Record

September 2008 *Federal Election Commission* *Volume 34, Number 9*

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EMILY's List v. FEC

On July 31, 2008, the U.S. District Court for the District of Columbia denied EMILY's List's motion for summary judgment and granted the FEC's cross-motion for summary judgment.

Background

EMILY's List is a nonconnected political committee registered with the FEC. In January 2005, EMILY's List filed suit in the U.S. District Court for the District of Columbia, asserting a facial challenge to regulations promulgated by the FEC to implement provisions of the Federal Election Campaign Act (the Act).

The regulations at issue established a new rule for when funds received by political committees in response to certain solicitations must be treated as "contributions" under the Act and thereby must abide by federal limitations and prohibitions. The regulations also modified the Commission's rules regarding how political committees may allocate spending between federal and nonfederal accounts.

Under current FEC rules, nonconnected political committees that maintain both federal and nonfederal accounts may allocate administrative expenses, costs of

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Advisory Opinions

AO 2007-33

"Stand-By-Your-Ad" Disclaimer Required for Brief Television Advertisements

A series of 10- and 15-second independent expenditure television ads Club for Growth Political Action Committee (Club for Growth PAC) plans to air in support of a federal candidate must contain the full, spoken "stand-by-your-ad" disclaimer in addition to meeting other disclaimer requirements.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, when express advocacy ads are paid for by a political committee, such as Club for Growth PAC, and are not authorized by any candidate, the disclaimer must clearly state the full name, permanent address, telephone number or web address of the person who paid for the communication and indicate that the communication is not authorized by any candidate or candidate's committee. 11 CFR 110.11(b)(3). For televised ads, this disclaimer must appear in writing equal to or greater than four percent of the vertical picture height for at least four

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generic voter drives and costs of public communications that refer to a political party but not to specific candidates with a minimum of 50 percent federal funds. (The remainder may be allocated to the nonfederal account). 11 CFR 106.6. Public communications and voter drives that refer to one or more clearly identified federal candidates, but not to any nonfederal candidates, must be financed with 100 percent federal funds. 11 CFR 106.6(f)(1). Public communications and voter drives that refer to one or more clearly identified nonfederal candidates but do not refer to any federal candidates may be financed with 100 percent nonfederal funds. 11 CFR 106.6(f)(2).

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With regard to solicitations, Commission regulations state that funds received in response to a solicitation must be considered federal "contributions" under the Act if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate. 11 CFR 100.57(a). Likewise, if a solicitation refers to a clearly identified federal candidate and a political party, but not to a clearly identified nonfederal candidate, all funds received in response are considered contributions. 11 CFR 100.57(b)(1). In contrast however, if the solicitation refers to one or more clearly identified nonfederal candidates, in addition to a clearly identified federal candidate, at least 50 percent of the funds received must be treated as contributions under the Act, regardless of whether the solicitation also refers to a political party. 100.57(b)(2).

EMILY's List sought to enjoin enforcement of the regulations, alleging that each was in excess of the Commission's authority, was arbitrary and capricious, was promulgated without adequate notice under the Administrative Procedures Act (APA) and violated the First Amendment to the Constitution. On February 25, 2005, the court denied EMILY's List's motion for a preliminary injunction, which was subsequently affirmed on appeal on December 22, 2005. See the April 2005 and February 2006 *Record*.

Court Decision on Summary Judgment

The court held that EMILY's List has standing to challenge both the rule regarding how political committees must treat funds received in response to certain solicitations and the rules for how federal and nonfederal activities must be allocated. EMILY's List brings a facial challenge to the rules rather than an "as-applied" challenge, asserting that the rules are overly broad under the First Amendment because "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face."

The court also held that the allocation and contribution limits that EMILY's List challenged in this case are contribution limits, which are subject to lesser scrutiny than the "strict scrutiny" standard that is typically applied to limits on campaign expenditures. The Supreme Court has "recognized that contribution limits, unlike limits on expenditures, 'entail only a marginal restriction upon the contributor's ability to engage in free communication.'" Moreover, contribution limits do not pose the same danger to associational rights as expenditure restrictions because the "overall effect of dollar limits on contributions is merely to require candidates and political committees to raise funds from a greater number of persons."

The district court held in this case that the challenged solicitation and allocation regulations serve the governmental interest of preventing corruption and the appearance of corruption by foreclosing the circumvention of the Act's contribution limits. The court held that EMILY's List cannot establish that the FEC's allocation regulations are facially overbroad since the regulations are closely drawn to match the sufficiently important interests of preventing corruption and the appearance of corruption by preventing the use of nonfederal funds for communications that may influence federal elections. The court also held that the solicitation regulations are closely drawn to match sufficiently important government interests and thus must be upheld under a lesser scrutiny standard. The court denied EMILY's List's motion for summary judgment and granted the FEC's cross-motion for summary judgment.

U.S. District Court for the District of Columbia, 1:05CV00049.

—Myles Martin

Hearn v. FEC

On July 10, 2008, the U.S. District Court for the Western District of Louisiana granted the FEC's motion to dismiss this case, finding that Ms. Hearn lacked standing to bring the suit. The court complaint filed by Gloria Hearn sought judicial review of two final determinations by the FEC that Ms. Hearn's campaign committee and its treasurer failed to file timely disclosure reports.

Background

Commission regulations require House campaign committees, among others, to file all reports and statements electronically if their total contributions or total expenditures exceed, or are expected to exceed, $50,000 in a calendar year. 2 U.S.C. §434(a)(11)(A)(i); 11 CFR 104.18(a)(1)(ii). Reports filed on paper do not satisfy the filing obligations for these committees. 11 CFR 104.18(a)(2).

On October 5, 2007, Ms. Hearn, a candidate for the U.S. House of Representatives in the 2006 election, filed a complaint in the U.S. District Court for the Western District of Louisiana challenging two administrative fines the Commission levied against her campaign committee and its treasurer for failure to file disclosure reports. In her complaint, Ms. Hearn alleged that her campaign committee filed paper copies of the reports on time, then re-filed the reports electronically after the Commission informed the committee that it should have filed electronically. According to the complaint, the Commission imposed fines of $5,000 and $3,500 for the two violations.

Court Decision

The FEC made its final determinations and imposed civil penalties on Ms. Hearn's campaign committee and the committee's treasurer, not on Ms. Hearn herself. Under the Federal Election Campaign Act, only a person against whom an adverse determination was made may request judicial review of an FEC determination. 2 U.S.C. §437g(a)(4)(C)(iii). As a result, the court found that Ms. Hearn lacked statutory standing to ask the district court to review the FEC's actions. The court granted the FEC's motion to dismiss and dismissed the case without prejudice.

U.S. District Court for the Western District of Louisiana, 1:07-cv-01674.

—Amy Kort

The Real Truth About Obama, Inc. v. FEC and U.S. Department of Justice

On July 30, 2008, The Real Truth About Obama (RTAO/ the plaintiff), Inc., a nonprofit "527" corporation, filed a complaint in the U.S. District Court for the Eastern District of Virginia challenging the constitutionality of three provisions of FEC regulations and an FEC "enforcement policy."

The complaint alleges that certain provisions of Commission regulations are unconstitutionally overbroad, void for vagueness, contrary to law and in violation of the First and Fifth Amendments. The plaintiff further alleges that the provisions in question exceed the FEC's statutory authority and have a chilling effect on their speech. Regulations in question include those related to express advocacy, funds received in response to solicitations and the Commission's implementation of the Supreme Court's decision in *Wisconsin Right to Life*, along with the Commission's "enforcement policy" on political committee status. The suit was filed against the FEC and the United States Department of Justice, the entity charged with criminal enforcement of the federal laws at issue.

Background

RTAO is a nonstock, nonprofit corporation in Richmond, Virginia, registered with the IRS under 26 U.S.C. §527. RTAO is not a federally registered political committee and claims that it does not engage in express advocacy or make contributions to political candidates. According to RTAO, the organization's primary purpose is to educate voters and engage in get-out-the-vote drives, along with other activities that are consistent with Section 527 of the Internal Revenue Code.

RTAO intends to engage in certain activities in the current election cycle that it claims will educate the public about Senator Barack Obama's policy positions, including the creation of a web site, digital postcards and audio ads for radio broadcast and web site posting. The organization intends to fund its efforts by sending written communications to potential donors that describe the organization and upcoming projects. RTAO intends to raise more than $1,000 and to disburse more than $1,000 to broadcast audio ads and place them on the web site.

RTAO claims that it is chilled from proceeding with its intended activities because it believes that it will be deemed a political committee by the FEC and subject to FEC and DOJ investigations and possible enforcement actions that may result in civil and criminal penalties.

Complaint

The Federal Election Campaign Act (the Act) and Commission regulations define a "political committee" as any group or association that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" during a calendar year. Groups or associations that meet this definition must follow the Act's limitations, prohibitions and reporting requirements. 11 CFR 100.5.

Expressly Advocating. An "expenditure" includes, among other things, funds spent for a communication that "expressly advocates" the election or defeat of a clearly identified

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federal candidate. 11 CFR 100.22. A communication can be considered express advocacy either by use of certain explicit words of advocacy of election or defeat or by the only "reasonable interpretation test." 11 CFR 100.22. Under the reasonable interpretation test, a communication is considered to expressly advocate when, taken as a whole and with limited reference to external events, such as the proximity of the election, the communication can only be interpreted by a reasonable person as advocating the election or defeat of a candidate. 11 CFR 100.22(b). RTAO asks the court to find the "reasonable purpose test" for the definition of "express advocacy" unconstitutionally vague and overbroad and in excess of the FEC's statutory authority.

Donations to "Support" or "Oppose." "Contributions" include, among other things, funds received in response to a solicitation that indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate. 11 CFR 100.57(a). RTAO asks the court to find this provision unconstitutionally vague and overbroad under the First and Fifth Amendments because the organization claims that "'support' and 'oppose' are undefined, go beyond express advocacy and are unconstitutionally vague."

"Major Purpose Test." A group or association that crosses the $1,000 contribution or expenditure threshold will only be deemed a political committee if its "major purpose" is to engage in federal campaign activity. RTAO claims that the FEC set forth an enforcement policy regarding PAC status in a policy statement,[1] and that this enforcement policy is "based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations . . . that, in themselves, can often shut down an organization, without adequate bright lines to protect issue advocacy in this core First Amendment area." RTAO asks the court to find this "enforcement policy" unconstitutionally vague and overbroad and in excess of the FEC's statutory authority.

Electioneering Communications. Under FEC regulations, a corporation or labor organization can make certain electioneering communications so long as the communication can be reasonably interpreted as something other than an appeal to vote for or against a clearly identified candidate. 11 CFR 114.15. This provision is part of the revised electioneering communications regulations that were promulgated to implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc*. The Court found that WRTL's ads in question could reasonably be interpreted as something other than an appeal to vote for or against a specific federal candidate and, as such, did not constitute the functional equivalent of express advocacy. The Court noted that the ads' content lacked "indicia of express advocacy" because they made no mention of "an election, candidacy, political party, or challenger . . . and [took no] position on a candidate's character, qualifications, or fitness for office." The Commission subsequently promulgated regulations that include a test to determine whether an ad can reasonably be interpreted as something other than an appeal to vote for or against a clearly identified candidate. 11 CFR 114.15. RTAO claims that this regulation exceeds any permissible construction of the Court's decision and is unconstitutionally vague and overbroad and in excess of the FEC's statutory authority.

Relief

The plaintiff seeks a declaration that the challenged regulations and "enforcement policy" are void and set aside. In addition, RTAO seeks a preliminary and permanent injunction enjoining the FEC and DOJ from enforcing these rules and "enforcement policy."

—Michelle Ryan

[1] *The complaint references the FEC's Supplemental Explanation and Justification of its Political Committee Status rules, 72 FR 5595 (February 7, 2007).*

Advisory Opinions

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seconds. 11 CFR 110.11 (c)(3)(iii). Radio and television ads must also include an audio statement identifying the political committee or other person responsible for the content of the ad. 11 CFR 110.11(c)(4)(i).

In this case, Club for Growth PAC intends to pay for 10- and 15-second television ads that expressly advocate the election of a federal candidate. It plans to include the required written disclaimer indicating that it is responsible for the content and that the ads are not authorized by any candidate or candidate's committee.

However, Club for Growth PAC requested it be allowed to omit or truncate the required spoken disclaimer. Since the ads are shorter than most other political ads, which run for 30 to 60 seconds, Club for Growth PAC argued the spoken disclaimer would limit the ad's ability to get its message to viewers.

Analysis

In previous advisory opinions, the Commission has recognized that in certain types of communications it is impracticable to include a full disclaimer as required by the Act and Commission regulations. For example, in AO 2004-10, the Commission found that the specific physical and technological limitations of ads read during live reports broadcast from a helicopter made it

impracticable for a candidate to read the required disclaimer himself or herself.

Likewise, in AO 2002-09, the Commission determined that certain candidate-sponsored text messages were eligible for the "small items" exception from the disclaimer requirements. Under this exception, bumper stickers, pins and other small items are not required to carry a printed disclaimer because their size would make doing so impracticable. 11 CFR 110.11(f)(l)(i).

However, Club for Growth PAC's plan presents facts that are materially different from those presented in these advisory opinions. AO 2004-10 did not dispense with the spoken disclaimer, but rather allowed the broadcaster, rather than the candidate, to read it. Moreover, the 10- and 15-second ads proposed by Club for Growth PAC do not present the same physical or technological limitations as those described in previous advisory opinions.

Likewise, the "small items" exception does not apply to the spoken disclaimer requirements for televised ads. Under Commission regulations, the "small items" exception applies only to "bumper stickers, pins, buttons, pens and other similar items upon which the disclaimer cannot be conveniently printed." 11 CFR 110.11(f)(1)(i). Thus, it does not apply to the *spoken* disclaimer for the television ads that Club for Growth PAC plans to sponsor. Additionally, the Commission noted that the Act provides no exemptions from the spoken disclaimer requirement simply because the ads are only 10 or 15 seconds long. Thus, Club for Growth PAC must include the full spoken disclaimer in its 10- and 15-second television ads.

Date Issued: July 29, 2008;
Length: 4 pages.

—Isaac J. Baker

AO 2008-5
Organization's Status as a Partnership

An entity organized under state law as a limited liability partnership, but classified as a corporation for federal tax purposes, is treated as a partnership under the Federal Election Campaign Act (the Act). Accordingly, the partnership's federal political action committee (PAC) is not a separate segregated fund (SSF), but rather a nonconnected PAC. As such, all administrative support provided to the PAC by the partnership would constitute contributions, subject to the limitations and prohibitions of the Act.

Background

Holland & Knight LLP (the Firm) is a law firm that is classified as a limited liability partnership (LLP) under the laws of Florida. However, for purposes of federal taxation, the Firm is classified as a corporation. The Firm is taxed as a partnership in Massachusetts and Florida, but is taxed as a corporation in other states in which it operates.

The Firm administers the Holland & Knight Committee for Effective Government (the Committee), a nonconnected PAC.

Analysis

The Act's legislative history and Commission regulations rely on state law to determine if an organization is a partnership or a corporation. Since the Firm is organized as a limited liability partnership under Florida law, the Firm is treated as a partnership under the Act and Commission regulations.

The Act generally prohibits corporations from making contributions or expenditures in connection with a federal election. However, the Act exempts from the definition of "contribution or expenditure" a corporation's costs for establishing, administering or soliciting contributions to its SSF. 11 CFR 114.1(a)(2)(iii) and 114.2(b). These exemptions are generally not extended to partnerships. Since the Firm is a partnership and not a corporation, the contribution and expenditure exemptions do not apply, and the Firm may not treat the Committee as its SSF, nor may the Firm treat disbursements for the costs of administering the Committee or for soliciting contributions for the Committee as exempt from the definition of "contribution or expenditure" under the Act and Commission regulations.

Administrative and solicitation costs paid by the Firm on behalf of the Committee are contributions. Partnerships are treated as persons under the Act and Commission regulations and may contribute up to $5,000 per calendar year to a nonconnected committee. 11 CFR 100.10 and 110.1(d). Any contributions made to the Committee by the Firm are attributable both to the Firm and to its partners. 110.1(e)(1) and (2).

Date Issued: July 29, 2008;
Length: 5 pages.

—Myles Martin

Alternative Disposition of Advisory Opinion Request

AOR 2008-01

The requestor withdrew its request for this advisory opinion on August 1, 2008 (Butler County Democrats for Change).

Advisory Opinion Requests

AOR 2008-08

Effect on various contribution limits due to handling of contribution (Jonathan Zucker, July 22, 2008)

AOR 2008-10

Web site as vehicle for hosting political ads created by outside persons and placement of those ads on television (VoterVoter.com, August 12, 2008)

Nonfilers

Committees Fail to File Pre-Primary Reports

Four campaign committees failed to file the Pre-Primary report required by the Federal Election Campaign Act (the Act) for primary elections on August 5, 2008, in Kansas, Michigan and Missouri, and one campaign committee failed to file the Pre-Primary report required for the August 12 primary election in Connecticut.

As of 5 p.m. July 31, 2008, the required disclosure report had not been received from the following committees active in August 5th primary elections:

- Lee Jones for Senate, principal campaign committee for Leroy Dean Jones, a candidate in Kansas. The committee treasurer is Sue Peachey.
- Betts for Congress, principal campaign committee for Donald Betts, Jr., a candidate in Kansas' 4th district. The committee treasurer is Thomas M. Warner, Jr.
- Jack Hoogendyk for US Senate, principal campaign committee for Jack Hoogendyk, a candidate in Michigan. The committee treasurer is Jack Hoogendyk.
- Allen for Congress, principal campaign committee for Joseph William Allen, a candidate in Missouri's 8th district. The committee treasurer is Kathryn Sunita Allen.

This report was due on July 24, 2008. If sent by certified or registered mail, the report should have been postmarked by July 21, 2008

As of 5 p.m. August 7, 2008, the required disclosure report had not been received from Lee Whitnum 2008, principal campaign committee for Lisa Lee Whitnum in Connecticut's 4th Congressional District. The committee's treasurer is L. Lee Whitnum. This report was due on July 31, 2008, and should have included financial activity for the period July 1, 2008, through July 23, 2008. If sent by certified or registered mail, the report should have been postmarked by July 28, 2008.

The FEC notified committees involved in these primaries of their potential filing requirements. Those committees who did not file on the due date were notified that reports had not been received and that their names would be published if they did not respond within four business days.

Some individuals and their committees have no obligation to file reports under federal election law, even though their names may appear on state ballots. If an individual raises or spends less than $5,000, he or she is not considered a "candidate" subject to reporting under the Act.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file pre-primary reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an administrative fine program with provisions for assessing monetary penalties.

—Myles Martin

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Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site www.fec.gov.

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

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