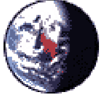

Allison Hayward
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09/28/2007 02:58 PM

To wrtl.ads@fec.gov

cc

bcc

Subject Hayward Comment on WRTL Rule

Attached please find my comments. I would like the opportunity to testify.

Allison R. Hayward

WRTL rule comments.doc

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September 28, 2007

To: Ron B. Katwan, Assistant General Counsel
Federal Election Commission

Fr: Prof. Allison Hayward
George Mason University School of Law

Re: Request for Comment, Notice 2007-16
Electioneering Communications

I would like to comment on the proposed revisions to 11 C.F.R. Parts 100, 104 and 114, required in light of the Supreme Court's decision in *Wisconsin Right to Life v. FEC*, 127 S. Ct. 2652 (June 25, 2007) ("*WRTL*"). This case presented an as-applied challenge to the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). I am offering these comments in my personal capacity as an academic and as someone with a continuing interest in these issues.

I would also like to testify at the public hearing on this rulemaking.

<u>Alternative 1 and Alternative 2</u>

The proposed Rulemaking sets forth two major alternatives. In Alternative 1, new Section 114.15 would protect from the Act's corporate and labor disbursement prohibitions those electioneering communications that are "susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate." This appears to be the FEC's attempt to restate the Court's admonition that a communication is only subject to BCRA's Section 203 if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 127 S. Ct. at 2667.[1] In Alternative 2, the definition of "electioneering communication" is recrafted to exclude altogether from the term these kinds of communications.

[1] To make it abundantly clear to future generations that, in fact, the FEC *means* to apply an identical standard, the FEC might consider rephrasing the clause to *match WRTL*. At the very least the FEC should make explicit in the Explanation and Justification that it believes these two tests will lead to an identical result.

Alternative 2 has many appealing virtues. It is simpler. It is broader in scope, as it would shield activity not only from the expenditure ban, but also from the reporting and coordination requirements. It renders the regulations more coherent – that is, you don't have different content tests applied to the same communication, depending on whether one is looking at "disbursements" or at "disclosure."

However, the Court's *WRTL* decision is narrower in focus than that. It limits its analysis to the constitutionality of section 203 of BCRA, as applied to this group. *See* 127 S. Ct. at 2658, 2660, 2663-64 and 2670. Section 203, in turn, amended only Section 316(b)(2) of FECA. Section 203 amended none of the Act's disclosure provisions. The Commission should promulgate regulations to reflect *this* opinion, and not venture to predict how or whether the Court would extend the same analysis to disclosure laws, which are typically subject to less rigorous scrutiny. It is better for the Commission's litigation record, and more appropriate to its role as a federal agency, to adopt a rule that hews closely to the Court's holding. Given that, Alternative 1 is the stronger choice (although Alternative 2, I must concede, is better policy).

Having said this, I believe there are good reasons to reexamine the burden imposed by campaign finance disclosure requirements, someday. The present standards are overly invasive, chilling, and ineffective against people who avoid public exposure by providing incomplete or confusing identification information. Even so, the disclosure burden *here* is *less* than in the political committee context (as it should be). It is some small comfort that for electioneering communications the law requires reporting only the name and address of donors, is triggered once the donor has given $1,000, and only after the recipient has spent $10,000. By comparison (as you know) the political committee threshold is $1,000 in contributions or expenditures, and requires reporting the name, address, occupation and employer of donors at an absurdly low $200 threshold.

The Proposed Rules also seek comment on the impact *WRTL* should have on the coordination regulations. The FEC should revise the "content prong" of "coordination," because there, again, the law *prevents* disbursements. The Court would apply the same level of scrutiny in this context as in *WRTL* and thus the FEC need not speculate. It can apply *WRTL* to the coordination regulations. Logically, the protection afforded electioneering that is *not* the functional equivalent of express advocacy must be honored by amending Section 109(c)(1) to restrict electioneering communications susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate.

Moreover, the FEC should repair the definition of "express advocacy" at Section 100.22. Section 100.22(b) brings into the regulatory definition of "express advocacy" a test that seems *similar* to the one set forth in *WRTL*. If the FEC deems Section 100.22(b) *identical* in scope to the *WRTL* standard, than electioneering communications collapse into the regulatory definition of "express advocacy." One doubts the Court even thought about this. If Section 100.22(b) is deemed to mean something different from *WRTL*, then the web of competing standards becomes impenetrable.

Remove Section 100.22(b) from the regulations. At its historic apex, this construction of express advocacy was *at best* a minority rule. *See* California Pro-Life Council v. Getman, 328 F.3d 1088, 1098 ("But standing apart from other circuit precedent is our decision in *FEC v. Furgatch* [807 F.2d 857 (9th Cir. 1987)]."); Virginia Soc'y for Human Life v. FEC, 263 F.3d 379, 391 (4th Cir. 2001) (finding 100.22(b) unconstitutional). It is no longer clear that the jurisdiction from whence it came (California) accepts the *Furgatch* rule. *Id.*, *see also* Gray Davis Committee v. American Taxpayers Alliance, 125 Cal. Rptr. 2d 534 (Ct. App. 2002) ("The *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment . . . ."). Section 100.22(b), spawn of *Furgatch*, is an artifact, a font of confusion, and unconstitutional. The FEC should eliminate it from its regulations.

Safe Harbor Factors

The Proposed Rule also seeks comment on two proposed safe harbors, one for grassroots lobbying communications and one for commercial and business advertisements. Although *WRTL* does not bring commercial advertisements before the Court, I understand the Commission deals perennially with questions and complaints about such ads. The FEC, as an ordinary rulemaking exercise independent from changes required by the *WRTL* decision, should provide clarifying rules for candidates and officeholders in anticipation of the upcoming election cycle.

I generally support the spirit of the safe harbors offered in the Proposed Rule. But, it is unwise to require that a "safe" communication be "exclusively" about a pending issue (in the case of the grassroots communication) or a "business or professional practice" (in the case of commercial and business advertisements). It makes no sense to deny safe harbor protection to a communication that contains both a discussion of a pending issue and promotion of the candidate's business, for instance. It makes no sense to deny the safe harbor to a communication that contains elements of grassroots lobbying (as defined) and other idiosyncratic details of importance to the corporation or labor organization. The negative provisions in subsections (C) and (D) adequately limit the scope of the safe harbor. The "exclusively" requirement should be removed.

Use of Examples

Examples are good. Examples help the casual political activist and the non-specialist understand the scope and application of the rules. I am torn, however, over whether or not examples belong in the regulations, as there is also virtue in brevity. The Commission might feature the examples and some discussion of them in the Explanation and Justification for the Final Rule, and make that material readily available (in normal-sized print, *not* the PDF of the *Federal Register*) to the press and public through the public information office and the website.

Finally, I would like to join the Madison Center's comments regarding litigation burdens at pp. 1-4 of its submission.[2] The FEC must recognize that the Supreme Court

[2] I read them on the Internet this afternoon. No coordination was involved.

showed no interest in considering any standards that require burdensome fact production. Once in the midst of an investigation, it is only human nature to seek "more." The FEC needs clear objective rules that require little fact development – and effective institutional restraints to combat those tendencies. As an agency of the government, the FEC must tread carefully when imposing discovery requests upon popular political activity. That restraint should operate even when adventuresome district judges would allow such requests, and even when editorialists make cute references to the agency's "FEClessness."

Thank you for the opportunity to offer my comments on the Proposed Rule. I look forward to the chance to discuss these rules with you on October 17, 2007.