



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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January 25, 2005

MEMORANDUM

AGENDA ITEM

For Meeting of: 01-27-05

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Ron B. Katwan *RIK*
Attorney

SUBJECT: Notice of Proposed Rulemaking: Definition of Agent for BCRA Regulations on Coordinated and Independent Expenditures and Non-Federal Funds or Soft Money (11 CFR 109.3 and 300.2(b)).

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that revisits the definition of agent at 11 CFR 109.3 and 300.2(b) in order to comply with the district court's decision in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004).

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 109 and 300**

3 [Notice 2005 –]

4 **Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money**
5 **and Coordinated and Independent Expenditures**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission requests comments on the
9 proposed revision of the definition of “agent” for its regulations on
10 coordinated and independent expenditures, and non-Federal funds,
11 which are commonly referred to as “soft money.” Current
12 Commission regulations define agent as “any person who has
13 actual authority, either express or implied” to perform certain
14 actions. This definition does not include persons acting only with
15 apparent authority. The Commission’s regulations defining agent
16 were challenged in Shays v. FEC. The District Court held that the
17 Commission’s definitions of agent did not necessarily run contrary
18 to Congress’s intent and were based on a permissible construction
19 of the statute. However, the court also held that the Commission
20 had not provided adequate explanation of its decision to exclude
21 from the definition of agent persons acting only with apparent
22 authority and therefore had not satisfied the reasoned analysis
23 requirement of the Administrative Procedures Act. The court

1 remanded the regulations to the Commission for further action
2 consistent with the court's opinion. Accordingly, in order to
3 comply with the court's decision, the Commission now revisits the
4 definition of agent by issuing this Notice of Proposed Rulemaking.
5 No final decision has been made by the Commission on the issues
6 presented in this rulemaking. Further information is provided in
7 the supplementary information that follows.

8 **DATES:**

Comments must be received on or before [INSERT DATE 30
9 DAYS AFTER THE DATE OF PUBLICATION IN THE
10 FEDERAL REGISTER]. If the Commission receives sufficient
11 requests to testify, it may hold a hearing on these proposed rules.
12 Commenters wishing to testify at the hearing must so indicate in
13 their written or electronic comments.

14 **ADDRESSES:**

All comments should be addressed to Mr. Brad C. Deutsch,
15 Assistant General Counsel, and must be submitted in either
16 electronic or written form. Commenters are strongly encouraged
17 to submit comments electronically to ensure timely receipt and
18 consideration. Electronic mail comments should be sent to
19 agentnprm@fec.gov and may also be submitted through the
20 Federal eRegulations Portal at www.regulations.gov. All
21 electronic comments must include the full name, electronic mail
22 address, and postal service address of the commenter. Electronic
23 comments that do not contain the full name, electronic mail

1 address, and postal service address of the commenter will not be
2 considered. If the electronic comments include an attachment, the
3 attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word
4 (.doc) format. Faxed comments should be sent to (202) 219-3923,
5 with printed copy follow-up. Written comments and printed copies
6 of faxed comments should be sent to the Federal Election
7 Commission, 999 E Street, N.W., Washington, D.C. 20463. The
8 Commission will post public comments on its Web site. If the
9 Commission decides that a hearing is necessary, the hearing will
10 be held in the Commission's ninth floor meeting room, 999 E
11 Street N.W., Washington, D.C.

12 **FOR FURTHER**
13 **INFORMATION**
14 **CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B.
Katwan, Attorney, 999 E Street N.W., Washington, D.C. 20463,
(202) 694-1650 or (800) 424-9530.

17 **SUPPLEMENTARY**

18 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155,
19 116 Stat. 81 (March 27, 2002) ("BCRA"), contained extensive and detailed amendments
20 to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. (the
21 "Act"). On July 29, 2002, the Commission promulgated regulations in order to
22 implement BCRA's new limitations on party, candidate, and officeholder solicitation and
23 use of non-Federal funds. Final Rules and Explanation and Justification for Regulations
24 on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR
25 49064 (July 29, 2002) ("Soft Money E&J"). On January 3, 2003, the Commission

1 promulgated regulations implementing BCRA's provisions regarding payments by
2 political committees and other persons for communications that are coordinated with a
3 candidate, a candidate's authorized committee, or a political party committee and
4 regarding expenditures by political party committees that are made either in coordination
5 with, or independently from, candidates. Final Rules and Explanation and Justification
6 for Regulations on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003)
7 ("Coordination E&J").

8 Many of the regulations promulgated in these two rulemakings apply not only to
9 principals, such as a candidate or party committee, but also to their agents. 67 FR at
10 49081-82; 68 FR at 421-22. Accordingly, in each rulemaking the Commission adopted a
11 definition of the term "agent." 67 FR at 49081-83; 68 FR at 423-25. The two identical
12 definitions provide that an agent is "any person who has actual authority, either express
13 or implied" to perform certain actions. See 11 CFR 109.3 and 300.2(b). The definitions
14 do not include persons acting only with apparent authority.

15 Subsequently, in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004), appeal filed,
16 No. 04-5352 (D.C. Cir. Sept. 28, 2004) ("Shays"), the district court held that the
17 Commission had not satisfied the reasoned analysis requirement of the Administrative
18 Procedures Act ("APA") because the Commission had not provided adequate explanation
19 of its decision to exclude from the definition of agent persons acting only with apparent
20 authority.¹ The court based its conclusion that the Explanations and Justifications for the

¹ Although the court held that, with respect to the definition of agent, the Soft Money E&J and the Coordination E&J both failed to satisfy APA requirements, it found that the definitions of agent at 11 CFR 109.3 and 300.2(b) did not necessarily run contrary to Congress's intent and were based on a permissible construction of the statute. Id. at 71-72, 81-86 (finding that both definitions "survive[] Chevron review").

1 Commission's definitions of agent did not satisfy APA requirements on three grounds.
2 First, the court found that the Commission had not explained why its former definition of
3 agent, which pre-dated BCRA and which had included a definition that covered certain
4 aspects of apparent authority, should be changed. Shays at 87. Second, the court found
5 that the Commission had not addressed the impact that its construction of the term agent
6 might have on preventing circumvention of the Act's limitations and prohibitions and
7 preventing the appearance of corruption, two policies that Congress sought to advance in
8 passing BCRA. Id. at 72, 87. Third, the court found that the Commission's main
9 concern in excluding apparent authority from the definitions – namely to prevent a
10 candidate or party committee from being held liable for the actions of a rogue or
11 misguided volunteer who purports to act on behalf of the candidate or committee – was
12 “not supported by the law of agency” Id. at 87.

13 The court remanded both definitions to the Commission for further action
14 consistent with its opinion. Id. at 130. Accordingly, in order to comply with the court's
15 decision in Shays, the Commission is now issuing this Notice of Proposed Rulemaking
16 (“NPRM”) on the definition of agent. For reasons explained in more detail below, the
17 Commission proposes to revise its regulations to include persons acting with apparent
18 authority in its definitions of agent at 11 CFR 109.3 and 300.2(b). The Commission may
19 nonetheless determine after the comment period to retain the current definitions of agent,
20 which exclude apparent authority. Accordingly, this NPRM seeks comment both on

The court concluded that “the FEC's definition of the term ‘agent’ is, at least on its face, a ‘permissible construction of the statute’” and that “the Commission's construction of the term ‘agent’ is faithful to the literal terms of the statute.” Id. at 84.

1 whether apparent authority should be added to the Commission's definitions of agent and
2 on whether there are reasons for continuing to exclude apparent authority from the
3 definitions.

4 **Proposed 11 CFR 109.3 and 300.2(b) – Definitions.**

5 According to the common law definition of actual and apparent authority as
6 codified in the Restatement (Second) of Agency (1958) ("Restatement"),² an agent's
7 actual authority is created by manifestations of consent (express or implied) made by the
8 principal to the agent. Restatement, § 7. Apparent authority, by contrast, is the result of
9 manifestations the principal makes to a third party about a person's authority to act on the
10 principal's behalf. Restatement, § 8. It is important to emphasize that apparent authority
11 is created only where the principal's word or conduct "reasonably interpreted, causes the
12 third party to believe that the principal consents to have the act done on his behalf by the
13 person purporting to act for him." Overnite Transp. Co. v. NLRB, 140 F.3d 259, 266
14 (D.C. Cir. 1998) (quoting Restatement, § 27). Moreover, to have apparent authority "the
15 third party must not only believe that the individual acts on behalf of the principal but, in
16 addition, 'either the principal must intend to cause the third party to believe that the agent
17 is authorized to act for him, or he should realize that his conduct is likely to create such
18 belief.'" Id. (quoting Restatement, § 27, cmt. a) (emphasis added). Finally, "apparent
19 authority can be created by appointing a person to a position, such as that of manager or
20 treasurer, that carries with it generally recognized duties; to those who know of the

² See Kolstad v. American Dental Ass'n, 527 U.S. 526, 542 (1999) ("The common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point for defining [the] general common law [of agency].")

1 appointment there is apparent authority to do the things ordinarily entrusted to one
2 occupying such a position, regardless of unknown limitations which are imposed upon
3 the particular agent.” Restatement, § 27, cmt. a.

4 At the time the Commission decided to exclude apparent authority from its
5 definitions of agent, its primary goal was to ensure that a principal would be able to
6 control whether a would-be agent had authority to act on the principal’s behalf.

7 Accordingly, the Commission sought to limit a principal’s liability for the actions of an
8 agent to situations where the principal had engaged in specific conduct to create an
9 agent’s authority. Particularly, the Commission was concerned that by including
10 apparent authority in the definition of agent it would, first, expose principals to liability
11 based solely on the actions of a rogue or misguided volunteer and, second, “place the
12 definition of ‘agent’ in the hands of a third party”. See Soft Money E&J, 67 FR at 49083;
13 Coordination E&J, 68 FR at 425. The Commission seeks comment on rationales for
14 excluding apparent authority from the definition of agent.

15 According to the Shays court, the scope of the common law concept of apparent
16 authority appears to exclude from the definition of agent precisely the types of conduct
17 that the Commission sought to exclude when it decided to limit its definitions of agent to
18 persons acting with actual authority. Just as the Commission intended when it adopted its
19 current definitions of agent, the common law definition of agent, including apparent
20 authority, limits a principal’s liability for a would-be agent’s actions to situations where
21 the principal has taken specific action to create authority, either actual or apparent, in a
22 person.

1 Given the Shays court's interpretation of the narrow scope of apparent authority,
2 the Commission now proposes to revise 11 CFR 109.3 and 300.2(b) by defining agent as
3 any person acting with either actual authority, express or implied, or apparent authority,
4 but also seeks comments on whether or not there remain reasons to exclude apparent
5 authority from the Commission's definitions of agent.

6 By including persons acting with apparent authority in the definition of agent, the
7 proposed revision would ensure that when a candidate or party committee conveys
8 through words or actions that another person has authority to act on that candidate's or
9 committee's behalf, then the actions of that person are imputed to the candidate or party
10 committee for purposes of determining liability under the Commission's soft money and
11 coordination provisions. The Commission solicits comments on whether persons acting
12 with apparent authority should be included in the definitions of agent at 11 CFR 109.3
13 and 300.2(b). Is the proposed revision required by BCRA? Would the proposed revision
14 reduce the opportunities for circumvention of the Act and the appearance of corruption?
15 Furthermore, would including apparent authority in the definition of agent affect the
16 exercise of political activity, and if so, how? Would including apparent authority in the
17 definition of agent make it more difficult for a campaign or party organization to predict
18 potential liability?

19 The Commission also seeks comment on whether it should specify the appropriate
20 conclusions to be drawn from a principal's silence. Should a principal be held liable for
21 the actions of another person based solely on the principal's failure to disavow that
22 person's actions, or must there be some other facts present to indicate knowledge and/or
23 complicity? Should the Commission's rules provide that the failure of a person to

1 disavow the actions of another person shall not, without more, create apparent authority
2 for purposes of the Act?

3 Alternatively, the Commission solicits comment on whether, instead of including
4 apparent authority, it would be more consistent with the purposes of BCRA to continue to
5 exclude persons acting only with apparent authority from the definitions of agent. The
6 Supreme Court has noted that not every nuance of the law of agency need be
7 incorporated into Federal statutes where full incorporation is not necessary to effect the
8 statute's underlying purpose. See, e.g., Farragher v. City of Boca Raton, 527 U.S. 775,
9 802 n. 3 (1998) (The "obligation here is not to make a pronouncement of agency law in
10 general or to transplant [the Restatement (Second) of Agency into a Federal Statute, but]
11 is to adapt agency concepts to the [Statute's] practical objectives.") However, would
12 excluding apparent authority from the definitions of agent create opportunities for
13 circumvention of the Act or permit activity that would give the appearance of corruption?

14 In the Soft Money E&J, the Commission reasoned that the exclusion of apparent
15 authority from the definition of agent was appropriate because apparent authority was
16 primarily designed to "protect innocent third parties who had suffered monetary damages
17 as a result of reasonably relying on representations by individuals who purported to have,
18 but did not actually have, authority to act on behalf of principals. Unlike other statutes,
19 such as consumer protection or anti-fraud legislation, BCRA does not affect individuals
20 who have been defrauded or have suffered economic loss due to detrimental reliance on
21 unauthorized representations." 67 FR at 49082. The Commission solicits comments on
22 whether there are reasons supporting this rationale for excluding apparent authority from
23 the definition of agent. Specifically, do the legislative purposes of BCRA of preventing

1 circumvention of the Act and the appearance of corruption differ from those of other
2 statutes, such as anti-fraud, consumer protection, or antitrust, in ways that support
3 excluding apparent authority from the definition of agent?

4 Particularly, the Commission notes the following differences between ordinary
5 commercial settings, which are the settings in which the concept of apparent authority has
6 been applied, and political settings, in which the Commission's regulations operate: (1)
7 ordinarily, in commercial settings people have no incentive to promote a product with
8 which they are not associated; (2) in commercial settings, those who have not suffered
9 harm generally have no incentive or standing to file complaints, whereas in political
10 settings opposing candidates may be motivated to impede their rivals' campaigns by
11 filing complaints; (3) in commercial settings, businesses usually have incentives to
12 dissuade people from purporting to act on their behalf, whereas in political settings a
13 candidate's or party's goal is often to motivate others to act on their behalf; and finally
14 (4) in political settings, constitutional rights are at stake that are not often at stake in
15 commercial settings. Do these differences between commercial and political settings
16 provide grounds for excluding apparent authority from the Commission's definitions of
17 agent? Are there additional reasons for excluding apparent authority from the definition
18 of agent?

19 Alternatively, rather than either excluding apparent authority altogether from the
20 definitions of agent at 11 CFR 109.3 and 300.2(b) or simply adding the term "apparent
21 authority" to these definitions, should the Commission instead provide a more narrowly
22 tailored definition of agent? Before the Commission adopted the definition of agent in
23 the soft money regulations in 2002, the Commission's former regulations contained a

1 narrowly tailored definition of agent that included certain aspects of apparent authority.
2 Specifically, former 11 CFR 109.1(b)(5) defined agent as including “any person who has
3 been placed in a position within the campaign organization where it would reasonably
4 appear that in the ordinary course of campaign-related activities he or she may authorize
5 expenditures.” Former 11 CFR 109.1(b)(5) appears to be narrower than the revision
6 proposed in this NPRM because it does not include cases where apparent authority exists
7 for persons other than those who hold a position “where it would reasonably appear that
8 in the ordinary course of campaign-related activities he or she may authorize
9 expenditures.” Under the proposed revision of the definitions of agent, which would add
10 the term “apparent authority” and rely on the Restatement for the definition of the term, a
11 principal potentially could invest a person with the authority of an agent also by making
12 statements to, or engaging in conduct with respect to, a third party, regardless of the
13 position the putative agent occupies within the principal’s organization. Should the
14 Commission re-adopt the definition of agent at former 11 CFR 109.1(b)(5)? Or would
15 that definition be either too narrow or too broad to effectuate the purposes of BCRA’s
16 soft money and independent and coordinated expenditures provisions? Would former 11
17 CFR 109.1(b)(5) be more or less effective than the proposed revision in preventing
18 circumvention of the Act and the appearance of corruption?

19 Alternatively, the Commission seeks comments on whether it should adopt an
20 entirely new approach towards apparent authority, different from both the definition at
21 former 11 CFR 109.1(b)(5) and the Restatement. Commenters who propose such a new
22 approach should explain how their proposal would be more effective than both the
23 revision proposed in this NPRM and former 11 CFR 109.1(b)(5) in implementing the

1 purposes of BCRA's soft money and independent and coordinated expenditures
2 provisions, and how a wholly new approach would prevent circumvention of the Act and
3 the appearance of corruption.

4 Finally, although the Commission proposes to have consistent definitions in both
5 11 CFR 109.3 and 300.2(b), the Commission also solicits comments on whether effective
6 implementation of BCRA's purposes would be better served by defining agent in the soft
7 money context differently from agent in the coordination context and, specifically,
8 whether apparent authority should be included in one but not in the other definition.

9

10 **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

11 **[Regulatory Flexibility Act]**

12

13 The Commission certifies that the attached proposed rules, if promulgated, would
14 not have a significant economic impact on a substantial number of small entities. The
15 basis for this certification is that the national, State, and local party committees of the two
16 major political parties, and other political committees are not small entities under 5
17 U.S.C. 601 because they are not small businesses, small organizations, or small
18 governmental jurisdictions. Further, individual citizens operating under these rules are
19 not small entities. To the extent that any political party committees or other political
20 committees may fall within the definition of "small entities," their number is not
21 substantial.

22

23 **List of Subjects**

24 11 CFR Part 109

1 Elections, Reporting and recordkeeping requirements.

2 11 CFR Part 300

3 Campaign funds, Nonprofit organizations, Political candidates, Political
4 committees and parties, Reporting and recordkeeping requirements.

5

6

1 For the reasons set out in the preamble, the Federal Election Commission
2 proposes to amend Subchapters A and C of Chapter I of Title 11 of the Code of Federal
3 Regulations as follows:

4 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**
5 **431(17), 441a(a) and (d), AND PUB. L. 107-55 SEC. 214(c))**

6 1. The authority citation for Part 109 would continue to read as follows:

7 **Authority:** 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d.; Sec. 214(c) of Pub.
8 L. 107-55, 116 Stat. 81.

9 2. Section 109.3 would be amended by revising the introductory text of the section
10 to read as follows:

11 **§ 109.3 Definitions.**

12 For the purposes of 11 CFR part 109 only, agent means any person who has actual
13 authority, either express or implied, or apparent authority to engage in any of the
14 following activities on behalf of the specified persons:

15 * * * * *

16
17 **PART 300 – NON-FEDERAL FUNDS**

18 3. The authority citation for Part 300 would continue to read as follows:

19 **Authority:** 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

20 4. Section 300.2 would be amended by revising the introductory text of paragraph
21 (b) to read as follows:

22 **§ 300.2 Definitions.**

23 * * * * *

1 (b) Agent. For the purposes of part 300 of chapter I, agent means any person who has
2 actual authority, either express or implied, or apparent authority to engage in any of the
3 following activities on behalf of the specified persons:

4 * * * * *

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Scott E. Thomas
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P