McCutcheon Decision: Add Some More Zeroes to That Check*, Center for Responsive Politics, blog posting, April 2, 2014, <http://www.opensecrets.org/news/2014/04/mccutcheon-decision-add-some-more-z.html>.

<sup>28</sup> This scenario assumes that a donor could give the \$32,400 maximum for the 2014 cycle to each of the three national party committees.

- district, state, or local parties, might be supported. To facilitate such giving, it is possible that parties will expand their use of JFCs.
- Post-*McCutcheon*, some have suggested that additional funds flowing to parties (such as through joint fundraising committees) could increase party clout compared with independent groups, such as super PACs. If more funds flow to parties rather than groups that generally do not disclose their donors, such as 501(c) entities, donor transparency also might increase.<sup>29</sup>

## PACs and Leadership PACs

- Eliminating aggregate contribution limits could have implications for leadership PACs. Beginning in the 1980s, sitting or prospective members of the congressional leadership formed these committees to provide another resource, besides their campaign committees, to make financial contributions to other lawmakers' campaigns. Today, leadership PACs extend to a wide range of Members. Contributions to leadership PACs (and other PACs) share a combined \$74,600 biennial limit (for 2013-2014) with parties. Some observers have suggested that *McCutcheon* might cause further proliferation of these committees and raise concerns about whether they would be seen as extensions of the Member's campaign committee.<sup>30</sup> Although such an outcome might occur, it is also perhaps noteworthy that any candidate who wishes to do so may already form a leadership PAC. If increased (or current) leadership PAC activity were of concern to Congress, one option could be to require that leadership PACs and the candidates with whom they are affiliated share a contribution limit. As **Table 1** shows, currently individuals may contribute \$5,000 annually to leadership PACs and up to \$5,200 per candidate for the 2014 election cycle. Those who view leadership PACs as a method of circumventing candidate contribution limits might favor a shared limit. On the other hand, those favoring the status quo might object to restricting leadership PACs, noting that they cannot contribute more than \$5,000 annually to any Member's campaign, and that separate limits are consistent with FEC rules based on longstanding campaign practice.<sup>31</sup>

<sup>29</sup> See, for example, Ray La Raja, "McCutcheon Decision Could be Good News After All," *Washington Post* "Monkey Cage" blog posting, April 3, 2014, [New York Times, April 2, 2014, <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html?hp&rref=opinion>.](http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all/?wprss=rss_national&_monetaClick=eyJ3aWRnZXRFaW5zdGFuY2VfaWQiOiJiNTIxNDNjNC11MzIxLTRmNWUOTQwNC11MDU0OWMxN2JmNmliL0CjB250YWluZXJfaWQiOiJyZXZfYWRfNyIsImVsZW1lbnRfcG9zaXRpb24iOiIwIiwibGlua19pZCI6ImUzODQ2ZjI1L0EwZDctNGU2MS04YzIxLWI2MTA1MzU0YTnkZCIsImFkX2lkIjoIYmRlNjU4MDgtN2FmNy00ODE0LWE0N2QtZjY1NzYzMzEwZjdiIiwiaWY2xpY2tfaWQiOiJzZTQ1ODIxMC05NW1wLTQ2ODItOWYwNy1jMDViYjJkMDkyOTYiLCJ3YXBvX3Zpc19pZCI6ImZkYTkWmM1LWQwYTEtNDkxZS1iZTJjLWU4ODdjNjg3ZmYwYiIsIndhcG9fc2Vzc19pZCI6bnVsbCwid2Fwb19sb2dpbl9pZCI6bnVsbCwicHViaWQiOiJ3cCJ9; and Nathaniel Persily, )

<sup>30</sup> See, for example, Bob Biersack, *McCutcheon's Multiplying Effect: Why An Overall Limit Matters*, Center for Responsive Politics, blog posting, September 17, 2013, <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html>.

<sup>31</sup> In a 2003 rulemaking, the FEC determined that although leadership PACs are "affiliated" with candidates, candidate committees and leadership PACs have separate contribution limits. On those rules and the agency's rationale, see Federal Election Commission, "Leadership PACs," 68 *Federal Register* 67013, December 1, 2003.

- Some have suggested that traditional PACs dedicated to contributing to a few candidates could emerge in a post-*McCutcheon* era, thereby potentially circumventing the spirit of the individual limits.<sup>32</sup> As with the leadership PAC example, it appears that this scenario could unfold regardless of *McCutcheon*, but the ruling might nonetheless provide new incentives for both kinds of PACs to emerge and solicit donors who previously would be unable to give as much as they might like because they had “maxed out.”

## General Considerations

- If Congress wishes to reexamine the ways in which contributions might flow through parties or PACs to candidates, three sets of provisions—those concerning coordinated party expenditures, coordination, or earmarks—could be especially relevant. These related concepts are discussed below.
  - FECA permits parties to make “coordinated party expenditures” in consultation with their candidates.<sup>33</sup> Often, these expenditures are for political advertising or polling. Coordinated party expenditures are subject to limits based on office sought, state, and voting-age population (VAP).<sup>34</sup> Limits for Senate candidates in 2014, adjusted for inflation, range from \$94,500 in states with the smallest VAPs to approximately \$ 2.8 million in California.<sup>35</sup> In 2014 parties can make up to \$47,200 in coordinated expenditures in support of each House candidate in multi-district states, and \$94,500 in support of House candidates in single-district states.<sup>36</sup> As noted previously, the *McCutcheon* appellants contended that limits on coordinated party expenditures minimize the chances that individual contributions to parties will improperly benefit particular candidates. Now that larger aggregate funds can flow to parties, some might argue that coordinated party expenditure limits also should be commensurately raised or eliminated. In fact, proposals to do so predate *McCutcheon*. Some see raising or eliminating the existing caps as a remedy for parties that face increasing financial competition from “outside” groups, such as super PACs and 501(c)

<sup>32</sup> See, for example, Charles Fried, “It’s Not Citizens United,” *New York Times*, October 2, 2013, p. A23.

<sup>33</sup> For additional discussion, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by (name redacted) and (name redacted).

<sup>34</sup> Senate limits are based primarily on VAP, whereas House limits are based primarily on a flat allocation. Specifically, the limits for Senate candidates and House candidates in single-district states are the greater of 2 cents multiplied by the VAP, adjusted for inflation, or \$20,000, adjusted for inflation. The limit for House candidates in multi-district states is \$10,000 (the 1974 base amount) plus adjustments for inflation, which have greatly increased the current limits over base amounts. See 2 U.S.C. §441a(d)(3).

<sup>35</sup> For 2014 limits, see Federal Election Commission, “Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold,” 79 *Federal Register* 7190-7192, February 6, 2014. If a joint expenditure designation between state and national parties were in place, the spending party, relying on both parties’ limits, could spend \$189,000 and \$5.6 million respectively.

<sup>36</sup> 2 U.S.C. §§441a(d)(3), 441a(c). If a joint expenditure designation between state and national parties were in place, the spending party, relying on both parties’ limits, could spend \$94,400 and \$189,000 respectively. State party committees may authorize their national counterparts to make coordinated-party expenditures on their behalf (or vice versa). If such agreements exist, one party could essentially assume the spending limit for another in particular states, in which case the total limits per state would effectively be double the amounts noted above. Parties may also make coordinated expenditures on behalf of presidential candidates. Limits for the 2016 cycle have not been announced.

organizations. Others caution that raising or eliminating coordinated party expenditure limits could effectively return parties to the “soft money” era that predated BCRA.<sup>37</sup>

- For expenditures that fall outside the coordinated party expenditure framework, other restrictions typically apply. Perhaps most prominently, existing FEC regulations establish a three-part test that considers who paid for a communication (such as a political advertisement), the conduct surrounding production, and communication content to determine whether impermissible coordination has occurred and, therefore, whether contribution limits were exceeded.<sup>38</sup> Some observers contend that these regulations—which have been the subject of protracted litigation—are too complex, easily avoided, or both.<sup>39</sup> If Congress chose to do so, it might reduce some of the ambiguity surrounding the current standard by replacing it with statutory language specifying what constitutes coordination and the level and type of permissible coordination. Establishing agreement on key concepts could be controversial, as the FEC has found through its regulatory efforts and subsequent litigation.
- Earmarking provisions in FECA and FEC regulations require attributing candidate contributions to their original source even if they are passed through an intermediary.<sup>40</sup> For example, if an individual contributed to a PAC with instructions that a portion of the contribution go to a specific candidate, the contribution would likely be treated as “earmarked” and reported accordingly.<sup>41</sup> Earmarking provisions were discussed at *McCutcheon* oral argument as a potential safeguard against circumventing aggregate contribution limits. Accordingly, it is possible that these provisions could be relevant for understanding the Court’s opinion. In general, however, because most contributions are not made through earmarking, it is unclear at this point how consequential these scenarios might be.

Beyond the policy approaches noted above, other general considerations might now be relevant as Congress decides whether or how to proceed. Brief selected points appear below.

- The plurality opinion in *McCutcheon* notes that “there are multiple alternatives available to Congress that would serve the Government’s anticircumvention interest” instead of aggregate contribution limits.<sup>42</sup> According to the Court, these include limits on transfers among political committees, segregated accounts for contributions above certain amounts (such as the aggregate limits), revisions to

<sup>37</sup> For additional discussion of hard money, soft money, and BCRA, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by (name redacted).

<sup>38</sup> 11 C.F.R. 109.21.

<sup>39</sup> Most notably, these include the *Shays v. FEC* cases.

<sup>40</sup> 2 U.S.C. §441a(a)(8); 11 C.F.R. §110.6. For independent expenditures (which candidate committees do not make), donor identity can remain unclear. For additional discussion, see CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).

<sup>41</sup> This scenario is distinct from bundling, in which an event host, for example, collects several checks made out to the candidate campaign and delivers them to the campaign. Bundling reporting requirements apply to lobbyists in some circumstances. See 2 U.S.C. §434(i).

<sup>42</sup> *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (slip op.); p. 33.

joint fundraising committee and earmarking restrictions, and a “modified version” of aggregate contribution limits. Disclosure also appears to be an option, although the Court points out that it is not endorsing any particular policy approach.<sup>43</sup> Some of the preceding discussion addresses these options. How these options would work in practice would depend on specific proposals, which the ruling does not address.

- Regardless of whether Congress chooses to act, implementing *McCutcheon* now falls to the FEC. As of this writing, the commission is “considering” the opinion.<sup>44</sup> If the commission follows its general practice, the agency will likely issue policy guidance, respond to advisory opinions, or both in the coming weeks or months. It could also initiate a rulemaking to reflect the ruling. Recent events suggest that the commission might have difficulty achieving the four-vote consensus necessary for such policy decisions.<sup>45</sup> Although the FEC has issued policy guidance and advisory opinions surrounding some aspects of the Supreme Court’s most recent major campaign finance decision, *Citizens United v. Federal Election Commission* (2010), the agency has been unable to reach consensus on rules implementing parts of the decision.<sup>46</sup>
- Even before the Court’s ruling in *McCutcheon*, many observers speculated that the case might be a precursor to a future constitutional challenge to the base limits.<sup>47</sup> If such a scenario developed, *McCutcheon* could have a far greater affect on campaign finance regulation than initially overturning just the aggregate limits.

## Conclusion

The debate over contribution limits is unlikely to end even now that the Court has decided *McCutcheon*. This report has provided a preliminary overview of policy issues that may be relevant as that debate continues in Congress and beyond. The most obvious implications from eliminating the aggregate limits could be for individual campaigns, parties, or PACs that are able to receive contributions which might today be precluded from donors who had already “maxed out.” Scenarios that could magnify individual contributions through contributions to multiple political committees, such as joint fundraising committees, may also develop. It is important to

<sup>43</sup> Ibid., pp. 33-35.

<sup>44</sup> Federal Election Commission, “Supreme Court Issues Opinion in *McCutcheon et al. v. FEC*,” press release, April 2, 2014, [http://fec.gov/press/press2014/news\\_releases/20140402release.shtml](http://fec.gov/press/press2014/news_releases/20140402release.shtml). For commissioner reaction as of this writing, see Ann M. Ravel, Vice Chair, and Ellen L. Weintraub, Commissioner, Federal Election Commission, “Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on *McCutcheon v. FEC*,” press release, April 2, 2014, [http://www.fec.gov/members/ravel/statements/McCutcheonStatement\\_AMR\\_ELW.pdf](http://www.fec.gov/members/ravel/statements/McCutcheonStatement_AMR_ELW.pdf).

<sup>45</sup> See, for example, Kenneth P. Doyle, “Impasse at FEC Means No New Rules Likely in Response to *McCutcheon* Ruling,” *Daily Report for Executives*, April 4, 2014, pp. A-18.

<sup>46</sup> See, for example, CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted); and CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by (name redacted).

<sup>47</sup> CRS Report WSLG842, *McCutcheon and Its Potential Impact on Campaign Finance Law*, by (name redacted). See also, for example, Adam Liptak, “Ruling Hints More Campaign Finance Dominoes May Fall,” *New York Times*, April 3, 2014, [http://www.nytimes.com/2014/04/04/us/politics/ruling-hints-more-campaign-finance-dominoes-may-fall.html?hp&\\_r=0](http://www.nytimes.com/2014/04/04/us/politics/ruling-hints-more-campaign-finance-dominoes-may-fall.html?hp&_r=0).

note that actual donor behavior and fundraising practices will depend heavily on individual preferences and strategic decisions.

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