FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION OF VICE CHAIR ELLEN L. WEINTRAUB AND

COMMISSIONERS CYNTHIA L. BAUERLY AND STEVEN T. WALTHER

IN ADVISORY OPINION 2012-11 (Free Speech)

Today the Commission provided a partial response to the Advisory Opinion Request filed by Free Speech, which asked (1) whether 11 proposed advertisements contained express advocacy; (2) whether funds received in response to four solicitations would constitute contributions; and (3) whether Free Speech would qualify as a political committee. On April 26, we voted in favor of proposed Draft B, which provided answers to each of requestor's questions. Our colleagues supported an alternative draft. Because there were areas of overlap between the response we supported and the response supported by our colleagues, we joined with our colleagues and voted in favor of a draft that distilled the common answers. We write separately, however, to explain in more detail how we approached this request.

The Commission's Advisory Opinion process is laid out in the Federal Election Campaign Act ("FECA"), 2 USC 431-57. It provides an opportunity for a requestor to seek the Commission's opinion about the application of the statute and existing regulations to a particular proposed transaction or activity. 2 USC 437f. Constitutional determinations are generally inappropriate for the Agency as a part of this process. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486,489 (D.C. Cir. 1995) (noting in the context of the Commission's administrative enforcement process that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional"). The Commission is neither free to announce or apply "new law" when rendering an advisory opinion, 2 USC 437f(b) ("Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."), nor generally empowered to waive its own regulations. *See*, Advisory Opinion 1994-35 (Alter); *see also Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982) (noting the "well-established legal principle that a federal agency must comply with its own regulations").

The Requestor's first question asked whether several advertisements contained express advocacy. Our draft answered this question by applying the Commission's regulatory definition of express advocacy at 11 CFR 100.22, which establishes a two-part definition. Part (a) of the regulation includes communications that use phrases — such as "vote for" or "reject" — "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 CFR 100.22(a). This is sometimes referred to as "magic words" express advocacy. *See McConnell v. FEC*, 540 U.S. 93, 126 (2003). Part (b) defines express advocacy as a

communication that has an unambiguous "electoral portion" as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)." 11 CFR 100.22(b). Both parts of section 100.22 are in effect.

The most recent federal court to consider this issue *upheld* the regulation; and the Commission is now actively defending an appeal of that decision. *See The Real Truth About Obama v. FEC ("RTAO")*, 796 F.Supp.2d 736 (E.D. Va 2011), *appeal docketed*, No. 11-1760 (4th Cir., July 15, 2011); Brief of Appellees FEC and DOJ at 25-52, *RTAO*, No. 11-1760 (4th Cir. Oct. 20, 2011).[1] It is true that, over a decade ago, several lower courts raised doubts about the constitutionality of section 100.22(b), suggesting that government regulation was limited to a wooden magic-words formula. *See, e.g.*, *FEC v. Christian Action Network*, 110 F.3d 1049, 1054 (4th Cir. 1997); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). However, the Supreme Court soundly rejected this approach in *McConnell* with respect to issue ads that are the "functional equivalent of express advocacy." *See* 540 U.S. at 189-94; *see also id.* at 278 n.11 (Thomas, J., dissenting) (noting that majority had "overturned" contrary lower court precedents, including *Christian Action Network*, with respect to that issue). Later, in 2007, in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), the Chief Justice's controlling opinion explained that the FECA may constitutionally reach "the functional equivalent of express advocacy," which was defined as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. 449, 469-70 (2007); *see also Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010) (applying the *WRTL* test). The definition in 11 CFR 100.22(b) comports with this reasoning.

Since *WRTL* was decided, the Commission has frequently applied 11 CFR 100.22(b). *See, e.g.*, MUR 5831 (Softer Voices); MUR 5833 (Ohio Democratic Party); MUR 5887 (Republican Mainstreet PAC). Additionally, as noted above, the Commission is actively defending this regulation in litigation. Any remaining concerns about its constitutionality should be put to rest after the Court's decision in *Citizens United*, because the definition at section 100.22 functions now not as a limit on speech, but rather to implement disclosure requirements. Accordingly, we believe the approach we supported is entirely consistent with the Supreme Court's decisions.

The requestor's second question asked us to analyze four planned donation requests to determine whether they would constitute "solicitations" of contributions. In doing so, we applied the test articulated in *FEC v. Survival Education Fund*, which held that requests for funds "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office" raise "contributions" under the Act. *FEC v. Survival Education Fund*, 65 F.3d 285,295 (2d Cir. 1995) (analyzing communications for purposes of section 441 d(a)). The draft supported by our colleagues suggests that the *Survival Education Fund* test as the Commission has traditionally applied it cannot survive after *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). *Emily's List* struck down the regulation at 11 CFR 100.57, which adopted the *Survival Education Fund* test, because the D.C. Circuit Court objected to the regulation's mandatory federal versus non-federal allocation formula. 581 F.3d at 17-18, 21. Nothing in *Emily's List*, however, undermines the general premise that a solicitation indicating

[1] Available at www.fec.gov/law/litigation/rtao.shtml#ac_decisions.

that donated funds will be used to support or oppose the election of a clearly identified federal candidate results in "contributions" under the FECA. Rather, *Emily's List* invalidated 100.57 for reasons wholly unrelated to the regulation's articulation of when a solicitation results in Federal contributions. Our draft's application of this premise is consistent with the Commission's longstanding approach to this issue. *See* Explanation and Justification, *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056 (Nov. 23, 2004); MUR 5511 (Swiftboat Vets and POWs for Truth); MUR 5753 (League of Conservation Voters 527); MUR 5754 (MoveOn.org Voter Fund); Supplemental Explanation and Justification, *Political Committee Status,* 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J").

Free Speech's third question asked us to determine whether its proposed activities would require it to register and report to the Commission as a political committee. As articulated in our draft, and based on the group's proposal to spend its entire proposed budget on Federal campaign activity, we concluded that Free Speech has as its major purpose the nomination or election of Federal candidates and would be required to register if it received over $1,000 in contributions or made over $1,000 in expenditures during a calendar year. *See* 2 USC 431(4)(A); 11 CFR 100.5; *see also* Supplemental E&J, 72 Fed. Reg. at 5597, 5605. Based on the facts of this request, this was not a difficult determination.

Finally, we emphasize that after *Citizens United*, the regulations and provisions of the Act at issue in Free Speech's request no longer function as limits on its speech. The result of a determination that an advertisement "expressly advocates" the election or defeat of a federal candidate, or that a solicitation clearly indicates that donated funds will be used to support or oppose the election of a federal candidate, is disclosure. "Effective disclosure" is integral to the campaign finance regime the Supreme Court envisioned, because it "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916. Our approach endeavors to be faithful to the Court's guidance.

May 8, 2012

Ellen L. Weintraub, Vice Chair

Cynthia L. Bauerly, Commissioner

Steven T. Walther, Commissioner