Record

September 2008 *Federal Election Commission* *Volume 34*

NONCONNECTED SUPPLEMENT

Table of Contents

Court Cases

1 *Shays v. FEC (III)*

Advisory Opinions

3 "Stand-by-Your-Ad" Disclaimer Required for Brief Television Advertisements, AO 2007-33

4 Organization's Status as a Partnership, AO 2008-5

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to nonconnected committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulations and advisory opinions that affect the activities of nonconnected committees. It should be used in conjunction with the FEC's October 2005 *Campaign Guide for Nonconnected Committees*, which provides more comprehensive information on compliance for nonconnected committees.

Legislation

Shays v. FEC (III)

On June 13, 2008, a three-judge panel of the U.S. Court of Appeals for the District of Columbia affirmed in part and reversed in part the district court's judgment in the *Shays III* case. Specifically, the appeals court agreed with the district court in finding deficient regulations regarding the content standard for coordination, the 120-day coordination window for common vendors and former campaign employees and the definitions of "GOTV activity" and "voter registration activity." The appeals court reversed the district court's decision to uphold the provision allowing federal candidates to solicit funds without restriction at state and local party events. These regulations were remanded to the FEC to issue "regulations consistent with the Act's text and purpose." The court did not vacate the regulations, so they remain in effect, pending further action. The appeals court upheld the FEC's regulations regarding the firewall safe harbor for coordination by former employees and vendors, which the district court had found deficient.

Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a

number of its Bipartisan Campaign Reform Act (BCRA) regulations. On July 11, 2006, U.S. Representative Christopher Shays and then-Representative Martin Meehan (the plaintiffs) filed another complaint in district court. The complaint challenged the FEC's recent revisions to, or expanded explanations for, regulations governing coordinated communications, federal election activity (FEA) and solicitations by federal candidates and officeholders at state party fundraising events. The plaintiffs claimed that the rules did not comply with the court's judgment in *Shays I* or with the BCRA. The complaint also alleged the FEC did not adequately explain and justify its actions.

Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
202/694-1100
202/501-3413 (FEC Faxline)
202/219-3336 (TDD for the hearing impaired)

Donald F. McGahn II, Chairman
Steven T. Walther, Vice Chairman
Cynthia L. Bauerly, Commissioner
Caroline C. Hunter, Commissioner
Matthew S. Petersen, Commissioner
Ellen L. Weintraub, Commissioner

Joseph E. Stoltz, Acting Staff Director
Thomasenia Duncan, General Counsel

Published by the Information Division of the Office of Communications
Greg J. Scott, Assistant Staff Director
Amy L. Kort, Deputy Assistant Staff Director
Myles G. Martin, Editor

http://www.fec.gov

On September 12, 2007, the district court granted in part and denied in part the parties' motions for summary judgment in this case. The court remanded to the FEC a number of regulations implementing the BCRA, including:

- The revised coordinated communications content standard at 11 CFR 109.21(c)(4);
- The 120-day window for coordination through common vendors and former employees under the conduct standard at 11 CFR 109.21(d)(4) and (d)(5);
- The safe harbor from the definition of "coordinated communication" for a common vendor, former employee, or political committee that establishes a "firewall'' (11 CFR 109.21(h)(1) and (h)(2)); and
- The definitions of "voter registration activity" and "get-out-the-vote activity" (GOTV) at 11 CFR 100.24(a)(2)-(a)(3).

On October 16, 2007, the Commission filed a Notice of Appeal seeking appellate review of all of the adverse rulings issued by the district court. On October 23, 2007, Representative Shays cross-appealed the district court's judgment insofar as it denied the plaintiff's "claims or requested relief."

Appeals Court Decision

The appellate court upheld the majority of the district court's decision, including the remand of the content standard for coordination, the 120-day common vendor coordination time period and the definitions of GOTV activity and voter registration activity. While the district court had held the firewall safe harbor for coordination by former employees and vendors invalid, the court of appeals reversed the district court and upheld the safe harbor provision. The court of appeals reversed the district court's decision to uphold the provision permitting federal candidates to solicit funds without restriction at state or local party events.

Coordination Content Standard. The court of appeals held that, while the Commission's decision to regulate ads more strictly within the 90- and 120-day periods was "perfectly reasonable," the decision to regulate ads outside of the time period only if they republish campaign material or contain express advocacy was unacceptable. Although the vast majority of communications are run within the time periods and are thus subject to regulation as coordinated communications, the court held that the current regulation allows "soft money" to be used to make election-influencing communications outside of the time periods, thus frustrating the purpose of the BCRA. The appellate court remanded the regulations to the Commission to draft new regulations concerning the content standard.

Coordination by Common Vendors and Former Employees. The appellate court affirmed the district court's decision concerning the 120-day prohibition on the use of material information about "campaign plans, projects, activities and needs" by vendors or former employees of a campaign. The court held that some material could retain its usefulness for more than 120 days and also that the Commission did not sufficiently support its decision to use 120 days as the acceptable time period after which coordination would not occur.

Firewall Safe Harbor. Contrary to the decision of the district court, the court of appeals approved the firewall safe harbor regulation to stand as written. The safe harbor is designed to protect vendors and organizations in which some employees are working on a candidate's campaign and others are working for outside organizations making independent expenditures. The appellate court held that, although the

firewall provision states generally as to what the firewall should actually look like, the court deferred to the Commission's decision to allow organizations to create functional firewalls that are best adapted to the particular organizations' unique structures.

Definitions of GOTV and Voter Registration Activity. The court of appeals upheld the district court's decision to remand the definitions of "GOTV" and "voter registration activity." The court held that the definitions impermissibly required "individualized" assistance directed towards voters and thus continued to allow the use of soft money to influence federal elections, contrary to Congress' intent.

Solicitations by federal candidates at state party fundraisers. While the district court had upheld the regulation permitting federal candidates and officeholders to speak without restriction at state party fundraisers, the court of appeals disagreed. The court stated that Congress did not explicitly state that federal candidates could raise soft money at state party fundraisers; rather, Congress permitted the federal candidates to "appear, speak, or be a featured guest." Congress set forth several exceptions to the ban on federal candidates raising soft money, and state party events were not included in the exceptions. Thus, the court found the regulation impermissible.

U.S. District Court of Appeals for the District of Columbia Circuit, 07-5360.

—Meredith Metzler

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 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