Record

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Notice of Proposed Rulemaking on Coordinated Communications

On October 8, 2009, the Commission approved a Notice of Proposed Rulemaking (NPRM) proposing amendments to portions of its three-part regulatory test for coordinated communications. 11 CFR 109.21. The NPRM also proposes adding a safe harbor to address certain public communications in which federal candidates endorse or solicit support for non-profit entities, as well as a safe harbor for certain commercial and business communications. Proposed 11 CFR 109.21(i) and (j). The Commission is undertaking this rulemaking to comply with the ruling in *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*), that invalidated aspects of the rules defining coordinated communications.

Background

As part of its rulemaking to implement the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission devised a three-prong test for determining whether a communication has been coordinated with a candidate or party, and thus

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EMILY's List v. FEC

On September 18, 2009, the U.S. Court of Appeals for the District of Columbia found that three Commission regulations that implement how nonconnected federal political committees may allocate funds to finance certain activities that influence both federal and non-federal elections, and that clarify when funds obtained in response to solicitations are contributions under the Federal Election Campaign Act (the Act), violate the Constitution and are in excess of the Commission's statutory authority. The court found these regulations to be invalid and ordered the district court to vacate the challenged regulations.

Background

EMILY's List is a nonconnected political committee registered with the FEC. In January 2005, EMILY's List filed suit in the U.S. District Court for the District of Columbia, asserting a facial challenge to regulations promulgated by the FEC to implement provisions of the Act.

The regulations at issue established a new rule for when funds received in response to certain solicitations must be treated as "contributions" under the Act and thereby

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must be subject to federal limitations and prohibitions. The regulations also modified the Commission's rules regarding how political committees may allocate funds between federal and nonfederal accounts.

Under current FEC rules, nonconnected political committees that maintain both federal and nonfederal accounts may allocate administrative expenses, costs of generic voter drives and costs of public communications that refer to a political party, but not to specific candidates, with a minimum of 50 percent federal funds.

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(The remainder may be allocated to the nonfederal account). 11 CFR 106.6(c). Public communications and voter drives that refer to one or more clearly identified federal candidates, but not to any nonfederal candidates, must be financed with 100 percent federal funds. 11 CFR 106.6(f)(1). Public communications and voter drives that refer to one or more clearly identified nonfederal candidates but do not refer to any federal candidates may be financed with 100 percent nonfederal funds. 11 CFR 106.6(f)(2).

With regard to solicitations, Commission regulations state that funds received in response to a solicitation must be considered "contributions" under the Act if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate. 11 CFR 100.57(a). Likewise, if a solicitation refers to a clearly identified federal candidate and a political party, but not to a clearly identified nonfederal candidate, all funds received in response are considered contributions. 11 CFR 100.57(b)(1). In contrast, however, if the solicitation refers to one or more clearly identified nonfederal candidates, in addition to a clearly identified federal candidate, at least 50 percent of the funds received must be treated as contributions under the Act, regardless of whether the solicitation also refers to a political party. 11 CFR 100.57(b)(2).

EMILY's List sought to enjoin enforcement of the regulations, alleging that each was in excess of the Commission's authority, was arbitrary and capricious, was promulgated without adequate notice under the Administrative Procedure Act (APA) and violated the First Amendment to the Constitution.

Court Decision

The court held that Commission regulations at 11 CFR 106.6(c), 106.6(f) and 100.57 violate the First Amendment and exceed the FEC's authority under the Act.

In its discussion of the First Amendment, the court referred to *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), which found that campaign contributions and expenditures constitute "speech" and, therefore, fall under the protection of the First Amendment. The court noted that in *Davis v. FEC* 128 S. Ct. 2759, 2773 (2008), it was decided that limiting contributions and expenditures in an effort to equalize the political field is not a "legitimate government interest" and, therefore, cannot be the reasoning behind these types of regulations. The court went on to state that the only legitimate government interest that allows for the restriction of campaign finances is preventing corruption or the appearance of corruption. The appeals court stated that that government interest has only been applied to contributions to candidates and parties because those two groups pose the greatest risk of *quid pro quo* corruption. *Buckley*, 424 U.S. at 26-27; *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981).

The court stated that, since the regulations in question do not address candidates, parties or for-profit corporations, which the court said are the only entities the Supreme Court has allowed these types of limits to be placed on, the appeals court had to determine how to apply the above principles to non-profit entities. The court determined that "the central issue turns out to be whether independent non-profits are treated like individual citizens (who under *Buckley* have the right to spend unlimited money to support their preferred candidates) or like political parties (which under *McConnell* [*v. FEC*, 540 U.S. 93 (2003),] do not have the right to raise and spend unlimited soft money)." The court then made a distinction between

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three different types of non-profits and stated how their contributions and expenditures can be regulated.

First, the court stated, there are non-profits that make no contributions, but only expenditures for political activities such as advertisements and GOTV activities. In the decision, the court stated that "non-profit entities, like individual citizens, are constitutionally entitled to raise and spend unlimited money in support of candidates for elected office—with the narrow exception that, under *Austin*, the Government may restrict to some degree how non-profits spend donations received from the general treasuries of for-profit corporations or unions."

The court stated that a second category of non-profits are those that make contributions to candidates, but no expenditures. The court stated that these groups can be limited in the contributions they receive.

The court stated that a third category, which includes EMILY's List, consists of those non-profits that make both contributions and expenditures. According to the court, such groups "are entitled to make their expenditures…out of a soft-money or general treasury account that is not subject to source and amount limits," as long as they make their contributions from a hard-money account. The court did not interpret *McConnell* as permitting the types of soft-money restrictions currently placed on political parties to be applied to non-profits like EMILY's List.

The court then held that sections 106.6(c), 106.6(f) and 100.57 are not closely drawn to meet an important government interest and would, therefore, be struck down. Among other things, the court stated that "non-profits are constitutionally entitled to pay 100 percent of the costs of…voter drive activities [and generic campaign activity] out of their soft-money accounts."[1] The court reached the same conclusion for ads that refer to a federal candidate.[2] It further stated that the solicitation regulation unconstitutionally prohibits a non-profit from stating that the money it is raising will be used to support its preferred candidate.[3] The court also held that the regulations exceeded the Commission's statutory authority because, the court said, they required non-profits to use hard money for activities that were exclusively non-federal. The court found the regulations to be invalid and ordered the district court to vacate the challenged regulations.

Judge Brown concurred in the result reached by the two judges in the majority because she agreed that the regulations exceeded the Commission's authority under the Act. However, she disagreed with the majority's First Amendment analysis, and she stated that the court's decision to reach the constitutional questions was unnecessary.

U.S Court of Appeals for the District of Columbia, 08-5422.

—Katherine Wurzbach

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[1] 11 CFR 106.6(c) requires that nonconnected political committees maintaining both a federal and a nonfederal account allocate administrative expenses, costs of generic voter drives and costs of public communications that refer to a political party, but not to a specific candidate, with a minimum of 50 percent federal funds.

[2] 11 CFR 106.6(f)(1) requires that public communications and voter drives that refer to one or more clearly identified federal candidates, but not to any nonfederal candidates, must be financed with 100 percent federal funds.

[3] 11 CFR 100.57 states that funds received in response to a solicitation must be considered federal "contributions" under the Act if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate.

Reports

Massachusetts Special Election Reporting: Senate Vacancy

Massachusetts will hold a Special Election to fill the vacant U.S. Senate seat held by the late Edward M. Kennedy. The Special Primary will be held on December 8, 2009, and the Special General will be held January 19, 2010.

Candidate committees involved in this election must follow the reporting schedule on page 4. Please note that the reporting period for the Post-General election report spans two election cycles. For this report only, authorized committees must use the Post-Election Detailed Summary Page rather than the normal Detailed Summary Page.

PACs and party committees that file on a semi-annual schedule and participate in this election must also follow the schedule on page 4. PACs and party committees that file monthly must continue to file according to their regular filing schedule.

Timely Filing for Paper Filers

Registered and Certified Mail. Reports sent by registered or certified mail must be postmarked on or before the mailing deadline to be considered timely filed. A committee sending its reports by registered or certified mail should keep its mailing receipt with the U.S. Postal Service (USPS) postmark as proof of filing because the USPS does not keep complete records of items sent by certified mail. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

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Reports

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Overnight Mail. Reports filed via overnight mail[1] will be considered timely filed if the report is received by the delivery service on or before the mailing deadline. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports. 2 U.S.C. §434(a)(5) and 11 CFR 104.5(e).

Other Means of Filing. Reports sent by other means—including first class mail and courier—must be received by the FEC before the Commission's close of business on the filing deadline. 11 CFR 100.19 and 104.5(e).

Forms are available for downloading and printing at the FEC's web site (http://www.fec.gov/info/forms.shtml) and from FEC Faxline, the agency's automated fax system (202/501-3413).

Filing Electronically

U.S. Senate committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial copy of their reports with the Commission in order to speed disclosure.

For other political committees, reports filed electronically must be received and validated by the Commission by 11:59 p.m. Eastern Time on the applicable filing deadline. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission's validation program by the filing deadline will be considered nonfilers and may be subject to enforcement actions, including administrative fines.

[1] *"Overnight mail" includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service's on-line tracking system.*

Massachusetts Senate Special Election Reporting

Committees Involved Only in the Special Primary (12/08/09) Must File:

	Close of Books[1]	Reg./Cert./Overnight Mailing Deadline	Filing Deadline
Pre-Primary	November 18	November 23	November 26[2]
Year-End	December 31	January 31[2]	January 31[2]

Committees Involved in Both the Special Primary (12/08/09) and the Special General (01/19/10) Must File:

	Close of Books[1]	Reg./Cert./Overnight Mailing Deadline	Filing Deadline
Pre-Primary	November 18	November 23	November 26[2]
Pre-General & Year-End[3]	December 31	January 4	January 7
Post-General	February 8	February 18	February 18
April Quarterly	March 31	April 15	April 15

[1] This date indicates the end of a reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered up through the close of books for the first report due.

[2] Notice that the registered/certified and overnight mailing deadline falls on a weekend or federal holiday. The report should be postmarked on or before that date.

[3] Committees should file a consolidated Pre-General and Year-End Report by the filing deadline of the Pre-General Report.

48-Hour Contribution Notices

Note that 48-hour notices are required of the participating candidate's principal campaign committee if it receives any contribution of $1,000 or more per source between November 19, 2009, and December 5, 2009, for the Special Primary Election, and between December 31, 2009, and January 16, 2010, for the Special General Election.

24- and 48-Hour Reports of Independent Expenditures

Political committees and other persons must file 24-hour reports of independent expenditures that aggregate at or above $1,000 between November 19, 2009 and December 6, 2009, for the Special Primary Election, and between December 31, 2009, and January 17, 2010, for the Special General Election. This requirement is in addition to that of filing 48-hour reports of independent expenditures that aggregate $10,000 or more during a calendar year. The period for 48-hour reports of independent expenditures runs from January 1, 2009, through November 18, 2009, in connection with the Special Primary Election, and January 1, 2009, through December 30, 2009, for the Special General Election.

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Electioneering Communications

The 30-day electioneering communications period in connection with the Special Primary Election runs from November 8 through December 8, 2009. The 60-day electioneering communications period in connection with the Special General Election runs from November 20, 2009, through January19, 2010.

Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of $16,000 during the special election reporting period (see reporting schedule chart on page 4). For more information on these requirements, see the March 2009 *Record.*

—Elizabeth Kurland

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results in an in-kind contribution. The test considers:

- The source of payment;
- The content of communication; and
- The conduct of those involved.

To be considered coordinated, the communication must satisfy all three prongs of the coordinated communication test.

In *Shays III Appeal*, the court invalidated a portion of the content prong of the test. To satisfy the content prong a communication must be:

- An electioneering communication;
- A public communication that republishes campaign materials;
- A public communication that expressly advocates; or
- A public communication that refers to a political party or clearly identified federal candidate and is publicly distributed within 90 or 120 days of the primary or general election.[1]

The appeals court concluded that the Commission's decision to apply "express advocacy" as the only content standard outside the 90-day and 120-day windows does not "rationally separate election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays III Appeal*, 528 F.3d at 926.

In *Shays III Appeal*, the Court of Appeals also invalidated a portion of the conduct prong of the test. To fulfill the conduct prong, the communication must be created, produced, or distributed:

- At the request or suggestion of;
- After material involvement by; or
- After substantial discussion with, a candidate, a candidate's authorized committee, or a political party committee;

or

- The person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce, or distribute the communication; and
- The commercial vendor provided services to the clearly identified candidate, that candidate's authorized committee, the candidate's opponent or his or her authorized committee or a political party committee referred to in the communication within the previous 120 days; and
- The commercial vendor conveys material information about the campaign or needs of the candidate to the person paying for the communication;

or

- The communication is paid for by a person or the employer of a person, who has previously been an employee or an independent contractor of a candidate or the candidate's authorized committee, the opponent or the opponent's authorized committee, or a political party committee during the 120 days before the purchase or distribution of the communication; and
- The person must convey material information about the campaign or needs of the candidate to the person paying for the communication.

The first three elements were not at issue in *Shays III Appeal*. The *Shays III Appeal* court invalidated the 120-day period of time during which a common vendor's or former campaign employee's relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR 109.21(d)(4) and (d)(5). *Shays III Appeal*, 528 F.3d at 928-29.

Proposals

In response to the court's decision, the Commission has proposed four possible modifications to the existing content standards in 11 CFR 109.21:

1) Adopt a content standard to cover public communications that promote, attack, support or oppose (PASO) a political party or a clearly identified federal candidate. This alternative would amend 11 CFR 109.21(c) by replacing the express advocacy standard with the PASO standard. As part of its consideration of a PASO content standard, the Commission is also considering whether it should adopt a definition of PASO. The NPRM sets

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[1] *These are the revised time periods the Commission promulgated in 2006 in response to Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005).*

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forth two possible approaches to defining PASO. Alternative A provides a specific definition for each of the component terms that would apply when any of those terms is used in conjunction with one or more of the other terms. Alternative B applies a multi-prong test to determine whether a given communication PASOs. See Alternatives A & B at Proposed 11 CFR 100.23.

2) Adopt a content standard to cover public communications that are the "functional equivalent of express advocacy." The proposed standard specifies that a communication is the "functional equivalent of express advocacy" if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against" a clearly identified federal candidate. See *FEC* v. *Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007).
3) Clarify the existing express advocacy content standard by providing a cross-reference to the express advocacy definition at 11 CFR 100.22.
4) Adopt a standard that pairs a public communication standard with a new conduct standard (the "Explicit Agreement" standard). This would require a formal or informal agreement between a candidate, candidate's committee or political party committee and the person paying for the public communication. Either the agreement or the communication must be made for the purpose of influencing a federal election.

In response to the court's decision regarding the conduct prong, the Commission has proposed three alternatives for the time periods specified in the common vendor and former employee conduct standards:

1) Retain the current 120-day period with the Commission providing additional justification for that time period. The *Shays III Appeal* court did not hold that the 120-day period was inherently improper, but rather that the Commission "must support its decision with reasoning and evidence…" *Shays III Appeal*, 528 F.3d at 929.
2) Amend 11 CFR 109.21(4) and (5) by deleting the phrase "the previous 120 days" and replacing it with "the two-year period ending on the date of the general election for the office or seat the candidate seeks." The two-year period corresponds with the election cycle for the House of Representatives, the most common election cycle of those regulated by the Commission.
3) Replace the existing 120-day period with a "current election cycle" period. "Current election cycle" is defined in current Commission regulations as beginning "on the first day following the date of the previous general election for the office or seat which the candidate seeks…The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held." 11 CFR 100.3(b).

Other issues. Although not included in the *Shays III Appeal* ruling, the Commission is also considering adding a safe harbor to 11 CFR 109.21(i) to address certain public communications in which federal candidates endorse or solicit support for non-profit entities organized under 501(c)(3) of the Internal Revenue Code, or for public policies or legislative proposals espoused by those organizations. This proposed additional safe harbor would, under certain circumstances, enable a federal candidate to participate in such a public communication, without the communication being treated as an in-kind contribution to the candidate.

The Commission is also considering adding a new safe harbor at 11 CFR 109.21(j) for certain commercial and business communications. This proposed safe harbor would apply to any public communication in which a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made prior to the candidacy in terms of the medium, timing, content and geographic distribution.

The Commission also seeks comment on whether it should issue an NPRM on the party coordinated communication regulation at 11 CFR 109.37, since that provision has a content prong that is substantially similar to the one for "coordinated communications" in 11 CFR 109.21(c). Also, the common vendor and former employee conduct standards of 11 CFR 109.21(d) that were struck down in *Shays III Appeal* are incorporated by reference in the party coordinated communication regulations. See 11 CFR 109.37(a)(3).

Comments

The NRPM was published in the October 21, 2009, *Federal Register* and is available on the FEC web site at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf. The Commission strongly encourages comments, especially those that include empirical data.

All comments must be received on or before January 19, 2010. Comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, fax or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent

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to CoordinationShays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E St. NW, Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends.

A public hearing on the proposed rules will be held at a later date in the Commission's ninth floor hearing room, 999 E St., NW, Washington, DC.

—Katherine Wurzbach

Notice of Proposed Rulemaking on Federal Election Activity

On October 8, 2009, the Commission approved a Notice of Proposed Rulemaking seeking comment on certain aspects of federal election activity (FEA). The rulemaking is in response to the court of appeals' 2008 holding in *Shays v. FEC* ("*Shays III*") which found the Commission's regulatory definitions of "voter registration activity" and "get-out-the-vote (GOTV) activity" contravened the purpose of the Bipartisan Campaign Reform Act of 2002 (BCRA) by creating loopholes that allowed the use of soft money for federal elections. The court remanded the regulations to the FEC "to issue regulations consistent with the Act's text and purpose."

Voter Registration Activity

Under current regulations, "voter registration activity" is defined as "contacting individuals by telephone, in person, or by other individualized means in order to assist them in registering to vote." 100.24(a)(2). The court of appeals in *Shays III* found this definition to be deficient for two reasons. First, it requires that the party contacting potential voters actually "assist" them in voting or registering to vote, thus excluding efforts that actively encourage people to vote or register to vote and dramatically narrowing which activities are covered. Second, the definition requires the contact to be "by telephone, in person, or by other individualized means," thus entirely excluding mass communications targeted to many people. The court concluded that these elements of the definition created loopholes in violation of BCRA's purpose and allowed the use of soft money to influence federal elections.

To comply with the court's decision, the Commission proposes amending the definition of "voter registration activity" to include "encouraging or assisting potential voters in registering to vote." The proposed definition attempts to close both loopholes identified by the court and would cover activities such as:

- Providing an individual with a flier that reads "Register to Vote" and that includes the URL and address of the appropriate state or local office handling voter registration;
- Providing an individual with a voter registration form and verbally encouraging the recipient to fill out the form and submit it to the appropriate state or local office; or
- Mailing voter registration forms to individuals and encouraging them, in a cover letter, to fill out and submit the forms in advance of the registration deadline.

The Commission seeks comment on whether the proposed defini-

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PACronyms, Other PAC Publications Available

The Commission annually publishes an alphabetical listing of acronyms, abbreviations and common names of political action committees (PACs).

For each PAC listed, the index provides the full name of the PAC, its city, state, FEC identification number and, if not identifiable from the full name, its connected, sponsoring or affiliated organization.

This index is helpful in identifying PACs that are not readily identified in their reports and statements on file with the FEC.

To order a free copy of PACronyms, call the FEC's Disclosure Division at 800/424-9530 or 202/694-1120.

PACronyms is also available on diskette for $1 and can be accessed free on the FEC web site at www.fec.gov.

Other PAC indexes, described below, may be ordered from the Disclosure Division. Prepayment is required.

- An alphabetical list of all registered PACs showing each PAC's identification number, address, treasurer and connected organization ($13.25).
- A list of registered PACs arranged by state providing the same information as above ($13.25).
- An alphabetical list of organizations sponsoring PACs showing the name of the PAC and its identification number ($7.50).

The Disclosure Division can also conduct database research to locate federal political committees when only part of the committee name is known. Call the telephone numbers above for assistance or visit the Public Records Office in Washington at 999 E St. NW.

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tion of "voter registration activity" adequately addresses the concerns of the *Shays III* court, including closing the loopholes identified by the court. The Commission also asks whether the proposed definition provides sufficient guidance as to which activities are covered and which are not.

GOTV

Commission regulations define GOTV activity as "contacting registered voters by telephone, in person or by other individualized means to assist them in voting." 100.24(a)(3). As it did with the definition of voter registration activity, the court of appeals in *Shays III* found the definition of GOTV activity to be deficient in that it required actual assistance by individualized means, thereby creating two loopholes in the definition that violated BCRA's purpose. The Commission proposes revising the definition of GOTV activity by eliminating the "assistance" and "individualized means" requirements from the current definition. Specifically, the Commission proposes redefining GOTV activity as "encouraging or assisting potential voters to vote." The proposed definition would cover such activities as:

- Driving through a neighborhood in a sound truck that plays a message urging listeners to "Vote next Tuesday at the Main Street community center";
- Mailing a flier to registered voters with the date of the election but not the location of polling places or their hours of operation; and
- Making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day.

The Commission seeks comment on whether the proposed definition of "GOTV activity" adequately addresses the concerns of the *Shays III* court, including closing the loophole sidentified by the court. The Commission also asks whether the proposed definition provides sufficient guidance as to which activities are covered and which are not.

Exclusion for Public Communications Relating to State and Local Elections

The Commission's proposed definition of GOTV also specifically excludes any "public communication that refers solely to one or more clearly identified candidate for state or local office and notes the date of the election." The Commission seeks comments on whether the proposed exclusion correctly implements the statutory definition.

Exemption for Mere Exhortations

The *Shays III* court seemingly acknowledged that exclusions to the definitions of "voter registration activity" and "GOTV activity" for "routine or spontaneous speech-ending exhortations" and "mere exhortations...made at the end of a political event or speech" would be permissible. Therefore, the Commission's proposed definitions of voter registration activity and GOTV activity exempt speeches or events that include exhortations to vote or to register to vote that are incidental to the speech or event. This exemption would not inoculate speeches or events that otherwise qualify as FEA under the proposed definitions, such as a speech given 60 days before an election that provides listeners with information on how to register to vote but that also includes an exhortation to register to vote. The Commission asks if has properly established the scope of the proposed exemption and whether it provides clear guidance as to the activities exempted from the definitions of voter registration activity and GOTV activity.

Other Issues

The Commission also asks whether it should explicitly supersede, in whole or in part, Advisory Opinion (AO) 2006-19 in light of *Shays III* and the proposed definitions for "voter registration activity" and "GOTV activity." In *Shays III*, the court of appeals cited AO 2006-19 in which the Commission found that letters and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming election did not count as GOTV activity in part because the communications did not provide individualized assistance to voters. The court held that this definition of GOTV activity was contrary to the statute, but did not address whether communications made solely in connection with a nonfederal election may be excluded from the definition of GOTV activity or FEA. The Commission seeks comment on whether it should supersede AO 2006-19 and, if so, whether it should explicitly address the circumstances involved in the AO either in the regulation or its E&J.

Voter Identification and GOTV Activity in Connection with a Nonfederal Election

In 2006, the Commission adopted an Interim Final Rule that revised the definition of "in connection with an election in which a candidate for federal office appears on the ballot." Prior to the revision, the definition covered municipalities, counties and states that conducted separate, nonfederal elections. The Interim Final Rule excluded purely nonfederal voter identification and GOTV activity from the definition of "in connection with an election in which a candidate for federal office appears on the ballot." It specifically excluded voter identification or GOTV activities that were "in connection with a nonfederal election that is held on a date separate from a date of any federal election" and that referred exclusively to:

- Nonfederal candidates participating in the nonfederal election, provided the nonfederal candi-

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dates are not also federal candidates;
- Ballot referenda or initiatives scheduled for the date of the nonfederal election; or
- The date, polling hours and locations of the nonfederal election.

This component of the "in connection with an election" sunsetted in 2007, and subsequent attempts by the Commission to reintroduce the rule were not completed. The Commission proposes adding 11 CFR 100.24(c)(5) to reintroduce much of the exclusion originally contained in the Interim Final Rule. The proposed rule would exclude from the definition of FEA any voter identification activities or GOTV activities that are "solely in connection with a nonfederal election held on a date separate from any federal election." The proposed rule is based on the premise that voter identification and GOTV activity for nonfederal elections held on a different date from any federal election will have no effect on subsequent federal elections. The Commission asks whether voter identification and GOTV efforts in connection with a nonfederal election have any meaningful effect on voter turnout in a subsequent federal election, or otherwise confer benefits on federal candidates. The Commission specifically requests comments supplemented by empirical data.

Comments

All comments must be in writing and addressed to Amy L. Rothstein, Assistant General Counsel, and submitted on or before Friday, November 20, 2009. Comments may be submitted in electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to FEAShays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft word (.doc) format. Faxed comments should be sent to 202-219-3923 with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW, Washington, D.C. 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends. The Commission will hold a hearing on these proposed rules on Wednesday, December 16, 2009, at 9:30 a.m. in the Commission's ninth floor hearing room, 999 E Street NW, Washington D.C. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

Additional Information

The Notice of Proposed Rulemaking on Federal Election Activity was published in the October 20, 2009, *Federal Register* and is available on the FEC web site at http://www.fec.gov/pdf/nprm/fea_definition/2009/notice_2009-22.pdf.

—Zainab Smith

Advisory Opinions

AO 2009-13
Political Committee Status of Consultants Serving LLCs Who Make Independent Expenditures

A communications consulting company established as a Limited Liability Company (LLC) may serve as a commercial vendor to a single-member, natural-person LLC that makes independent expenditures concerning federal elections or candidates without triggering political committee status. This consulting company may also serve as a commercial vendor to two or more of these LLCs without triggering political status assuming that it does not facilitate communications between the LLCs and does not convey information from one LLC to another.

Background

Black Rock Group (BRG) is an LLC that assists its clients, including CEOs, elected officials and Fortune 500 companies, in building public policy campaigns through communication, "earned media" and grassroots messaging. BRG intends to extend these strategic communication and general consulting services to single-member, natural-person LLCs established for the sole purpose of making independent expenditures that expressly advocate the election or defeat of one or more federal candidates.

The LLCs that BRG plans to work with will all be established for the sole purpose of making independent expenditures supporting or opposing federal candidates. BRG will only work with an LLC if it consists of a sole member and manager, is treated as a disregarded entity (not as a corporation) for federal income tax purposes, receives all capital contributions solely from the personal funds of its only member, accepts no donations from any other individual or entity and engages in no for-profit business activities.

Each single-member, natural-person LLC will spend more than $1,000 per calendar year on independent expenditures expressly advocating the election or defeat of one or more federal candidates via television, radio, direct mail, phone banks and print ads. In no case will any communication be funded by more than one LLC. However, in some cases more than one LLC may make independent expenditures for or against the same federal candi-

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date. Neither BRG nor its LLC clients nor any other vendor providing services to each LLC will coordinate any communications with any federal candidate or political party committee. The same BRG personnel will service all of the LLCs, and BRG will manage other consultants such as pollsters, media production and placement companies and other communication vendors who will provide services to each LLC. BRG will not have firewalls preventing BRG personnel advising one LLC from discussing that client's private plans and activities with staff advising another LLC. BRG anticipates facilitating certain communications between LLCs by, for example, scheduling meetings or conveying messages between them.

Analysis

Treatment of LLC as an Individual. Under the Federal Election Campaign Act (the Act) and Commission regulations, contributions and independent expenditures made by a single-member, natural-person LLC are treated as if they were made by an individual. 2 U.S.C. §431(8) and (9); 11 CFR 110.1(g). In AO 2009-02, the Commission determined that independent expenditures made by an LLC with a sole natural person member should be treated as if they were made by that member. Because the LLC is a third party and is not the requestor of this advisory opinion, the Commission could not state in advance that the LLC at issue would have the same kind of unity with the sole member of the LLC demonstrated in AO 2009-02. However, for purposes of this advisory opinion, the Commission assumed that the LLC to which BRG is providing its services will be similar in all material respects to the single-member LLC addressed in AO 2009-02. Therefore, the single-member, natural-person LLCs addressed by this opinion are treated as individuals, not as "political committees" under the Act.

Political Committee Status of BRG. This advisory opinion addresses two "political committee" status issues: first, the possible status of BRG as a political committee and, second, the status of BRG and one single-member, natural-person LLC as a "group of persons" constituting a "political committee." The Act and Commission regulations define "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)(A); 11 CFR 100.5(a). The Supreme Court limited the scope of the term to organizations that are controlled by a federal candidate or whose major purpose is the nomination or election of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The request, as well as the information available on BRG's website, indicates that BRG is organized and operated for commercial purposes, and not for purposes of nominating or electing a candidate. BRG is a vendor of communication consulting services to a range of clients. BRG indicates that it has not in the past advocated the election of any federal candidate, supported any political party or stated any political purpose, and does not plan to do so in the future. BRG is neither owned nor controlled by any federal candidate. Therefore, the Commission concludes that BRG is not itself a political committee.

BRG and one single-member, natural-person LLC as a Group of Persons. Although BRG will advise its LLC client on message development and the communication of its views on federal candidates, it offers similar consulting services to its non-political clients by advising them on media strategy, message campaigning and building public policy campaigns. The LLC will retain ultimate control over the timing, content, method and candidate referenced in each communication constituting an independent expenditure, and BRG itself will not pay for any communications. The relationship between BRG and its LLC client is consistent with that of a commercial vendor, defined by Commission regulations as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 CFR 116.1(c). The consulting services BRG will provide to its LLC client are consistent with its usual and normal business practice; thus, BRG and its LLC client will not constitute a "group of persons."

Political Committee Status of BRG and Multiple LLCs. Assuming that none of the LLCs directly communicate with one another and that BRG does not facilitate communication between them, the Commission agreed that there was nothing to suggest that either the LLCs or the LLCs together with BRG would be a political committee. The Commission has previously concluded that individuals using a common commercial vendor did not constitute a "group of persons" and thus were not a political committee. See AO 2008-10. In that advisory opinion, the requestor represented that it did not facilitate communications or arrangements among its clients. If BRG does not facilitate communication between any of its LLC clients or otherwise convey any information about one LLC to any other LLC, BRG will simply be establishing a separate commercial relationship with each individual LLC, and the LLCs or the LLC together with BRG will not become a political committee. The Commission did not address

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whether any agreements or collaboration between the LLCs that does not involve BRG would result in the creation of a political committee.[1]

Date issued: September 28, 2009; Length: 7 pages.

—*Christopher B. Berg*

AO 2009-22

National Party Committee may File Lobbyist Bundling Reports Quarterly

The Democratic Senatorial Campaign Committee (DSCC), a national committee of a political party, may file Lobbyist Bundling Reports on a quarterly basis instead of monthly. The applicable covered periods for these reports in election years would be semi-annually, quarterly and any applicable pre-and post-election reporting periods. In non-election years, the covered periods would be the semi-annual periods beginning on January 1 and July 1.

Background

As a national committee of a political party, the DSCC is required by the Federal Election Campaign Act (the Act) to file monthly campaign finance reports with the Commission. 2 U.S.C. §434(a)(4)(B) and 11 CFR 104.5(c)(4). It may also need to file Lobbyist Bundling reports periodically and has the option of filing those reports on a quarterly basis instead of monthly. 11 CFR 104.22(a)(5)(iii).

Analysis

The Act and Commission regulations require certain political committees ("reporting committees")[1] to disclose information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of a certain amount within a specified period of time ("covered period"). 2 U.S.C. §434(i) and 11 CFR 104.22. The covered periods for Lobbyist Bundling Reports generally correspond to the reporting periods for the reporting committee's regular campaign finance reports. However, reporting committees that file monthly campaign finance reports may elect to file their Lobbyist Bundling reports "pursuant to the quarterly covered period…instead of the monthly covered period…" 11 CFR 104.22(a)(5)(iv). Overlapping semi-annual covered periods apply to all reporting committees.

A reporting committee required to file campaign finance reports quarterly with the Commission must file its Lobbyist Bundling reports for the quarters beginning January 1, April 1, July 1 and October 1 of each calendar year and the applicable pre-and post-election reporting periods in election years; in a non-election year, reporting committees not authorized by a candidate [i.e. a political party committee] need only observe the semi-annual reporting period. 11 CFR 104.22(a)(5)(ii). This schedule applies both to reporting committees who file campaign finance reports quarterly and to those that file campaign finance reports monthly, but choose to file Lobbyist Bundling reports on a quarterly basis.

Thus, if the DSCC elects to file its Lobbyist Bundling Report on a quarterly basis, the reporting schedule is as follows: in election years, semi-annually, quarterly and the applicable pre-and post-election reporting periods, as appropriate; in nonelection years, the DSCC need observe only the semi-annual covered periods beginning on January 1 and July 1, as appropriate. Additionally, the Committee must file Lobbyist Bundling Reports for any special election covered periods in which it receives bundled contributions above the threshold amount from lobbyists/registrants and lobbyist/registrant PACs. 11 CFR 104.22(a)(5)(v).

Date Issued: October 9, 2009; Length: 3 pages.

—*Myles Martin*

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[1] *The Commission could not approve a response by the required four affirmative votes as to whether BRG and its clients would become a "group of persons" if it served as a common vendor among various LLCs sponsoring independent expenditures concerning (1) the same federal candidates or elections or (2) different federal candidates or elections where BRG did not represent that it would not pass messages between various LLCs and that the LLCs would not communicate directly among themselves.*

[1] *"Reporting committees" means political party committees, political committees authorized by candidates (i.e., candidate committees) and leadership PACs. 11 CFR 104.22(a)(1).*

New Formats for Downloading Data Files, Disclosure Data Blog

At data.fec.gov, the Commission is building files that will allow for more sophisticated use of campaign finance data. Each of the files can be downloaded in either .csv or .xml formats. Each also has a metadata page that describes the information included and the structure of the file itself. There is a .pdf version of each file for printing.

On the Disclosure Data Blog, the Commission will post information about the files and future plans, and solicit questions, ideas and suggestions from users.

Regulations

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AO 2009-23

Nonfederal PAC Need Not Allocate its Expenses

Given the requestor's representation that they are not "political committees" under the Federal Election Campaign Act (the Act) or Commission regulations, FEC allocation rules do not apply to the Virginia Chapter of the Sierra Club's ("VA Chapter") proposed use of its state-registered political action committee ("State PAC") and funds from the Sierra Club Voter Education Fund ("SC-VEF") to finance certain activities relating to upcoming elections in Virginia.

Background

VA Chapter is a state chapter of the Sierra Club, which is a nonprofit corporation pursuant to section 501(c)(4) of the Internal Revenue Code. VA Chapter formed the State PAC in 1985 for the exclusive purpose of engaging in state and local political campaign activities, and registered it with Virginia's State Board of Elections. VA Chapter raises funds in accordance with Virginia law for the State PAC's account, which may include funds from its members, corporations, labor organizations and other individuals. The State PAC has made contributions to state and local candidates, but has not used its account to make any contributions or expenditures in connection with federal elections. Since July 31, 2000, the State PAC has been organized under section 527 of the Internal Revenue Code. 26 U.S.C. §527.

SC-VEF is also organized under section 527 of the Internal Revenue Code. The Sierra Club established SC-VEF as a nonfederal political organization in order "to educate people about public official's environmental records, voting records and position of candidates for election to Congress, the Presidency, and state or local offices…" Both VA Chapter and SC-VEF maintain that neither the State PAC nor SC-VEF is a "political committee" under FEC regulations.

Proposed Activities. The State PAC intends to conduct three categories of activities in connection with the 2009 Virginia elections and the 2010 federal general elections. SC-VEF intends to assist by providing partial funding for these activities. First, the State PAC intends to conduct voter drives, including voter identification efforts asking potential voters for their views on environmental matters and how those views may affect their voting behavior in the upcoming elections. The voter drive activities will also involve voter registration and GOTV activity urging the public to register to vote and to elect candidates who support government actions to protect the environment. None of these voter drive activities will refer to any clearly identified federal, state or local candidates, or political parties.

Second, the State PAC intends to make public communications expressly advocating the election or defeat of clearly identified state and local (but not federal) candidates in connection with the 2009 Virginia general election. Some of these public communications will feature federal officeholders who are candidates for re-election in the 2010 federal elections endorsing state and local candidates, but the communications will neither reference the 2010 election, nor the fact that the officeholders are federal candidates.

Third, the State PAC will distribute "issue advertisements" in connection with the above-mentioned 2009 and 2010 elections that will refer to positions on issues of public policy held by clearly identified federal officeholders from Virginia, some or all of whom will also be candidates for re-election in 2010. These communications will not expressly advocate the election or defeat of any federal candidates, nor will they contain the functional equivalent of express advocacy. Additionally, the public communications will not be coordinated with any federal candidates.

Analysis

Under the Act and Commission regulations, the term "political committee," includes any committee, club, association or other group of person which receives contributions or makes expenditures in excess of $1,000 during any calendar year. 2 U.S.C. §431(4) and 11 CFR 100.5(a)-(c). The Supreme Court has held that only organizations under the control of a candidate or whose major purpose is federal campaign activity (i.e., the nomination or election of federal candidates) can be considered political committees under the Act. See *Buckley v. Valeo*, 4242 U.S. 1, 79 (1976).

Commission regulations provide that various types of political committees that make disbursements in connection with both federal and nonfederal elections must allocate certain expenses between federal funds (i.e., funds that are subject to the limitations and prohibitions of the Act) and nonfederal funds (i.e., those funds not subject to the limitations or prohibitions of the Act). 11 CFR Part 106. More specifically, section 106.6 requires separate segregated funds and nonconnected committees that make disbursements in connection with both federal and nonfederal elections to allocate expenses in certain ways depending upon the nature of the activity involved. Under those rules, these entities may make such disbursements in one of two ways: 1) they may pay the activities using 100 percent federal funds; or 2) if they have established separate federal and nonfederal accounts pursuant to 11 CFR 102.5, they may allocate the expenses between these accounts. 106.6(a).

The Commission has consistently applied these allocation rules only to

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PACs that qualify as "political committees" under the Act and Commission regulations. Accordingly, given the representation that the State PAC and SC-VEF are not "political committees" under the Act and given the nature of their proposed activities, the allocation rules at 11 CFR 106.6 do not apply. This conclusion assumes that neither entity will engage in any activity that would cause it to become a political committee under the Act.

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—Myles Martin

AO 2009-24

Illinois Green Party Qualifies as State Party Committee

The Illinois Green Party (the ILGP) qualifies as a state party committee under the Federal Election Campaign Act (the Act) because: (1) the Green Party of the U.S. (the GPUS) qualifies as a political party; (2) ILGP is part of the official GPUS structure; and (3) ILGP is responsible for the day-to-day operations of the GPUS at the state level.

Background

The Act defines a "state committee" as an organization that, by virtue of the bylaws of a "political party," is part of the official party structure and is responsible for the day-to-day operations of the political party at the state level, as determined by the Commission. 2 U.S.C. §431(15); 11 CFR 100.14(a). A "political party" is an "association, committee, or organization that nominates a candidate for election to any federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. §431(16); 11 CFR 100.15.

The determination as to whether a state party organization qualifies as a state committee of a national political party hinges on three elements. First, the national party that the state party organization is part of must itself be a "political party." Second, the state party organization must be part of the official structure of the national party. Third, the state party organization must be responsible for the day-to-day operations of the national party at the state level. See, e.g., AOs 2009-16, 2008-16, 2008-13, 2007-06 and 2007-02.

Analysis

The Commission must first assess whether the national party qualifies as a "political party" under the Act and Commission regulations. 2 U.S.C. §§431(15) and (16); 11 CFR 100.14 and 100.15. In previous advisory opinions the Commission has determined that the Green Party qualifies as a political party, and the Commission has recognized the GPUS as a national committee of a political party since 2001. The Commission is not aware of any factual changes that would alter that conclusion.

The ILGP must also qualify as part of the official party structure of the national party, pursuant to 11 CFR 100.14. In previous advisory opinions, the Commission has looked to supporting documentation indicating that the state party is part of the official party structure. The Executive Director for the GPUS provided documentation that suffices to establish the ILGP is part of the GPUS's official party structure.

Third, the ILGP must maintain responsibility for the day-to-day operations of the GPUS at the state level. 2 U.S.C. §431(15); 11 CFR 100.14. In previous advisory opinions, the Commission has evaluated this third element by considering two criteria:

- Whether the organization has placed a candidate on the ballot (thereby qualifying as a "political party"); and
- Whether the bylaws or other governing documents of the state party organization indicate activity commensurate with the day-to-day functions and operations of a political party at the state level.

Ballot placement on behalf of a "candidate" is required because the requesting organization's existence as a "political party" is necessary for state committee status. A state party organization must actually obtain ballot access for one or more "candidates," as defined by the Act. See 2 U.S.C. §§431(2), (15), and (16); 11 CFR 100.3(a); 100.14(a); 100.15. Former Representative Cynthia McKinney qualified as a "candidate" under the Act, and McKinney's name was listed on the 2008 Illinois ballot as the GPUS's candidate for President, satisfying the first criterion. Further, the ILGP also listed five candidates for the U.S. House in various districts in Illinois on the 2008 ballot, each of whom qualified as "candidates" under the Act according to disclosure reports filed with the Commission.

The Commission also determined that the ILGP's constitution and bylaws delineate activity commensurate with the day-to-day functions and operations of a political party on the state level, thereby satisfying the second criterion.

Because all three elements of the definition of "state committee" are satisfied, the Commission determined that the ILGP qualifies as a state committee of a political party under the Act and Commission regulations.

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—Kathy Carothers

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