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To: Brad C. Deutsch, Assistant General Counsel, Federal Election Commission

From: Elizabeth Kingsley
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Date: March 4, 2005

Re: Notice 2005-3 (NPRM on definition of "agent")

We write as lawyers who primarily represent nonprofit organizations, many of whom are actively involved in efforts to influence public policy as well as undertaking electoral advocacy. We are not writing to represent the views or interests of any particular client or clients, but our role in advising them necessarily informs our perspective on the proposed regulations regarding the definition of the term "agent." The organizations we advise are concerned with these regulations because they will determine whose assistance they may seek in the critical task of raising funds, as well as with whom the groups may confer in preparing messages on issues of public concern.¹ While these regulations will clearly have an important effect on political parties, candidates, office holders, and individuals who may be alleged to act as "agents," our focus is on the outside organizations. A comprehensive analysis of the impact of the proposed regulations is beyond the scope of these comments, but we hope the few observations we have to offer may prove useful.

The Standard Adopted Should Be Set Out Plainly

First and foremost, we strongly believe that whatever standard is adopted must be clearly stated in the regulations. The proposed rules merely incorporate the term "apparent authority" without giving any indication how that phrase should be understood. Certainly, the NPRM includes an interesting and useful discussion of the principles from the Restatement, and we expect that the Explanation and Justification accompanying publication of final rules will also provide illuminating commentary. However, most members of the "regulated community" do not have meaningful access to these materials. Organizations and others who seek to participate in the democratic electoral and policy-making process should not be expected to research not only hundreds of pages of laws and regulations, but explanatory memoranda and a legal treatise not available easily outside law libraries, in order to know what their rights and responsibilities are. It cannot be healthy for democracy that one must confer with a lawyer in order to participate in

¹ Because of the uncertain status of the substantive regulations on coordinated communications, we cannot be certain how widely they will sweep when and if they are redrafted, the precise extent to which the definition of "agent" will affect our clients' ability to carry out their program activities is not clear at this time.

HARMON, CURRAN, SPIELBERG EISENBERG LLP

Notice 2005-3
March 4, 2005
Page 2

the political process.² The barriers to entry in the marketplace of political ideas are high enough; in all of its rulemakings, the Commission should seek to minimize them by stating as clearly and simply as possible what the rules are. Whatever definition the Commission chooses to adopt, it should be spelled out clearly in these regulations, so that a person of ordinary intelligence can understand who will and who won't be treated as an "agent" with whom their dealings must be limited.³

In addition, it is important to note that a Restatement does not have the force of law. It may set forth widely accepted principles, but in any given jurisdiction a minority view may prevail. Absent an express adoption of the Restatement principles as governing, even sophisticated members of the regulated community cannot be assured that it can know in advance what definition of "apparent authority" will be applied.

Indeed, this was the approach taken in the pre-BCRA regulations. The NPRM states that those rules included elements of apparent authority, and asks why the new rules should not be structured along similar lines. However, the previous regulations did not merely set out a general standard of "apparent authority." If the Commission does determine that apparent authority is sufficient to impose liability on third parties for their dealings with people other than actual candidates, office holders, and parties in the absence of actual authorization to act on the principal's behalf, it should at least set out with some clarity what is meant by that term.

Apparent Authority and the Appearance of Corruption

It may be deceptively tempting to jump to the conclusion that a statutory regime for which a major articulated purpose is preventing the appearance of corruption should include within its definition relationships defined by their appearance. However, this would be a misreading of the term "apparent authority."

The law of agency determines under what conditions one person may be bound by the actions of another in dealings with a third party. It does not account for the interests of anyone beyond those three roles: principal, agent, third party. The perceptions and beliefs of the public at large, or anyone outside the agency triangle, are not relevant. An inquiry into whether an agent has apparent authority would examine representations made to the third party (in our thinking, "client") by the principal, or conduct that causes the third party to reasonably believe that the principal has consented to an agent acting on his behalf. Of course, even under an actual authority standard, a third party organization in possession of facts that support such a belief would be foolish to conclude it was not dealing with an agent.

² We note, of course, that this prospect will benefit our firm's financial picture even if not the health of our democratic system. Nonetheless, while we greatly enjoy the way we earn our living, we do not wish to see any greater complexity added to an already daunting system of regulation.

³ Although we do not set forth the legal arguments here, we presume the Commission is well aware of the constitutional concerns that arise when rules governing political speech are unduly vague or difficult to ascertain.

HARMON, CURRAN, SPIELBERG EISENBERG LLP

Notice 2005-3
March 4, 2005
Page 3

In many cases, few facts relevant to a finding of apparent authority (or its absence) would be known to the public. Because the determination hinges on an examination of the facts known to the third party rather than those known to any outside person, an apparent authority standard is likely to generate a large number of complaints that can only be resolved by detailed and intrusive inquiry. Commission staff would have to determine not only the facts available on the public records, or in an organization's private files, but the state of mind of its staff at the time they had dealings with an alleged agent.

As many commentators have noted in prior rulemakings on this question, the doctrine of apparent authority was developed at common law to protect the reasonable expectations of third parties in dealing with a person who they reasonably believed to be an agent of another person. If the principal's actions led to that reasonable expectation, the principal would be bound vis-à-vis the third party by the purported agent's actions.⁴ The proposed regulations transform a protective concept into a punitive one. The third parties intended to be protected by the doctrine would instead be exposed to potential liability, and certainly to the expense and burdens of an administrative investigation, which are not trivial. There is simply no legal basis for imposing liability on a third party based on their dealings with an agent who did not have actual authority. Even less so is there any basis for imposing such liability based on the expectations of other people or organizations who are not party to the transaction.

Should the Commission decide to adopt an apparent authority standard, it should be faithful to the legal principles of the Restatement and not hold a third party organization liable based on facts known to or alleged by others, but only on the actual facts reasonably known to the organization. A standard which imposed liability on an organization based on the perceptions and beliefs of others, whether reasonable or not, would go far beyond any existing common law of agency. We are unaware of any indication in the statute or legislative history that Congress intended any meaning for the word "agent" so far outside the scope of its usual understanding.

Definitions Should Be Guided By Statutory Purposes

Two related statutory purposes have been held constitutionally sufficient to support the restrictions FECA and BCRA impose on political activity. These are preventing corruption or the appearance of corruption of office holders who might become beholden to wealthy contributors. Activities that have been deemed unacceptably corrupting when conducted by those office holders or the parties with which they are inextricably connected are reasonably also prohibited to anyone acting on behalf of the office holder, candidate, or party. The question for

⁴ Because apparent authority stems from the reasonable belief of the third party, it would not exist where the alleged agent disclaims that role. "[A]pparent authority exists only with regard to those who believe and have reason to believe that there is authority." Restatement 2nd, sec. 8 comment a. Hence, an outside group (presumably one advised especially devious legal counsel) need only ask an individual if they are acting on behalf of anyone else. If the answer is no, there can be no argument that it reasonably appears to the group that the person is an agent. Less sophisticated grass roots organizations are less likely to understand or apply this approach, an outcome which suggests that an apparent authority standard merely creates a trap for the unwary.

HARMON, CURRAN, SPIELBERG EISENBERG LLP

Notice 2005-3
March 4, 2005
Page 4

the Commission is whether the same holds true when the person interacting with a third party organization is not in fact acting on behalf of or representing the principal.

A standard that requires that an agent be controlled by a principal accomplishes this; it is hard to see how working cooperatively with someone who is not in fact acting on behalf of or answerable to a candidate creates a danger of corruption. Moreover, the actual statutory language in large part refers to an "agent acting on behalf of" a certain type of person.⁵ This is language of actual authority, an agent who is actually acting on behalf of a principal, rather than believed to be doing so by a third party.

We suspect that some commenters will support an apparent authority standard based on the misplaced assumption that it would impute agency based on what is apparent to outsiders, or the general public. However, apparent agency is not a route to allow the Commission, watchdog groups, political adversaries, or any other members of the public to create presumptions that certain people must be acting on behalf of candidates or parties, or to impute agency to anyone.

To illustrate, if Organization X considers person A to look like a proxy for candidate P, and Organization Y works together with A to craft public communications, X may believe, based on X's reasonable perception, that Y has made an illegal contribution to P. This is not consistent with the law of agency. X may believe that the actions of Y create a danger of corrupting P, but while X's belief is relevant to the appearance of corruption, it is not determinative of the existence of apparent authority. The connection between an apparent authority standard and the pursuit of the statutory goal of minimizing the appearance of corruption is tenuous at best.

Conclusion

For the reasons discussed above, we do not believe that an apparent authority standard would further permissible statutory purposes, and it may even be inconsistent with the statutory language. Should the Commission disagree with this conclusion, we urge most strongly that the regulations should state with greater specificity the standard that will be applied in determining whether a person is an agent, in terms understandable to a person of reasonable intelligence who has not been so misguided as to attend law school or otherwise become immersed in the arcana of election law.

⁵ 441i(a)(2); 441i(b)(1); 441i(d). 441i(e) and 441a(a)(7)(D)(ii) say "agent of" and "agent or official of" without adding "acting on behalf of." It is not clear from the statute whether this omission is intended to confer slightly different meanings on the term "agent" in these different uses. It seems more plausible to us that the drafters simply omitted the longer phrase in the two situations where the language was already quite convoluted. Adding "acting on behalf of" necessitates repeating the set of people on whose behalf the agent may act, and could make the latter two provisions almost unreadable.