

**BREACHING THE BIENNIAL LIMIT: WHY THE FEC HAS  
FAILED TO ENFORCE AGGREGATE HARD-MONEY  
LIMITS AND HOW RECORD LINKAGE TECHNOLOGY CAN  
HELP**

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I. INTRODUCTION

During the final stretches of the 2010 midterm election cycle, the *Washington Times* published a feature article on a group of wealthy political donors.<sup>1</sup> Known as “heavy hitters” in political fundraising circles, these individuals earned this title by donating large sums of money spread across multiple recipients. The Bipartisan Campaign Reform Act (BCRA) of 2002 included a specific provision targeting these large individual donors.<sup>2</sup> The statute limits their aggregate contributions—also known as the biennial limit—to \$115,500 per

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1. Jim McElhatton, *Top '08 political donors tighter in 2010*, THE WASHINGTON TIMES (Oct. 3, 2010), <http://www.washingtontimes.com/news/2010/oct/3/top-08-political-donors-tighter-in-2010>.

2. 2 U.S.C. §§ 441a(a)(3)(A)–(B) (2006).

election cycle.<sup>3</sup> What is curious about the *Washington Times* article is that it reported top donors giving aggregate amounts far in excess of the \$115,500 limit, thus clearly violating the BCRA. Yet, the article does not mention the biennial limit, nor does it offer any indication that these donors had broken the law.

More surprising is the silence on behalf of the Federal Election Committee (FEC). There are no public records to indicate that the FEC investigated or pursued enforcement action. One top-donor, Ray Oden, Jr. (who had exceeded the biennial limit in both 2006 and 2008), spoke openly to reporters about his political donations. He mused that nearly every time he picked up his phone, it was another campaign soliciting donations.<sup>4</sup> Despite this, he does not mention receiving a call from the FEC. In fact, the FEC does not have a single record on file documenting the active enforcement of a donor who violated the biennial limit.<sup>5</sup>

The aggregate biennial limit is not an overseen detail tucked away in a cumbersome legislative bill. The law clearly states an aggregate biennial limit for individuals, and the FEC revises the limit each election cycle to adjust for inflation.<sup>6</sup> The FEC refers to the aggregate biennial limit numerous times on its website and in informational materials distributed to campaigns. In fact, the FEC has gone so far as to publish and regularly update an informational

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3. The biennial contribution limit of \$115,500 applies only to the 2009–10 election cycle. The FEC revises the biennial contribution limit each election cycle to adjust for inflation.

4. McElhatton, *supra* note 1; *see also* Appendix A.

5. FED. ELECTION COMM'N, FEC ENFORCEMENT QUERY SYSTEM (2010), *available at* <http://eqs.nictusa.com/eqs/searcheqs?SUBMIT=new&CURRSTATE=fec.mur.gui.DocumentView>.

6. During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than \$37,500, in the case of contributions to candidates and the authorized committees of candidates; \$57,500, in the case of any other contributions, of which not more than \$37,500 may be attributable to contributions to political committees which are not political committees of national political parties. 2 U.S.C. §§ 441a(a)(3)(A)–(B) (2006); *see also* FED. ELECTION COMM'N, CONTRIBUTION LIMITS FOR 2011–12 (2012), *available at* <http://www.fec.gov/info/contriblimits1112.pdf> (showing the biennial limit is indexed for inflation in odd-numbered years).

The 2011–12 limit is \$117,500. This limit includes up to \$46,200 in contributions to candidate committees and \$70,800 in contributions to any other committees, of which no more than \$46,200 of this amount may be given to committees that are not national party committees. FED. ELECTION COMM'N, CONTRIBUTION LIMITS FOR 2011–12 (2012), *available at* <http://www.fec.gov/info/contriblimits1112.pdf>.

brochure devoted to the aggregate biennial limit.<sup>7</sup> The FEC is fully aware of the aggregate biennial limit and has made every appearance of being serious about enforcement. What, then, explains the absence of a single FEC enforcement action for contributions given in excess of the biennial limit? How can a major Washington newspaper publish an article on donors in clear violation of the law without any FEC response? It seems that while the agency speaks loudly, it carries no stick.<sup>8</sup>

The FEC faces a distinct problem of detecting violators in enforcing the aggregate biennial limit. Ascertaining the aggregate amount given by an individual across various candidates and committees during an election cycle is a difficult task. The FEC assigns a unique identification number to PACs but not to individual donors. In order to calculate whether an individual's contributions exceed the biennial limit, one must first search through the FEC database and locate every contribution made by that individual. Information on the contributor's reported name, address, and employer are often available, but personal information is not always reported by the donor; and when it is, entries often vary from one record to the next. Lacking a unique identifier for individual contributors makes auditing an arduous task.

The FEC can attribute its failure in part to the complications in detecting and auditing violators that results from inadequate disclosure practices. This article addresses this issue in detail and offers several feasible solutions. The FEC's failure to enforce its mandate, however, cannot simply be chalked up to difficulties in detection. Even in cases where the violations of the biennial limit are public knowledge, the FEC has refused to act.

The FEC's refusal to act is explained in part by its flawed regulatory model and broken enforcement program. In enforcing contribution limits, the FEC has sought to establish a norm of self-

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7. FED. ELECTION COMM'N, THE BIENNIAL CONTRIBUTION LIMIT (2004) (updated Jan. 2013), available at <http://www.fec.gov/pages/brochures/biennial.shtml>.

8. Other scholars that have written on the topic of legal enforcement of campaign finance laws have reached similar conclusions about the FEC's failings in fulfilling its enforcement duties. See Todd Lochner & Bruce E. Cain, *Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629 (2000); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575 (2000); Bradley A. Smith & Stephen M. Hoerling, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002), available at [http://www.fec.gov/members/former\\_members/smith/smitharticle01.pdf](http://www.fec.gov/members/former_members/smith/smitharticle01.pdf).

auditing by campaigns. On the one hand, this approach has been successful in enforcing the better known \$2,500 limit on individual donations to candidates per primary or general election cycle. Campaigns have strong incentives to carefully monitor contributions in order to prevent contributors from exceeding the \$2,500 limit because if a campaign does not catch violators, the FEC or good government groups likely will, exposing the campaign to both political and financial liability. The FEC, in large part, appears to favor self-regulation as a means of shifting the burden of auditing to campaigns.

On the other hand, a self-regulatory model is particularly ill-suited to enforce the biennial limit because a complete and accurate record of each potential donor's giving activity is needed and campaigns seldom have the capacity to gather detailed information on contributions made by their donors to other candidates.<sup>9</sup> This highlights a key hurdle to enforcing the biennial limit. Campaigns and organizations are only aware of contributions made to or through them, yet donors who exceed the biennial limit often give to multiple campaigns. In a self-regulatory scheme, it is incumbent on the donor to adhere to BCRA limitations and on the FEC to pool information across campaigns to identify violators. As a result, any enforcement model reliant on self-auditing is no longer viable absent the FEC providing campaigns the required tools to monitor donors across their entire giving record. Failing this, compliance with campaign finance laws will ultimately rest in the hands of individual donors, which, to date, has not been very effective.

In practice, the biennial limit only applies to a small but important subset of donors, composed of lobbyists and the extremely wealthy. Yet these are precisely the influential individuals that campaign finance reforms have sought to limit. Here we propose and assess several possible reforms to the FEC's regulatory model designed to facilitate enforcement of the biennial limit without imposing unmanageable auditing costs.

First, we demonstrate the applicability of an automated system for monitoring contribution records. We do this by applying customized entity resolution software to the FEC database that links

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9. In fact, one of the few FEC enforcement actions related to the aggregate biennial limit was brought against Aristotle Inc. Aristotle was a private company that developed a software product for use by campaigns that provided information on how much individuals in their donor list had given to other federal candidates.

each record to a unique individual in order to track his or her giving behavior.<sup>10</sup> Our results detected over a thousand violations of the biennial limit in 2012 alone. We argue that the FEC should adopt similar technology as an automated method to alerting the agency to potential violations, thus streamlining centralized auditing in a highly cost efficient manner. In fact, a conservative estimate suggests that by failing to detect and enforce violations of the aggregate biennial limit, the FEC has left tens of millions in civil penalties on the table.

Second, although the above reform would provide a much more efficient method of auditing, it does not address the fundamental problem with the FEC's enforcement model. Here, we propose a solution seemingly drastic but actually quite basic. It is common to require registration for many legal activities, including what is often called the cornerstone of our democracy—voting. A more stringent reform here would be to implement a system by which individual donors would be required to register with the FEC, similar to what is required by the IRS or by each state in order to vote.

## II. THE LAW

The first major impact of the BCRA,<sup>11</sup> which amended the Federal Election Campaign Act (FECA) of 1971,<sup>12</sup> was felt during the 2004 election cycle. The BCRA intended to end the use of “soft money,” define and regulate “electioneering communications,”<sup>13</sup> establish rules to define “coordinated and independent expenditures,” provide for additional disclosures, and sharply increase contribution limits for individual donors which were thereafter to be indexed with inflation.<sup>14</sup> As had previously been the case, contribution limits for individual donors continued to vary depending on whether the donation was to a candidate, PAC, or party committee,<sup>15</sup> which permitted individuals to give in much greater amounts to political

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10. See Adam Bonica, *Mapping the Ideological Marketplace*, AM. J. OF POLITICAL SCI. (forthcoming), available at <http://ssrn.com/abstract=2148801> or <http://dx.doi.org/10.2139/ssrn.2148801> (discussing the software and its development).

11. 2 U.S.C. § 441 (2006).

12. 2 U.S.C. § 431 (2006).

13. This portion of the BCRA was overturned. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (stating that overruling *Austin* effectively invalidates not only BCRA Section 203, but also 2 U.S.C. § 441b's prohibition on the use of corporate treasury funds for express advocacy).

14. FED. ELECTION COMM'N, CAMPAIGN FINANCE LAW QUICK REFERENCE FOR REPORTERS: MAJOR PROVISIONS OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 (2010), available at [http://www.fec.gov/press/bkgnd/bcra\\_overview.shtml](http://www.fec.gov/press/bkgnd/bcra_overview.shtml).

15. *Id.*

action committees (PACs) and party committees than to candidates. The extent to which the BCRA shifted the balance of power in the political marketplace away from PACs and toward individual donors is most readily apparent in its effect of nearly doubling the aggregate limit (i.e. \$50,000<sup>16</sup> to \$95,000<sup>17</sup>) on hard-money contributions to candidates and committees over a two-year period.<sup>18</sup>

#### BIENNIAL LIMITS

Nearly everyone involved in politics is aware that federal law limits the amount of money an individual can contribute to a candidate or candidate's committee.<sup>19</sup> It is less well known that federal law also limits the total amount of money an individual can donate during an election cycle.<sup>20</sup> The biennial limit applies to contributions made to federal candidates, party committees, and PACs.<sup>21</sup> The limit is in effect for a two-year period beginning the first of January of an odd-numbered year and ending on the last day of December of an even-numbered year.<sup>22</sup> The law is clear: over a two-year period, an individual can donate no more than \$45,600 to all candidates and \$69,900 to all political parties and PACs—\$115,000 in total.<sup>23</sup>

In addition “an individual[’s] contribution to a federal candidate counts against [the] biennial limit for the year in which the

16. *Id.* The aggregate limit prior to the passage of the BCRA was set at \$25,000 annually, translating to a biennial limit of \$50,000 reported above.

17. *Id.*

18. It is worth noting that on February 19, 2013, the Supreme Court granted review in *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.C. Cir. 2012), *review allowed*, 133 S. Ct. 1242 (2013). McCutcheon is an Alabama resident who wants to donate in amounts that would violate the aggregate biennial limit. *Id.* at 136–37. He sued the FEC and is arguing that the aggregate biennial limit violates the First Amendment. *Id.* at 137. The Supreme Court has not set a date for argument.

19. FED. ELECTION COMM’N, *supra* note 14 (stating that the contribution limit of \$2,400 applied only to the 2009–10 election cycle whereas in 2003, an individual donor’s contribution to a candidate was capped at \$2,000 per election).

20. 2 U.S.C. § 441a(a)(3) (2006).

21. *Id.*

22. *Id.*

23. These figures are for the 2009–10 election cycle. *See* 2 U.S.C. § 441a(a)(3)(A)–(B) (2006) (providing limits on contributions); *see also* FED. ELECTION COMM’N, CONTRIBUTIONS (2004) (updated Jan. 2013), *available at* <http://www.fec.gov/pages/brochures/contrib.shtml#Chart#Chart> (stating the biennial limit is indexed for inflation in odd-numbered years).

The 2009–10 limit for total contributions was \$115,500, which included \$45,600 in contributions to candidate committees and \$69,900 in contributions to any other committees. FED. ELECTION COMM’N, CONTRIBUTIONS (2004) (updated Jan. 2013), *available at* <http://www.fec.gov/pages/brochures/contrib.shtml#Chart#Chart>.

contribution is made, even if the candidate is not up for election within that two-year period.”<sup>24</sup> But “the specific limits on [] contributions to candidates apply on a per election basis,” which means that if an individual “make[s] a contribution during 2009 to support a Senate candidate’s primary election campaign for 2012, the contribution would count against [the] 2012 primary election limit for that candidate, but would also count against [the] 2009–10 biennial limit [for the individual].”<sup>25</sup> While seemingly confusing, it is ultimately a small issue because there is no effect on the individual contributor. Moreover, campaigns employ a large staff to review contribution records for compliance with the FEC, making violations relatively easy to catch.

The FEC cautions individual contributors to take note of two specific situations in order to not “inadvertently [] exceed the biennial limit: [j]oint contributions [] and [c]ontributions to political committees that have separate accounts for federal and nonfederal election activity.”<sup>26</sup> “A joint contribution typically occurs when [two] individual[s] each make a contribution using a single check or written instrument. If [they] both sign the check, the contribution counts equally against [both] respective limits, unless [they] specify, in writing, a different split.”<sup>27</sup> As for PACs and political party committees with separate accounts for federal and nonfederal election activity, contributions deposited into the federal account are viewed as federal contributions and count against the biennial limit, while contributions to the nonfederal account do not.<sup>28</sup>

The FEC provides some direction to an individual who exceeds

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24. FED. ELECTION COMM’N, THE BIENNIAL CONTRIBUTION LIMIT (2004) (updated Jan. 2013), *available at* <http://www.fec.gov/pages/brochures/biennial.shtml>.

25. *Id.*

26. *Id.*

27. *Id.* The FEC’s Biennial Contribution Limit Brochure also provides examples and solutions to help navigate the joint contribution process, for example:

In 2009, you and your spouse write a check for \$5,000 to a PAC. If you both sign the check, \$2,500 counts against your 2009–10 biennial limit and \$2,500 towards your spouse’s biennial limit for 2009–10. However, if only you sign the check, the entire \$5,000 contribution is attributed to you and counts towards your 2009–10 biennial limit. In another case, you and your spouse write a \$6,000 check to a PAC and only your spouse signs the check. Since the full amount of the contribution would exceed your spouse’s \$5,000 annual limit on contributions to the PAC, the committee could automatically consider the extra \$1,000 as a contribution from you. As a result, \$5,000 of the \$6,000 contribution would count against your spouse’s 2009–10 biennial limit and the remaining \$1,000 would go towards yours.

*Id.*

28. *Id.*

the biennial limit. It warns that “[e]xceeding the biennial limit is a violation of federal law”<sup>29</sup> and that any “individual who exceeds the limit faces a potential penalty equal to the amount of the contributions involved (or up to twice this amount in the case of a knowing and willful violation).”<sup>30</sup> But if an individual “inadvertently exceeds the biennial limit, the Commission advises that [they] immediately take one or more of the steps listed below. Viewing such actions as mitigating circumstances, the Commission may decrease any potential civil money penalty.”<sup>31</sup> The FEC then goes on to advise individuals to obtain a refund of the contributions that caused the individual to exceed the biennial limit, to reattribute joint contributions, or request that PACs and party committees transfer contributions that caused the individual to exceed the biennial limit to nonfederal accounts.<sup>32</sup>

### III. THE JOINT PROBLEMS OF DETECTION AND ENFORCEMENT

What if donors who violate the biennial limit know that the FEC is incapable of detection and unwilling to issue penalties? Would they follow the advice of the Commission and mitigate their liability or simply ignore the law? In our analysis, we find that hundreds of individuals have exceeded the biennial limit since the BCRA was enacted. But according to the FEC Enforcement Query System,<sup>33</sup> no one has ever been penalized for violating the law. Why is the FEC lax on enforcing the biennial limit? The most likely answer is that the FEC lacks the enforcement capability rather than the motivation. The FEC does not issue a unique contributor ID, similar to a bank account number or social security number, traceable back to individual donors. Instead, the FEC must rely on a set of self-reported personal information, such as name, address, occupation, and employer.

For example, identifying individuals who violate the candidate contribution limit in a single transaction is relatively easy under the current disclosure requirements. If a donor writes a check for an amount greater than the maximum allowed, it sets off a red light. All information required to determine if a violation has occurred is contained in that one record. But it is more difficult to identify a donor who writes multiple checks to different candidates with a sum that—only in total—exceeds the biennial limit because each record

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29. THE BIENNIAL CONTRIBUTION LIMIT, *supra* note 24.

30. *Id.*

31. *Id.*

32. *Id.*

33. FEC ENFORCEMENT QUERY SYSTEM, *supra* note 5.



must be linked back to the individual.

Although donors generally adhere to the norm of voluntary disclosure, in practice, donors and campaigns are only held to a “best efforts” requirement. This means that the personal information reported by a given donor often varies across records. Variation is usually the result of one of the following reasons:

- 1) Donors may report their information truthfully, but inconsistently. Donors often incorporate a middle initial, use a nickname, write their address differently, use the address of their office or their second home, or abbreviate their employer in one instance but not another.<sup>34</sup>
- 2) Donor information can be distorted during the data-entry process. Someone other than the donor often performs data-entry. Difficult to read handwriting can become problematic.
- 3) Donor address and employment information is left blank. This makes it difficult to ensure that a contribution came from the same person, especially if that individual has a common name or multiple addresses.

Campaigns generally make an effort to get to know their large donors and are usually quick to refund contributions that would have brought their supporter over the limit. But tracking donor activity across campaigns presents a much greater challenge. The FEC’s reporting system makes it easy for a contributor—inadvertently or otherwise—to elude efforts by campaigns (or the FEC, for that matter) to track their donations.

#### PAST ENFORCEMENT ACTIONS

To date, the FEC has not once initiated an enforcement action against individuals who have violated the biennial limit.<sup>35</sup> While there are a few enforcement actions on record, the majority of these actions were initiated by the contributor. For example, in 2001, John

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34. For example, the first name might be reported as “Robert” in one record and as “Bob” in another; “retired” may be reported as one’s occupation in one field and “professor emeritus” in another; there might be some slight differences in how a street address is reported; or the differences might accurately reflect changes to a change in residence or employment. *See* Appendix A-B.

35. FEC ENFORCEMENT QUERY SYSTEM, *supra* note 5.

D. Ong brought to the FEC's attention the fact that "he inadvertently exceeded in 1997 and 1999 the \$25,000 aggregate annual limit on individual contributions to federal election campaigns" by \$15,000.<sup>36</sup> In the negotiated settlement, Ong had to pay a civil penalty in the amount of \$15,000.<sup>37</sup> In 2005, Benson K. Whitney advised the FEC that in 2000 "he inadvertently made contributions to federal election campaigns and political committees that exceeded the annual aggregate limits for individuals that existed at the time the contributions were made" by \$5,000.<sup>38</sup> In this case, the negotiated settlement stipulated that the statute of limitations had expired, but Whitney nevertheless agreed to "demonstrate compliance with the FECA" by agreeing to pay the U.S. Treasury \$5,000.<sup>39</sup> In yet another case in which the contributor alerted the FEC, in 2005 Ambassador W.R. Timken, Jr. advised the FEC that four years earlier "he inadvertently made contributions to federal election campaigns and political action committees that exceeded the annual aggregate limits for individuals that existed at the time the contributions were made" by \$6,499.<sup>40</sup> Like the previous two contributors, Timken also agreed in his negotiated settlement to pay a fine of \$6,999.00.<sup>41</sup>

There are instances in which third-parties have informed the FEC of contribution limit violations. These cases usually come about, however, because of unrelated charges brought simultaneously against the individual. For example, in the case of Thomas W. Noe, the FEC believed that Noe had violated the FECA, but decided to "take no further action as to Mr. Noe, who has been convicted of criminal charges relating to the same conduct."<sup>42</sup> In the same case, the FEC "also found that twenty individual conduits knowingly and willfully violated 2 U.S.C. § 441f by permitting their names to be used to effect the making of a contribution in the name of another."<sup>43</sup>

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36. John D. Ong, FEC Negotiated Settlement (Jan. 10, 2003), *available at* <http://eqs.nictusa.com/eqsdocsADR/00002F4B.pdf>.

37. *Id.*

38. Benson K. Whitney, FEC Negotiated Settlement (July 28, 2006), *available at* <http://eqs.nictusa.com/eqsdocsADR/000056A2.pdf>.

39. *Id.*

40. W.R. Timken, Jr., FEC Negotiated Settlement (Mar. 24, 2006), *available at* <http://eqs.nictusa.com/eqsdocsADR/00005349.pdf>.

41. *Id.* Note that there appears to be a typo in paragraph six: "\$6,999.00" should have been "\$6,499.00."

42. Fed. Election Comm'n, Letter from Thomansenia P. Duncan to Craig Donsanto (Sept. 16, 2008), *available at* <http://eqs.nictusa.com/eqsdocsMUR/28044211067.pdf> (discussing the matter, MUR 5871, involving Thomas W. Noe).

43. *Id.*

Yet the Commission entered into conciliation agreements with seven of the individuals and “decided to take no further action except send a letter of admonishment to [the] thirteen [] remaining conduits.”<sup>44</sup> It often appears that an FEC investigation is not triggered unless there is already scrutiny by another enforcement agency. Further, if there are other charges involved, the FEC will typically drop any potential additional charges.

Also troubling is that the Commission often recommends to overlook what it might deem small violations. For example, in 2006, TheRestofUs.org alleged that William Bain Adams exceeded the federal aggregate contribution limit in 2002 by \$3,000.<sup>45</sup> TheRestofUs.org, after further research, concluded that Adams only exceeded the limit by \$500, but maintained their complaint.<sup>46</sup> The FEC, without explanation, recommended the complaint be dismissed, even after noting that a “Google search turned up [William Bain Adams’] name in connection with possible illicit contributions to committees and a DOD contractor, Brent Wilkes, and two former members of Congress, Randy Cunningham and Tom DeLay.”<sup>47</sup> But the Commission reasoned that “these allegations are outside the scope of the complaint filed by TheRestofUs.org, and apparently are being investigated by the Department of Justice.”<sup>48</sup>

The case of M. Sue Wilson serves to perfectly highlight both the problems inherent in detecting violations and the FEC’s apparent reluctance to sanction individuals in violation of the law. In this case:

[Wilson] acknowledges that an inadvertent violation of the FECA occurred. [Wilson] contends that when the committee continued to solicit contributions, she assumed that she could still legally contribute. She uses M. Sue Wilson professionally and socially and her checks reflect this preference. Some of her credit cards require that her full name, Marilyn Sue Wilson or Marilyn S[.] Wilson, be on the card. That, apparently, is where the discrepancy came in with these contributions. The first contribution of \$2,000 was made by credit card, the second contribution of \$250 was by personal check, and the final contribution of \$1,000 was made by

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44. *Id.*

45. William Bain Adams, FEC Memorandum (June 12, 2006), *available at* <http://eqs.nictusa.com/eqsdocsADR/00005626.pdf>.

46. *See id.*

47. *Id.*

48. *Id.*

her bank-card associated with her checking account.<sup>49</sup>

In the end, Wilson accepted an admonishment from the Commission and agreed to “educate herself about the FECA . . . [and to] maintain [] a list of all contributions made to candidates or to finance federal elections.”<sup>50</sup> Arguably, one can interpret the FEC’s willingness to extend leniency to both Wilson and the recipient committee, and to dismiss the violation as a mere accident, as an implicit acknowledgment of a broken auditing model.

If the FEC is unable to detect violations from a set of disclosed records because of slight variation in how a name is reported—thereby causing one person to appear as three separate individuals—why should a committee be expected to have been aware of the same? Worse yet, the case in question reflects a failure to audit transactions between an individual and a committee, something far less challenging than auditing violations of the biennial limits.

#### PENALTIES (OR LACK THEREOF)

The illustrations of penalties from the previous examples are the norm. Typically, the FEC hands out what amounts to a slap on the wrist for the individual, if anything at all. Individuals that violate campaign finance laws are usually only subject to a monetary fine, generally equal to the amount of the excessive contribution, which is usually no larger than a few thousand dollars. These are relatively minor amounts for most donors.

Technically, the FEC can impose much harsher monetary penalties, and the Commission reserves the right to do so if the violation was intentional. But the FEC hardly ever levies such a fine, even when it has probable cause to believe a violation was intentional. For example, in the case of Richard Egan, the Commission found “reason to believe that [] Egan violated 2 U.S.C. § 441(a)(3) by contributing \$6,600 in excess of the \$25,000 annual limit for 1998, and by contributing \$30,100 in excess of the \$25,000 annual limit for 2000.”<sup>51</sup> The Commission had entered into a conciliation agreement with Egan, however, prior to the finding of “probable cause to

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49. M. Sue Wilson, FEC Negotiated Settlement (Dec. 10, 2004), *available at* <http://eqs.nictusa.com/eqsdocsADR/000031B2.pdf>.

50. *Id.*

51. Letter from David M. Mason, Vice-Chairman of the FEC, to Kenneth A. Grosse, at 5 (July 26, 2001), *available at* <http://eqs.nictusa.com/eqsdocsMUR/00000B83.pdf> (discussing the matter, MUR 5222, involving Richard Egan).

believe” and had also approved the conciliation agreement, therefore closing the matter.<sup>52</sup> In the end, Egan only paid a civil penalty of \$36,700 (the same amount as his excess contributions).<sup>53</sup>

#### THE BIDEN CASE PROBLEM

The FEC’s penalty structure reflects the reliance on campaigns to enforce the rules. The Biden case exemplifies how the FEC prefers to enforce individual contribution limit violations by targeting campaigns rather than the individual donors. In July 2010, it was reported that Vice President Biden’s 2008 presidential campaign owed more than \$219,000 for accepting an illegal in-kind campaign contribution and failing to return campaign contributions to individual donors who had exceeded the legal limit.<sup>54</sup> The amount of excessive contributions from individual donors alone totaled \$106,216.<sup>55</sup>

In fact, a search of the FEC Enforcement Query System reveals only a handful of cases—nine—in which the FEC has targeted individual donors for excessive contributions under the clause that limits aggregate biennial contributions for individuals: 2 U.S.C. 441a(a)(3). Seven of these cases predated the implementation of the BCRA during the 2004 election cycle. This appears to demonstrate part of the problem; if the FEC is reluctant to enforce violations by individual donors and almost exclusively pursues enforcement actions against single campaigns, it all but eliminates any precedence of accountability to the private donors themselves.

#### THE BOTTOM LINE

One of the biggest issues behind the FEC’s reluctance is that the FEC is structured to rely primarily on self-regulating campaigns. The myriad rules, requirements, and regulations set forth by campaign finance legislation—and FEC and court interpretations—make full compliance difficult. Similar to how the burden of compliance for consumer loans rests on the commercial banks rather than consumers, the burden of compliance to campaign finance regulations rests largely on campaigns rather than the individual donors. When

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52. *See id.*

53. Richard Egan, FEC Negotiated Settlement (Jul. 12, 2001), available at <http://eqs.nict.usa.com/eqsdocsMUR/00000B84.pdf>.

54. Robert Pear, *Biden Owes \$219,000 for Campaign Violations*, N.Y. TIMES, July 18, 2010, at A18.

55. *Id.*

compliance requires knowledge of a complex set of rules, expertise pays. Such information costs are dealt with more efficiently by relying on campaign workers who are involved day-in-and-day-out with fundraising activities. Of course, to take the analogy of bank regulation compliance further, the banks also ask for far more information about its customers than campaigns ask about their donors. Most banks would not accept a loan application where the customer had left her home address and employer off. Unfortunately, the FEC only requires a donor's best efforts.

In the following section, we discuss approaches that the FEC could adopt to provide for efficient auditing. As we show, the FEC's problems with detection are not trivial, with several hundred individual donors violating the biennial limit in any given election cycle.

#### IV. AUTOMATED METHODS TO DETECT VIOLATIONS OF THE BIENNIAL LIMIT

In theory, detecting donors in violation of biennial limits merely entails summing an individual donor's aggregate contributions to each type of recipient as outlined by the FEC. In practice, detecting violators is considerably more complicated. The FEC assigns a unique ID to all registered PACs that can be used to track each PAC's contribution across recipients and election cycles. But the FEC does not assign a unique contributor ID to individual donors. Thus, in order to sum the contributions made by each individual donor, one must first devise a way to assign each contribution record to the correct donor.

This can be accomplished by leveraging recent advances in automated entity resolution techniques that link records to individuals based on information disclosed to the FEC and state reporting agencies—i.e., names, addresses, occupations, and employers.<sup>56</sup> We employ a customized linkage algorithm written in R and MySQL designed specifically for linking contributions records across state and federal reporting agencies.<sup>57</sup> The software loads a reference record associated with each individual, queries the database for all records with key similarities, and applies a carefully refined set of decision rules to determine which of these contribution records were made by

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56. Bonica, *supra* note 10.

57. Both the software and access to the database will be made available by the authors upon request. For additional details, see *id.*

the same individual. This task is complicated by donors who fail to disclose the requested personal information in its entirety or do so inconsistently across records, while others relocate and change addresses once or more during a given period. The algorithm accounts for all of these inconsistencies with a combination of probabilistic matching and supervised learning methods. These computerized decision rules closely mirror a human coder but process records more efficiently.

The coding scheme performs well in tests. The linkage algorithm was validated using a training set composed of contribution records made by corporate board members who were meticulously hand-coded, aided by information on employment history the SEC made public. Corporate board members were selected as the training set because they are often among the most difficult cases to code, as they are typically affiliated with more than one institution and have multiple residences. In 57 percent of the cases, the algorithm correctly assigned a single ID to all contributions made by the individual. In 42 percent of the cases, the algorithm split contributions made by the individual into two or more groups (type 1 coding errors). But in only 13 percent of these cases did the algorithm fail to assign at least 90 percent of the individual's contributions to a single ID. Thus, in most of these cases, the algorithm correctly grouped most of the individual's records but left off a few hard-to-code stragglers. There were only two instances where the algorithm erroneously grouped contributions made by separate individuals (type 2 coding errors). Both cases involved family members associated with the same employer or organization. The first is William Gates, Jr. and his father William Gates, Sr., both of whom serve as directors for the Gates Foundation. The second case erroneously grouped members of the Walton family, heirs to the Wal-Mart fortune. Importantly, type 1 errors, which result in a loss of information, are far less problematic than type 2 errors, which have the potential to introduce bias. It is reassuring that even among the most difficult to code individuals, type 2 errors are exceedingly rare.

#### ASSESSING THE FREQUENCY AND EXTENT OF AGGREGATE BIENNIAL LIMIT VIOLATIONS

In order to assess the scope of the problem, we apply the record linkage software discussed above to the FEC database for individual contributors. After grouping together contribution records linked to

each individual donor, we begin the process of aggregating contributions from each individual in order to determine which donors appear to have exceeded the biennial limits. First, we must screen out contributions that do not count toward these limits. Examples of exempt contributions include those given to super PACs and other independent groups, noncontribution committees, and committees with nonfederal accounts.<sup>58</sup> We were also careful to prevent double counting by screening records that track earmarked contributions given through fundraising conduits or joint fundraising committees. Adhering to the accounting rules for biennial limits, we sum up the total number of donors in violation of the limits for candidates and contributors, as well as the sum total of dollars given in excess of the limit. The results are reported in Table 1 below.

The results show that violations of the biennial limit are remarkably common. In each election cycle since the BCRA went into effect, the number of donors in violation of the biennial limit ranges from several hundred to over a thousand. It appears that violations have increased sharply both in terms of numbers and severity in recent election cycles. The software detected 1802 possible violations for the 2011–12 election cycle, up from 714 in the 2007–08 cycle.<sup>59</sup> The estimated total amounts given in excess of the limits is on the rise as well, reaching \$29 million in the 2012 election cycle, an increase of 375% over the 2008 election cycle.

<b>Election Cycle</b>	<b>N Exceeding Limit to Candidates</b>	<b>Sum \$ Given in Excess to Candidates</b>	<b>N Exceeding Limit to Committees</b>	<b>Sum \$ Given in Excess to Committees</b>
<b>2003–2004</b>	159	\$1.27 M	559	\$9.27 M
<b>2005–2006</b>	175	\$1.32 M	593	\$7.05 M
<b>2007–2008</b>	180	\$1.48 M	534	\$6.25 M
<b>2009–2010</b>	196	\$2.54 M	626	\$11.1 M

58. See THE BIENNIAL CONTRIBUTION LIMIT, *supra* note 24 (providing a complete treatment of the accounting rules for which contribution types count towards the biennial limit).

59. A copy of the complete list of names and amounts is on file with the Willamette Law Review.



2011– 2012	337	\$4.93 M	1465	\$24.1 M
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**Table 1:** Number and size of violations of the biennial contribution limit by election cycle.

We emphasize that due to the inherent uncertainty involved in record linkage, the above numbers represent estimates of the number of violations, not official counts. Indeed, there is no guarantee that every individual identified by the computer coding process has in fact exceeded the biennial contribution limit. Some individuals may only appear to have exceeded the limit because of reporting errors such as double counting. In other instances, two individuals with similar personal information may be erroneously grouped together. A deliberate decision was made to calibrate the linkage algorithm to err on the side of caution by guarding against false positives at the cost of increased rates of type 1 coding errors. As a result, the reported figures represent a narrowed subset of cases for which there is little ambiguity about whether a given individual has exceeded the limit and, as a result, are most likely conservative estimates of the actual number of violators.

Applying the identity resolution software to the database of contributors is just an initial step in the process of detecting potential violations. Confirming that an individual has in fact exceeded the biennial limit would, at a minimum, require a thorough manual audit in order to ensure that the software has not erroneously combined records across multiple individuals and that no errors have occurred in the collection and reporting of the data. Given that a large-scale manual auditing of the potential set of violators is far too time consuming a task to undertake here, we must rely on the machine-audited results estimates for our initial analysis.<sup>60</sup>

It should be noted that even a close examination of the records would not always reveal whether contributors have exceeded the biennial limit. In some cases, the names, addresses, and occupational information of two individuals mirror one another so closely that they are indistinguishable even after close scrutiny by either a human or machine coder. The most common circumstance leading to this outcome is when a father and son share a forename, address, profession, and employer, which is not uncommon for family owned

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60. We include in the appendix an example of a hand-checked set of records in order to illustrate the process.

businesses.<sup>61</sup> This speaks to a deep-rooted problem with the FEC's disclosure model. Insofar as auditing FEC records can take us, in many cases it remains nearly impossible to make a clear determination that a violation has occurred based solely on the publicly disclosed information the FEC makes available. Confirming that a set of contribution records originated from a single individual would require further investigation of the matter involving gathering additional information beyond what is included in the FEC records, much of which is not publically available. In the remaining sections, we consider more aggressive solutions for dealing with the problem of detecting and enforcing campaign finance laws.

## V. SUGGESTED REFORMS

The FEC could greatly increase detection by adopting automated entity resolution, auditing to identify potential violations, and implementing a manual auditing scheme to confirm that a violation has occurred. Compliance via self-auditing might increase significantly if the FEC signaled its intent to enforce the biennial limit by publicly issuing fines to a few dozen repeat offenders. The allure of such an approach stems from the negligible costs of implementation and the absence of either required changes to federal law or expansions of agency authority. Despite this, the difficulties with record-linkage and the ease with which violators can manipulate disclosure in order to evade detection make this at best a partial solution to a greater problem.

A comprehensive solution to the problem of detection would require donors to register with the FEC, which could then issue a unique individual identification number to each donor. This would accomplish three things. First, it would take advantage of the current penalty system and shift the responsibility of compliance from individuals to campaigns by helping to facilitate campaigns in screening for contributions from individuals who have exceeded the biennial contribution limits. Although the FEC's regulatory model of relying on self-auditing campaigns to ensure that their contributors are in compliance of the \$2,400 individual limit has been successful, applying a similar self-auditing scheme to biennial limit violations would require a unique identifier for each contributor that campaigns could use to track past contributions.

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61. See Appendix 2 (describing an example based on the Oden family).

Second, assigning unique contributor IDs would also help the FEC enforce the biennial limit. The FEC's failure to enforce the limit signals to campaigns and individuals that violations of the biennial limit will not be met with penalties. The FEC may be reluctant to enforce the limit because tracking contributions from individuals across candidates and committees is time consuming and verifying that all the contributions in fact originated from the same person could prove costly. Widespread enforcement of the law would optimistically yield tens of millions in fines (paid to the Treasury, not the agency) but might place a strain on the FEC's limited resources. The FEC has demonstrated a preference for issuing large, lump-sum fines to campaigns—Biden's presidential campaign being a good example. If filing complaints and collecting fines were made more economical by simplifying the process, the FEC may be less likely to shirk its enforcement responsibilities.

Third, this solution would prevent donors from exceeding the biennial limit by providing to campaign staffs and individual donors the type of information needed to track giving and detect potential violations. This could be as simple as a computer program that warns donors when they near their limits, similar to those implemented by credit card companies. Making this type of system available to campaigns would provide them with the opportunity to communicate with donors if a potential violation is detected and, if needed, issue a reimbursement. At a minimum, this solution helps by making donors more aware of the law, and it could further aid donors by monitoring their giving.

Not only is the current process of matching individuals using their name, address, and occupation laborious, the provided information is not always sufficient to completely eliminate uncertainty about whether a contribution record truly belongs to an individual.<sup>62</sup> Screening records for violations is more difficult than it needs to be. The FEC already assigns a unique identifier to PACs and other political committees that give to federal candidates. As such, if committees were also subject to biennial contribution limits, detecting violations would be as easy as summing up the committee's total contributions made during the election cycle. Likewise, if the FEC assigned a unique contributor ID to individual contributors, enforcing the biennial limit would require much less effort.

A unique identifier for donors would provide campaigns the

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62. See Appendix A–B.

means to screen contributors. Keeping records of the amount a donor gave to a single campaign is manageable and provides important information for future fundraising efforts, but tracking each donor's contributions made during the election cycle would be a far more cumbersome task. With a unique identifier for donors, it could be as easy as checking a bank balance. The FEC could implement a unique identifier as a key linked to the donor's social security number. Or, alternatively, the Commission could assign the identifier similar to how banks issue account numbers to their customers.

## VI. POTENTIAL ISSUES WITH SUGGESTED REFORMS

Issuing donor IDs would require donors to register with the FEC, possibly through campaigns. Given the rigorous requirements associated with registering to vote, it is puzzling that there is not already a registration process in place for individuals who want to contribute to a campaign. Putting aside normative concerns, implementing and maintaining a registration system for donors could impose substantial costs on the agency. Despite the growing number of violations, it is unclear whether the scope of the problem would justify the costs, especially given the choice to structure donations so as to attribute excess contributions to one's spouse and the expanded opportunities to give in unlimited amounts to super-PACs and other soft-money committees following the Supreme Court's ruling in *Citizens United*.<sup>63</sup> In this view, it might make more sense to implement the automated coding scheme as a cost-efficient way of enforcing the biennial limit, at least in the short term.

Earlier, we assumed that the biennial limit is not enforced because the FEC lacks the enforcement capability, and we also gave donors the benefit of the doubt. In other words, we assumed that no one was intentionally attempting to evade detection. The solution becomes more difficult if the FEC is simply unable to efficiently implement the procedures needed to track donors, or if donors are gaming disclosure. Even if the FEC were to issue IDs to individual donors, there is still the issue of penalties and whether the FEC would enforce the law and penalize donors.

There may also be objections to a registration process that issues unique contributor IDs because of First Amendment and privacy concerns. In the wake of the Supreme Court's recent approach to

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63. *Citizens United v. FEC*, 558 U.S. 310 (2010).

campaign finance issues, it is very likely that individuals and organizations would challenge a campaign donor registration on First Amendment grounds. But it is worth noting again that even though voting is *the* cornerstone right, we make citizens jump through hoops—evidenced by a registration process—in order to exercise that right. Moreover, actual voter fraud is very rare,<sup>64</sup> whereas money fraud is extremely prevalent.

#### VII. CALL FOR GREATER ENFORCEMENT

It not clear why the FEC has not streamlined their system of identifying contributors, or why so many individuals who violate the biennial limit go unnoticed and unpunished. However, believing that the FEC is an effective agency, it is clear that we must call for greater FEC oversight and enforcement of federal election laws. In cases in which the FEC cherry-picks which statutes to enforce, there should be a strong push to hold the Commission accountable. Any violation of the law, no matter how large or how small, is a punishable offense. With billions being spent on campaigns every election, the FEC needs to step up and be the watchdog that the American electorate deserves.

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64. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, *THE TRUTH ABOUT VOTER FRAUD 7* (2007), *available at* <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>.









































