



FEDERAL ELECTION COMMISSION
Washington, DC 20463

STATEMENT OF COMMISSIONER HANS A. VON SPAKOVSKY

***COMMISSION'S DECISION NOT TO OPEN NEW RULEMAKING
ON 527 ORGANIZATIONS***

May 31, 2006

The Federal Election Commission announced today that it will not appeal the March 29, 2006, decision of the District Court for the District of Columbia in *Shays v. FEC* and *Bush-Cheney '04, Inc. v. FEC*. The Court held that the Commission had not adequately explained its reasons for declining to issue regulations on political organizations qualified under Section 527 of the federal tax code. The Commission voted to attempt to satisfy the Court by fashioning a more expansive "Explanation and Justification" for its original decision, based on the existing record and on the views of the Commissioners serving in 2004.

I agree with the decision not to appeal the Court's ruling since I do not think an appeal would be successful. However, I voted with Chairman Toner against proceeding in this manner because I do not believe that simply rewriting the "Explanation and Justification" is the best course of action. Since the original "Explanation and Justification" was issued in November 2004 explaining why the Commission decided not to issue a regulation, three new Commissioners have joined the FEC. As one of those new Commissioners, I am extremely uncomfortable with trying to explain why the Commission acted the way it did in 2004 when I was not present and not a member of the Commission. I am skeptical that today's Commission will be able to reconstruct the rationales and thought processes of a Commission membership that no longer exists.

In my view, two preferable alternatives exist. First, we could have opened a new rulemaking and reconsidered the issue of 527 regulation altogether. Second, we could have voted to allow the current Commission to review the existing record, and then write a new "Explanation and Justification" based on the views of the current Commissioners. Both alternatives have the virtue of reflecting the views of the Commissioners who currently serve, and neither would attempt to speak for past members of the Commissions.

Opening a new rulemaking would also provide the Commission with the opportunity to finally issue a regulation and provide clear guidance to the regulated community on a confusing subject that has been neglected by the FEC since the agency was first formed. Under the Federal Election Campaign Act ("FECA"), any "committee, club, association, or other group of persons" that receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures in a calendar year is a "political committee" that is required to register with the FEC and abide by the limits and prohibitions of federal campaign finance law. However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court narrowed this statutory provision by adopting the "major purpose" test. The Court held that only an organization whose "major purpose" is influencing elections can be considered to be a "political committee" under FECA. *Id.* at 79.

Unfortunately, in the 30 years since the *Buckley* decision, the FEC has never issued a regulation defining the “major purpose” test in greater detail, leaving the regulated community without any guidance other than the case-by-case enforcement conducted by the agency. The issue that the FEC should be concentrating on is not whether 527 organizations qualify as political committees, but under what conditions *any* organization (including a 527) satisfies the “major purpose” test as a result of activities designed to influence federal elections. Providing a regulation on this issue would finally lay to rest these questions and provide a clear roadmap to the entities that participate in federal elections, enabling them to understand the conditions that subject them to federal regulation and oversight.

The *Shays/Bush-Cheney '04* decision is the perfect opportunity to remedy the Commission’s failure to provide adequate guidance. By not opening a new rulemaking, the Commission is foregoing an opportunity to better explain to the regulated community the requirements of federal law.