I

March 4, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2005-3: Definition of "Agent"

Dear Mr. Deutsch:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2005-3, published at 70 Fed. Reg. 5382 (February 2, 2005). As the principal sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law.

The NPRM seeks comment on whether the Commission should modify its regulatory definition of the statutory term "agent" to include those acting with "apparent authority." For the reasons set forth below, we strongly urge the Commission to adopt the proposed revision that would include "apparent authority" in both 11 C.F.R. § 109.3 and 11 C.F.R. § 300.2(b).

Background of this Rulemaking

BCRA made extensive and detailed amendments to the Federal Election Campaign Act of 1971 (FECA), as amended. In the years since its enactment, the FEC had interpreted FECA in enforcement matters, rulemakings, and advisory opinions to allow the use of political party committee accounts to raise and spend non-federal funds, commonly known as "soft money," to influence federal elections. BCRA terminated this practice by prohibiting the national parties from raising or spending soft money and prohibiting state and local parties from spending soft money to influence federal elections. These provisions withstood constitutional scrutiny in *McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court ruled that they further the legitimate congressional interest in preventing both actual corruption and the appearance of corruption in federal campaigns.

Titles I and II of BCRA are replete with prohibitions, characterizations, and requirements that apply not only to candidates and political parties, but also to their agents. This was not a meaningless legislative drafting technique; it was central to the

very purpose of the statute. BCRA was designed to completely close the soft money loophole. To allow the agents of parties or candidates to undertake activities specifically prohibited to parties or candidates would have severely undermined its efficacy. A too narrow interpretation of the term "agent," poses the same danger.

A person may designate another person, known as an agent, to act for and under the direction of the principal when dealing with third parties. Such designation may be express, implied or apparent. Restatement (Second) of Agency §§ 7, 8 (1958). The first post-BCRA proposed rulemaking, on Title I, included a definition of "agent" that omitted the concept of "apparent authority." We objected to this omission in comments filed in response to that first NPRM:

> It is ... critical that the term "agent" be construed to include anyone who has an agency relationship with the entity under the common law understanding of that term. The proposed definition that limits agents to those who have actual and express authority to act for the principal would undermine the purpose and intent of BCRA. It would allow parties and candidates to avoid the prohibitions of the new law through the use of staff or intermediaries as long as they never expressly authorize the raising of soft money on their behalf.
>
> * * *
>
> The concept of apparent authority is an important one to include in the definition because candidates and parties must take seriously their responsibility to make sure that their employees are familiar with and follow the new law. In the political world, many individuals have titles or positions that led the general public or potential donors to believe that they are acting on behalf of candidates or parties. When that is the case, the candidate or party must be held accountable for the actions of those individuals. At he very least, if the principal is aware of the activities of he agent, the principal must be held responsible for those activities, even if the activities are not expressly authorized.

Comments of Sen. McCain, Sen. Feingold, Rep. Shays, and Rep. Meehan on Notice 2002-7, at 14 (May 29, 2002).

The Commission issued final regulations implementing Title I of BCRA on July 29, 2002. Final Rules, 67 Fed. Reg. 49064 (July 29, 2002) ("Soft Money E&J"). Final rules implementing the coordination and independent expenditure provisions of Title II were issued on January 3, 2003. Final Rules, 68 Fed. Reg. 421 (January 3, 2003) ("Coordination E&J"). Each rule contained an identical definition of the term "agent." Two identical definitions, found at 11 C.F.R. § 300.2(b) (Title I) and § 109.3 (Title II), define an agent as "any person who has actual authority, either express or implied" to perform certain actions. The definitions do not include persons acting with apparent authority.

This definition of agent, along with a number of other provisions of the Commission's post-BCRA rules, was challenged by Representatives Shays and Meehan,

in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal pending* No. 04-5352 (D.C. Cir.). The court found the definition permissible under the *Chevron* standard. *Shays and Meehan*, 337 F. Supp. 2d at 85. The court nevertheless struck down the definition, finding that the Commission "did not adequately explain its decision" to not include apparent authority within the scope of the definition, and "entirely failed to consider" key aspects of the problem, as required by the Administrative Procedures Act (APA). *Id.* at 72. Moreover, the court made it clear that not only does the Commission have the authority to include apparent authority within the definition, doing so would better serve the purposes of BCRA, since the current rule "may compromise the Act or create the potential for abuse." *Id.*

Consistent with the *Shays and Meehan* decision, this NPRM proposes to include persons acting with apparent authority in its definitions of agent at 11 C.F.R. §§ 109.3 and 300.2(b). However, the NPRM also notes that the Commission may retain the current definitions of agent, and seeks comment on whether there are reasons for continuing to exclude apparent authority from the definitions. 70 Fed. Reg. at 5383.

Analysis and Discussion

According to the current NPRM, when the Commission adopted rules in 2002 that excluded apparent authority from the definition of agent, it did so because its primary goal was to ensure that a principal would be able to control whether a would-be agent had authority to act on the principal's behalf. It thus sought to limit a principal's liability for the actions of an agent "to situations where the principal had engaged in specific conduct to create an agent's authority." NPRM, 70 Fed. Reg. at 5384. The Commission also feared that including apparent authority in the definition of agent could expose principals to liability based solely on the actions of a rogue or misguided volunteer, and would place the definition of agent in the hands of a third party. Soft Money E&J, 67 Fed. Reg. at 49083; Coordination E&J, 68 Fed. Reg. at 425.

The *Shays-Meehan* court specifically found that these concerns were unfounded. *Shays and Meehan*, 337 F. Supp. 2d at 87. The Commission in the current NPRM bases its proposal to include someone acting with apparent authority in the definition of agent on "the *Shays* court's interpretation of the narrow scope of apparent authority." 70 Fed. Reg. at 5384. That "narrow scope," however, is consistent with the Restatement (Second) of Agency and a substantial body of case law. The Commission cites no legal authority to support its contention that a person acting without authorization could bind the purported principal. While rogue agents or people falsely claiming to be agents are a legitimate concern, that concern will exist regardless of whether the definition of agent includes someone who is acting on apparent authority.

The Commission apparently believed in 2002, and may still believe today, that a person who independently holds himself or herself out to act on behalf of another is considered to have apparent authority to act as an agent of that other person. This is inaccurate. Under the Restatement (Second) of Agency § 8 cmt. a (1958), "[a]pparent authority results from a manifestation by a person that another is his agent, the

manifestation being made to a third person and not, as when [actual] authority is created, to the agent." The main distinction between actual and apparent authority is that in cases of actual authority, the manifestation is made by the principal directly to the agent, while manifestations of apparent authority are made by the principal to a third party.

The Restatement further explains that apparent authority "is created as to a third person by written or spoken words or any other conduct *of the principal* which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Id.* at § 27 (emphasis added). The comment on this section emphasizes that the creation of apparent authority, like actual authority, is the responsibility of the principal, and thus within the control of the principal:

> Apparent authority is created by the same method as that which creates [actual] authority, except that the manifestation of the principal is to the third person rather than to the agent. For apparent authority there is the basic requirement that *the principal be responsible for the information which comes to the mind of the third person*, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent. *Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.*

Id. at § 27 cmt. a (emphasis added).

The Tentative Draft of the Restatement (Third) of Agency takes the same approach. It defines "apparent authority" as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that believe *is traceable to the principal's manifestations*." Restatement (Third) of Agency § 2.03 (T. D. No. 2, 2001) (emphasis added).

The Commission seeks comment on whether it should specify the appropriate conclusions to be drawn from a principal's silence on an agent's actions. In particular, it asks whether the failure of a person to disavow the actions of another should, without more, create apparent authority for purposes of the act. But this question is based on a continued misreading of the law of agency. Except in those instances where a principal's silence could be reasonably construed to confer apparent authority, no agency relationship would generally be established by a person's silence. The key point of analysis remains the fact that it is not until a principal confers agent status on another that it becomes necessary for the principal to disavow improper actions to sever the principal/agent relationship.

The Commission has never explained why, in adopting the definition of agent rejected by the *Shays and Meehan* court, it chose to ignore its own long-standing

precedents that considered as an agent one who has apparent authority to act on behalf of a principal. For example, prior to the enactment of BCRA, a long-standing Commission rule governing coordinated expenditures defined "agent" as a person who had either "actual or written authority, either express or implied," *or* had "*been placed in a position within the campaign organization where it would reasonably appear* that in the ordinary course of campaign-related activities he or she may authorize expenditures." 11 C.F.R. § 109.1(b)(5) (2002) (emphasis added).

In addition, there are numerous enforcement actions ("Matters Under Review," or "MUR"s), both before and after the enactment of BCRA, in which the Commission has relied upon the concept of apparent authority. Indeed, the Commission was still basing enforcement actions on apparent authority after the current regulatory definition of agent was adopted. In MUR 5357, a 2003 enforcement action, the First General Counsel's Report discussed apparent authority in a matter involving the alleged making of impermissible corporate contributions through the reimbursement of conduit donors:

> Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts within the scope of his authority. *See Weeks v. United States,* 245 U.S. 618, 623 (1918). Even if an agent does not enjoy express or implied authority, however, *a principal may be liable for the agent's actions on the basis of apparent authority*. A principal may be held liable based on apparent authority even if the agent's acts are unauthorized, or even illegal, *when the principal placed the agent in the position to commit the acts. See Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993).

MUR 5357/Pre-MUR 412, First General Counsel's Report (Sept. 8, 2003) at 4 (emphasis added); *see also* MUR 4843, First General Counsel's Report (Nov. 8, 1999) at 5.

There is nothing in the legislative history of BCRA indicating that Congress specifically considered or debated the meaning of the term agent, or decided to adopt a meaning other than that commonly used in the law, and used by the Commission in enforcement of the election laws. Absent such legislative history, and in the absence of specific statutory language indicating or even suggesting a different meaning, the Commission should conclude that Congress intended "agent" to mean what it generally means in the law – and that includes the concept of apparent authority. *See Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739-40 (1989). The NPRM itself acknowledges that "the common law definition of agent include[s] apparent authority...." 70 Fed. Reg. at 5384; *see also* Restatement (Second) of Agency § 8, *supra.* There is no reason not to employ that definition in the Commission's regulations implementing BCRA, particularly when it furthers BCRA's primary goal of prohibiting the raising and spending of soft money in connection with Federal elections.

We believe now, as we did back in 2002 during the first rulemaking, that it is crucial to include the concept of apparent authority in the definition of agent. It will force candidates and parties to make sure their employees are familiar with and follow the new law. And it will allow them to be held accountable if those they represent to

their donors or vendors as holding positions of authority act improperly. The definition rejected by the District Court leaves open too many situations where violations of BCRA could go unrecognized or unpunished.

Conclusion

The *Shays and* Meehan court stated that a "regulation that included within its scope those acting with apparent authority may better implement the statutory scheme of BCRA." 337 F. Supp. 2d at 85-86. As the primary sponsors of the legislation, we agree, and we therefore urge the Commission to revise the definition of "agent" contained at 11 C.F.R. §§ 109.3 and 300.2(b) as proposed in the NPRM.

Sincerely,

Senator John McCain
Senator Russell D. Feingold
Representative Christopher Shays
Representative Marty Meehan