



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON *VAN HOLLEN v. FEC*

**Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN**

On March 30, 2012, the United States District Court for the District of Columbia ruled in favor of the plaintiff's motion for summary judgment in this matter.¹ We voted against the recommendation by the Commission's Office of General Counsel not to appeal the decision. We supported appealing the district court's ruling² initially because we feared that the opinion left the Commission with insufficient guidance as to what an acceptable regulatory implementation of the statute would look like. The district court subsequently issued an order and opinion denying defendant-intervenors' motion for a stay pending appeal. While the latter ruling settled – for now – the regulatory question, the court's opinions still create, in our view, a maze of uncertainty for many advocacy groups wishing to exercise their First Amendment rights.

BACKGROUND

2 U.S.C. § 434(f)(2) provides that sponsors of electioneering communications³ must report the names and addresses of “all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement [for the electioneering communication] during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.”⁴ If the sponsor established a segregated bank account in advance, then the reporting may be limited to “all contributors who contributed an aggregate amount of \$1,000 or more to that account” during the same period.⁵

In 2007, prior to our appointment, the Commission promulgated a regulation to implement this statute, which required reporting under the following conditions:

¹ *Van Hollen v. FEC*, No. 11-0766, slip op. (D. D.C. Mar. 30, 2012).

² Because the Commission may not act without an affirmative vote of at least four of its members, and our colleagues voted against appeal, the Commission is not seeking an appeal in this matter. 2 U.S.C. § 437c(c).

³ Generally, an electioneering communication is any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office and is made within 30 days before a primary or 60 days before a general election, and is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A).

⁴ 2 U.S.C. § 434(f)(2)(F).

⁵ 2 U.S.C. § 434(f)(2)(E).

If the disbursements were made by a corporation or labor organization pursuant to 11 C.F.R. § 114.15, the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

11 C.F.R. § 104.20(c)(9).⁶

Plaintiff brought a challenge under the Administrative Procedure Act (“APA”) on the grounds that the Commission’s 2007 regulation impermissibly narrowed the scope of the rule for corporations and labor organizations to reporting only donors who made donations for the purpose of furthering electioneering communications.⁷ On March 30, 2012, the United States District Court for the District of Columbia ruled in favor of the plaintiff’s motion for summary judgment.⁸ Under a “*Chevron* step one”⁹ analysis, the district court held that the Commission improperly narrowed the regulation because the meaning of the term “contribute” in the statute was plain, and did not include a purpose or intent element.¹⁰ In reaching this conclusion, the court relied primarily on the definitions of “contributor” and “contribute” set forth in the Oxford English Dictionary and Merriam-Webster Dictionary. Ultimately, the court agreed with the plaintiff and held that “contributor ‘means a person who gives money without expectation of service or property or legal right in return.’”¹¹

ANALYSIS

The district court’s decision is confusing in two ways: First, there seem to be internal contradictions in the opinion. Second, it seems that a rule consistent with the opinion, when applied to real-world examples, might lead to potentially absurd results.

In rendering its decision, the court held that the BCRA was not ambiguous with respect to the reporting of electioneering communications. Yet, the court’s opinion appeared to condone the Commission’s initial rulemaking in 2003, in which the Commission implemented the statute by requiring the reporting of “each *donor* who *donated* an amount aggregating \$1,000 or more to the

⁶ See Draft Final Rules on Electioneering Communications, Certification dated November 21, 2007, available at <http://sers.nictusa.com/fosers/showpdf.htm?docid=73272> (Commissioners Lenhard, Mason, Walther, and Weintraub voted affirmatively. Commissioner von Spakovsky dissented).

⁷ *Van Hollen v. FEC*, No. 11-0766, Complaint at ¶ 3 (D. D.C. filed Apr. 21, 2011).

⁸ See *supra* note 1.

⁹ Under “*Chevron* step one,” the court asks “whether Congress has directly spoken to the precise question at issue,” and whether “the statute unambiguously forecloses the agency’s interpretation.” *Van Hollen v. FEC*, slip op. at 12 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

¹⁰ *Id.* at 26-28.

¹¹ *Id.* at 27.

person making the disbursement.”¹² The court noted approvingly that, “If [the BCRA’s use of] ‘all contributors who contributed’ was ambiguous from the start, the FEC had a rulemaking to address it. And its substitution of the words ‘donor’ and ‘donation,’ with their clear connotation of providing something for nothing . . . seems to ameliorate the concerns supposedly raised by the expansion of the statute’s reach to include corporations and unions.”¹³ In its subsequent opinion denying defendant-intervenors’ motion for a stay pending appeal, the district court confirmed that the 2003 regulation “now governs the disclosures required under the BCRA.”¹⁴

Yet, if BCRA’s electioneering communications reporting provision was clear on its face, then it is unclear why it is appropriate for the Commission’s now-revived 2003 regulation to substitute different terminology with a more “clear connotation” than what was used in the statute. Under *Chevron* step one, the court, had it followed its own logic, should have found the entirety of what is now designated as 11 C.F.R. § 104.20(c)(9) to be invalid, rather than just the 2007 portion that was added to the regulation. But the court only struck the challenged addition made in 2007 and, indeed, confirms the 2003 rule now governs.

Alternatively, notwithstanding *Chevron* step one, if BCRA was ambiguous, and the Commission did address its ambiguity in 2003, the court seems to be suggesting the agency cannot revisit that initial determination.¹⁵ If that is true, it would severely limit an agency’s ability to fix mistakes in its regulations or reconsider close calls with the benefit of experience. In other words, if an ambiguity can be resolved in more than one way and still be consistent with the statute, it is not apparent why choosing one option should foreclose an agency from reopening that determination later.

As for the requirement in the 2003 regulation that sponsors of electioneering communications report their “donors,” the court did not provide sufficient guidance as to what that term would cover in the post-*WRTL* and post-*Citizens United* landscape. Rather, the court asked rhetorically, “[i]s it really difficult to determine if dues paid in return for the benefits of membership are ‘donations,’ or if investors who pay for shares of stock and customers who pay for goods and services are a corporation’s ‘donors?’”¹⁶ First, this question appears to concede that there is a line between receipts that trigger reporting and receipts that do not – and that line is determined by the purpose behind the money. More importantly, although the court thought the answer as to where that line should be is obvious, we are not sure the answer is so clear.

The considerations that animated the Commission’s 2007 rulemaking illustrate the difficulty in discerning the difference between dues and donations. There, it was shown to be quite difficult to craft a rule that would capture consistently the concept of “donation” with respect to the diversity

¹² 11 C.F.R. §§ 104.20(c)(7), (8) (2003) (emphasis added).

¹³ *Van Hollen v. FEC*, slip op. at 25 n.8.

¹⁴ *Van Hollen v. FEC*, No. 11-0766, slip op. (D. D.C. Apr. 27, 2012) at 3 (*hereinafter*, “Opinion on Motion for Stay”).

¹⁵ *Van Hollen v. FEC*, slip op. at 25 n.8.

¹⁶ *Id.*

of entities that may make electioneering communications. The idea of “benefits for memberships” does not necessarily answer the question. For example, take the contrast between a labor organization and a Section 501(c)(4) organization such as the Sierra Club.¹⁷ On the one hand, member dues given to a labor union might not appear to be “donations” or “contributions”¹⁸ because the members are getting in return the “benefits of membership,” as the court suggests. On the other hand, the Sierra Club asks its supporters to “*donate*” to the organization,¹⁹ and for one’s \$15 “donation,” a donor gets the following “Member-only *benefits*”:

- One-year subscription to Sierra magazine
- Worldwide Members-only outdoor trips
- Automatic membership in your local Sierra Club Chapter
- Discounts on Sierra Club calendars, books, and other merchandise²⁰

It is unclear, if there is a difference between the two, why the benefits received from union membership would prevent union dues from triggering reporting requirements, yet benefits received from Sierra Club membership would not.

Moreover, “donors” to the Sierra Club presumably care about the group’s work “in preserving wilderness, wildlife and nature’s most splendid wild places,”²¹ and this type of work, along with the group’s lobbying efforts, could, in some non-trivial sense, be viewed as the type of “benefits of membership” described by the district court. Thus, when applied to actual entities, the court’s distinction between “dues” (for which the payer receives “benefits”) versus “donations” (for which the payer receives no “benefits”) is not so neatly drawn.

To add to this confusion, a rule distinguishing between a labor union and a Section 501(c)(4) entity creates an anomalous result. If union dues were to be excluded from treatment as contributions or donations (because members get a benefit from their dues), but funds given to the Sierra Club are included, then labor unions running electioneering communications would be

¹⁷ Sierra Club, IRS Form 990, *available at* http://dynamodata.fdncenter.org/990_pdf_archive/941/941153307/941153307_201012_990O.pdf (last visited April 19, 2012).

¹⁸ It strikes us that it would not be improper in this context to use the term “contribution” colloquially to also mean “dues,” which, again, calls into question the court’s *Chevron* step one analysis. The term also is used colloquially to include transactions such as “contributions” made by individuals to their Individual Retirement Accounts, for which they receive certain tax benefits. *See, e.g., “IRA Contribution Limits,”* Internal Revenue Service, *at* <http://www.irs.gov/retirement/participant/article/0,,id=211358,00.html> (last visited Apr. 23, 2012).

¹⁹ Sierra Club, “Donate,” *at* https://secure.sierraclub.org/site/Donation2?idb=0&df_id=1282&1282.donation=form1&autologin=true&s_src=N10ZSCZZ02&s_subsrc=JRG (last visited April 19, 2012) (emphasis added).

²⁰ Sierra Club, “Join the Sierra Club,” *at* https://secure.sierraclub.org/site/Donation2?idb=0&df_id=7040&7040.donation=form1&s_src=N10ZSCMC01&s_subsrc=MC (last visited April 19, 2012) (emphasis added).

²¹ Sierra Club, “Why join the Sierra Club?,” *at* https://secure.sierraclub.org/site/SPageServer?pagename=Why_Join (last visited April 19, 2012).

required to disclose less information about who financed their ads than non-profit corporations. However, there is nothing in the legislative history that indicates Congress intended this. After all, at the time BCRA was passed, unions were prohibited from even making electioneering communications, unlike certain non-profit corporations that take funds only from individuals.²² In other words, entities that were more strictly regulated (*i.e.*, unions) would be subject to a lesser disclosure requirement than entities that had been regulated less (*i.e.*, certain non-profit corporations) at the time BCRA was passed.

Moreover, there are still additional ambiguities to resolve. According to the court:

The Oxford English Dictionary defines “contributor” as “one that contributes or gives to a common fund; one that bears a part in effecting a result.” The verb “contribute” is defined, in relevant part, as “to give or pay jointly with others; to furnish a common fund or charge.” Similarly, the Merriam-Webster dictionary defines “contributor,” in relevant part, as “to give or supply in common with others [;] . . . to give a part to a common fund or store[.]” Each of these definitions suggests that as the term is commonly used, an individual’s status as a “contributor” *is not dependent on his or her purpose in transferring the funds.*²³

The practical reality is that it is implausible that anyone would give money to any entity, whether it is a for-profit or non-profit corporation or labor organization, for no purpose whatsoever. Thus, if the reporting of “contributors” is “not dependent on his or her purpose in transferring the funds,” is the district court essentially requiring the reporting of all funds that an entity receives for any and all purposes (provided that the aggregate reporting threshold is met)? If so, does this mean that unions and groups like the Sierra Club would, in fact, have to report every person who gives \$1,000 or more to the organization if it sponsors an electioneering communication?

This certainly cannot be what Congress intended.²⁴ In fact, there is legislative history that makes clear that Congress intended the opposite result. Senator Jeffords, one of the principal

²² See 2 U.S.C. § 441b(b)(2) (2002) (prohibiting labor union funding of electioneering communications); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The district court was well aware of the post-*MCFL* legal regime. See *Van Hollen v. FEC*, slip op. at 4 n.1. Several years after BCRA, the Supreme Court further relaxed the prohibition on corporate- and labor-sponsored electioneering communications, and which decision was the impetus for the Commission’s 2007 rulemaking on electioneering communications. See note 28, *infra*. Of course, *Citizens United v. FEC* removed the prohibition altogether. 130 S. Ct. 876 (2010).

²³ *Van Hollen v. FEC*, slip op. at 26 (internal citations omitted) (emphasis added).

²⁴ The counterpoint to this is that entities may set up the segregated bank accounts set forth in 2 U.S.C. § 434(f)(2)(E) for the purpose of sponsoring electioneering communications, whereby the reporting obligation attaches only to funds deposited into such accounts. But what about an entity that decides to exercise its First Amendment rights on an *ad hoc* basis, perhaps in response to a legislative issue that arises suddenly? If the entity did not set up a segregated account more than a calendar year in advance of speaking (within which period the electioneering reporting obligation attaches with respect to an entity’s “contributors”), depending on how broadly the Commission implements this decision, the practical difficulty of reporting sources of funds may effectively prevent that entity from speaking. This may contravene the Supreme Court’s holding in *Citizens United* that a corporation may fund electioneering communications and independent expenditures from its general treasury funds, and cannot be required to make such communications only from a separate segregated fund. 130 S. Ct. 876.

architects of the electioneering communication provisions, said as much. In deliberating the bill, Senator Jeffords made clear that the electioneering communication provisions “will not require the invasive disclosure of all donors”²⁵ By resolving the case on *Chevron* step one, the district court does not look to such legislative history.

The court views the separate bank account as a way to address the practical concerns that animated the Commission’s 2007 rulemaking which the court strikes down:

[T]he separate bank account option Congress provided in BCRA might be a viable way to solve the agency’s concerns about the burden the disclosure rule would impose on the newly regulated entities So it appears to the Court that the separate bank account option already included in the statute would largely solve the problem the FEC set out to address.²⁶

Yet, the court’s decision could be read to cast doubt on the Commission’s 2007 implementation of the statute’s electioneering communications reporting requirement for sponsors that choose to use the option of the segregated bank account. The language in BCRA originally specified that these accounts were to “consist[] of funds contributed solely by *individuals*.”²⁷ In response to the Supreme Court’s 2007 ruling in *FEC v. Wisconsin Right to Life* (“*WRTL*”),²⁸ in addition to adding the purpose element to the electioneering communications regulation at issue in this litigation, the Commission altered its regulations to allow for corporate and union funds to be accepted into the segregated accounts set forth in 2 U.S.C. § 434(f)(2)(E).²⁹ Since the court rejected the Commission’s argument that *WRTL*’s expansion of the right to sponsor electioneering communications to additional entities justified the Commission’s introduction of the purpose element in the 2007 rulemaking,³⁰ does that also affect the Commission’s regulations regarding separate accounts? Under the court’s reasoning, assuming that the language of BCRA is to be read literally (notwithstanding other judicial decisions and other language in the Act), the availability of the separate electioneering communications reporting accounts for use in accepting corporate and labor organization funds may also be cast into doubt, since the statute on its face does not appear to provide for this interpretation.

Given these and other questions, uncertainty has been created as to how sponsors must report their electioneering communications going forward. *Roll Call* has said, “[t]he March 30 ruling muddies the waters further,” while the law firm of Covington & Burling has noted, “[t]o the

²⁵ 147 Cong. Rec. S2813 (Mar. 27, 2001).

²⁶ *Van Hollen v. FEC*, slip op. at 20 n.5.

²⁷ 2 U.S.C. § 434(f)(2)(E) (emphasis added).

²⁸ 551 U.S. 449 (2007).

²⁹ 11 C.F.R. § 114.14(d)(2)(i); *see also* Explanation and Justification for Regulations on Electioneering Communications, 72 Fed. Reg. 72899, 72912 (Dec. 26, 2007).

³⁰ *Id.* at 16-22.

degree that individuals view the election laws as *murky, counterintuitive or the product of an Alice in Wonderland-like experience*, the effect of this decision may serve to reinforce that view.”³¹

CONCLUSION

The district court’s ruling in this litigation leaves us with little direction to resolve the difficult questions facing members of the public who sponsor electioneering communications. This problem is especially acute for those entities that BCRA and the Commission’s 2003 regulation did not contemplate as being eligible to fund electioneering communications. Short of an appeal, the best advice the Commission may be able to offer the public is to take any “reasonable interpretation”³² of the statute, the regulation, and the court opinion. This is not the preferred course. As the Supreme Court has stated, vagueness in the law must be avoided so as to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,” and this is especially so in “sensitive areas of basic First Amendment freedoms,” where vagueness “operates to inhibit the exercise of (those) freedoms.”³³ Speakers ought not be left to guess at the potential breadth of the reach of attendant reporting obligations, particularly when Congress itself has not sanctioned such breadth.

³¹ Eliza Newlin Carney, *FEC Ruling Leaves Ad Uncertainty*, ROLL CALL, Apr. 9, 2012 (emphasis added).

³² See, e.g., “Federal Election Commission Announces Plans to Issue New Regulations to Implement the Honest Leadership and Open Government Act of 2007,” Federal Election Commission, Sep. 24, 2007, at <http://www.fec.gov/press/press2007/20070924travel.shtml>.

³³ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).