



FEDERAL ELECTION COMMISSION
Washington, DC 20463

**Testimony of Federal Election Commission
Chairman Michael E. Toner and Vice Chairman Robert D. Lenhard
On Indian Tribes and the Federal Election Campaign Act
Before the Senate Committee on Indian Affairs
February 8, 2006**

Chairman McCain, Vice Chairman Dorgan, and Members of the Committee: Thank you for inviting us here today. We are pleased to provide some background and answer any of the Committee's questions regarding the application of the Federal Election Campaign Act to Indian tribes and the Federal Election Commission's past decisions in this area.

As the Supreme Court has observed, "Indian tribes occupy a unique status under our law." *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845, 851 (1985). The unique nature of this relationship has created its own complexities in applying the Federal Election Campaign Act of 1971, as amended (FECA), to Indian tribes' federal political activity. Indian tribes are not specifically mentioned anywhere in FECA. FECA's application to tribes has developed through the Federal Election Commission's (FEC or Commission) advisory opinion and enforcement processes.

Three main questions concerning tribes have come before the Commission. First, what provisions of FECA apply to tribes; second, whether FECA's aggregate contribution limit that applies to individuals applies to tribes; and third, whether a tribe may continue to make contributions from its general treasury if it has established a business that is either a corporation or a federal contractor. The FEC's interpretation of these questions is discussed below, along with an analysis of how certain legislative proposals would impact tribes' federal political activity.

FECA Provisions Applicable to Indian Tribes

Contribution Limits

A threshold question addressed by the FEC was whether FECA applied to Indian tribes at all. In several enforcement cases where Indian tribes were respondents, the tribes contended that they were not covered by federal campaign finance laws. *See* MUR 4867 (Tribal Alliance for Sovereignty/Five Civilized Tribes PAC), MURs 2465/1616/1557 (Seminole Tribe of Florida), and MUR 2302/2283/2274 (Sisseton-Whapeton Sioux Tribe). The tribes argued that FECA did not apply to them

both because FECA did not explicitly describe tribes as entities subject to regulation and because as sovereign nations, they were not subject to FECA.

The FEC determined that federal law did not require an agency to construe a statute's silence on whether it has specific jurisdiction over Indian tribes to mean that Indian tribes were exempt from the statute's provisions. The FEC also noted that the legislative history of FECA contained no evidence that Congress intended to exclude Indian tribes from FECA's coverage. Accordingly, the FEC determined that FECA is applicable to Indian tribes and proceeded with its enforcement actions. These decisions have not been challenged by the tribes in court.

With the question of the authority of Congress to regulate the federal campaign finance activities of Indian tribes having been settled, the Commission then confronted the issue of which FECA provisions are applicable to Indian tribes. As we noted at the outset, Indian tribes are not specifically mentioned in FECA. However, FECA does limit the amount of money that any "person" can contribute to a federal candidate, a political party, or to a federal political action committee (PAC).¹ The statute defines a "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. 431(11). In a 1978 advisory opinion, the FEC first concluded that Indian tribes are an "organization or group of persons" and, therefore, are subject to FECA's limits on how much a person can contribute to a political candidate, political party, or PAC. *See* Advisory Opinion ("AO") 1978-51 (Friends of Eldon Rudd). This conclusion was reaffirmed by the Commission in AO 1999-32 (Tohono O'odham Nation).

Aggregate Limits

Under FECA, an "individual" is subject to both the limits on how much a "person" can contribute to a candidate, party, or PAC, and also to an additional limit on how much they can give in aggregate to all candidates, parties, and PACs in a two-year election cycle. 2 U.S.C. 441a(a)(3).² FECA does not specifically define the term "individual." Accordingly, the FEC has had to address whether certain entities meeting the definition of "person" are also "individuals" and therefore are subject to the aggregate contribution limits. The FEC has determined that political committees, limited liability companies, and partnerships, although "persons" under FECA, are not "individuals" subject to the aggregate limits. *See* AOs 1986-36 (political committee), 1995-11 (limited

¹ The statutory language used for all of these entities is a "political committee." 2 U.S.C. 431(4). A political committee is a group of persons that receives in excess of \$1,000 in contributions or makes in excess of \$1,000 in expenditures in a calendar year, and whose major purpose is to influence the election or defeat of a candidate. 2 U.S.C. 431(4) and *Buckley v. Valeo*, 424 U.S. 1 (1976). Examples of political committees are candidate committees, political party committees, and corporate and labor organization PACs. For the purposes of this testimony, we will use the more commonly recognized terms of campaign committee, political party, and PAC.

² For the 2006 election cycle, the aggregate biennial contribution limit for individuals is \$101,400 total, which includes a limit of \$40,000 on all contributions to candidates and \$61,400 on all contributions to PACs and political parties.

liability company), and 1979-28 (unincorporated recreation association); *see also* 11 C.F.R. 110.1(e) (partnerships).³ Through these opinions, the FEC has interpreted “individuals” to mean particular human beings. This is also the common definition used in the English language dictionary. The FEC addressed the question of whether Indian tribes fell within the definition of an “individual” in 2000. Consistent with its prior decisions, the FEC determined that tribes, although “persons,” are not individuals subject to the aggregate contribution limits. *See* AO 2000-5 (Oneida Nation of New York).

Reporting Requirements

Tribal contributions are reported to the FEC by the candidates, parties, and PACs that receive the contributions. Federal political committees are required to file disclosure reports with the FEC. 2 U.S.C. 434. These reports contain information on the committees’ receipts and disbursements, and are available to the public on the FEC’s website, www.fec.gov. Federal political committees include candidate committees, political party committees, and corporate and labor organization PACs. Tribes are not political committees because their major purpose is not to influence the election or defeat of candidates. *See Buckley v. Valeo*, 424 U.S. 1 (1976). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“MCFL”) (stating that if MCFL’s independent expenditures “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.”). Consequently, tribes are not required to register and file reports with the FEC detailing their contributions. In this respect as well, tribes are treated like individuals, partnerships, homeowner’s associations, and other entities that are permitted to make contributions but that do not qualify as federal political committees. These entities are all “persons” subject to FECA, but not “political committees” required to register and file reports to the FEC.

Although tribes are not required to file reports detailing their own contributions, tribal contributions are reported by the recipient and can be searched on the FEC database in the same manner as one would search for contributions by an individual or partnership. Searching for a tribe name in the FEC database will return a listing of all contributions by entities containing the name searched. However, this listing may not be comprehensive due to inconsistent recording of tribal names by individual political committees. For example, contributions from the Morongo Band of Mission Indians are recorded by the various political committees that received those contributions as coming from the “Morongo Band of Mission Indians,” “Morongo Band of Indians,” “Morongo Band-Mission Indians,” and “Morongo Band.” Therefore, searches by tribe name on the FEC database may not capture all contributions by a specific Indian tribe. This problem is not unique to tribes, but can occur when searching for contributions by individuals or any entity that does not have to register or file reports with the FEC. For example, different committees may have recorded the same John Q. Smith’s contributions as having been received from “John Q. Smith,” “John Smith,” or “J. Q. Smith.” A search for Mr. Smith’s contribution may not return all of his contributions depending on the search terms entered into the database.

³ The individual partners to whom contributions are attributed are subject to the aggregate limits.

Congress has Prohibited Certain “Persons” from Making Contributions

FECA specifically prohibits certain types of “persons” from making federal contributions, such as corporations, labor organizations, and national banks. 2 U.S.C. 441(b). FECA also prohibits foreign nationals and federal government contractors from making federal contributions. 2 U.S.C. 441e (foreign nationals); 2 U.S.C. 441c (government contractors). Because Indian tribes do not typically incorporate, are not labor organizations, and are not national banks, the prohibitions in 2 U.S.C. 441b on these entities making contributions do not extend to Indian tribes. Foreign nationals under FECA are defined as foreign principals as that term is used in 22 U.S.C. 611(b)⁴ and as individuals who are not U.S. citizens or nationals and who are not lawfully admitted for permanent residence. 2 U.S.C. 441e. The foreign national prohibition does not apply to Indian tribes because they are not foreign principals and their members are U.S. citizens.

Through advisory opinions, the FEC has addressed whether a tribe which has created a business that is a federal contractor is prohibited from making contributions to influence a federal election. The FEC’s analysis has turned on whether the tribes and the tribal federal contractors were two separate entities. *See* AOs 2005-1 (Mississippi Band of Choctaw Indians) and 1999-32 (Tohono O’odham Nation). In determining whether a tribe and a tribal federal contractor were separate and distinct entities, the Commission followed the analysis used by the federal courts in addressing whether an Indian tribe and a related business were a single or separate entity.⁵ The FEC has considered factors that indicated the tribe’s and the tribal federal contractor’s independence from each other. These factors include: (1) whether they were separately incorporated; (2) whether they lease and own property separately; (3) whether any member of the tribal council may serve on the federal contractor’s board; (4) whether the two entities have separate legal counsel, bank accounts, tax identification numbers, employees, personnel, and benefit policies; and (5) whether their funds are intermingled. In applying these factors to the facts in AOs 2005-1 and 1999-32, the Commission concluded that the related federal contractors operated sufficiently independent of the tribes to be considered separate entities. The effect of this conclusion is the tribes could continue to make contributions even though the tribal federal contractors cannot. However, the Commission has emphasized that none of the monies generated by the federal contractor could be used by the tribe to make contributions. *See* AO 2005-1 (noting that none of the funds from the federal contractor were intermingled with other tribal funds and concluding that “revenues from [the government contractor] may not be used to make contributions to federal candidates or political committees.”). This same principle would apply to tribal businesses that are incorporated.

⁴ This definition includes the government of a foreign country.

⁵ *See, e.g., Navajo Tribe v. Bank of New Mexico*, 700 F.2d. 1285, 1288 (10th Cir. 1982) (“Where sovereignty is not an issue, courts have consistently held that tribal enterprises are separate and therefore, independent of the Tribe.”) and similar cases discussed in AO 1999-32 (Tohono O’odham Nation).

Impact of Certain Legislative Proposals

Requiring Tribal PACs

We are aware of only one bill that is currently pending in either the House or the Senate that directly addresses the issue of Indian tribes making contributions to influence federal elections. A bill introduced by Representative Mike Rogers would apply the restrictions on corporate political activity to unincorporated Indian tribes. H.R. 4696, Section 401. As a consequence, tribes would be barred from making contributions or expenditures from their general treasury funds. Like corporations, tribes would be allowed to sponsor a separated segregated fund, or PAC, and that PAC would have to register and report to the FEC. The PAC would be free to make contributions in federal elections, but could only raise money by soliciting voluntary contributions from members of the tribe. Tribal members would be limited to \$5,000 in contributions per year to the tribe's PAC.

This proposal would end the use of the tribe's general treasury funds, including unincorporated business and unincorporated gaming facility revenue, to make federal contributions. As a federal registered political committee, a PAC would also have to file disclosure reports with the FEC. However, this proposal would not place aggregate limits on the tribal PAC's contributions. In addition, if the tribe's PAC qualified as a multicandidate political committee,⁶ which most PACs do, the amount of money that the tribal PAC could contribute to a single candidate would increase from \$2,100 per election, the contribution limit for a "person," to \$5,000 per election, the contribution limit for a multicandidate committee, while the amount that the tribal PAC could contribute to a national political party would decrease from \$26,700 to \$15,000 and from \$10,000 to \$5,000 for a state political party. 2 U.S.C. 441a(a)(1) & (2).

This proposal will also raise the question of what group of individuals qualifies as members of a tribe for the purpose of soliciting contributions to the PAC. The proposed bill equates a tribe's membership to a corporation's stockholders for solicitation purposes. H.R. 4696, Section 401. However, the bill does not define the individuals that are considered tribal members. It is our understanding that this topic has been of great concern to tribes and that tribes have taken different views of what standards should apply to determine if an individual qualifies as a member of a particular tribe. The FEC's current rules for what constitutes the member of a membership organization may be inappropriate in the context of Indian tribes. If Congress decides to amend FECA to treat Indian tribes in a way that is analogous to corporations, it would be very helpful for Congress to use its expertise in the complexity of the history and culture of Indian tribes to set a standard for what constitutes membership in a tribe for FECA purposes.

⁶ A multicandidate political committee is defined as a political committee that has been registered at least 6 months, has more than 50 contributors and, with the exception of state party committees, has made contributions to at least 5 candidates for federal office. 11 C.F.R. 100.5(e)(3).

Treating Tribes as Individuals

A statutory change that treats Indian tribes as individuals would address the aggregate contribution limit issue discussed above, but would not restrict the use of unincorporated gaming facility revenues and other tribal monies to finance political contributions nor alter disclosure. As an individual, a tribe would become subject to the biennial aggregate contribution limit of \$40,000 to all candidates and \$61,400 to all PACs and parties. Under FECA, a contribution by an individual from his or her own funds is permissible unless reimbursed by another person. For example, an individual can make contributions from the funds he or she receives from salary, interest income, or ownership in a business. Accordingly, if a tribe were treated strictly like an individual, tribes arguably could continue making contributions from any of their own sources of income, including its unincorporated business and unincorporated gaming facility revenue. Further limitation on the source of funds a tribe could use for contributions would likely require a change beyond treating tribes as individuals. This statutory change also will not affect the disclosure issues discussed above.

Conclusion

We appreciate the opportunity to appear before the Indian Affairs Committee to discuss the application of FECA to Indian Tribes and the FEC's past decisions relating to tribal activities. If Congress chooses to amend FECA in this area, the FEC stands ready to implement and enforce any statutory changes that are made. Please do not hesitate to call us if the Committee has any further questions that the FEC can address.

Respectfully submitted,

Michael E. Toner
Chairman

Robert D. Lenhard
Vice Chairman