AGENDA DOCUMENT NO. 05-37

FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 08-18-05

SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

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Assistant General Counsel

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SUBJECT: Notice of Proposed Rulemaking on Electioneering Communications (11 CFR 100.29).

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that revisits the definition of "electioneering communications" at 11 CFR 100.29 in order to comply with the decisions in *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004); *aff'd,* No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005). The NPRM also addresses a petition for rulemaking concerning advertisements that promote political documentary films, books, plays, and similar means of communications.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register.*

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[NOTICE 2005->]

ELECTIONEERING COMMUNICATIONS

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission is seeking comment on proposed changes to its rule defining "electioneering communications" under the Federal Election Campaign Act of 1971, as amended ("FECA"). The proposed changes would modify the definition of "publicly distributed" and the exemptions to the definition of "electioneering communications" consistent with the ruling of the U.S. District Court for the District of Columbia in Shays v. FEC, portions of which were affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. With regard to possible exemptions, the Commission is considering a range of options, including: (1) retaining the section 501(c)(3) organization exemption and the State candidate exemption; (2) narrowing the section 501(c)(3) organization exemption; (3) repealing the two current exemptions for section 501(c)(3) organizations and State candidates; and (4) replacing all of the current exemptions with a broad new exemption covering all communications that do not promote, support, attack or oppose a Federal candidate. The Commission has made no final decision on the issues presented in this

rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before September 30, 2005. The Commission will hold a hearing on the proposed rules on October 19 and, if necessary, October 20, 2005 at 9:30 a.m. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, must be addressed to Ms. Mai T. Dinh, Assistant General Counsel, and must be submitted in either email, facsimile, or paper form. Commenters are strongly encouraged to submit comments by email or facsimile to ensure timely receipt and consideration. Email comments must be sent to either ECdef@fec.gov or submitted through the Federal eRegulations Portal at <www.regulations.gov>. If the email comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends. The hearing will be held in the

Commission's ninth floor meeting room, 999 E Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Mr. Anthony T. Buckley, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), amended the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. (the "Act"), by adding a new category of communications, "electioneering communications," to those already regulated by the Act. See 2 U.S.C. 434(f)(3). Generally speaking, electioneering communications are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within 60 days before a general election or 30 days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a)(1) through (3). Electioneering communications carry certain reporting obligations and funding restrictions. See 2 U.S.C. 434(f)(1) and (2), and 441b(a) and (b)(2).

BCRA exempts certain communications from the definition of "electioneering communication," 2 U.S.C. 434(f)(3)(B)(i) to (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose ("PASO") a candidate, 2 U.S.C. 434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii).

On October 23, 2002, the Commission promulgated regulations to implement BCRA's electioneering communications provisions. Final Rules and Explanation and Justification for Regulations on Electioneering Communications, 67 FR 65190 (Oct. 23, 2002) ("EC E&J"). In Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), aff'd, No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005) ("Shays"), the District Court held that one regulation limiting electioneering communications to communications publicly distributed for a fee failed review under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) ("Chevron"), and one regulation exempting section 501(c)(3) organizations failed to satisfy the Administrative Procedure Act, 5 U.S.C. 706(2) ("APA"). Shays, 337 F. Supp. 2d at 124-29. The District Court remanded the case for further action consistent with its decision. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court, holding that the "for a fee" regulation failed Chevron review. Shays v. FEC, No. 04-5352, slip op. at 52-57, 2005 WL 1653053, at *28-31 (D.C. Cir. July 15, 2005). The Commission did not appeal the District Court's decision regarding an exemption from the "electioneering communication" definition for section 501(c)(3) organizations. The Commission is issuing this NPRM to comply with the District Court and Court of Appeals decisions with respect to both regulations.

A. 11 CFR 100.29(b)(3)(i) – Communications Publicly Distributed Without a Fee

In 11 CFR 100.29(b)(3)(i), the Commission defined "publicly distributed" as "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system" (emphasis added). The Commission included the requirement that the communication be publicly distributed for a fee, in part, because "[m]uch of the legislative history and virtually all of the studies cited in legislative history and presented to the Commission in the course of this rulemaking focused on

paid advertisements in considering what should be included within electioneering communications." EC E&J at 65192 (citations to studies omitted). Both the District Court and the Court of Appeals in Shays determined that the "for a fee" language in the definition of "publicly distributed" operated much like an exemption to the definition of "electioneering communication." Shays, 337 F. Supp. 2d at 128-29; No. 04-5352, slip op. at 55, 57, 2005 WL 1653053, at *30, 31. The District Court found that the exemption exceeded the Commission's statutory authority to create exemptions because it could potentially include communications that PASO a Federal candidate. Shays, 337 F. Supp. 2d at 128-29. Both the District Court and the Court of Appeals held that the "for a fee" provision is inconsistent with the plain text of BCRA and thus violated Chevron step one.[1] Shays, 337 F. Supp. 2d at 129; No. 04-5352, slip op. at 54, 2005 WL 1653053, at *29.

Additionally, the Court of Appeals observed that "excluding federal candidates from broadcasts promoting blood drives and other worthy causes for 90 days out of every two years (30 days before the primary plus 60 days before the general election) would hardly seem unreasonable given that such broadcasts 'could associate a Federal candidate with a public-spirited endeavor in an effort to promote or support a candidate' -- a risk the FEC itself acknowledged in the very same rulemaking, in justifying its refusal to promulgate a general exemption for [public service announcements] (whether paid or unpaid)." Shays, No. 04-5352,

[1] The District Court described the first step of the Chevron analysis, which courts use to review an agency's regulations: "a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" See Shays, 337 F. Supp. 2d at 51 (quoting Chevron, 467 U.S. at 842-43).

slip op. at 56, 2005 WL 1653053, at *30 (citation omitted). Thus an exemption that is limited to non-PASO communications may, in practice, exempt comparatively few communications from the definition of "electioneering communications." Additionally, many other types of communications that would be covered by an exemption for communications that are not publicly distributed for a fee are also already exempt under the statutory press exemption, which exempts "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." 2 U.S.C. 434(f)(3)(B)(i).

Consequently, the Commission proposes to eliminate the phrase "for a fee" from the definition of "publicly distributed" at 11 CFR 100.29(b)(3)(i). The Commission seeks comment on whether this approach of removing "for a fee" from the "electioneering communication" definition without exempting such communications would require extensive monitoring of radio and television programming to ensure that it either fits the statutory press exemption or otherwise avoids the reach of the "electioneering communication" rules. Would the Commission have to distinguish "commentary" from free time donated to political committees or candidates, which was approved in Advisory Opinions ("AOs") 1982-44 and 1998-17?

The Commission is also considering another alternative that is not reflected in the proposed rules below. This alternative would include deleting "for a fee" from the definition of "publicly distributed" and would also include a new exemption for communications for which the broadcast, cable or satellite entity does not seek or obtain compensation for publicly distributing the communications, unless the communications promote, support, attack or oppose a Federal candidate. An important rationale that underlies this alternative proposal is that broadcasters donate airtime to organizations to broadcast communications in the public interest, such as public service announcements promoting a wide range of worthy endeavors. Subjecting

these communications to the electioneering communication regulations may discourage broadcasters from performing an important public service in providing free airtime for these ads. An exemption that is limited to non-PASO communications may, in practice, exempt comparatively few communications from the definition of "electioneering communications." The Commission seeks comment on whether this alternative proposal is preferable to the proposed rules that would delete "for a fee" from the definition of "publicly distributed" without an exemption for unpaid advertisements that do not PASO Federal candidates.

B. 11 CFR 100.29(c)(6) – Exemption for Section 501(c)(3) Organizations

In 2002, the Commission exempted from the "electioneering communication" definition any communication that is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code. See current 11 CFR 100.29(c)(6). The Commission explained that it "believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do." EC E&J at 65200. Under the Internal Revenue Code, organizations described in section 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." See 26 U.S.C. 501(c)(3).

In considering a challenge to the exemption for section 501(c)(3) organizations, the Shays District Court examined whether the exemption complies with BCRA. The District Court found the record unclear as to whether the regulation's reliance on the Internal Revenue Code prohibitions would impermissibly exempt advertisements that PASO Federal candidates. On this

basis, the District Court held that it could not determine whether or not the regulation fails Chevron review.[2] See Shays, 337 F. Supp. 2d at 127.

The District Court held that the exemption for section 501(c)(3) organizations violated the APA because the Explanation and Justification for 11 CFR 100.29(c)(6) led the court to conclude that the Commission "failed to conduct a reasoned analysis." See Shays, 337 F. Supp. 2d at 127-28. Specifically, the District Court found the EC E&J deficient because it did not address the "compatibility" of the Internal Revenue Service's ("IRS's") enforcement of the section 501(c)(3) prohibition on political activity and FECA's requirements. The District Court identified three specific omissions from the EC E&J: (1) it did not discuss whether or not public communications that PASO a Federal candidate would be viewed by the IRS as political activity in which section 501(c)(3) organizations may not engage; (2) it did not discuss the risk, if any, that limited lobbying activity permitted for section 501(c)(3) organizations could give rise to advertisements that PASO a Federal candidate; and (3) it did not address the implications of allowing the IRS "to take the lead in campaign finance law enforcement."[3] See Shays, 337 F.

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[2] The first step of the Chevron analysis is described in footnote 1 above. The second step of the Chevron analysis is whether the agency's resolution of an issue not addressed in the statute is based on a permissible construction of the statute. See Shays, 337 F. Supp. 2d at 52 (citing Chevron).

[3] Although the EC E&J states that the exemption for section 501(c)(3) organizations does not amount to a delegation of the enforcement of the electioneering communication provisions to the IRS, it also noted: "Should the Internal Revenue Service determine, under its own standards for enforcing the tax code, that an organization has acted outside its 501(c)(3) status, the organization would be open to complaints that it has violated or is violating Title II of BCRA." 67 FR at 65200. The Shays District Court compared these two statements from the EC E&J and found it "clear ... that a prerequisite to the FEC enforcing its exemption is the completion of enforcement action by the IRS pursuant to 'its own standards for enforcing the tax code.'" Shays, 337 F. Supp. 2d at 127.

Supp. 2d at 128. The District Court remanded this regulation to the Commission for further action consistent with its order. Id. at 130. Instead of appealing this aspect of the District Court decision, the Commission chose to initiate this rulemaking to address the three concerns expressed by the District Court. In addition to the District Court's concerns, a well-developed administrative record will inform the Commission's reconsideration of an exemption for section 501(c)(3) organizations.

1. PASO Communications as Political Activity

The Shays District Court stated that "the validity of the Commission's regulation depends on whether or not the tax laws and regulations, as well as their enforcement, effectively prevent Section 501(c)(3) groups from issuing 'public communications' that promote or oppose a candidate for federal office." Shays, 337 F. Supp. 2d at 127. The District Court also specified that the EC E&J failed to discuss "whether or not the IRS viewed as political activity 'public communications' that support or oppose a candidate as those concepts are understood under this nation's campaign finance laws." Id. at 128. Thus the task before the Commission, if it decides to retain current 11 CFR 100.29(c)(6), is to make a finding based on a well-developed record that section 501(c)(3) organizations cannot make PASO communications when acting lawfully within their tax-exempt status.

In response to the 2002 NPRM concerning electioneering communications, Notice of Proposed Rulemaking on Electioneering Communications, 67 FR 51131 (Aug. 7, 2002), several section 501(c)(3) organizations submitted comments and addressed the issue of whether these organizations pay for PASO communications. One commenter asserted that section "501(c)(3)[] [organizations] could never legally broadcast advertisements that contain even the slightest suggestion of support for or opposition to any candidates due to the substantial restrictions under

federal law."[4] The commenter said it knew of "no examples where 501(c)(3)s have broadcast the so-called 'sham issue ads' that BCRA attempts to ban or regulate." In contrast, another commenter stated that it does engage in issue advocacy that includes broadcast advertisements that refer to candidates and officeholders, and implied that these advertisements may well PASO a candidate.[5]

In addition, the record in Shays v. FEC includes press reports describing a radio ad run by a section 501(c)(3) organization, the Federation for American Immigration Reform ("FAIR"), that appears to attack or oppose a Federal candidate. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 78 n.138, Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004). The text of the ad reportedly included the following: "This is an urgent message about our jobs. Senator Spence Abraham is again pushing a bill to import hundreds of thousands more foreign workers to take American jobs—our jobs.... Recently Abraham killed the requirement that

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[4] See Comment submitted by Alliance for Justice and the Sierra Club Foundation (available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/alliance_for_justice.pdf); see also Comment submitted by Independent Sector (stating that federal tax law prohibits section 501(c)(3) organizations from engaging in activity that would support or oppose any candidate) (available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/independent_sector.pdf). The Alliance for Justice describes itself as "a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations." The Independent Sector, which describes itself as "a coalition of corporate, foundation, and voluntary organization members which serves as a national forum to encourage giving, volunteering, and nonprofit initiatives," submitted its comments on behalf of its membership and on behalf of seven specifically identified members.

[5] See Comment submitted by Southeastern Legal Foundation, Inc. ("SLF") (available at www.fec.gov/pdf/nprm/electioneering_comm/comments/se_legal_foundation.pdf).

employers hire Americans first. He clearly thinks it's OK to favor foreign workers. Why treat Americans so badly? Money. Abraham has raised big political money from huge corporations that want cheap, foreign labor. And his newest bill gives them everything they want. Is your job next? Let's try to convince Abraham not to sell our jobs. His bill could be voted on any day. So call now: 1-800-xxx-xxxx. That's 1-800-xxx-xxxx. Tell him you've had enough of his big foreign labor bills, like S. 2045. This message sponsored by the Federation for American Immigration Reform. Visit our web site at fairUS.org."[6]

In a Technical Advice Memorandum the IRS "reluctantly conclude[d]" that television advertisements by a section 501(c)(3) organization that would be generally understood to "support or oppose a candidate in an election campaign" did not constitute intervention in a political campaign because the communication was core to the organization's mission. See Technical Advice Memorandum 89-36-002, 1989 WL 596078 (Sept. 8, 1989).

While these statements and examples are helpful to the Commission in understanding the interaction between tax law and campaign finance law as they pertain to communications by section 501(c)(3) organizations, they provide a limited record for the Commission to exempt all section 501(c)(3) organizations' communications. For example, how should the Commission interpret the Technical Advice Memorandum, which does not have precedential authority? To the extent that section 501(c)(3) organizations pay for advertisements similar to the one by FAIR described above, do the section 501(c)(3) organizations broadcast their advertisements during the

[6] Based on the timing of the article, it appears that this advertisement was publicly distributed more than 30 days before the 2000 primary election in Michigan. The Commission is unaware of whether the advertisement continued to run during the 30 days prior to the primary or the 60 days prior to the general election.

30- and 60-day electioneering communication windows? Is the FAIR advertisement typical of grass roots lobbying advertisements by section 501(c)(3) organizations or is it atypical?

The Commission invites comments that would shed more light on these issues. Specifically, the Commission is seeking data as to whether section 501(c)(3) organizations have a history of airing ads close to elections, particularly those that satisfy the definition of "electioneering communication." The Commission is not aware that any of the advertisements addressed in the legislative history of BCRA, including those analyzed in the Brennan Center for Justice's Buying Time: Television Advertising in the 2000 Federal (or 1998 Congressional) Elections, or the record in McConnell v. FEC, 540 U.S. 93 (2003), were made by section 501(c)(3) organizations, and seeks comment on whether there are, in fact, communications from section 501(c)(3) organizations in this record. Additionally, since the Commission promulgated the current 11 CFR 100.29(c)(6), to what extent have section 501(c)(3) organizations availed themselves of this exemption? If commenters are able to submit the texts of advertisements by section 501(c)(3) organizations that would meet the definition of "electioneering communications," the Commission seeks comment on whether the advertisements would be consistent with the section 501(c)(3) organization's tax-exempt status.

In addition to reconsidering the adequacy of an administrative record that could support current 11 CFR 100.29(c)(6), this NPRM also proposes an amendment to the current rule. Proposed section 100.29(c)(6) would provide an exemption for communications by section 501(c)(3) organizations subject to two limitations. First, the exemption would not apply to communications that PASO a Federal candidate. Second, the exemption would not apply to section 501(c)(3) organizations that are directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder. Would limiting the exemption to non-PASO

communications adequately address the District Court's concerns because the exemption no longer turns on the IRS's view on political activities? How common is it for Federal candidates to directly or indirectly establish, finance, maintain, or control a section 501(c)(3) organization? Is there a greater potential that section 501(c)(3) organizations that are established, financed, maintained, or controlled by Federal candidates would pay for communications that PASO Federal candidates?

The Commission is not proposing to define "PASO" in this rulemaking. In rejecting a vagueness challenge to the PASO standard, the Supreme Court in McConnell held that PASO provisions, at least with respect to political parties, "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." McConnell, 124 S. Ct. at 675 n. 64. In light of the Supreme Court's ruling in McConnell, is the PASO standard essentially self-executing and understandable without further definition by the Commission or, given that the proposed regulation would apply to entities beyond political parties, must the Commission provide some definition of PASO for the proposed regulation to be meaningful and explicable to broadcasters and the regulated community?

The Commission has applied the PASO standard to an advertisement that was the subject of an advisory opinion, concluding that the advertisement did not PASO the Federal candidate who appeared in the advertisement. See AO 2003-25, at 3. That advertisement presented a Federal candidate's endorsement of a candidate for mayor, and the script read as follows:

> Hi. I'm Evan Bayh. Over the past few years, I've come to know Jonathan Weinzapfel very well. We've worked together, and I've seen first-hand how committed he is to making Evansville a better city. From working to cut taxes, to

passing a law that protects our kids from drugs, Jonathan Weinzapfel knows how to get the job done. He's got a bipartisan, common-sense way of solving problems. He cares about what really matters to people. And he's exactly the kind of Mayor Evansville needs.

AO 2003-25, at 2-3. The advertisement ran outside the electioneering communication window, so it did not meet the definition of "electioneering communication." AO 2003-25, at 6. However, the Commission is seeking comment on whether the conclusion in AO 2003-25—i.e. a Federal candidate's endorsement does not PASO that Federal candidate—was correct, and whether the conclusion can be applied in the context of communications by section 501(c)(3) organizations. For example, a section 501(c)(3) organization pays for a television advertisement that features a Federal candidate endorsing the section 501(c)(3) organization and the advertisement satisfies the timing and targeting elements of the definition of "electioneering communication." Would this advertisement be exempt from the definition of "electioneering communication" under proposed 11 CFR 100.29(c)(6), based on the premise that the Federal candidate's endorsement of the section 501(c)(3) organization does not PASO that Federal candidate? Or should the Commission conclude that the endorsement does PASO the Federal candidate and would not be exempt under proposed section 100.29(c)(6)?

Another example of a communication by a section 501(c)(3) organization that may illustrate the application of the PASO standard can be found in Advisory Opinion 2004-14. The script for one of the television advertisements read as follows:

Hi, I'm Congressman Tom Davis. Did you know that the Washington, DC metropolitan area has the highest prevalence of kidney disease in the nation? Nearly five thousand area residents are on dialysis and more than 1,700 await a

life-saving kidney transplant. But there's something you can do to help. Join me and WUSA9 sports anchor Frank Herzog for the Fourth Annual Cadillac Invitational Golf Classic, benefiting the National Kidney Foundation. The tournament will take place on Monday, April 26, at Lowes Island Club in Potomac Falls, Virginia. To find out more, call [omitted] or visit www.kidneywdc.org. Come out and support the National Kidney Foundation in its commitment to making lives better for Washington area kidney patients.

AO 2004-14, at 2. In Advisory Opinion 2004-14, the Commission concluded that this advertisement was not an electioneering communication because it was not publicly distributed for a fee and it was not distributed within the electioneering communication windows. See AO 2004-14, at 4 (citing 11 CFR 100.29(a)(2) and (b)(3)(i)). However, the Commission offers this advertisement to solicit comment on whether this communications would be exempt under proposed 11 CFR 100.29(c)(6) because it does not PASO Congressman Davis, if it otherwise met the definition of "electioneering communication."

The policy rationale behind the proposed rules is that, to the extent possible, the Commission does not want to discourage section 501(c)(3) organizations from performing a public service in pursuing their charitable endeavors. The Commission, however, is considering whether applying the PASO limitation would severely limit the benefit of such an exemption for section 501(c)(3) organizations. In Shays v. FEC, the Court of Appeals suggested that public service announcements ("PSAs") that associate a Federal candidate with a public-spirited endeavor could promote or support that candidate. Shays v. FEC, No. 04-5352, slip op. at 56, 2005 WL 1653053, at *30 (D.C. Cir. July 15, 2005). Given that many broadcast advertisements by section 501(c)(3) organizations are PSAs that might be viewed as PASO communications,

what utility does the proposed exemption have if the exemption does not include such PSAs? Additionally, many section 501(c)(3) organizations may lack familiarity with the nuances of campaign finance law. Would section 501(c)(3) organizations find the PASO standard confusing or difficult to apply, making it less likely that they would avail themselves of the proposed exemption if the Commission were to adopt it? Finally, if a fuller record shows that section 501(c)(3) organizations make a significant number of PASO communications during the 30 and 60 day windows, or if the record fails to resolve the issue one way or another, is there a substantial policy rationale for having a section 501(c)(3) exemption?

2. Lobbying Activity that May Include PASO Communications

The Shays District Court identified a second deficiency in the Commission's promulgation of the 501(c)(3) exemption: "the FEC did not note that tax laws permit Section 501(c)(3) organizations to engage in limited lobbying activities, or discuss the risk, if any, that such activities could run afoul of 2 U.S.C. § 434(f)(3)(B)(iv)." Shays, 337 F. Supp. 2d at 128 (citing 26 U.S.C. 501(c)(3), (h)). The District Court refers to the requirement in section 501(c)(3) of the Internal Revenue Code that "no substantial part of the activities of [the

organization] is carrying on propaganda, or otherwise attempting, to influence legislation."[7]

Under IRS regulations, the definition of "grass roots lobbying communications" as applied to section 501(c)(3) organizations is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." 26 CFR 56.4911-2(b)(2)(i). An element of that definition is "encouraging recipients to take action" which includes a communication that "states that the recipient should contact a legislator" or that "specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation ... [but] does not include

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[7] Certain section 501(c)(3) organizations may choose not to lobby at all, may lobby under section 501(c)(3)'s "substantial part" test, or may lobby under a section 501(h) election. Section 501(h) of the Internal Revenue Code provides that certain section 501(c)(3) organizations may elect to have their lobbying activities governed by objective expenditure tests in lieu of being subject to the subjective "substantial part" test of section 501(c)(3) of the Internal Revenue Code. Section 501(h) of the Internal Revenue Code, which sets forth the objective test, establishes a sliding scale of permissible "lobbying nontaxable amounts" and "grass roots nontaxable amounts." The grass roots nontaxable amount ranges from a low of 5% of an organization's exempt purpose expenditures (for organizations with up to $500,000 of exempt purpose expenditures) to a high of $250,000 (for organizations with exempt purpose expenditures in excess of $17,000,000). 26 U.S.C. 4911(c)(4). Expenditures for grass roots lobbying in excess of the nontaxable amount will be subject to a 25% tax. 26 U.S.C. 4911(a)(1). Additionally, if lobbying expenditures are "normally" in excess of 150% of the nontaxable amounts for a four-year period, the organization may be subject to revocation of tax-exempt status. 26 U.S.C. 501(h)(1)(B); 26 CFR 1.501(h)-3(b) and (c)(7). Please note that the section 501(c)(3) organization that received the IRS's Technical Advice Memorandum 89-36-002 (Sept. 8, 1989), which is discussed above, had elected to be subject to 26 U.S.C. 501(h).

naming the main sponsor(s) of the legislation for purposes of identifying the legislation." Id. at 56.4911-2(b)(2)(iii)(B) and (D) (specifying other types of communications that are considered as "encouraging recipients to take action," but that are not relevant to this issue). Given the IRS's definition of "grass roots lobbying communications," to what extent, if any, may the permitted grass roots lobbying communications result in some section 501(c)(3) organizations making communications that PASO a Federal candidate?

In order to consider the issues surrounding grass roots lobbying communications, the Commission seeks comment on how frequently section 501(c)(3) organizations make grass roots lobbying communications. One research survey addressing this question entitled "SNAP: Strengthening Nonprofit Advocacy Project" was submitted to the Commission in the 2002 rulemaking.[8] This research project, conducted by Tufts University, OMB Watch and Charity Lobbying in the Public Interest, reports that it surveyed 2,735 randomly selected section 501(c)(3) organizations that file IRS Form 990, excluding hospitals, universities, religious organizations, and private foundations. Of the organizations surveyed, 63% responded. According to this report, 78% of the organizations that responded engage in grassroots lobbying. As to the frequency of their grassroots lobbying, 63% reported low (19%), very low (22%), or none (22%).

An analysis of data from the National Center for Charitable Statistics, which was drawn from reports filed with the IRS, found that 1.5% of section 501(c)(3) organizations (or 3,515 organizations) reported lobbying expenditures in 1998, and these organizations reported devoting

[8] A copy of this report is available at http://www.ombwatch.org/npadv/Final%20SNAP%20Overview.ppt (last viewed on August 2, 2005).

only 1.2% of their total expenses to lobbying that year. Only 702 organizations reported grass roots lobbying expenditures, although only organizations making the section 501(h) election are required to report that information disaggregated from total lobbying expenditures. In 1998, 43% of the section 501(c)(3) organizations that reported lobbying expenditures (or approximately 1,500 organizations) made the section 501(h) election. The median total lobbying expenditures was $8,000, and the median total grassroots lobbying expenditures was $4,246. See Jeff Krehely, Assessing the Current Data on 501(c)(3) Advocacy: What IRS Form 990 Can Tell Us, in Exploring Organizations and Advocacy: Strategies and Finances 37-50 (Elizabeth J. Reid and Maria D. Montilla eds., 2001).[9]

How should the Commission interpret these findings? Are there any other reports, studies, or evidence regarding lobbying by 501(c)(3) organizations that the Commission should consider?

3. Reliance on IRS Enforcement

The District Court in Shays held that the effect of the current exemption in 11 CFR 100.29(c)(6), as explained in the EC E&J, is that "the FEC would do nothing until the IRS investigated and decided whether or not the organization violated the tax laws." Shays, 337 F. Supp. 2d at 128. The District Court concluded that the Commission failed to consider the effectiveness of, and the problems presented by, adopting an enforcement policy that relies on the IRS's enforcement of the tax code. Id.

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[9] This document is available at http://www.urban.org/Uploadedpdf/org_advocacy.pdf (last viewed on August 3, 2005).

In addressing the extent to which the Commission could or should rely on IRS enforcement of the tax code as a safeguard for ensuring that section 501(c)(3) organizations do not make communications that would support or oppose a Federal candidate, the Commission is considering statements and testimony from several sources, including section 501(c)(3) organizations and the Government Accountability Office ("GAO"). Several section 501(c)(3) organizations, commenting on the 2002 NPRM, stated that the possibility of an IRS revocation of their 501(c)(3) status because of their political activities was a strong deterrent to their engaging in activity that may be viewed as supporting or opposing candidates.[10] See EC E&J at 65199. One commenter stated that IRS's enforcement is vigorous and noted that the "IRS has repeatedly stated and successfully argued in court that this prohibition [on participation or intervention in political campaigns] is a 'zero tolerance' rule." Comment of Independent Sector.

A report by the GAO provides a different perspective, suggesting that the IRS lacks the resources for adequate oversight and enforcement. In 2002, the GAO issued a report noting that the IRS had little data on the compliance of section 501(c)(3) organizations, and recognizing the need for improved monitoring of compliance and for "better understanding of the type and extent of compliance problems in the charitable community." U.S. Gen. Accounting Office, Tax

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[10] See e.g., Comments submitted by Independent Sector and Alliance for Justice (available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/independent_sector.pdf and http://www.fec.gov/pdf/nprm/electioneering_comm/comments/alliance_for_justice.pdf, respectively), and hearing testimony of Mr. Tim Mooney of Alliance for Justice (available at http://www.fec.gov/pdf/nprm/electioneering_comm/20020828trans.pdf).

Exempt Organization: Improvements Possible in Public, IRS, and State Oversight of Charities, GAO 02-526 (Apr. 2002).[11]

The Commission seeks comments and other reports, documents or evidence that would shed light on the appropriateness of the current rule's deference to IRS determinations and actions in this area and that would assist the Commission in deciding whether to retain the current rule.

This mix of views regarding IRS enforcement, along with the questions raised above concerning the interaction between PASO communications and lobbying, leave the Commission without a clear record at this time regarding whether or not section 501(c)(3) organizations make PASO communications. Consequently, under proposed 11 CFR 100.29(c)(6), the Commission would make its own judgment as to whether a communication PASOs a candidate, without regard for how the IRS may view the same communication, and without waiting for the IRS to consider enforcement action. Thus, the proposed rule would not delegate "the first response to potential violations to the IRS." See Shays, 337 F. Supp. 2d at 128.

The Commission seeks comment on whether the proposed rule adequately addresses the deficiencies identified by the District Court in Shays in relying on the IRS's enforcement of the tax code applicable to section 501(c)(3) organizations.

C. Eliminating All Regulatory Exemptions from the Electioneering Communications Restrictions

[11] Although this report addressed section 501(c)(3) organizations' compliance with the tax code in general and not their political activities specifically, the GAO's statements and conclusions about the IRS's enforcement capabilities are useful to the discussion of the IRS's enforcement of the prohibition on section 501(c)(3) organizations' activities that are considered participating or intervening in a political campaign.

As an alternative to the proposed modifications to the current section 501(c)(3) exemption, the Commission also seeks comment on whether it should repeal both of the regulatory exemptions from the electioneering communications rules, 11 CFR 100.29(c)(5) and (6), and instead rely solely on the exemptions that Congress established in BCRA. These regulatory exemptions include not only the section 501(c)(3) exemption in current 11 CFR 100.29(c)(6), but also an exemption for communications paid for by candidates for State or local office in connection with an election to State or local office that do not PASO any Federal candidates in current 11 CFR 100.29(c)(5). The Commission is also considering the proposed revisions to the State candidate exemption in the proposed rules that follow. The proposed revisions seek to clarify the exemption and harmonize its structure with proposed 11 CFR 100.29(c)(6).

BCRA establishes several exemptions from the electioneering communications provisions. Certain communications appearing in a news story, commentary, or editorial are exempt under 2 U.S.C. 434(f)(3)(B)(i) and current 11 CFR 100.29(c)(2). Communications that constitute a reportable expenditure or independent expenditure are exempt under 2 U.S.C. 434(f)(3)(B)(ii) and current 11 CFR 100.29(c)(3). Finally, candidate debates are exempt under 2 U.S.C. 434(f)(3)(B)(iii) and current 11 CFR 100.29(c)(4). Under this proposal, these statutory exemptions would remain in the regulations, while current 11 CFR 100.29(c)(5) and (c)(6) would be repealed.

D. Exempting all Communications that Do Not PASO a Federal Candidate

The Commission is also considering exempting from the "electioneering communication" definition all communications that do not PASO a Federal candidate. This proposal, which is not reflected in the proposed rules that follow, would employ the exemption authority provided to the

Commission by Congress in 2 U.S.C. 434(f)(3)(B)(iv) to its full extent. The Commission seeks comments on whether this proposal's broad view of the Commission exemption authority is consistent with Congressional intent. Such an exemption would focus on the content of the communication and treat all communicators equally, in contrast to current 11 CFR 100.29(c)(5) and (c)(6), which are limited to particular speakers. Does this equality of treatment help justify the exemption? What form would the administrative record need to take to support such an exemption? Would such an exemption be consistent with the standard in 2 U.S.C. 434(f)(3)(A)(i)(I) that requires only a reference to a clearly identified candidate for Federal office? Would it effectively elevate the PASO standard as the primary determinant for electioneering communications? Must the Commission provide some definition of PASO for the exemption to be meaningful and explicable to the regulated community or is the PASO standard self-executing and understandable without further definition by the Commission?

E. Petition for Rulemaking to Exempt Advertisements Promoting Films, Books and Plays

On August 26, 2004, the Commission published a Notice of Availability seeking public comment on a Petition for Rulemaking ("Petition") received by the Commission. The Petition requested the Commission revise its electioneering communications regulation by exempting the promotion and advertising of political documentary films, books, plays and similar means of expression that may otherwise meet the definition of an electioneering communication under 11 CFR 100.29. See Notice of Availability of Rulemaking Petition: Exception for the Promotion of Political Documentary Films from "Electioneering Communications," 69 FR 52461 (Aug. 26, 2004) ("Notice of Availability"). The documentary films, books and plays at issue in the Petition are not themselves subject to the electioneering communication rules because these items are not

broadcast or disseminated through a cable or satellite system, but appear in movie theaters or other non-broadcast environments.[12] The premise for the Petition is that advertisements for such films, books, and plays would not be covered by the statutory exemption for communications "appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." 2 U.S.C. 434(f)(3)(B); see also 11 CFR 100.29(c)(2).

The comment period ended September 27, 2004. The Commission received seven comments, including a letter from the Internal Revenue Service indicating that it had "no comments." These comments are available at http://www.fec.gov/law/law_rulemakings.shtml under "Electioneering Communications Exception for Promotion of Political Documentaries."

The Petition and some commenters argued that political documentary films and books might often refer to clearly identified candidates for Federal office, and that applying the electioneering communication rules to the broadcast, cable or satellite TV and radio advertisement of such items could stifle free speech. The Petition suggested that the Commission should create a specific exemption in 11 CFR 100.29(c) for all advertisements and promotion of political documentary films, books, plays and "other forms of political expression that may involve references to Federal candidates." See Notice of Availability at 52461. One commenter suggested a narrower exemption for advertising of such political documentaries except for the four weeks preceding an election, but would require disclosure of funding of all political documentaries. Another commenter noted that that the Petition only sought an exemption for works deemed "political," and argued that a broader exemption for the promotion

[12] The Commission has concluded that documentaries and educational programming that are aired, broadcast, or otherwise disseminated through radio, television, cable or satellite are covered by the exemption in section 100.29(c)(2) for a "news story, commentary, or editorial." EC E&J at 65197.

of documentary films, books and plays, regardless of whether the works are "political" was appropriate.

Two commenters also raised questions as to whether these documentaries are already covered by the current press exemption in 11 CFR 100.29(c)(2), and whether advertisements promoting them would also be covered by the press exemption. One of these commenters asserted that an additional rulemaking is unnecessary because the Commission has already stated that the press exemption in section 100.29(c)(2) applies to a documentary, and the commenter believes that by extension, the press exemption applies to the promotion of that documentary. See Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). The other commenter suggested a rulemaking was appropriate to revise section 100.29(c)(2) to specify that advertising for such documentary films falls within the scope of this press exemption. In contrast, other commenters were opposed to any specific exemption for advertising of documentary films as inconsistent with existing campaign finance law.

After considering the Petition and the comments received, the Commission has decided to open a rulemaking on this issue, as part of its revision of the electioneering communication rules in response of the Shays court opinions. Proposed 11 CFR 100.29(c)(7) would exempt communications promoting movies, books or plays, as long as the communications are run within the ordinary course of business of the persons that pay for such communications, and the communications do not PASO a Federal candidate. As urged by one of the commenters, the proposed rules would expand the exemption beyond "political" works to include advertising for any movie, book or play.

While the proposed rule applies to "movies" generally, the Commission seeks comment as to whether this reference should be understood to mean only movies appearing in theatres, or

whether it should also apply to movies available for rental on DVD or video, or available on pay-per-view. Likewise, should the exemption apply only to printed books or should it also apply to books that are made available in audio and on-line formats? Furthermore, should the exemption be based on the actual or projected release date of the movie or book? For example, should the exemption only apply to movies that are shown during, or are being released within six months of, the electioneering communication window and to books that are in print during, or within six months of, the electioneering communications window? This sort of temporal limitation would be intended to prevent circumvention of the electioneering communication provisions by advertising a movie that either does not exist or is not intended for public distribution. Are any of these limitations necessary? Would they be sufficient to prevent circumvention?

The proposed rule would limit the exemption to persons who promote movies, books or plays "within the[ir] ordinary course of business." Should the Commission limit this exemption so that it applies only to persons who are the publisher of a book or the producer, distributor or promoter of a movie or play? Would this limitation unfairly exclude first-time distributors? Should the Commission extend the exemption to any person who promotes movies, books or plays without regard to whether such advertisements are in the ordinary course of business? Should the Commission limit the exemption to entities not directly or indirectly established, financed, maintained, or controlled by any Federal candidate, individual holding Federal office, or any political committee, including political party committees? Does the Commission have the statutory authority to promulgate the exemption without it being conditioned on the promotional communications not PASOing a Federal candidate? The Commission seeks comment on whether such communications in the past have in fact PASOed a Federal candidate.

The Commission also seeks information as to whether any persons refrained from advertising movies, books or plays on television or radio during the 2003-2004 election cycle because of concerns that advertisements would violate electioneering communications rules. How significant a burden would it be for advertisements that run during the 30/60-day window to avoid clearly identifying a candidate? See MUR 5467, In the Matter of Michael Moore, et al. (where, in response to allegations that the Respondents intended to run advertisements promoting a film during the electioneering communications period that would contain references to clearly identified Federal candidates, the Respondents stated that the distributors of the film had decided prior to the filing of the complaint not to broadcast advertisements for the film during the electioneering communications period that would contain a reference to any clearly identified Federal candidate).

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the changes proposed in the electioneering communications regulation would only affect individuals and a small number of non-profit organizations. First, the proposed changes to the definition of "publicly distributed" would only affect the small number of advertisements that are run on broadcast, cable or satellite TV or radio where the airtime is donated without charge. To the extent this proposed rule affects media organizations donating the time or running their own programming, they do not fall within the definition of "small business." There are very few small businesses or organizations that receive donated time for advertising and might be affected by the proposed rule. Second, the proposed changes to the

exemption for communications paid for by section 501(c)(3) non-profit organizations would not affect a substantial number of small organizations because these organizations may not be able to afford expensive radio and television advertising and, to the extent they can, they are already limited in what campaign activity they may engage in under the Internal Revenue Code. The changes in this proposed rule affect only communications made by these organizations that promote, support, attack or oppose a Federal candidate within a limited window of time before a Federal election. There are not a substantial number of small organizations that make such communications. Therefore, the proposed rule will not affect a substantial number of small organizations.

List of Subjects

11 CFR Part 100

Elections

For reasons set out in the preamble, Subchapter A of Chapter 1 of title 11 of the Code of Federal Regulations would be amended as follows:

PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for 11 CFR part 100 would continue to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.29 would be amended by revising paragraph (b)(3)(i), the introductory text of paragraph (c), and paragraphs (c)(5) and (c)(6), and by adding new paragraph (c)(7), to read as follows:

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

* * * * *

(b) * * *

(3) (i) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated ~~for a fee~~ through the facilities of a television station, radio station, cable television system, or satellite system.

* * * * *

(c) The following communications are exempt from the definition of ~~E~~electioneering communication. ~~does not include a~~Any communication that:

* * * * *

(5) Is ~~not described in 2 U.S.C. 431(20)(A)(iii) and is~~ paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate; ~~or~~

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986, provided that:

(i) The communication does not promote, support, attack or oppose any Federal candidate; and

(ii) The organization is not directly or indirectly established, financed, maintained, or controlled by one or more Federal candidates, or individuals holding Federal office. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.; or

(7) Promotes a movie, book, or play, provided that the communication is within the ordinary course of business of the person that pays for such communication, and such communication does not promote, support, attack or oppose any Federal candidate.

_____

Scott E. Thomas
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-U