



FEDERAL ELECTION COMMISSION

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**Remarks at FEC Regional Conference For House & Senate Campaigns,
Political Party Committees and Corporate/Labor/Trade PACs
Tampa, Florida
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Welcome to the FEC's regional conference for House and Senate Campaigns, political party committees, and PACs. I am grateful that you have taken the time to join us to discuss the details of what is becoming an increasingly complex regulatory regime. I appreciate the chance to address you today, and hopefully provoke your thoughts about some of the campaign finance developments before us.

I will first turn to the courts, where we've seen the biggest news in campaign finance regulation. As some of you just may have heard, in December the Supreme Court upheld most of the 2002 campaign finance reform law. When the Court handed down its decision in *McConnell v. FEC*, 540 S.Ct. ___, 124 S.Ct. 619 (2003), many people were surprised at the degree it seemed to depart from previous campaign finance decisions. Some had been confident that key provisions of the Bipartisan Campaign Reform

Act, known as BCRA, would be overturned. The debate seemed to be more about how much of it would remain. But, except for a few narrow provisions, the Court upheld BCRA.

The message of *McConnell* is that Congress has great discretion in how it regulates contribution activity and solicitations for contributions that are associated with federal elections. But *McConnell* does little to change the everyday reality of your work as treasurers, candidates, administrators, and activists. You are for the most part in the same position you were in 2002 after the conclusion of the Commission's rulemakings occasioned by the passage of BCRA that March. To be sure, this is the first federal election cycle under these rules, and I know that most of you are still trying to absorb the changes created by BCRA, even as the Commission continues to clarify specific applications of BCRA through Advisory Opinions. Moreover, *McConnell* was a facial challenge to BCRA -- that is, the plaintiffs were arguing that applied in any situation the law was unconstitutional. So, other litigants may raise as-applied challenges to the law, based on specific fact situations, in the future. But *McConnell* itself does not require major changes to our BCRA rules, and as this year proceeds I look forward to some stability in the law, as I am sure you do.

If in the end *McConnell* didn't much change the rules adopted by the Commission in the summer of 2002 to implement BCRA, I want to discuss briefly another case that may. As some of you may be aware, our regulations implementing BCRA are currently being challenged in court. Representatives Christopher Shays and Marty Meehan, with support from Senators McCain and Feingold, have filed suit arguing that the regulations are in important respects arbitrary, capricious, and in excess of our regulatory jurisdiction. *Shays, Meehan v. FEC*, No. 02-1984 (D.D.C.). They argue, generally, that the regulations adopted by the Commission to implement BCRA are too lax, and that more restrictive regulations are required by the statute in a great many areas of campaigning. Briefing will be completed in this matter by the end of March, and so we may see a decision from the District Judge in that case as early as this spring.

How might this decision affect you? Well, among many other challenged provisions, the Shays-Meehan lawsuit specifically attacks regulations that define the terms "solicit" and "direct;" our definition of "agent;" and our coordination regulation.

We defined "solicit," in pertinent part, as, "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," and defined "direct" in similarly straightforward terms.

See 11 CFR 300.2 (m) & (n). Representatives Shays and Meehan believe that this definition is too narrow, and seek to create liability even when the candidate or officeholder does not “ask” for funds. *Amended Complaint, Para. 35.* The Commission believed that such a standard would open lawmakers and candidates up to endless complaints and place them at the mercies of their listeners, rather than holding them accountable for their own conduct.

As for “agent,” we defined the term to mean any person with actual authority to act on behalf of a candidate. *11 CFR 300.2(b).* Representatives Shays and Meehan argue that the term should include a person acting with apparent authority. That is to say, if the Shays-Meehan suit is successful on this point, a person whom has not been authorized to act on behalf of a candidate or committee may nevertheless create a liability for that candidate or Committee if the listener believes that the speaker has authority to act for the candidate or committee. *Amended Complaint, Para. 41.* If the court agrees with Reps. Shays and Meehan on either this issue or the expanded definitions they seek for “solicit” and “direct,” it could dramatically broaden the type and number of situations in which a federal official is found to have solicited soft money, and could make officeholders, candidates, and parties

liable for the acts of individuals acting outside the scope of authority granted to them by the candidate.

Representatives Shays and Meehan also seek to force the Commission to define coordinated activity more broadly. Now, the rule we've adopted already has some real teeth to it – for example, we recently decided Advisory Opinion 2003-38 Bush-Cheney '04, Inc. and Alice Forgy Kerr For Congress, holding that if a Republican Congressional candidate in Kentucky's special election next week were to pay for an ad featuring President Bush endorsing her, it would count as an illegal coordinated contribution to the Bush for President campaign. Understand the meaning of this: under the coordination regulations, in many circumstances, if a federal officeholder endorses another candidate and is featured in the endorsee's ad, the endorsing officeholder must help pay for that ad. So this is not a weak rule. Yet the Shays-Meehan suit argues that even this tough coordination rule, "would completely undermine the integrity of contribution limits..." *Amended Complaint, Para. 87*. An even broader rule, as supported by Representatives Shays and Meehan, would impact the activities of PACs, candidates and others in a myriad of ways. Activities that are now considered separate would become in-kind contributions, which are reportable by the recipient as both a contribution and as an expenditure. The

lawsuit challenges several other provisions of the regulations as well, in each case seeking to expand the potential liability of candidates and committees. For example, it seeks to limit the ability of officeholders to make unpaid public service announcements on behalf of charities in their districts. *Id.*, *Para. 84*. It seeks to expand regulation of the internet, which, as we have seen, is blossoming as a truly egalitarian tool of popular democracy. *Id.*, *Paras. 65, 100*. Why it is thought to be a good idea to smother this powerful new tool of grassroots democracy is, quite frankly, lost on me. And they seek to limit the ability of local parties to conduct voter registration and get-out-the-vote activities even when no federal candidate is on the ballot, apparently on the theory that no one cares about such insignificant “off year” elections as the Mayors of New York, Los Angeles, or Philadelphia. *Id.*, *Paras. 63-64*. This is not a complete list of what the lawsuit seeks to change – in every single case, to mandate more regulation.

You may have heard that in *McConnell*, the Supreme Court criticized past Commission rulings for opening up “loopholes” in the law. This is true. However, all of the Commission decisions criticized by the Court pertained to FEC rulings that were at least a decade old, and in some cases over a quarter century old, long before the passage of BCRA, and long before the appointment of the current General Counsel or the Commissioners who

voted to adopt the BCRA regulations. Given that fact, I think, quite frankly, that this oft-repeated line is an intentional effort to discredit the Commission's sensible BCRA rules. Let us be clear: the *McConnell* Court did not once criticize any of the Commission's BCRA regulations. Although the regulations adopted to implement BCRA were not at issue in *McConnell v. FEC*, they were mentioned several times in the Court's opinion, and the Court repeatedly expressed the opinion that our construction of the law was reasonable. In fact, the Court referred to our regulations several times, usually in rejecting the plaintiffs' arguments that BCRA was constitutionally overbroad. The Court allowed that, while the *McConnell* case does not present the question of whether or not the regulations are constitutional, "the fact that the statute provides this basis for the FEC reasonably to narrow" portions of the Act "calls into question Plaintiff's claims of facial overbreadth." 124 S. Ct. at 675 n. 63.

To give a few particulars, the Court's majority rejected plaintiff's contention that the national party solicitation restrictions are overbroad, in part by relying on our definition of "agent." 124 S. Ct. at 668. It criticized plaintiffs for an unnaturally broad reading of the terms "solicit" and "direct," and stated that the FEC's interpretations of these terms were reasonable. The Court even suggested that the Intervenors in *McConnell*

(Representatives Shays and Meehan, and Senators McCain and Feingold) shared that view. 124. S. Ct. at 670. The Court spoke positively of our definitions of “get-out-the-vote,” “voter identification,” and “generic campaign activity,” and when a disbursement is considered to be “in connection with an election in which a federal candidate appears on the ballot.” All of these regulations are under attack in the Shays-Meehan lawsuit, in every case with the goal of forcing the Commission to expand potential liability. I believed at the time of adoption that our regulations were wise and proper, and the Supreme Court’s frequent, positive references to our regulations make me more hopeful that the Commission’s reasonable interpretations of BCRA will withstand this legal challenge. A decision upholding these regulations would provide for stability in the specific BCRA regulations we enforce, at least in the near term, and assure that your efforts to master the ins and outs of our rules will not go to waste.

As I say that, however, you should also be aware of a rulemaking the Commission will soon open that has been prompted by *McConnell*. Given the broad reading of the campaign finance statute in that case, we will be examining whether we need to adapt our definition of “expenditure,” and what continuing effect the “express advocacy” standard has in our law. While this may sound like a modest change, it could potentially cause

politically oriented groups – so-called 527 organizations, and possibly 501(c) organizations -- that are not now considered to be political committees to become so. If this happened, they would need to register as committees, and be required to file reports, itemizing contributions and expenditures, just like any other committee. They would observe the other limits and prohibitions of the Act. They could not accept funds from corporations or unions, and would be required to observe the contribution limits. They would be required to follow the disclaimer requirements for solicitations and for advertising.

So, the consequences of revising our interpretation of “expenditure” are potentially quite dramatic. Both sides of the question have written articles and analyses of the question, and you may have seen some of the many articles in the press weighing the arguments. I look forward to a good discussion and efficient resolution of this question, so that groups can proceed with confidence and our enforcement resources will be properly allocated. As it stands, we should have a Notice of Proposed Rulemaking published in March, a public hearing in mid-April, and a final rule one way or the other no later than May 13.

Additionally, you may have heard that the Commission now has pending before it an Advisory Opinion request from a group called ABC,

which raises many similar issues. This Opinion could be very important. The General Counsel has issued a proposed draft that is available on our website. The AO will be voted on by the Commission on February 18. At this point I cannot predict the likely outcome, but you should watch for it, especially if you have non-federal accounts or work with non-federal committees.

There are several other rulemakings we will be engaged in this year. Under BCRA, inaugural committees will be required to file reports, and will not be permitted to accept contributions from foreign nationals. We will amend our reporting rules and foreign national rules to reflect this provision, and the final regulation should be adopted in June.

We have a few rules that need amending in light of *McConnell v. FEC*. First, there is the party committee “choice” provision, that prevented all the party committees of one party from making coordinated expenditures for a candidate if any one of them had made an independent expenditure for the candidate, or visa versa. Our regulations contain this rule, adopted from BCRA, but the Court found the corresponding BCRA section unconstitutional. Then there is the provision preventing party committees from donating any funds to tax-exempt organizations, which *McConnell* found was overly restrictive, instead holding that parties must be allowed to

donate to those groups from their hard-dollar accounts. The *McConnell* court also found unconstitutional the ban on contributions by minors, so the Commission will rewrite that rule.

Finally, we will write new rules to govern the release of information from closed enforcement matters. For a numbers of years the public file of a closed enforcement matter, or MUR, contained just about everything the Commission had obtained in its investigation, including documents obtained under subpoena and deposition transcripts. The AFL-CIO challenged this policy, and the courts have ruled that this approach “infringes on First Amendments interests.” *AFL-CIO v. FEC*, 333 F.3d 168 at 179 (D.C. Cir. 2003). We are presently operating under an interim policy and are placing in the public record of any MUR: a copy of the complaint, responses, General Counsel’s reports that support substantive action, briefs from the Counsel and Respondent, Statements of Reasons, and Conciliation Agreements, among other things. Our rulemaking will consider what, if any, changes need to be made to the interim policy.

I want to turn now to some changes in our enforcement policies that may affect you.

Over the past several years, the Commission has introduced a number of new programs or made changes that have improved the enforcement

process. Most notably, the Administrative Fines program, enacted by Congress on the basis of a legislative recommendation from the FEC, and the Alternative Dispute Resolution program, introduced by the FEC, have helped us to dramatically increase the number of cases handled each year, while reducing the time needed for resolution.

Under the law, except for Admin Fines, the FEC lacks direct enforcement power. That is, if the Commission finds a violation, it must attempt to reach a conciliation agreement with the respondent. If the respondent refuses to agree to the Commission's proposed penalties, the Commission must then take the respondent to court. In practice, however, in 98% of enforcement matters, including over 95% of those in which the Commission finds probable cause and seeks a penalty, the matter is resolved without recourse to the Courts. In other words, for the vast majority of respondents, the FEC is indeed the final stop.

Given that campaign finance laws tread close to the constitutional rights of speech and association, an agency such as the FEC should be especially sensitive to respecting the procedural rights of those called before it. Unfortunately, the Commission has not always placed a proper premium on the rights of those citizens targeted for investigation. The good news

here is that with support from the Office of General Counsel, we are reforming many of our enforcement practices.

On June 11, 2003 we held a public hearing to seek input on possible changes to the Commission's enforcement practices. This re-evaluation has the support of the Commission's General Counsel, Larry Norton, Deputy Counsel Jim Kahl, and Associate General Counsel for Enforcement, Rhonda Vosdinh, all of whom assumed their positions within the past 30 months ago. Several changes in procedures have been made, or are being made, in response to concerns raised at that hearing. For example, the FEC now provides respondents with the right to obtain copies of their own depositions. This is a most basic right, long denied respondents by the Commission. We are in the process of clarifying our policies on treasurer liability – whether a treasurer is named in his or her personal or official capacities in a MUR, and how that carries forward if a committee changes its treasurer. A proposed policy was published last month in the Federal Register and is available for comment until February 27, 2004. In the coming months we will also clarify the treatment of *sua sponte* submissions – that is, those respondents who come to us upon detecting on their own a potential violation of the Act or our regulations. The General Counsel has also made changes to the Commission's longstanding "confidentiality

statement" intended to make clear that the confidentiality provisions of the Act do not preclude witnesses from speaking to respondents – a problem in the past, when the Commission's sweeping language sometimes led witnesses to believe that they were prohibited from voluntary cooperation with respondent's counsel.

We continue to look for ways to expedite the pace of investigations, and we are seeing progress. Cases are being resolved more rapidly. The number of open, inactive cases has declined from a monthly average of 98 in FY 2000 to just 57 in 2003. The average time to complete action on a MUR has declined by 25% over the past 3 years. Moreover, in FY 2003 only one case was dismissed as stale, as compared to 86 just five years ago, and 13 in FY 2000. Additionally, under the supervision of Mr. Norton and Ms. Vosdigh, the Counsel's office has become more discriminating in naming respondents, focusing investigations and keeping innocent bystanders from being swept up in the process. Generally, respondents are treated with a respect and sense of fairness not always present in the past.

The flip side of this new efficiency and respect for the due process rights of respondents is that we have been assessing record penalties. In the past 24 months alone we have assessed our largest fine ever, a number of other high six-figure settlements in cases involving illegal corporate activity,

and our largest conciliation agreements ever against sitting members of both houses of Congress. For years, the line in Washington was that in dealing with the Commission, the punishment was the process. No longer. This Commission is dedicated to handling cases expeditiously, and to treating respondents fairly and respectfully. But when violations are uncovered, we will seek meaningful penalties. So I'm glad you're here at this compliance seminar! The process must be fair to those who are innocent. The punishment must be meaningful to those who are guilty.

This is also a good place to point out yet another new development at the Commission. Thanks to some super efforts last year by our Data Processing staff, Staff Director Jim Pehrkon, and then Commission Chair Ellen Weintraub, one can now research past MURs, including conciliation documents, through our Web page, using the Enforcement Query System button on the home page. This allows you to search through past MURs in any number of ways. It is a huge job to get old MURs up on the web, but we now have them up through the last election cycle and are constantly adding more, working backwards from the most recent. This is something committees had asked for, and I think will help to demystify the enforcement process. Later this year, you will see our web site thoroughly remodeled to make it easier to use and find documents generally.

In summary, these have been remarkably productive years for the Commission. In all that we do, our goal throughout is to provide for fair, effective enforcement of the federal government's campaign finance laws.