AGENDA DOCUMENT NO. 02-55-A

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 31, 2002

AGENDA ITEM
For Meeting of: 8-01-02

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Draft NPRM re "electioneering communications"

I have some concern with certain proposed interpretations of the statute reflected in Agenda Document No. 02-55. While this is a preliminary assessment of the new law, and we can adjust our final regulation later, we should reflect on a few topics before we unwittingly cause problems down the road.

First, I continue to believe we do not have authority to interpret the statute as if it incorporates a 50,000 person targeting requirement regarding ads mentioning presidential primary candidates. The definition of "electioneering communication" ("EC") at 2 U.S.C. § 434(f)(3)(A) only applies targeting in the case of House and Senate candidates.[1] The limitation on the allowance for incorporated 501(c)(4)'s and 527's at 2 U.S.C. § 441b(c)(6) also clearly indicates the targeting concept is limited to House and Senate contexts.[2] While we may have some leeway to create exceptions to the definition of EC, I think incorporating a targeting concept for ads referring to presidential primary candidates (see p. 7, line 22, through p. 8, line 2; p. 14, line 7, through p. 15, line19; p. 52, line 22, through p. 53, line 6) is problematic.

The upshot of the draft's approach is that some tacticians may escape the EC rules by running ads in areas where a primary is not imminent, knowing that it nonetheless will

[1] It provides: "IN GENERAL, (i) the term 'electioneering communication' means any broadcast, cable, or satellite communication which . . . (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

[2] It provides: "SPECIAL RULES FOR TARGETED COMMUNICATIONS—(A) EXCEPTION DOES NOT APPLY—Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph. (B) TARGETED COMMUNICATION—For purposes of subparagraph (A), the term 'targeted communication' means an electioneering communication (as defined in section 304(f)(3)) [2 U.S.C. § 434(f)(3)] that . . . in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

have a dramatic impact. An ad run, for example, in California on March 8, 2000 in California (the day after the California primary) might have had a significant effect on the Oregon primary scheduled for May 16, 2000, even though it didn't technically reach 50,000 Oregonians. It seems plausible that Congress would have understood the nuances of the presidential election process such that the distinction carved in the statutory language was intentional.

Moreover, by exempting presidential primary communication under a targeting concept, the draft seems to be foreclosing the opportunity for incorporated 501(c)(4)'s and 527's to utilize the allowance at 2 U.S.C. § 441b(c)(2) which permits such organizations to make EC's as long as funds from individuals are used.[3] See draft at p. 25, lines 8 and 9 ("The Wellstone amendment then defines 'targeted communication' to encompass all electioneering communications."); p. 26, lines 12-15 (similar).[4] I do not think we should interpret the statute so that the allowance at § 441b(c)(2) is a nullity. Moreover, the approach incorporated in the draft doesn't deal with the fact that in the general election there still will be EC's mentioning presidential candidates that are in no way governed by a targeting concept. Certainly for these, even under the draft's approach, there must be some recognition of the allowance for incorporated 501(c)(4)'s and 527s set forth at § 441b(c)(2). There is no regulation text that anywhere suggests such an opportunity.

While the draft does at p. 26, lines 1-11, seek comment on the construction of the statute I suggest, I worry that we don't have any legal basis for the favored approach reflected elsewhere in the draft. At this point, I only raise the issue, since we can repair this at the later stage of the rulemaking.

A second area that concerns me is the discussion of 'other' possible exceptions to the EC definition. We need to be careful we don't imply we can ignore the statutory mandate that no such exception be allowed if would fit the test of a "public communication that . . . promotes or supports a candidate . . . or attacks or opposes a candidate" (2 U.S.C. § 431(20)(A)(iii)). See 2 U.S.C. § 434(f)(3)(B)(iv). The suggestion that an ad might escape the EC definition if it merely promotes local tourism or a ballot initiative (see p. 21, line 10), or if it merely includes a telephone number and a reference

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[3] It provides: "EXCEPTION—Notwithstanding paragraph (1), the term 'applicable electioneering communication' does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) made under section 304(f)(2)(E) or (F) of this Act if the communication is paid for exclusively by funds provided directly by individuals . . . ."

[4] Plainly, this is not the case as the language quoted at n. 2 shows. Perhaps some confusion in this area is generated by the fact that the version of S. 27 to which the Wellstone amendment was attached did not make the distinction between Senate and House campaigns on one hand, and Presidential campaigns on the other. See § 201 of S. 27 (using the clause: "is made to an audience that includes members of the electorate for such election, convention, or caucus"). When the legislation was taken up in the House, the Shays-Meehan substitute that was adopted on February 13, 2002, at § 201 incorporated this distinction (using the clause: "in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate"). Thus, the Senate debate surrounding the Wellstone amendment, and the text of the Wellstone amendment itself, must be read in light of the more relevant House provision. It was the latter language that was passed and became law.

to a specific piece of legislation (see p. 22, lines 14 and 15), is problematic. Again, I only raise the issue for comment, understanding that we can do the right thing later.

A third concern I have is that the language on p. 23, lines 10-18 may generate some confusion. We should be clearer that the statute only prohibits groups covered by the prohibitions at 2 U.S.C. § 441b (corporations and unions for the most part) and persons covered by 2 U.S.C. § 441e (foreign nationals) from making EC's outright. Unincorporated groups, other than unions and foreign nationals, may use treasury funds to make EC's, unless they are using funds donated by a group covered by § 441b(a). While it is true that "political committees" as defined under FECA that have incorporated for liability purposes only will not be treated as corporations because of FEC regulations (11 C.F.R. § 114.12(a)), other incorporated 527's will not enjoy such treatment. Thus, the language on p. 23 may be off a bit in suggesting broadly that the latter may make EC's. If they are incorporated, they will be subject to the ban, as I read the law. On the other hand, under the allowance at § 441b(c)(2), such incorporated 527's will be able to undertake non-targeted EC's if they use only funds from individuals.

To make the distinctions a bit clearer, I would substitute the following language:

> BCRA allows the following persons to make electioneering communications: (1) individuals; (2) "political committees" as defined under FECA, including authorized committees, party committees, separate segregated funds, and nonconnected committees; (3) unincorporated organizations, including partnerships, LLC's that do not qualify as corporations, unincorporated trade associations or membership organizations, unincorporated 501(c)(3) or (4)'s, and unincorporated 527's, as long as they do not use funds received from corporations or labor organizations to pay for the electioneering communications; and (4) incorporated 501(c)(4)'s and 527's, as long as they meet certain requirements discussed more fully below.

I hope the foregoing points will, if nothing else, facilitate analysis of this part of our rulemaking.