



January 5, 2008

Stephen Gura, Deputy Associate General Counsel
Federal Election Commission
999 E Street, NW.
Washington, DC 20463

Re: Federal Election Commission [Notice 2008–13], Agency Procedures

Dear Mr. Gura,

OMB Watch is a nonprofit, charitable organization that promotes government accountability and citizen participation at the national level. We encourage nonprofits' participation in governmental decision-making, which includes advocacy, lobbying activities, and nonpartisan voter participation. We advocate for governmental policies that reduce barriers for nonprofits to engage in public policy debates and help to make nonprofit sector activities more transparent and accountable. It is for these reasons we appreciate the opportunity to comment specifically on the Commission's implementation of regulations.

We hope that the Commission will take time in 2009 to address the problem vagueness and case-by-case enforcement creates for nonprofit organizations in the following areas:

- Electioneering communications rule
- Definition of "express advocacy"
- Definition of "major purpose"

Electioneering Communications Rule: Problems with vagueness and inability to adequately enforce 11 CFR 114.15

The Bipartisan Campaign Reform Act (BCRA) of 2002 prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. This electioneering communications rule was modified by the Supreme Court in the case *Wisconsin Right to Life v. FEC* (WRTL) in 2007 to limit the prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."¹

OMB Watch is particularly concerned with the FEC's ability to fairly and adequately enforce restrictions on the use of corporate and labor organization funds for electioneering communications. This is in part due to the lack of clarity in the FEC's rule interpreting WRTL,

¹ 127 S. Ct. 2652 (2007)

11 CFR 114.15, which fails to clearly distinguish electoral activity from non-electoral activity. This has generated a multitude of court challenges.

On November 20, 2007, the FEC issued 11 CFR 114.15, *Permissible use of corporate and labor organization funds for certain electioneering communications*, defining exemptions from the ban on corporate funding for non-electoral broadcasts, in order to comply with the Supreme Court decision. The rule allows broadcasts of genuine issue ads, but does not provide a specific standard. There is a safe harbor for some grassroots lobbying broadcasts, and the rest of the rule only lists criteria to be considered. It says a broadcast:

- Either: (i) Focuses on a legislative, executive or judicial matter or issue; and
- (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or
 - (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
- (ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

This sets up the FEC to decide if a communication is permissible on a case-by-case basis. For example, in the listing "Rules of Interpretation" for all communications that do not fall within the limited safe harbor, the Commission says it "will consider whether the communication includes any indicia of express advocacy."

In comments on the proposed rulemaking, OMB Watch called for the regulation to be more specific, which would alleviate current confusion and fill a gap to help both organizations issuing communications and the FEC itself.² A recent Advisory Opinion for the National Right to Life Committee, where the Commissioners were unable to make a decision, demonstrates that the line between issue advocacy and electioneering remains indistinct.³

Deciding whether a communication is permissible on a case-by-case basis provides little guidance as to what is and is not prohibited activity, making it difficult to know how the FEC will interpret a communication. Such uncertainty may ultimately have a chilling impact on groups that want to engage in advocacy and release various forms of communications.

The FEC has examples of communications that fall within the safe harbor, however, this overall approach has the same kinds of problems charities and religious organizations are experiencing with the vagueness of the Internal Revenue Service's (IRS) "facts and circumstances" standard for enforcing the tax code's ban on partisan intervention in elections by 501(c)(3) organizations. In 2009 the FEC should consider moving away from the safe harbor towards a more explicit rule that is less ambiguous.

Vague Express Advocacy Definition

² [Notice 2007-16]

³ Advisory Opinion 2008-15 National Right to Life Committee, Inc.

The definition of express advocacy according to 11 CFR 100.22, is any communication, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), [. . .] When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)."⁴

This definition is very similar to the standard set in the Supreme Court's opinion in *WRTL*; "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." It leaves too much room for interpretation.

The impact of this vagueness problem is that the FEC cannot fairly or adequately enforce the rule defining express advocacy. As former Commissioner David Mason said, it may be considered unconstitutional after *WRTL*. In a statement of reasons accompanying MUR 5874 (involving the question of voter guides issued by the Gun Owners of America), Mason noted; "Chief Justice Roberts explained that speech standards must avoid the "open-ended rough-and-tumble of factors" to survive constitutionality scrutiny. Considerations such as timing, the intent of the speaker, the effect of the communication, other speech made by the speaker and different sources to which the communication refers are excluded contextual reference points. Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice because it endorses an inherently vague 'rough-and-tumble of factors' approach in demarcating the line between regulated and unregulated speech."⁵

The current definition of express advocacy is even vaguer than the current electioneering communications rule in 11 CFR 114.15. As a practical matter, this makes it impossible for citizens' organizations that want to communicate with the general public to judge whether their broadcast is allowable or not, requiring risk of sanctions. In these circumstances, it cannot be enforced fairly. During 2009 the FEC must clarify the line between express advocacy and issue advocacy. For the sake of future enforcement cases and for continued citizen engagement in genuine issue advocacy, FEC regulations should outline in distinct language what is electoral and non electoral activity.

Vague Major Purpose Definition and Determining What Constitutes a Political Committee

Under BCRA and FEC regulations, a political committee is defined as any "group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year." In *Buckley v. Valeo*, the U.S. Supreme Court said that a political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."⁶ In addition, the major purpose test, established in *Massachusetts Citizens for Life (MCFL)*, is also used to determine which organizations should be considered political committees.⁷ The *MCFL* decision notes that if the "major purpose" of an

⁴ 11 CFR 100.22

⁵ Statement of Reasons of Vice Chairman David M. Mason, MUR 5874 Nov. 15, 2007

⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976)

⁷ *FEC v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646 (D. Mass. 1984)

organization is to influence federal elections, it should be considered a political committee subject to FEC rules. However, the definition of the term "major purpose" is unclear. As a result, it is difficult to definitively determine when an organization is considered a political committee.

The 2008 presidential election illustrates the need to clearly define what constitutes a "major purpose." During the election season, the American Issues Project (AIP) sponsored an ad in several swing states questioning Democratic presidential nominee Barack Obama's ties to a controversial professor. The group claimed that a single \$2.9 million donation for the ad did not violate federal campaign finance laws because it was a Qualified Nonprofit Corporation under FEC rules and was thus exempt from the \$5,000 contribution limit.⁸ That logic and AIP's claimed status that it is an issue advocacy organization are questionable at best.

This case illustrates the need for clarity surrounding what constitutes "major purpose." It also shows that consideration may need to be given to both the timing of the electioneering communication and the timing of past, present, or alleged future issue advocacy. AIP claimed in media reports that they plan to engage in issue advocacy after the election. Is this sufficient? Is it issue advocacy if the only activity to date is partisan electioneering surrounding a federal campaign? Clarity around the "major purpose" definition will help to close a loophole in campaign finance rules and ensure that all organizations that are acting as a political committee are treated as such and those that are not are free to speak on public issues.

In light of the AIP case, this standard is not clear. If an ad criticizes a candidate for federal office within the time frame that triggers scrutiny, how does one determine if the major purpose was the "nomination or election of a candidate?" Is an attack on a candidate's character and fitness treated differently than criticism of a member of Congress' vote on a bill? There needs to be some type of threshold that organizations can look to in determining if they meet the "major purpose" standard.

In *Akins v. FEC*, which applied the two aforementioned cases, the court held that "the major purpose test is applicable for determining a political committee status when evaluating an organization that has only made independent expenditures."⁹ Thus, clarity surrounding when an organization is considered a political committee will not come until the ambiguities surrounding "major purpose" are addressed, and without clarity surrounding when an organization is considered a political committee, organizations will continue to exploit loopholes in campaign finance laws to engage in activities that the laws are designed to prevent.

⁸A "qualified nonprofit corporation" is an organization in which the only express purpose is the promotion of political ideas; does not engage in business activities; has no shareholders and no persons who are offered or receive any benefit that is a disincentive to disassociate from the corporation on the basis of the corporation's position on a political issue; and was not established by a business corporation and does not directly or indirectly accept donations or anything of value from business corporations; and is described in the Internal Revenue Code at 26 U.S.C. §501(c)(4). 11 CFR 114.10(c).

⁹*Akins v. FEC*, No. 92-1864 (JLG) (D.D.C. Aug. 11, 1993) (on motion for amended complaint); (D.D.C. Dec. 8, 1993); (D.D.C. Mar. 30, 1994) (opinion); 66 F.3d 348 (D.C. Cir. 1995), rev'd, 101 F.3d 731 (D.C. Cir. 1996) (en banc), vacated and remanded, 118 S. Ct. 1777 (1998) The FEC has defined independent expenditures as "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate without cooperation or consultation with that candidate or his or her committee."

The IRS uses the "primary purpose" test to determine if organizations have engaged in prohibited campaign intervention. Organizations that are tax-exempt under section 501(c)(4) of the Internal Revenue Code, known generally as "social welfare" organizations, are allowed to be involved in political campaigns, as long as it is not their "primary purpose."

However, similar to the FEC's "major purpose" test, there is no IRS definition that clearly defines what constitutes "primary purpose." Due to this similarity, the lack of clarity surrounding both terms, and the confusion that is sometimes caused due to the FEC and the IRS using to different standards, the FEC should consider working with the IRS to harmonize the definitions of "major purpose" and "primary purpose."

Conclusion

FEC actions have impact beyond the highly specialized world of federal elections and campaign finance regulation, since its rules involve the exercise of First Amendment rights. The vagueness in the electioneering communications rule and the definitions of express advocacy and major purpose raise serious constitutional issues. These rules fail to adequately inform nonprofits of prohibited conduct and give the FEC extremely broad discretion in its enforcement activities. This raises both procedural due process and free speech issues.

In 2009 the FEC has the opportunity to address these flaws in the rules, before the 2010 election season. We urge you to do so.

Sincerely,



Amanda Adams, Nonprofit Policy Analyst



Lateefah Williams, Nonprofit Policy Analyst