FEDERAL ELECTION COMMISSION

Statement of Commissioner Hans A. von Spakovsky

Final Rule on Definition of Agent for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures

January 23, 2006

We have an obligation to promulgate regulations that are clear, unambiguous, and easily understood by everyone who participates in the campaign process. The worst thing we can do is issue complex, ambiguous rules that make it impossible for candidates and volunteers to know what actions are legally valid, and which are not. The Bipartisan Campaign Reform Act of 2002 ("BCRA") charts a vary narrow course between two overarching objectives that can conflict if we are not extremely careful in how we enforce the law – on the one hand, protecting our election process from corruption that can damage our democracy and the confidence of the public in the legitimacy of our governance – yet on the other hand, encouraging citizens to participate in our elections not just by going to the polls and voting, but participating in the campaign process itself – helping the candidates they believe will govern the nation best.

The dissenters from the Constitutional Convention were adamant that we needed a bill of rights to prevent the slow imposition of tyranny from an all powerful federal government, a government today, including the FEC, which has more power over its citizens than the Founders could have ever imagined. The associational rights of our citizens, "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," was considered so important, that it was written into the First Amendment of the Bill of Rights.

The regulations we are about to issue on the definition of agent have a direct bearing on the associational rights of our citizens. The Commission has struck the correct and proper balance between the intent of BCRA to foster a clean election process and our obligation to protect the constitutional rights of citizens to volunteer to participate in the campaign process.

Defining an agent as "any person who has actual authority, either express or implied" to perform certain actions, provides the wide coverage we need to enforce BCRA against individuals in campaigns who are acting on behalf of their candidates. It

is a clear and unambiguous rule, easily understood and followed, and it will not allow circumvention of the law or create an appearance of corruption.

This definition is also fully in accord with the district court's opinion in the *Shays* litigation over the regulations issued by the FEC. The court stated that "there is nothing that demonstrates that the Commission has taken an impermissible construction of the term…There is nothing in the record that this interpretation 'unduly compromises' FECA and Plaintiffs have not specifically explained why or if they believe the regulation has such an effect on the coordinated communications regulation." *Shays v. Federal Election Commission*, 337 F. Supp.2d 28, 71-72 (D.D.C. 2004).

Critics who want to add "apparent authority" to the definition of agent are wrong when they claim it is required to carry out the purposes of the statute. Apparent authority is an amorphous, confusing legal standard that depends not on the clearly demonstrated issue of whether an agent received authority from his principal to act on his behalf, but whether some third party had some perception, mistaken or not, that a particular campaign volunteer had the authority to act on behalf of the principal. It is a standard that infringes on the basic constitutional rights of association and is offensive to democratic traditions whereby citizens are free to lend their support to political causes of their choosing. It is a standard that should not be applied to the political context, which is made up of relatively few paid agents and employees, and large numbers of citizen volunteers – the exact opposite of the commercial context where it is normally used.

Citizens do not need the consent of a candidate or elected official to raise money for their chosen causes, and we should not issue a rule that says a citizen can relinquish his associational rights without his consent because of some misperception by a third party, while no candidate should be held liable for an act unless he has assented, either in an express or implied manner, to the act. An apparent authority standard would impose such results. I do not believe striking fear into volunteers and campaign workers who work with candidates is worth catching a miniscule number of cases with an "apparent authority" standard – not a single example of which, by the way, the plaintiffs in the *Shay*s litigation or the critics who testified at our prior hearing were able to find or cite to.