

COMMENTS OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO ON THE NOTICE OF PROPOSED RULEMAKING ON THE DEFINITION OF "AGENT" FOR BCRA REGULATIONS ON NON-FEDERAL FUNDS OR SOFT MONEY AND COORDINATED AND INDEPENDENT EXPENDITURES

Pursuant to Federal Election Commission Notice 2005-3, published in the Federal Register on February 2, 2005, the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) provides the following comments regarding the proposed revision to the definition of "agent" for the FEC's regulations on coordinated and independent expenditures and non-Federal funds. AFSCME is not requesting to testify at any hearing relating to this matter.

AFSCME is a labor union with approximately 1.4 million members. AFSCME's members are principally employed by State, county and municipal governments, though a significant number of the union's members are employed in the private sector, principally in health care. AFSCME has an affiliated political committee that is registered with the Federal Election Commission. AFSCME and its members are active in federal, State and local elections. Participation in the political process and at the voting booth is a fundamental tenet of our organization.

AFSCME respectfully suggests the FEC retain its current regulations, which limit the definition of agent to "any person who has actual authority, express or implied" to perform certain actions. The existing definition is clear, definite and does not present an unwarranted risk that it will either facilitate a circumvention of the contribution limits or create an appearance of corruption. In contrast, a definition that treats an individual as an agent of a candidate, campaign or party in circumstances in which they have not been expressly authorized to act, but where the principle has acted in such a way as to lead third parties to reasonably conclude that the individual is authorized to act, will make the regulations ambiguous. This is especially true of how this change may be interpreted in the context of volunteers.

Unlike commercial activities where individuals are paid for their work on behalf of the organization, political campaigns rely extensively on volunteers, most of whom are rewarded with immaterial benefits: the satisfaction of ideological affinity with the candidate and fellow supporters; the emotional satisfaction of proximity to power; the excitement of a successful struggle. Challengers rely more heavily on volunteers because they frequently lack the fundraising capacity to staff their campaigns with paid employees. Frequently, an initial step in building a campaign is to win the support of politically important voters, and to publicize their involvement in the campaign in a way that encourages others to believe the campaign will succeed. Sometimes these volunteers are identified as the campaign's "steering committee" or "executive committee." Individual volunteers may be given an honorary title as "liaison" to one constituency group or another. Frequently, the most sought after individuals for these positions in a campaign are those who have some political significance of their own. They may be a Governor, a Mayor, a prominent corporate or union leader, a member of an influential trade association, an environmental, hunting or other group of active citizens in the community. Throughout an election season, a party or a campaign will frequently print and distribute stationary, literature or host a website that lists these prominent supporters and includes their status in the campaign. At rallies or other campaign events, the candidate may have some of these individuals on stage or point them out in the audience, and introduce them as close friends and important advisors to the candidate. The participation of these volunteers and the satisfaction they gain from their involvement can fuel a campaign.

All of these acts are designed to give the appearance that particular individuals play a central role in the campaign, regardless of whether that is true in practice or not. Under the Commission's existing definition of agency, none of these common campaign practices bear any relevance to the Commission's decision over whether an individual is an agent, and as a consequence, whether their conduct is attributable to the campaign in finding reason to believe a violation of the law has occurred.

The proposed revision will expand the definition of agent to include situations of "apparent authority," in other words, situations in which "the principle engages in conduct that 'reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'" Overnite Transportation Company v. NLRB, 140 F.3d 259, 266 (D.C. Cir. 1998)(quoting the Restatement (Second) of Agency). At what point in the examples above has the candidate acted in such a way that he or she "should realize that his conduct is likely to create [a] belief [that the agent is authorized to act for the candidate]"? Id. The ambiguity of the standard in this context makes it difficult to answer that question with confidence.

A related concern is that the application of apparent authority is less defined in the political context. Whether an individual is acting with apparent authority is in part determined by the customary practice of other agents in the field. Restatement (Third) of Agency, §2.03 (citing Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp., 632 F.Supp. 1082, 1090 n.13 (D.D.C. 1990).) Whether the principal manifested his intent through conduct is evaluated according to general custom or practice in the field, prior dealings between the parties and norms particular to the industry. See, e.g., LIUNA v. HAS, 728 F.Supp. 519, 526 (E.D. Wisc. 1980). While there may be some elements of political campaigns where there is a generally acknowledged custom or practice in the field (e.g., who is authorized to write a check on behalf of the campaign), an "apparent authority" standard may more frequently leave the Commission in search of whether there is an industry standard in politics that should have guided the reasonable expectations of third parties in their dealings with a campaign volunteer.

It is important to stress that the risk that these political volunteers face is real and significant. Individuals who are "agents" of a party or federal candidate's campaign are bound by the same prohibitions as the party or campaign regarding soliciting, receiving, directing, transferring or spending nonfederal funds. 2 U.S.C. 323(a) & (e). The consequences for violating this prohibition include civil and criminal penalties. While a political party or campaign, with the active involvement of sophisticated legal counsel,

could avoid potential liability, these rules will apply equally to the unsophisticated and the unwary.

Moreover, there is no reason to believe that revising the definition of agent to include those with apparent authority is necessary to avoid circumvention of the Act or the appearance of corruption. No evidence of the kind was presented to the District Court in *Shays*. The District Court in *Shays* only held that the Commission's definition of agent was not adequately explained; it did *not* hold that its current definition ran contrary to Congress' intent, or was based on an impermissible construction of the statute. *See Shays v. FEC*, 337 F.Supp.2d 28, 83-85 (D.D.C. 2004). As such, there is no need for the Commission to replace a clear definition of agent with a vague and undefined one.

For these reasons, AFSCME respectfully suggests the Commission retain the current definition of agent. Thank you for the opportunity to comment.