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October 28, 2005

Mr. Brad Deutsch
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Notice of Proposed Rulemaking on the Definition of "Solicit" and "Direct"

Dear Mr. Deutsch:

The following comments address a feature of the Commission's proposed definition of "solicit," put forward for comment in the wake of the Court of Appeals' decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). This feature calls for the meaning of words to be construed as they would be understood, in the particular context, by a "reasonable person." Proposed 11 C.F.R. § 300.2(m). The Notice suggests that this new "reasonable person" standard will supply objectivity to the Commission's effort to judge whether words spoken or written are words that "solicit." The Commission should, however, resist adoption of this standard, because it will not perform the task assigned to it and will likely hinder the Commission's achievement of its stated objectives.

The Commission has framed those objectives in the form of various questions. Would the proposed definition "reduce the opportunities for circumvention"? Would they "properly effectuate Congressional intent"? Would they supply adequate guidance, affect one way or the other the exercise of political activity, and be "practical to enforce?" 70 Fed. Reg. 56601 (Sept. 28, 2005). Distilled into the principal themes, these questions express the Commission's concern with enforcement, clarity and compatibility with normal, protected political practice.

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The reasonable person standard adds little to this quest and it will more likely complicate it. In the first instance, it is fanciful to assume that reasonable standards advance the goal of "objectivity." Even scholars prepared to defend its use for this purpose acknowledge the questions raised in various contexts about the "objective" uses of this standard. See Mayo Moran, *Rethinking the Reasonable Person* (2003).

When an appeal is made to a "reasonable person," it is often made more to explain, rather than to reach, a result. In other words, it possesses largely rhetorical, not analytical, power: when a result is said to be "reasonable," it is meant (usually) that the result is the right one or at least an acceptable outcome among others. The "reasonable person," when summoned in this sense, adds nothing to the effort to supply guidance to those proposing to conform their conduct to the legal standard. It does not help to answer the question posed by the Commission,— "would the proposed definition be too broad or too narrow?"—because it can be invoked on behalf of breadth, or with equal rhetorical vigor, to narrowness, depending on the facts under review.

Used in a different way, to clarify what conduct is expected, the "reasonable person" standard must rest on some assumptions about the standpoint and characteristics of the fictional person. Someone who knows how fundraising is conducted? Or someone who does not raise but gives money—an even smaller percentage of the population—and who can distinguish between general political talk and a solicitation, that is, a bid for a contribution? Or the politician who speaks with numerous audiences, with a wide variety of objectives, through each day and each year, and who can speak reasonably about the difference between building support and hoping for the immediate return of campaign contributions?

As would be expected, the "reasonable person" often enough looks and acts most like the person applying the standard: "perhaps unsurprisingly, the reasonable person often turns out to bear a rather suspicious similarity to the judge." Moran at 17. It is absolutely certain that the experienced political operative and the government regulator, each reasonable in their own way, are not reasonable in the same way. So the campaign hand may apply a reasonable person test without any hope of thereby reaching the same conclusion, on the same facts, as the regulator.

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This is a problem of uncertainty, but it is, at the same time, a problem of bias. The regulator is not merely exercising a distinctive kind of "reason," different from the campaign professional, but she is sure to exercise it under the influence of different *ends*. The politician and the political professional are familiar with a wide range of political goals and activities, some of which are directly affected by BCRA and others of which are (in theory) not. The regulator knows BCRA and she is experienced in politics mostly as it encounters BCRA. So the political professional's field of vision is necessarily different, which means that her "reasonable" judgment of the purpose or meaning of particular activities will share in that difference.

An example of the problem is found in this question put by the Commission:

In the absence of any disclaimers, would a 'pure policy' speech delivered by a Federal officeholder or candidate at an event raising non-Federal funds by a solicitation if the Federal candidate or officeholder stands under a banner reading "Support the 2005 Democratic ticket tonight"?

70 Fed. Reg. at 56603. This question took up a fair amount of discussion at the hearing on the exemption for candidate and officeholder participation in a state and local party fundraising event. It seems clear, by the very formulation of the question, that some might "reasonably" believe that this setting converts words of pure policy into words of "solicitation." In a post-*McConnell* regulatory regime, reorganized to ferret out "circumvention," this conclusion seems, to those charged with enforcement, entirely "reasonable." To those who organize events, deliver speeches or raise money, the suggestion that this hypothetical describes a true "solicitation" would seem barely short of absurd—and in no way "reasonable." Consideration of the "audience" is futile: who in the audience is the "reasonable person" whose views define those of the crowd, including those who came to hear, and heard in fact, a speech about policy. Application of a "reasonable person" standard does not help to clarify why one

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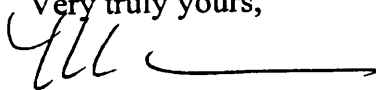
viewpoint is more reasonable than the other—it merely throws the game to one side, allowing the FEC to hitch "reason" to the service of its pursuit of "circumvention."¹

Of course, even without a reasonable person standard, in the Commission's proposed rule, the use of terms like "suggest" could produce the same unfortunate results. This is grounds, without more, for the Commission to set aside the proposed rule and adopt a more prudent version, such as Alternative Two. This Alternative preserves the current, more narrow language, while reassuring the plaintiffs and the Court that the Commission's application of that language would not be divorced from reality.

But what is also disturbing about the "reasonable person" standard is that it falsely suggests progress toward objectivity while, in fact, significantly increasing the likelihood that the "reasonable person" will resemble the regulator and that what is "reasonable" will correspond simply to her policy judgments, but without explicit acknowledgement of those policy judgments in the rule itself. Without that clear guidance, the regulated community, to conform its conduct to the perceived expected dictates of the regulators, would have to try to think about politics as the regulator does. This is unhealthy and should be avoided.

Please also consider the submission of these comments as a request to testify at the hearing on November 14-15, 2005 scheduled by the FEC to consider these proposed rules.

Very truly yours,



Robert F. Bauer

¹ Even beyond the problem of vantage point, the rule is torn between two criteria for "reasonably" assessing the purpose of a communication. One criterion is the "plain meaning" of the words; the other is "context." 70 Fed. Reg. at 56601. How these very different criteria are managed is left unclear, leaving ample room for the "subjective interpretation" the rule is alleged to avoid. *Id.*