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FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 20, 2006

AGENDA ITEM
For Meeting of: 01-19-06
CONTINUED ON JANUARY 23, 2006
SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Ron B. Katwan
Attorney

SUBJECT: Draft Revised Explanation and Justification for Definitions 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 Revised Explanation and Justification revisiting the definitions 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), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied*, No. 04-5352 (Oct. 21, 2005).

The Office of the General Counsel requests that this draft be placed on the agenda for the January 23, 2006 open meeting.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 109 and 300

[Notice 2006 –]

Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures

AGENCY: Federal Election Commission.

ACTION: Revised Explanation and Justification.

SUMMARY: The Federal Election Commission is publishing a revised Explanation and Justification for its definitions of "agent" in its regulations on coordinated and independent expenditures, and non-Federal funds, which are commonly referred to as "soft money." The regulations, which are being retained, implement the Bipartisan Campaign Reform Act of 2002 by defining "agent" as "any person who has actual authority, either express or implied" to perform certain actions. These definitions do not include persons acting only with apparent authority. These revisions to the Explanation and Justification are in response to the decision of the U.S. District Court for the District of Columbia in Shays v. FEC. Further information is provided in the Supplementary Information that follows.

DATES: Effective date is [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B. Katwan, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA") amended the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. (the "Act"). In 2002, the Commission promulgated regulations in order to implement BCRA's new limitations on party, candidate, and officeholder solicitation and use of non-Federal funds. Final Rules and Explanation and Justification for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002) ("Soft Money Final Rules"). The Commission also approved final rules implementing BCRA's provisions regarding payments by political committees and other persons for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee, as well as other expenditures that are made either in coordination with, or independently from, candidates and political party committees. Final Rules and Explanation and Justification for Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003) ("Coordination Final Rules").

Many of BCRA's provisions and the regulations implementing BCRA apply not only to principals, such as candidates, political party committees, or other entities, but also to their agents. See 67 FR at 49081-82; 68 FR at 421-22. Before BCRA was enacted, the Commission's regulations at former 11 CFR 109.1(b)(5) (2001) defined "agent" only for purposes of establishing whether an expenditure made by an individual

was made independent of a candidate or political party. The definition was limited to "any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures, or [...] any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures." The definition of "agent" at former section 109.1(b)(5) did not apply to any fundraising activities.

When implementing BCRA in 2002, the Commission did not seek comment on whether it should retain the pre-BCRA definition of "agent." Rather, the Commission sought comment on whether a principal should be held liable if an agent has actual, as opposed to apparent, authority to engage in the alleged actions at issue, and whether a principal should be held liable only if an agent has express, rather than implied, authority to act. See Notice of Proposed Rulemaking on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 35654, 35658 (May 20, 2002). The Commission also sought comment on whether the term "agent" should be left undefined in the Commission's rules and interpreted instead based on common law principles of agency. Id.

The final rules adopted by the Commission in 2002 contained two identical definitions of "agent" for the regulations on coordinated and independent expenditures (11 CFR 109.3) and the soft money regulations (11 CFR 300.2(b)). Both rules defined "agent" as "any person who has actual authority, either express or implied," to perform certain actions. The Commission decided to exclude from the BCRA rules defining "agent" those persons acting only with apparent authority. The 2002 BCRA rules sought

to limit a principal's liability for the actions of an agent to situations where the principal had engaged in specific conduct to create an agent's authority. The Commission was concerned that by including apparent authority in the definitions of "agent" it would expose principals to liability based solely on the actions of a rogue or misguided volunteer and "place the definition of 'agent' in the hands of a third party." See Soft Money Final Rules, 67 FR at 49083; Coordination Final Rules, 68 FR at 424-425. Accordingly, the Commission's BCRA definitions did not include the second part of the pre-BCRA definition, which had covered only limited aspects of apparent authority, specifically, apparent authority based on "a position within the campaign organization."

In 2004, the Commission's post-BCRA definitions of "agent" were reviewed by the U.S. District Court for the District of Columbia in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) ("Shays"), aff'd, 414 F.3d 76 (D.C. Cir. 2005) (pet. for reh'g en banc denied Oct. 21, 2005) (No. 04-5352). The District Court held that the Commission's decision not to include apparent authority within the definitions of "agent" was an acceptable and permissible construction of the term under the Act. Shays at 84. The court found that Congress had not directly spoken to the question at issue, satisfying the first step of Chevron review.[1] Id. at 71, 84. The court determined that "the Commission's construction of the term 'agent' is faithful to the literal terms of the statute." Id. at 71-72, 81-86 (finding that both definitions "survive[] Chevron review"). Specifically, the District Court concluded, "the term 'agent' is subject to different interpretations and the FEC's interpretation of the term complies with an acceptable

[1] The first step of the Chevron analysis, which courts use to review an agency's regulations, asks whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency's resolution of an issue not addressed in the statute is based on a permissible construction of the statute. See Shays at 51-52 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

interpretation of the statute." Id. at 84. The court emphasized that the Shays plaintiffs "provide[d] no basis for the conclusion that the term 'agent' has developed a 'settled meaning under . . . the common law,' or that the meaning includes those acting with apparent authority." Id. at 83. The District Court noted, "Black's Law Dictionary provides that the term in its normal parlance does not include those acting with apparent authority." Id. (emphasis added).[2] Accordingly, the court "conclude[d] that the term 'agent' does not have a settled common law meaning that includes those acting with apparent authority." Id.

While upholding the Commission's definition under Chevron, the District Court found that the Commission's Explanation and Justification for the definitions of "agent" at 11 CFR 109.3 and 300.2(b) did not satisfy the reasoned analysis requirement of the Administrative Procedure Act ("APA") on three grounds. See Shays at 72, 88; see also 5 U.S.C. 553. First, the court found that the Commission had not adequately explained why it departed from its pre-BCRA definition of "agent," by not including the portion of the definition that covered certain applications of apparent authority. Shays at 87. Second, the court found that the Commission had not addressed the impact that its construction of the term "agent" might have on preventing circumvention of the Act's limitations and prohibitions and on preventing the appearance of corruption, two policies that Congress sought to advance in passing BCRA. Id. at 72, 87. Third, the court found that the Commission's main concern in excluding apparent authority from the definitions – namely, to prevent a candidate or political party committee from being held liable for

[2] The court also noted that individuals with apparent authority "are therefore not technically 'agents' with regard to the activity at issue; it is only by their actions and those of their 'principal' that they are deemed to act as agents for purposes of establishing liability." Id. at 84, citing Restatement (Second) of Agency 8, cmt. a.

the actions of a rogue or misguided volunteer who purports to act on behalf of the candidate or committee – was "not supported by the law of agency . . . ." Id. at 87.

The court remanded the definitions to the Commission for further action consistent with its opinion. Id. at 130. The Commission did not appeal this portion of the District Court decision.

In response to the Shays decision, the Commission issued a Notice of Proposed Rulemaking, which was published in the Federal Register on February 2, 2005. Notice of Proposed Rulemaking on the Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 70 FR 5382 (Feb. 2, 2005) ("NPRM"). The NPRM sought comment on several alternatives, which were (1) whether to continue to exclude apparent authority from its definitions of "agent" at 11 CFR 109.3 and 300.2(b), (2) whether to add apparent authority to these definitions, (3) whether to return to the pre-BCRA definition, and (4) whether to adopt a different definition of "agent" covering certain applications of apparent authority while excluding others. The comment period closed on March 4, 2005. The Commission received six written comments from eleven commenters on the proposed rules. Additionally, the Commission received a letter from the Internal Revenue Service indicating, "the proposed rules do not pose a conflict with the Internal Revenue Code or the regulations thereunder." The Commission held a hearing on this rulemaking on May 17, 2005. Four commenters testified at the hearing. For purposes of this document, the

terms "comments" and "commenter" apply to both written comments and oral testimony at the public hearing.[3]

The commenters were divided between those who favored adding apparent authority to the definitions of "agent" and those who supported retention of the 2002 rule. The Commission has decided, after carefully weighing the relevant factors, including its extensive experience in investigating and prosecuting statutory violations, to retain the current definitions in 11 CFR 109.3 and 300.2(b) and to provide this revised Explanation and Justification for the decision to exclude apparent authority from these definitions. The Commission has decided that its current definitions of "agent": (1) as required by BCRA, cover individuals engaged in a broad range of activities specifically related to BCRA-regulated conduct, thereby dramatically increasing the number of individuals and type of conduct subject to the Act, especially when compared to the Commission's pre-BCRA definition of agent; (2) cover the wide range of activities prohibited by BCRA and the Act, thereby providing incentives for compliance, while protecting core political activity permitted by BCRA and affirmed by the U.S. Supreme Court in McConnell[4] that, under an apparent authority standard, could otherwise be restricted or subject to Commission investigation; and (3) are best suited for the political context, which is materially different from other contexts in which apparent authority is applicable.

[3] The written comments and a transcript of the hearing are available at http://www.fec.gov/law/law_rulemakings.shtml under Definition of Agent for BCRA Regulations on Coordinated and Independent Expenditures and Non-Federal Funds or Soft Money.

[4] See McConnell v. FEC, 504 U.S. 93, 159-61 (2003).

Explanation and Justification

11 CFR 109.3 and 300.2(b) – Definitions.

According to the common law definition of actual authority, as codified in the Restatement (Second) of Agency (1958) ("Restatement"), an agent's actual authority is created by manifestations of consent (express or implied) made by the principal to the agent.[5] Restatement 7. Apparent authority, by contrast, is the result of manifestations the principal makes to a third party about a person's authority to act on the principal's behalf. Restatement 8. Apparent authority is created where the principal's words or conduct "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 Transp. Co. v. NLRB, 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting Restatement 27). Moreover, to have apparent authority "the third person must not only believe that the individual acts on behalf of the principal but, in addition, 'either the principal must intend to cause the third party to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.'" Id. (quoting Restatement 27, cmt. a) (emphasis added).

Finally, apparent authority may be created not only by manifestations the principal makes directly to a third party, but, in addition, "as in the case of [actual] authority, apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily

[5] 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].")

entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent." Restatement 27, cmt. a.

The Supreme Court has emphasized that not every aspect of agency law needs to be incorporated into a Federal statute when it is not necessary to effectuate the statute's underlying purpose. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 803 n.3 (1998) (The "obligation here is not to make a pronouncement of agency law in general or to transplant [the Restatement (Second) of Agency into a Federal Statute, but] is to adapt agency concepts to the [Statute's] practical objectives.") In construing the term "agent," the Commission believes that the current definitions of "agent," which are based on actual authority, either express or implied, best effectuate the intent and purposes of BCRA and the Act.

The Commission's current definitions of "agent": (1) as required by BCRA, cover individuals engaged in a broad range of activities specifically related to BCRA-regulated conduct, thereby dramatically increasing the number of individuals and type of conduct subject to the Act, especially when compared to the Commission's pre-BCRA definition of agent; (2) cover the wide range of activities prohibited by BCRA and the Act, thereby providing incentives for compliance, while protecting core political activity permitted by BCRA and affirmed by the U.S. Supreme Court in McConnell that, under an apparent authority standard, could otherwise be restricted or subject to Commission investigation; and (3) are best suited for the political context, which is materially different from other contexts in which apparent authority is applicable.

1. As required by BCRA, the Commission's definitions of "agent" cover individuals engaged in a broad range of activities specifically related to BCRA-regulated conduct, thereby dramatically increasing the number of individuals and type of conduct subject to the Act, especially when compared to the Commission's pre-BCRA definition of agent.

In implementing BCRA, the Commission adopted regulations that defined "agent" based on a broad range of activities specifically related to BCRA-regulated conduct, thereby dramatically increasing the number of individuals who met the definition of an "agent" of a candidate, political party committee, or other political committee. The Commission's pre-BCRA independent expenditure rules limited the definition of "agent" to "any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures, or [...] any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures." 11 CFR 109.1(b)(5)(2001).

Campaign committees typically authorize very few people to make expenditures, and typically limit those powers to employees under the campaign's direct control. The number of positions within a campaign organization where it would reasonably appear that a person could make expenditures is similarly limited. Therefore, the Commission's pre-BCRA definition of "agent" captured only a small number of individuals within a campaign organization. Moreover, by defining agency based on authority to make

expenditures, the Commission's pre-BCRA definition did not restrict individuals involved in the solicitation and receipt of funds specifically prohibited by BCRA.

In enacting BCRA, Congress extended the scope of agency for purposes of the Act to include persons with the authority to solicit and receive funds, thereby increasing significantly the number of persons subject to the Act. Accordingly, the Commission's soft money regulations define "agents" as individuals with actual authority to solicit or receive funds. See, e.g., 11 CFR 300.2(b)(1)(i) ("solicit, direct or receive funds") and 300.2 (b)(3) ("solicit, receive, direct, transfer, or spend funds"). In contrast to the pre-BCRA rule, the current definition applies to the solicitation of funds generally, and is not limited to activities based on statutorily defined terms, such as expenditures or contributions. The number of individuals involved in fundraising for a campaign can reach hundreds, and in the case of presidential campaigns and national party committees, potentially thousands, of individuals, most of whom are volunteers. Therefore, the number of individuals subject to the Commission's current definition of "agent" in the soft money regulations is far greater than the number of individuals who were subject to the pre-BCRA regulation, while the type of activity restricted is specifically related to BCRA-regulated conduct.

The Commission's current definition of "agent" in its coordination regulations defines agents as individuals with actual authority to request, make, or be materially involved with the production of certain types of communications. 11 CFR 109.3. In contrast to the pre-BCRA rule, this definition applies to a wide range of activities related to the creation and distribution of political communications, and is not limited to activities based on statutorily defined terms, such as expenditures or contributions. For

example, the rule captures individuals who, on behalf of a Federal candidate, have actual authority, "to provide material or information to assist another person in the creation, production, or distribution of any communication." 11 CFR 109.3(b)(5). Therefore, the rule not only captures a much larger set of individuals than the pre-BCRA rule, but also captures the proper type of activity prohibited by the coordination regulations, i.e., activities related to the production and distribution of communications.

After examining the Commission's pre- and post-BCRA enforcement record, the Commission has determined that the decision to limit agency to those with actual authority, express or implied, has not had a material impact on its ability to prosecute cases in the three years the rule has been in place. In the Commission's experience in administering and enforcing the Act since promulgating the current rules in 2002, excluding apparent authority from the definitions of "agent" has not facilitated circumvention of the Act nor led to actual or apparent corruption. Commenters both favoring and opposing the regulations in their current form agreed that there is no evidence that the operation of the current definitions of "agent" in the 2003-2004 election cycle in any way undermined the success of BCRA cited by its Congressional sponsors. When asked at the hearing whether the lack of apparent authority had led to circumvention of the Act, a representative of a major reform organization testified, "I don't know of any specific situation." The Commission concurs with this conclusion.

In upholding the Commission's definitions of "agent" under Chevron, the District Court observed, "it is not readily apparent that the regulation on its face creates the potential for gross abuse" and "in the end simply finds Plaintiffs' concerns [that the definitions would allow circumvention of the Act] to be too amorphous and speculative at

this stage to mandate the reversal of the Commission's regulation." Shays at 85-86. The record evidence developed and reviewed in this rulemaking and the Commission's prosecutorial experience support the District Court's conclusion.

Nevertheless, if the Commission should encounter evidence of actual or apparent corruption or of circumvention of the Act in the future, the Commission has the authority to revisit the regulation and take action as appropriate, including an approach targeted to the specific problems that are actually found to occur.

2. Actual authority, either express or implied, is a broad concept that covers the wide range of activities prohibited by BCRA and the Act, thereby providing appropriate incentives for compliance, while protecting core political activity permitted by BCRA and affirmed by the U.S. Supreme Court in McConnell that, under an apparent authority standard, could otherwise be restricted or subject to Commission investigation.

Based on a careful review of the relevant factors, the Commission has found that inclusion of apparent authority in the Commission's definitions of "agent" is not necessary to implement BCRA or the Act, and that actual authority is sufficient to prevent circumvention and the appearance of corruption. In arguing for an apparent authority standard, some commenters erroneously stated that the Commission's current definitions of "agent" were too narrow because they failed to capture various hypotheticals involving allegedly prohibited activity. These hypotheticals included: (a) actions by individuals with certain titles or positions within a campaign organization or party committee; (b) actions by individuals where the candidate privately instructed the individual to avoid raising non-Federal funds; (c) actions by individuals acting under

indirect signals from a candidate; and (d) actions by individuals who willfully kept a candidate, political party committee, or other political committee ignorant of their prohibited activity. As discussed further below, actual authority, either express or implied, sufficiently addresses this hypothetical behavior. Moreover, a principal's private instructions or indirect signals to agents, or a principal's attempts to keep himself ignorant of an agent's activities, do not implicate apparent authority, which involves manifestations to a third person rather than to the agent.

While the Commission's actual authority standard is sufficiently broad to address this activity, it also protects core political activity permitted by BCRA and affirmed by the U.S. Supreme Court in McConnell that, under an apparent authority standard, could otherwise be restricted or subject to Commission investigation. Therefore, the Commission's current definitions of "agent" best effectuate the intent and purpose of BCRA and the Act, and create the appropriate incentives for candidates, party committees, and other political committees to ensure that their employees and volunteers are familiar with, and comply with, BCRA's soft money and coordination provisions.

a. Actions of individuals with certain titles or positions.

Apparent authority is not necessary to capture impermissible activity by persons holding certain titles or positions within a campaign organization, political party committee, or other political committee. A title or position is most frequently part of the grant of actual authority, either express or implied, to act on behalf of a principal. The scope of the authority created will depend on the title given and the understanding of the agent and the principal. For example, an individual with the title of fundraising chair of a campaign has actual authority to raise funds on behalf of that campaign. See Restatement

27, cmt a. Fundraising is within the scope of a fundraising chair's actual authority. Later actions by a principal, reasonably understood by the agent, can expand the scope of authority under either express or implied actual authority. Thus, even if the definitions of "agent" are limited to persons acting with actual authority, a person may be an agent as a result of actual authority based on his or her position or title within a campaign organization, political party committee, or other political committee.

b. Actions by individuals where the candidate privately instructed the individual to avoid raising non-Federal funds.

The Commission's current definitions of "agent" are sufficiently broad to capture actions by individuals where the candidate authorizes an individual to solicit Federal funds on his or her behalf, but privately instructs the individual to avoid raising non-Federal funds. One commenter's scenario proposed, "a Federal candidate publicly named a fundraising chairman who thus was vested with the apparent authority of the candidate, but where the candidate privately instructed the agent to avoid raising non-Federal funds. Suppose further that the fundraiser nonetheless solicits soft money." Contrary to the commenter's assertion, the fundraising chairman in this scenario could be an agent for the purpose of soliciting funds under the Commission's current regulations.[5] Because raising funds is within the fundraising chair's scope of actual authority, soft

[5] The Commission notes that regardless of whether it includes apparent authority in the definition of "agent," for the candidate to be liable in this scenario under existing Commission regulations prohibiting soft money solicitations the fundraising chair must be "acting on behalf" of the candidate when he or she makes the soft money solicitation. See 11 CFR 300.10(c)(1) ("An officer or agent acting on behalf of a national party committee or a national congressional campaign committee;") and 300.60(c) ("Agents acting on behalf of a Federal candidate or individual holding Federal office;") (emphases added). As the Commission noted in the Soft Money Final Rules, "a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." Soft Money Final Rules, 67 FR at 49083.

money solicitations on behalf of the candidate are prohibited. As an agent of a federal officeholder the fundraiser would be liable for any such violation. In addition, the candidate and committee principal may also be liable for any impermissible solicitations by the agent, despite specific instructions not to do so. See U.S. v. Investment Enterprises, Inc., 10 F.3d 263, 266 (5th Cir. 1993) (determining that it is a settled matter of agency law that liability exists "for unlawful acts of [] agents, provided that the conduct is within the scope of the agent's authority"); see also Restatement 216 ("A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion."); Restatement 219(1) ("A master is subject to liability for the torts of his servant committed while acting in the scope of their employment.").

c. Actions by individuals acting under indirect signals from a candidate.

The Commission's current definitions of "agent" are sufficiently broad to capture actions by individuals acting under indirect signals from a candidate. Commenters raised concerns that candidates could withhold actual authority, but attempt to signal indirectly that the agent should ignore his or her express instructions and solicit illegal soft money nevertheless. Several commenters described this as the use of a "wink and a nod" that would authorize the agent to act illegally. Contrary to what these commenters suggested, however, the principal's indirect signals give the fundraiser actual authority to raise money, and by implication, to do so illegally. See Restatement 26, cmt. c ("[authority to perform a particular act] may be inferred from words or conduct which the principal has reason to know indicate to the agent that he is to do the act for the benefit of the

principal"). Moreover, because apparent authority is based on communications between the principal and a third party, if the principal indirectly signaled to the agent that the agent should violate the law, the principal's actions would not create apparent authority. Apparent authority does not further the Commission's efforts to prevent this type of misconduct.

d. Actions by individuals who willfully keep a candidate, political party committee, or other political committee ignorant of their prohibited activity.

The Commission's current definitions of "agent" are also sufficiently broad to capture actions by individuals who willfully keep a candidate, party committee, or other political committee ignorant of their prohibited activity. In another scenario, commenters maintained that "so long as agents keep their principals sufficiently ignorant of their particular practices ... those operating with apparent authority could exploit their positions to continue soliciting and directing soft money contributions, continue peddling access to their principals, and continue by virtue of their apparent authority to perpetuate the appearance if not the reality of corruption."

Assuming that apparent authority in this scenario is based on a position like that of fundraising chair, the agent would have actual authority to raise funds and thus the candidate would be liable for the agent's illegal soft money solicitations, if done on the candidate's behalf, even if the solicitations were made without the candidate's knowledge.[7] Moreover, under actual authority, a principal cannot avoid liability through attempts to keep himself ignorant of his or her agent's actions. See Restatement 43 ("Acquiescence by the principal in conduct of an agent whose previously conferred

[7] See note 6, above.

authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.")

Thus, for all the reasons discussed above, actual authority, whether express or implied, is a broad concept that provides candidates, political party committees, and other political committees with the appropriate incentives to monitor the conduct of those whom they hold out to the public as their agents.

e. Apparent authority based on direct manifestations a principal makes to a third party is not necessary to implement the purposes of BCRA and the Act because the Commission's soft money and coordination regulations would, in many situations, reach the principal's own conduct directly.

In addition, apparent authority based on direct manifestations a principal makes to a third party is not necessary to implement the purposes of BCRA and the Act because the Commission's soft money and coordination regulations would, in many situations, reach the principal's own conduct directly. Where a Federal candidate creates apparent authority to solicit soft money for a volunteer, employee, or consultant by talking directly to a third party, in many situations, the conversation between the candidate and the third party will constitute a solicitation by the candidate in and of itself. For example, assume a Federal candidate informs a contributor that an illegal soft money contribution to Jane Doe's gun owner's rights organization would greatly benefit the Federal candidate's campaign. Regardless of whether Jane Doe has authority to act on behalf of the Federal candidate, the Federal candidate would face liability based on his or her own comments to the contributor. Not only is the principal's statement likely captured by the Commission's current regulations, the Commission is currently conducting a rulemaking

to expand its definition of "solicit" at 11 CFR 300.2(m) as it was understood by the Shays court, and in light of the Court of Appeals decision in Shays v. FEC. See Notice of Proposed Rulemaking on the Definitions of "Solicit" and "Direct", 70 FR 56599 (Sept. 28, 2005); see also Shays v. FEC, 414 F.3d 76, 105–07 (D.C. Cir. 2005) (holding the Commission's definitions of ''to solicit'' and ''to direct'' did not survive the first step of Chevron review.). Under this approach, liability for statements to third parties will rest directly on candidates, rather than indirectly through purported agents.

f. Actual authority protects core political activity permitted by BCRA and affirmed by the U.S. Supreme Court in McConnell that, under an apparent authority standard, could otherwise be restricted or subject to Commission investigation.

While the Commission's current regulations are sufficiently broad to create appropriate incentives for candidates, party committees, and other political committees to ensure that their employees and volunteers are familiar with, and comply with, BCRA's soft money and coordination provisions, the current regulations also preserve the ability of individuals to solicit funds on behalf of multiple entities. BCRA restricts the ability of Federal officeholders, candidates, and national party committees to raise non-Federal funds. BCRA does not prohibit individuals who are agents of the foregoing from also raising non-Federal funds for other political parties or outside groups.[8] As the Supreme Court made clear in McConnell, even "party officials may also solicit soft money in their unofficial capacities." McConnell, 504 U.S. at 159-61. The Commission recognized in the Soft Money Final Rules that "individuals, such as State party chairmen and

[8] Federal candidates and officeholders may raise non-Federal funds in limited circumstances. See 2 U.S.C. 441i(e)(1)(B), (2), and (3).

chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties." Id.; see also Restatement 13 ("merely acting in a manner that benefits another is not necessarily acting on behalf of that person.").[9]

An apparent authority standard would potentially subject individuals conducting permissible fundraising activities to Commission complaints and investigations. Such a result would unduly burden participation in permissible political activity. For example, assume Candidate meets Contributor who mentions he is from Trenton, New Jersey. Candidate tells Contributor about his an old friend Tom from Trenton and praises Tom's involvement in an environmental group in New Jersey. Candidate says, "Say hello to Tom if you see him, and tell him to give me a call. Tom is an old friend and one of the reasons I keep getting elected." Contributor later meets Tom, who solicits Contributor for a soft money contribution to the environmental group.

If a complaint was filed with the Commission, the Commission could, under an apparent authority standard, investigate whether Jane Doe reasonably believed Tom was Candidate's agent, and if so, whether Tom made the solicitation on behalf of Candidate. However, under an actual authority standard, there is no actual authority between Tom and Candidate, thereby ending the Commission's inquiry into his conduct and preserving his ability to remain active in his environmental organization.

In reaching this conclusion, the Commission is mindful that both the Supreme Court in McConnell and the commenters agreed that citizen participation in both Federal campaigns and with organizations that may raise soft money is permissible under BCRA.

[9] See note 6, above.

3. Liability premised on actual authority is best suited for the political context, which is materially different from contexts where apparent authority is applicable.

The Commission emphasizes that the decision to exclude apparent authority from its definitions of "agent" is informed by the difference between the political context in which the Commission's definitions of "agent" operate, and the non-political contexts in which apparent authority is normally applied.[10]

Electoral campaigns are materially different from many commercial endeavors in that campaigns must depend on broad participation by volunteers. Unlike commercial agents, political volunteers have an affirmative interest in promoting and working toward the campaign's goals based on personal and ideological, rather than economic, incentives. Unlike commercial principals, campaigns welcome the assistance and support of nearly any volunteer, regardless of their expertise, availability, or exact reasons for supporting the campaign. A commercial principal does not customarily rely on a large number of mainly inexperienced volunteers to carry out its commercial purposes. Moreover, a commercial principal typically does not have a large number of people willing to work on its behalf for no economic benefit and without the commercial principal's knowledge. See, e.g., AO 1999-17.

As the Commission pointed out in the Soft Money Final Rules, in most non-political contexts, the purpose of apparent authority is "to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of [the] principals. Unlike other legislative areas, BCRA does not affect

[10] This rulemaking does not impact the role of apparent authority in the enforcement or interpretation of commercial obligations between political committees and vendors. See, e.g., Karl Rove & Co. v. Thornburgh, 39 F. 3d 1273 (5th Cir. 1994).

individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations." 67 FR 49082. See, e.g., United States v. One Parcel of Land, 965 F.2d 311, 318-19 (7th Cir. 1992) ("'Apparent authority' is a vehicle by which a principal is held vicariously liable to an innocent third party for injury resulting from the misrepresentations or misdeeds of the principal's agent who acted with apparent authority from the principal."); Fraioli v. Lemcke, 328 F. Supp. 2d 250, 278-79 (D.R.I. 2004) ("The doctrine of apparent authority exists to promote business and protect a third party's reasonable reliance on an agency relationship."); Hammett v. VTN Corp., 1989 WL 149261 at *6 (E.D. La. 1989).

Instead, an overriding purpose of BCRA, and the purpose to which the rules interpreting agency are drafted, is to prevent circumvention of the Act and actual corruption or the appearance thereof. Applying apparent authority concepts developed to remedy fraud and economic loss to the electoral arena could restrict permissible electoral activity where there is no corruption or the appearance thereof.

As the Supreme Court noted in Buckley v. Valeo, "encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates" is an important goal of the Act. Buckley v. Valeo, 424 U.S. 1, 36 (1976). In the Commission's judgment, the potential of apparent authority to restrict activity that would not circumvent the statute or give the appearance of corruption outweighs any possible benefits that may be derived from providing candidates and party committees with additional incentives for monitoring their campaign workers, especially given the fact that actual authority is a broad concept that already creates appropriate incentives for such monitoring. Conclusion

This revised Explanation and Justification, thus, addresses the three concerns articulated by the District Court in Shays. First, the Commission determined that its current definitions of "agent," by focusing on authority to engage in a broad range of activities specifically related to BCRA-regulated conduct rather than only on expenditures, dramatically increases the number of individuals and type of conduct subject to the Act, and therefore, properly implemented BCRA's prohibitions.

Second, the Commission has attempted to addressed the District Court's concern regarding prevention of circumvention of the Act and the appearance of corruption by explaining (1) that there is at present no evidence of corruption or circumvention under the current definitions of "agent" that dictates a change in Commission regulations, (2) that even without inclusion of apparent authority, the Commission's soft money and coordination regulations would reach situations where the principal makes direct manifestations to a third party regarding a person's authority to act on the principal's behalf and (3) that even without inclusion of apparent authority, reliance on actual authority, express or implied, still reaches most situations where agency is based on title or position.

Third, this revised Explanation and Justification addresses the District Court's concern regarding a perceived misunderstanding of the law of agency, by explaining that the Commission's decision now to continue to exclude apparent authority from the definitions of "agent" is not based on an assumption, noted by the court, that "rogue agents" might potentially create liability for campaigns, party committees, or other political committees solely through the agents' own actions. Instead, the revised Explanation and Justification recognizes that apparent authority does, in fact, require

affirmative conduct by a principal (whether through title or position or through direct manifestations to a third party), and that there are persuasive policy reasons for excluding apparent authority from the definitions of "agent."

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Michael E. Toner
Chairman
Federal Election Commission

DATED _____

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