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Introduction

This supplement summarizes the regulatory changes the Commission has made during the last year as a result of the decisions in the *Shays v. FEC* litigation. The material has been excerpted from past *Record* articles.¹ The excerpts are arranged chronologically.

The Usage Guide, to the left, is designed to help committees identify and locate summaries on the rules that apply to them

¹ *The final rules on candidate solicitation were summarized in the August 2005 Record, page 1; final rules on the de minimus exception were summarized in the December 2005 Record, page 9; final rules on state party wages were summarized in the January 2006 Record, page 2; final rules on electioneering communications were summarized in the February 2006 Record, page 1; final rules on the definition of agent were summarized in the March 2006 Record, page 1; final rules on the definition of federal election activity were summarized in the March and May 2006 Record, pages 2 and 3, respectively; final rules on the definitions of solicit and direct were summarized in the April 2006 Record, page 1; final rules on the Internet were summarized in the May 2006 Record, page 1; and final rules on coordinated communications were summarized in the July 2006 Record, page 1. Complete information on Shays rulemakings is available on the FEC web site at www.fec.gov.*

Candidate Solicitations

On June 23, 2005, the Commission approved a revised Explanation and Justification for its rule at 11 CFR 300.64, regarding appearances by federal candidates and officeholders at state, district and local party fundraisers. The rule, which was not amended, contains an exemption permitting federal candidates and officeholders to speak at such events “without restriction or regulation.”

Background

Under the Federal Election Campaign Act (the Act), federal candidates, officeholders and their agents may not solicit, receive, direct, transfer or spend nonfederal funds in connection with federal or nonfederal elections except under limited circumstances. See 2 U.S.C. §441i(e). However, the Act permits them to speak or be featured guests at state, district and local party fundraisers (“state party fundraisers”), where nonfederal funds may be raised. See 2 U.S.C. §441i(e)(3).

The Commission’s regulation at 11 CFR 300.64 permits federal candidates and officeholders to speak without restriction or regulation at these fundraisers. In *Shays v.*

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Candidate Solicitations

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FEC the court found that, although this exemption was a permissible interpretation of the statute, the Explanation and Justification for the rule did not satisfy the “reasoned analysis” requirement of the Administrative Procedure Act (APA). The court remanded the regulation to the Commission for further action consistent with its opinion.

Accordingly, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking comments both on proposed changes to the Explanation and Justification for the existing rule and on a proposal to amend the regulation to prohibit federal candidates and officeholders from soliciting or directing nonfederal funds when attending or speaking at state party fundraisers.

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The Commission held a public hearing on May 17 to receive testimony concerning this NPRM. See the June 2005 *Record*, page 6, and the April 2005 *Record*, page 4.

Revised E&J

After considering public comments and testimony, the Commission decided to retain the current exemption in 11 CFR 300.64 permitting federal candidates and officeholders to attend, speak or be featured guests at state party fundraisers without restriction or regulation. The Commission determined that the existing rule provides the “more natural” interpretation of the statute, is more consistent with legislative intent and provides federal candidates and officeholders with clear notice regarding permissible speech at state party fundraisers. The revised Explanation and Justification explains how the existing rule effectuates the careful balance Congress struck between the need to avoid the appearance of corruption created when large amounts of soft money are solicited and the need to preserve the legitimate and appropriate role that federal officeholders and candidates play in raising funds for their political parties—especially at the grass-roots level.

The revised Explanation and Justification was published in the June 30, 2005, *Federal Register* (70 FR 37649) and is available on the FEC web site at www.fec.gov/law/law_rulemakings.shtml and from the FEC faxline, 202/501-3413. ♦

De Minimis Exception

On November 10, 2005, the Commission voted to remove from its regulations an exemption allowing state, district and local party committees to use only Levin funds¹ to pay for certain types of federal election activity (FEA) aggregating \$5,000 or less in a calendar year.

Background

On July 29, 2002, the Commission promulgated regulations at 11 CFR 300.32(c)(4) requiring any state, district or local party committee that spends more than \$5,000 for allocable Type 1 and Type 2 FEA² in a calendar year either to pay for such expenses entirely with federal funds or to allocate between federal and Levin funds. Under the so-called “*de minimis* exemption,” any state, district or local party committee that spends \$5,000 or less for those types of FEA in a calendar year may finance the activity entirely with Levin funds.

In *Shays v. FEC*, the district court held that the *de minimis* exemption was inconsistent with Congressional intent. The Commis-

¹ *Levin funds*, a type of nonfederal funds raised only by state, district or local political party committees, are limited to donations of \$10,000 per calendar year and may be raised from sources otherwise prohibited by the Federal Election Campaign Act (except foreign nationals). 11 CFR 300.31.

² “Allocable Type 1 & 2” FEA means: 1) voter registration activity 120 days before a federal election; and 2) voter identification, get-out-the-vote activity or generic campaign activity in connection with an election in which a candidate for federal office appears on the ballot. Neither type of activity may be allocated if it refers to a clearly identified federal candidate. 11 CFR 100.24.

sion appealed the court's ruling, but also issued a Notice of Proposed Rulemaking (NPRM) to eliminate the exemption. (See the March 2005 *Record*, page 6.) On July 15, 2005, the Court of Appeals for the D.C. Circuit affirmed the district court's opinion.

Final Rules

In light of the appeals court's decision, and after considering public comments, the Commission decided to eliminate the \$5,000 *de minimis* exemption. The revised rules require state, district and local committees and organizations of political parties to pay for all allocable Type 1 and Type 2 FEA either entirely with federal funds or federal and Levin funds without regard to their total amount of annual disbursements. ♦

State Party Wages

On December 1, 2005, the Commission voted to amend its rules to permit state, district and local party committees to pay as administrative expenses the salaries, wages and fringe benefits of employees who spend 25 percent or less of their compensated time in a month on federal election activity (FEA) or activity in connection with a federal election ("covered employees"). The previous regulation that allowed party committees to use nonfederal funds for salaries and wages for covered employees was struck down by the courts in *Shays v. FEC*.

Background

On July 15, 2005, the U.S. Court of Appeals for the DC Circuit upheld the appealed portion of the U.S. District Court for the District of Columbia's September 18, 2004

decision. See the September 2005 *Record*, page 1. That decision invalidated several Commission regulations implementing provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), including the regulations addressing payment of salaries and wages of covered employees. BCRA does not address what type of funds state party committees may use for covered employees and the district court held that the Commission's interpretation of the statute was not a permissible reading under step two of *Chevron* review.¹ The appeals court affirmed the district court's decision, but held that the regulations addressing the salaries and wages of state party employees failed to provide sufficient explanation under the Administrative Procedure Act.²

Final Rules

After considering public comments and testimony from a public hearing, the Commission issued final rules that:

- Require state party committees to either pay the salaries and wages of covered employees entirely from a federal account or allocate the salaries and wages between their federal and nonfederal accounts as administrative costs using the allocation ratios at 106.7(d)(2)(i) through (iv);

¹ In *Chevron* review, the court asks first whether Congress has spoken directly to the precise issue at hand. If so, then the agency's interpretation of the statute must implement Congress's unambiguous intent. If, however, Congress has not spoken explicitly to the question at hand, the court must consider whether the agency's rules are based on a permissible reading of the statute.

² Under the Administrative Procedure Act, regulations that are promulgated without a reasoned analysis may be found "arbitrary and capricious" and may be set aside by a reviewing court. 5 U.S.C. §706(2)(A)

- Establish that salaries and wages paid to employees who spend *none* of their compensated time in a given month on FEA or activities in connection with a federal election may be paid entirely with nonfederal funds;
- Allow state party committees to use federal funds raised at a federal/nonfederal fundraiser to pay for FEA provided that the direct costs of the fundraiser are paid entirely with federal funds or are allocated according to the "funds received" method; and
- Make clear that a state party committee that raises *only* federal funds at a fundraising activity must pay the entire direct costs of the fundraising activity with federal funds.

The revised rules also supersede advisory opinion 2003-11 to the extent that it allowed party committees to pay fringe benefits using only nonfederal funds. The rules now require committees to pay fringe benefits as administrative expenses.

The final rule was published in the December 20, 2005, *Federal Register* (70 FR 75379) and is available on the FEC web site at www.fec.gov/law/law_rulemakings.shtml and from the FEC faxline, 202/501-3413. ♦

Electioneering Communications

On December 15, 2005, the Commission voted to modify its regulations governing electioneering communications (EC) to comply with the court decisions in *Shays v. FEC* that invalidated certain portions of those rules. The revised rules, which took effect on January 20, 2006, redefine "pub-

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Electioneering Communication

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licly distributed” and eliminate an exemption included in the Commission’s original regulations.

Background

Introduced as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), the EC provisions place funding restrictions and reporting requirements on certain communications that mention a federal candidate and are aired before the relevant electorate in close proximity to the candidate’s election. The statute includes some exemptions from these restrictions and authorizes the Commission to create others, so long as the exempted communications do not promote, attack, support or oppose (PASO) a federal candidate.

In *Shays v. FEC*, the U.S. District Court for the District of Columbia invalidated two of the Commission’s EC regulations. One regulation exempted communications paid for by any 501(c)(3) non-profit organizations. The court stated that, although Internal Revenue Code (IRC) prohibits 501(c)(3) organizations from participating or intervening in political campaigns, the Commission, in creating its exemption, had not explained why it felt the Internal Revenue Service (IRS) restriction was sufficient.

The court also ruled that the Commission exceeded its statutory authority when it limited the definition of “publicly distributed” to communications aired “for a fee.” The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court’s holding regarding the “for a fee” provision.

The Commission issued a Notice of Proposed Rulemaking to modify the EC regulations to comply with the District Court’s ruling and address other related concerns. See the October 2005 *Record*, page 6.

Final Rules

In creating its final rules, the Commission took into account public comments and testimony from a public hearing on the proposed rules.

501(c)(3) Organizations. In response to the court’s concerns, the Commission found that the record in this rulemaking did not demonstrate that the IRC and the Act are perfectly compatible. In the final rules, the Commission eliminated the 501(c)(3) exemption, effectively subjecting those organizations to the ban on corporate-financed ECs.

“For a Fee.” In order to qualify as an EC a communication must be “publicly distributed.” The Commission had defined “publicly distributed” as “aired, broadcast, cablecast or otherwise disseminated for a fee” 11 CFR 100.29(b)(3)(i) (emphasis added). The District Court said that this provision was either inconsistent with the statute or it exceeded the Commission’s exemption authority. In its final rules, the Commission removed “for a fee” from the regulatory definition, so that any communication “aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system or satellite system,” if not otherwise exempted, is subject to the EC regulations.

Some commenters were concerned that removing the “for a fee” provision could dissuade 501(c)(3) organizations from distributing Public Service Announcements (PSA) that include federal candidates, which may be aired during EC periods: 30 days before a primary election and 60 days before a general election. These commenters noted that 501(c)(3) organizations have little or no control over when their PSAs will air; therefore, a PSA featuring a federal candidate could be broadcast during the EC periods.

In response to this concern, the Commission encourages organizations to provide broadcasters with an expiration date or some indication that the PSAs which include federal candidates should not be run during the EC periods. Additionally, broadcasters should check PSAs which include federal candidates to ensure that they are not publicly distributed during those periods.

State and Local Candidates. In its initial EC rulemaking, the Commission created another limited exemption for communications by state and local candidates. The Commission decided to retain this exemption, but clarified the regulation.

Films, Books and Plays. The Commission decided not to take action at this time on a Petition for Rulemaking that requested an exemption from the EC regulations for the promotion and advertising of “political documentary films, books, plays and similar means of expression.” The Commission will address this issue after it has completed all Rulemakings required by the *Shays* decision.

The revised EC regulations were promulgated in the December 21, 2005 *Federal Register* (70 FR 75713) and are available on the FEC web site at www.fec.gov/law/cfr/ej_compilation/2005/notice_2005-29.pdf. ♦

Definition of “Agent”

On January 23, 2006, the Commission approved a revised Explanation and Justification (E&J) for the definitions of agent used in its regulations on coordinated and independent expenditures and its regulations regarding nonfederal funds. The revisions respond to the district court decision in *Shays v. FEC*.

Background

In its September 18, 2004 decision in *Shays*, the U.S. District Court for the District of Columbia held that the Commission had not adequately explained its decision to include in its definitions of agent those with “actual authority,” but not “persons acting only with apparent authority.” Having concluded that the Commission’s inadequate explanation violated the reasoned analysis requirement of the Administrative Procedure Act (APA), the court remanded the definitions to the agency for further action consistent with its opinion.

In response, the Commission approved a Notice of Proposed Rulemaking (NPRM) on January 27, 2005 requesting comments on several alternatives, including possible changes to the definitions of agent used in its regulations. On May 1, 2005, the Commission held a public hearing to receive testimony on the proposed rules. For more information on the public hearing, see the July 2005 *Record*, page 6.

Revised E&J

After considering public comments and testimony, the Commission decided to retain the current definitions of agent in 11 CFR 109.3 and 300.2(b), but to explain more fully its decision to exclude

“apparent authority.” In short, the Commission believes that the current definitions, which include “actual authority,” either express or implied, best reflect the intent and purposes of the statute.

Furthermore, after examining its pre- and post-BCRA enforcement record, the Commission has determined that excluding “apparent authority” from the definitions of agent has not allowed circumvention of the Act nor led to actual or apparent corruption. The current definitions cover individuals engaged in a broad range of activities specifically related to BCRA-regulated conduct, rather than only to expenditures. This has dramatically increased the number of individuals and type of conduct subject to the Act, especially when compared to the Commission’s pre-BCRA definition of agent.

Similarly, the Commission believes including “apparent authority” in the definitions of agent is not necessary in order to implement BCRA or the Act. “Actual authority,” either express or implied, is a broad concept that covers the wide range of activities prohibited by the statute. This not only provides committees with appropriate incentives for compliance, but also protects core political activity that could otherwise be restricted or subject to Commission investigation under an apparent authority standard. The revised E&J also provides analysis of several specific hypothetical situations raised by commenters to illustrate how “actual authority” sufficiently addresses behavior.

Finally, the E&J concludes that liability premised on “actual authority” is best suited for the political context. Although “apparent authority” is applicable in commercial contexts, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations.

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.

The revised Explanation and Justification was published in the January 31, 2006, *Federal Register* (71 FR 4975) and is available on the FEC web site at www.fec.gov/pdf/nprm/definition_agent/notice_2006-1.pdf. ♦

Federal Election Activity

On February 9, 2006, the Commission approved final rules that revise the definitions of certain types of federal election activity (FEA). The revised rules, which take effect March 24, comply with the district court’s decision in *Shays v. FEC*.

Background

As part of its decision in *Shays*, the district court invalidated portions of the regulatory definition of FEA that describe voter registration activity, get-out-the-vote (GOTV) activity and voter identification. The court found that the voter registration and GOTV definitions were improperly promulgated because the Commission’s initial Notice of Proposed Rulemaking (NPRM) did not indicate that the definitions would be limited to activities that “assist” individuals in registering or voting.

The court also invalidated the portion of the GOTV definition that exempts communications by associations or similar groups of state

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Federal Election Activity

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or local candidate/officeholders that refer only to state or local candidates. With regard to the definition of voter identification, the court found the Commission's decision to exclude voter list acquisition and the activities of groups of state and local candidates/officeholders to be contrary to Congressional intent. For these reasons, the district court remanded the regulations to the Commission for further action consistent with its decision.

Final Rules

In response to the district court's decision, the Commission published an NPRM on May 4, 2005 that proposed possible modifications to the definitions of voter registration activity, GOTV activity and voter identification. In addition, the NPRM proposed several changes to the definition of "in connection with an election in which a candidate for federal office appears on the ballot." See page 1 of the June 2005 *Record*.

On August 4, 2005, the Commission held a public hearing to receive testimony on the proposed rules. See page 4 of the September 2005 *Record*. After considering the public comments and testimony, the Commission issued final rules that:

- Retain the current definitions of voter registration and GOTV activity, which exclude from these definitions mere encouragement to register and/or vote, and provide a more complete explanation of what the term voter registration activity encompasses;
- Amend the definition of voter identification to include acquiring information about potential voters, including, but not limited to, obtaining voter lists;

- Remove the exception to the definitions of GOTV activity and voter identification for associations or other similar groups of candidates for state and local office;
- Remove the reference to "within 72 hours of an election" from the definition of GOTV activity;
- Revise the definition of "in connection with an election in which a candidate for federal office appears on the ballot" to remove restrictions on the rules for special elections to odd-numbered years.

Interim Final Rule

The Commission also voted to promulgate an interim final rule modifying the definition of "in connection with an election in which a candidate for federal office appears on the ballot." This rule exempts activities and communications that are in connection with a nonfederal election held on a date separate from a date of any federal election and that refer *exclusively* to nonfederal candidates participating in the nonfederal election, ballot referenda or initiatives scheduled for the date of the nonfederal election, or the date, polling hours and locations of the nonfederal election.

The Commission approved the text of the new rule and directed the Office of General Counsel to draft an appropriate Explanation and Justification that will also seek public comment on the interim final rule. The final rules were promulgated in the *Federal Register* (71 FR 8926) on February 22, 2006 and are available on the FEC web site at www.fec.gov/law/law_rulemakings.shtml. The Interim Final Rule will be published and available in the *Federal Register* after final Commission approval of the Explanation and Justification. ♦

Interim Final Rule on Definition of FEA

On February 9, 2006, the Commission approved an interim final rule regarding voter identification and get-out-the-vote (GOTV) activities limited to nonfederal elections. The Commission is seeking public comment on all aspects of the interim final rule and may amend the final rule as appropriate in response to comments received.

Background

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), voter identification, GOTV activity and generic campaign activities conducted "in connection with an election in which a candidate for federal office appears on the ballot," constitute federal election activity (FEA), and are subject to certain funding limits and prohibitions.

In response to the district court decision in *Shays v. FEC*, the Commission published a Notice of Proposed Rulemaking (NPRM) that proposed several changes to the definition of FEA, including exceptions for activities conducted in proximity to nonfederal elections. After reviewing public comments and testimony given at an August 4, 2005, public hearing, the Commission approved Final Rules and Explanation and Justification (E&J) on the Definition of Federal Election Activity (2006 Final Rules). The Commission decided not to incorporate into those final rules any of the FEA nonfederal time period exceptions proposed in the NPRM but instead adopted a more narrowly focused interim final rule.

Interim Final Rule

Initially, the Commission included within its definition of FEA voter registration, GOTV and generic campaign activity conducted between the filing deadline for access to the primary election ballot and the date of the general election

or, in states that do not conduct primaries, beginning January 1 of each even-numbered year. The regulation provided an exemption to this definition for an association of state or local candidates conducting activity in connection with a nonfederal election, but the Commission eliminated that exemption in order to comply with the district court decision in *Shays*. As a result, political campaign activity relating solely to nonfederal elections scheduled in 2006 will fall within the FEA time period. To avoid capturing activity that relates solely to nonfederal elections, the interim final rule distinguishes between voter identification and GOTV activities that are FEA and those activities that are not FEA, because they do not involve elections in which federal candidates are on the ballot.

For an activity to be covered by the interim final rule:

- The nonfederal election must be held on a date separate from any federal election and the communication or activity must be in connection with the nonfederal election and
- The activity or communication must refer exclusively to:
- Nonfederal candidates on the ballot;
- Ballot initiatives or referenda; or
- The date, time and polling locations of the nonfederal election.

Because generic campaign activity, by definition, promotes a political party and does not promote a federal or nonfederal candidate, such activity would not be covered by the interim final rule. The Commission seeks comment on whether this is an appropriate determination. The Commission is soliciting comments on all aspects of the interim final rule and may amend the interim rule as appropriate in response to comments received. ♦

“Solicit” and “Direct”

On March 13, 2006, the Commission approved final rules and explanation and justification that expand the definitions of “solicit” and “direct” as those terms relate to the raising and spending of federal and nonfederal funds. The rulemaking stems from court decisions in *Shays v. FEC* that invalidated the existing regulatory definitions of those terms.

Background

On July 15, 2005, the U.S. Court of Appeals for the District of Columbia upheld the U.S. District Court for the District of Columbia’s September 18, 2004 decision in *Shays v. FEC*. See the September 2005 *Record*, page 1. That decision invalidated several Commission regulations implementing provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), including the regulations that define “to solicit” and “to direct.”

The Court of Appeals concluded that by limiting the definition of “to solicit” only to explicit, direct requests for money, thus permitting indirect requests for funds, the Commission’s regulatory definition allows candidates and parties to circumvent BCRA’s prohibitions and restrictions on nonfederal funds and thereby violates “Congress’s intent to shut down the soft-money system.” As to the term “direct,” the Court of Appeals held that the Commission’s definition of “direct” was invalid because it effectively defined “direct” as “ask” and thus, like the definition of “solicit” and contrary to Congress’s intent, limited “direct” to explicit requests for funds.

Final Rules

The Commission had approved a Notice of Proposed Rulemaking (NPRM) on September 28, 2005, seeking comments on proposed revisions to its definitions of the terms “solicit” and “direct.” On November 15, 2005, the Commission held a public hearing to receive testimony on the proposed revisions. See December 2005 *Record*, page 7. After considering the public comments and testimony, the Commission issued final rules.

Definition of “Solicit.” The revised definition of “solicit” encompasses written and oral communications that, construed as reasonably understood in the context in which they are made, contain a clear message asking, requesting or recommending, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide something of value. Included in the regulations is a non-exhaustive list of examples of communications and statements that constitute solicitations. For instance, “Group X has always helped me financially in my elections. Keep them in mind this fall” would constitute a solicitation under the revised definition, whereas a statement such as “Thank you for your support of the Democratic Party” made during a policy speech would not.

Under the revised definition, a solicitation may be made directly or indirectly and mere statements of political support or guidance as to the application of the law do not constitute solicitations.

To “Direct.” The new definition of “direct” focuses on guidance provided to a person who intends to donate funds. Specifically, “to direct” means to guide, directly or indirectly, a person who has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide anything of value by identifying a candidate,

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“Solicit” and “Direct”

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political committee or organization for the receipt of such funds, or things of value. A contribution, donation, transfer or thing of value may be made or provided directly or through a conduit or intermediary.

As with the definition of “solicit,” direction does not include merely providing information or guidance as to the applicability of a particular law or regulation.

The final rules appeared in the *Federal Register* on March 20, 2006, and will become effective on April 19, 2006. ♦

Internet Rules

On March 27, 2006, the Commission approved regulations that narrowly expand the definition of “public communication” to include certain types of paid Internet content. This change complies with the district court’s determination in *Shays v. FEC* that the Commission could not exclude all Internet communications from its “public communication” definition.

The revised rules also modify the Commission’s disclaimer requirements, add an exception for uncompensated individual Internet activities, revise the “media exemption” to make clear that it covers qualified online publications and add new language regarding individuals’ use of corporate and labor organization computers and other equipment for campaign-related Internet activities.

Background

The Bipartisan Campaign Reform Act of 2002 (BCRA) requires that State, district and local political party committees and State and

local candidates use federal funds to pay for any “public communication” that promotes, attacks, supports or opposes (PASOs) a clearly identified federal candidate. Congress defined “public communication” as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. §421(22). Based on that definition, the Commission expressly excluded all Internet communications from its regulatory definition of the term.

In its other BCRA rulemakings, the Commission incorporated the term “public communication” into provisions on generic campaign activity, coordinated communications and disclaimer requirement. By excluding Internet content from the definition of public communication, the Commission effectively exempted most Internet activity from those regulations. The term was also used in the definition of an “agent” of a state or local candidate and in certain allocation rules governing spending by SSFs and nonconnected committees. 11 CFR 300.2(b) and 106.6(f).

On October 21, 2005, the U.S. District Court for the District of Columbia in *Shays* rejected the Commission’s decision to exclude all Internet communications from the definition of “public communication.” 337 F.Supp. 28 (D.D.C. 2004), aff’d, 414 F.3d 76 (D.C. Cir. 2005). The court concluded that some Internet communications do fall within the scope of “any other form of general public political advertising,” and therefore required the Commission to determine which Internet communications were encompassed by that term.

The Commission issued a Notice of Proposed Rulemaking (NPRM) on March 24, 2005 seeking comment on possible rule changes and

held public hearings on June 28 and 29, 2005. For more information, see the May 2005 *Record*, page 1 and August 2005 *Record*, page 2.

Final Rules

Public Communication. While the new regulations continue to exempt most Internet communications, those placed on another person’s web site for a fee are now considered “general public political advertising” and, therefore, qualify as “public communications.” By contrast, unpaid Internet communications, including blogs, e-mail and a person’s own web site, are not.

Coordination. Content that a person places on their own web site is not included in the definition of “public communication,” even if it includes republished campaign material. Therefore, a person’s republication of a candidate’s campaign materials on their own web site, blog or e-mail does not constitute a “coordinated communication.” However, when a person pays a fee to republish campaign materials on another person’s web site, the republication would qualify as a “public communication.”

Disclaimer Requirements. Under the new rules, political committees must include disclaimers on their web sites, as well as their widely-distributed e-mail, i.e., more than 500 substantially similar messages, regardless of whether the e-mail messages are solicited or unsolicited. No other person is required to include a disclaimer on his or her own web site or e-mail messages. Persons other than political committees need only include disclaimers on paid Internet advertising that qualifies as a “public communication” and then only if the communication includes certain content such as a message expressly advocating the election or defeat of a clearly identified Federal candidate. 11 CFR 110.11.

Uncompensated Individual Internet Activities. Online campaign activity by uncompensated individuals or groups of individuals is exempt from the definitions of contribution and expenditure. 11 CFR 100.94. This exemption applies whether the individual acts independently or in coordination with a candidate, authorized committee or political party committee. Exempt Internet activities include:

- Sending or forwarding election-related e-mail messages;
- Providing a hyperlink to a campaign or committee's web site;
- Engaging in campaign-related blogging;
- Creating, maintaining or hosting an election-related web site; and
- Paying a nominal fee for a web site or other forms of communication distributed over the Internet.

Media Exemption. In general, a media entity's costs for carrying *bona fide* news stories, commentary and editorials are not considered "contributions" or "expenditures" unless the media facility is owned or controlled by a federal candidate, political party or federally registered political committee. See 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.73 and 100.132. The new regulations clarify that the exemption, commonly known as the "news story exemption" or the "media exemption," extends to media entities that cover or carry news stories, commentary and editorials on the Internet, including web sites or any other Internet or electronic publication. See also AOs 2005-16, 2004-7 and 2000-13.

The media exemption applies to the same extent to entities with only an online presence as those media outlets that maintain both an offline and an online presence. See the explanation and justification for revised regulations. 11 CFR 100.73 and 100.32.

Corporate and Labor Internet Activities. Commission regulations have long permitted stockholders

and employees of a corporation and members of a union to make occasional, isolated or incidental use of the organization's facilities for voluntary political activity. The new regulations clarify that employees may use their work computers at the workplace and elsewhere to engage in political Internet activity, as long as that use does not prevent them from completing their normal work or increase the overhead or operate expenses for the corporation or labor organization. The organization may not condition the availability of its space or computers on their being used for political activity or to support or oppose any candidate or political party. 11 CFR 114.9.¹

State and Local Party Activities. If a party committee pays to produce content that would qualify as federal election activity (FEA)—e.g., a video that PASOs a federal candidate—and pays to post that content on another person's web site, then the entire costs of production and publication of the content must be paid for with federal funds. 11 CFR 100.24. The costs of placing content on the party committee's own web site, however, are not restricted to federal funds. See the explanation and justification for revised 11 CFR 100.26.

The final rules were published in the April 12, 2006 *Federal Register* (71 FR 18589) and will go into effect on May 12, 2006. The final rules are available on the FEC web site at www.fec.gov/law/law_rulemakings.shtml and from the FEC Faxline 202/501-3413. ♦

Coordinated Communications

On June 8, 2006, the Commission published final rules and explanation and justification governing coordinated communications. (71 FR 33190) The rules, which take effect on July 10, comply with the Court of Appeals ruling in *Shays v. FEC* that the Commission had not adequately explained one aspect of the previous coordinated communications regulations. 11 CFR 109.21(c)(4).

Background

The *Shays* court found that the 120-day pre-election time frame used in the content prong of the three-prong coordinated communication test was not sufficiently justified, since there was "no support in the record for the specific content based standard the Commission... promulgated." In response, the Commission issued a Notice of Proposed Rulemaking (NPRM) on December 8, 2005, and held public hearings on January 25 and 26, 2006. Neither the written comments nor the hearing testimony provided quantitative evidence concerning proposed time frames. As a result, the Commission licensed data from TNS Media Intelligence/CMAG regarding television advertising run by Presidential, Senate and House candidates during the 2004 cycle in effort to address the appeals court's concerns. The Commission issued a Supplemental Notice of Proposed Rulemaking on March 15, 2006, to allow the public to comment on the licensed data.

For more information, see the January 2006 *Record*, page 2 and the March 2006 *Record*, page 3.

¹ *The new regulations do not affect the existing regulations concerning communications by such organizations to the restricted class or to the general public. 11 CFR 114.9(e).*

(continued on page 10)

Coordinated Communications

(continued from page 9)

Final Rules

Revised Time Frame. The Commission has retained the existing content prong at 11 CFR 109.21(c)(4), but has modified the 120-day pre-election time frame. The Commission has established separate time frames for political parties, congressional and presidential candidates, based on comments received in the rulemaking and the licensed data.

- For communications that refer to House and Senate candidates, the period begins 90 days before each candidate’s election and runs through the date of that election. 109.21(c)(4)(i). This time frame applies separately to primary and general elections. In some states these periods will overlap, depending on the timing of the primary election.
- For communications that refer to Presidential candidates, the time frame for each state begins 120 days before the date of its presidential primary and runs through the general election. 109.21(c)(4)(ii).
- For communications coordinated with a political party committee that refer to political parties, do not reference a clearly identified federal candidate and are distributed in a jurisdiction where that party has a candidate on the ballot, the time frames are based on the election cycle:
 - o In a non-Presidential election cycle, the time frame begins 90 days before each election and ends on the date of that election (109.21(c)(4)(iii)(B));
 - o In a Presidential election cycle, the time frame for each state begins 120 days before the date of its primary and runs through the general election. 109.21(c)(4)(iii)(C).
- However, communications that refer only to a political party, but are coordinated with a candidate, are subject to the 90- or 120-day period applicable to that candidate, as long as they are distributed in that candidate’s jurisdiction. 109.21(c)(4)(iii)(A).
- For communications that refer to political parties and reference a clearly identified federal candidate, the appropriate candidate time frame would apply when the communication is distributed in the candidate’s jurisdiction:
 - o If the clearly identified federal candidate is a House or Senate candidate, the 90-day time frame applies;
 - o If the candidate is a Presidential candidate, the 120-day time frame applies. 109.21(c)(4)(iv)(A)-(B).
- For communications coordinated with a political party committee that refer to both a political party and a clearly identified federal candidate and are distributed outside the candidate’s jurisdiction, the election-cycle rules for communications referring to political parties described above apply. 109.21(c)(4)(iv)(C).

The Commission has also clarified that a public communication satisfies the content standards at 109.21(c)(4)(i) or (ii) with respect to a candidate only if it is publicly distributed or otherwise publicly disseminated during the relevant time periods before an election in which that candidate or another candidate seeking election to the same office is on the ballot.

“Directed to Voters.” The Commission has removed the phrase “directed to voters in the jurisdiction” from former 109.21(c)(4)(iii). The revised rule states that a public communication must be “publicly distributed or otherwise publicly disseminated in the clearly identified candidate’s jurisdiction” or if the public communication refers

to a political party, but not to a clearly identified federal candidate, in a jurisdiction in which one or more candidates of a political party appear on the ballot. The Commission has decided not to specify a minimum number of persons that must be able to receive a communication for the fourth content standard to apply.

Common Vendor and Former Employee Conduct Standard.

BCRA requires that the Commission address “the use of a common vendor” and “persons who previously served as an employee of a candidate of a political party” in the context of coordination. The Commission has decided to revise the temporal limit in the common vendor and former employee conduct standards to encompass 120 days rather than the entire current election cycle. The 120-day period starts on the last day of the individual’s employment with a candidate or political party committee or on the last day that a commercial vendor performed any of the services listed in 109.21(d)(4)(ii) for a candidate or political party committee.

Endorsements and Solicitations. The Commission has created a new safe harbor in 109.21 for endorsements by federal candidates of other federal and nonfederal candidates. The Commission has also created a safe harbor for solicitations by federal candidates for other federal and nonfederal candidates, political committees and certain tax-exempt 501(c) organizations as permitted by 11 CFR 300.65. Such endorsements or solicitations are not coordinated communications unless the communication promotes, attacks, supports or opposes (PASOs) the endorsing or soliciting candidate or another candidate who seeks election to the same office as the endorsing or soliciting candidate. This safe harbor applies no matter when the endorsement or solicitation occurs.

This safe harbor was not extended to state ballot initiatives.

Publicly Available Information.

The Commission has created a safe harbor for use of publicly available information in creating, producing or distributing a communication. Such use would not, in and of itself, satisfy any of the conduct standards in 109.21(d). This safe harbor would apply to four of the five conduct standards; only the “request or suggestion” conduct standard in 109.21(d)(1) is excluded from the safe harbor.

To qualify for this safe harbor, the person paying for the communication must demonstrate that the information used in creating, producing or distributing the communication was obtained from a publicly available source. A communication that does not fall within this safe harbor will not automatically be presumed to satisfy the conduct prong of the coordinated communication test.

Establishment and Use of a Firewall. The Commission has created a safe harbor from the conduct standards when a commercial vendor, former employee or political committee establishes and uses a firewall to prevent the sharing of information about the candidate or political party’s plans, projects, activities or needs. To qualify for the safe harbor, the firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy. It must also be designed and implemented to prohibit the flow of information between:

- Employees or consultants providing services for the person paying for the communication; and
- Those currently or previously providing services to the candidate, the authorized committee, the candidate’s opponent, the opponent’s authorized committee or a political party committee.

This provision does not dictate specific procedures required to prevent the flow of information, since a firewall is more effective if established and implemented by each entity based on its specific organization, clients and personnel. However, a good example of an acceptable firewall is described in MUR 5506 (EMILY’s List), First General Counsel’s Report at 6-7. Additionally, the Commission does not require firewalls and will not draw a negative inference from the lack of such a screening policy.

Payment Prong Amendment. The new regulations clarify that the payment prong is satisfied if the communication “is paid, in whole or in part, by a person other than that candidate, authorized committee, or political party committee.”

Party Coordinated Communications (11 CFR 109.37). The Commission revised its regulations regarding party coordinated communication to ensure consistency with the revisions in the fourth content standard at 109.21(c)(4). These regulations apply to communications paid for by party committees and are similar to the standards for coordinated communications. The new regulations replace the old 120-day time frame with the new 90- and 120-day periods applicable to communications that refer to House and Senate candidates or Presidential candidates, respectively.

Revised 109.37 does not contain separate rules for communications that refer to political parties, because the content standard in 109.37(a) is not satisfied by communications that reference only political parties, unlike revised 109.21.

“Agent” Clarification. The Commission has added a sentence to 109.20(a) to explain that any reference in the coordinated communication rules to a candidate, a candidate’s authorized committee or a political party committee, also refers to any their agents. ♦

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