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PARTY GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to political party committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of political party committees. It should be used in conjunction with the FEC's July 2009 *Campaign Guide for Political Party Committees*, which provides more comprehensive information on compliance for these organizations.

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Regulations

Notice of Proposed Rulemaking on Coordinated Communications

On October 8, 2009, the Commission approved a Notice of Proposed Rulemaking (NPRM) proposing amendments to portions of its three-part regulatory test for coordinated communications. 11 CFR 109.21. The NPRM also proposes adding a safe harbor to address certain public communications in which federal candidates endorse or solicit support for non-profit entities, as well as a safe harbor for certain commercial and business communications. Proposed 11 CFR 109.21(i) and (j). The Commission is undertaking this rulemaking to comply with the ruling in *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*), that invalidated aspects of the rules defining coordinated communications.

Background

As part of its rulemaking to implement the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission devised a three-prong test for determining whether a communication has been coordinated with a candidate or party, and thus results in an in-kind contribution. The test considers:

- The source of payment;
- The content of communication; and
- The conduct of those involved.

To be considered coordinated, the communication must satisfy all three prongs of the coordinated communication test.

In *Shays III Appeal*, the court invalidated a portion of the content prong of the test. To satisfy the content prong a communication must be:

- An electioneering communication;
- A public communication that republishes campaign materials;
- A public communication that expressly advocates; or
- A public communication that refers to a political party or clearly identified federal candidate and is publicly distributed within 90 or 120 days of the primary or general election.[1]

The appeals court concluded that the Commission's decision to apply "express advocacy" as the only content standard outside the 90-day and 120-day windows does not "rationally separate election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays III Appeal*, 528 F.3d at 926.

In *Shays III Appeal*, the Court of Appeals also invalidated a portion of the conduct prong of the test. To fulfill the conduct prong, the communication must be created, produced, or distributed:

- At the request or suggestion of;
- After material involvement by; or
- After substantial discussion with, a candidate, a candidate's authorized committee, or a political party committee;

or

- The person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce, or distribute the communication; and
- The commercial vendor provided services to the clearly identified candidate, that candidate's authorized committee, the candidate's opponent or his or her authorized committee or a political party committee referred to in the communication within the previous 120 days; and
- The commercial vendor conveys material information about the campaign or needs of the candidate to the person paying for the communication;

or

- The communication is paid for by a person or the employer of a person, who has previously been an employee or an independent contractor of a candidate or the candidate's authorized committee, the opponent or the opponent's authorized committee, or a political party committee during the 120 days before the purchase or distribution of the communication; and
- The person must convey material information about the campaign or needs of the candidate to the person paying for the communication.

The first three elements were not at issue in *Shays III Appeal*. The *Shays III Appeal* court invalidated the 120-day period of time during which a common vendor's or former campaign employee's relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR 109.21(d)(4) and (d)(5). *Shays III Appeal*, 528 F.3d at 928-29.

Proposals

In response to the court's decision, the Commission has proposed four possible modifications to the existing content standards in 11 CFR 109.21:

1) Adopt a content standard to cover public communications that promote, attack, support or oppose (PASO) a political party or a clearly identified federal candidate. This alternative would amend 11 CFR 109.21(c) by replacing the express advocacy standard with the PASO standard. As part of its consideration of a PASO content standard, the Commission is also considering whether it should adopt a definition of PASO. The NPRM sets forth two possible approaches to defining PASO. Alternative A provides a specific definition for each of the component terms that would apply when any of those terms is used in conjunction with one or

[1] *These are the revised time periods the Commission promulgated in 2006 in response to Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005).*

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more of the other terms. Alternative B applies a multi-prong test to determine whether a given communication PASOs. See Alternatives A & B at Proposed 11 CFR 100.23.
2) Adopt a content standard to cover public communications that are the "functional equivalent of express advocacy." The proposed standard specifies that a communication is the "functional equivalent of express advocacy" if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against" a clearly identified federal candidate. See *FEC* v. *Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007).
3) Clarify the existing express advocacy content standard by providing a cross-reference to the express advocacy definition at 11 CFR 100.22.
4) Adopt a standard that pairs a public communication standard with a new conduct standard (the "Explicit Agreement" standard). This would require a formal or informal agreement between a candidate, candidate's committee or political party committee and the person paying for the public communication. Either the agreement or the communication must be made for the purpose of influencing a federal election.

In response to the court's decision regarding the conduct prong, the Commission has proposed three alternatives for the time periods specified in the common vendor and former employee conduct standards:

1) Retain the current 120-day period with the Commission providing additional justification for that time period. The *Shays III Appeal* court did not hold that the 120-day period was inherently improper, but rather that the Commission "must support its decision with reasoning and evidence…" *Shays III Appeal*, 528 F.3d at 929.
2) Amend 11 CFR 109.21(4) and (5) by deleting the phrase "the previous 120 days" and replacing it with "the two-year period ending on the date of the general election for the office or seat the candidate seeks." The two-year period corresponds with the election cycle for the House of Representatives, the most common election cycle of those regulated by the Commission.
3) Replace the existing 120-day period with a "current election cycle" period. "Current election cycle" is defined in current Commission regulations as beginning "on the first day following the date of the previous general election for the office or seat which the candidate seeks…The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held." 11 CFR 100.3(b).

Other issues. Although not included in the *Shays III Appeal* ruling, the Commission is also considering adding a safe harbor to 11 CFR 109.21(i) to address certain public communications in which federal candidates endorse or solicit support for non-profit entities organized under 501(c)(3) of the Internal Revenue Code, or for public policies or legislative proposals espoused by those organizations. This proposed additional safe harbor would, under certain circumstances, enable a federal candidate to participate in such a public communication, without the communication being treated as an in-kind contribution to the candidate.

The Commission is also considering adding a new safe harbor at 11 CFR 109.21(j) for certain commercial and business communications. This proposed safe harbor would apply to any public communication in which a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made prior to the candidacy in terms of the medium, timing, content and geographic distribution.

The Commission also seeks comment on whether it should issue an NPRM on the party coordinated communication regulation at 11 CFR 109.37, since that provision has a content prong that is substantially similar to the one for "coordinated communications" in 11 CFR 109.21(c). Also, the common vendor and former employee conduct standards of 11 CFR 109.21(d) that were struck down in *Shays III Appeal* are incorporated by reference in the party coordinated communication regulations. See 11 CFR 109.37(a)(3).

Comments

The NRPM was published in the October 21, 2009, *Federal Register* and is available on the FEC web site at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice_2009-23.pdf. The Commission strongly encourages comments, especially those that include empirical data.

All comments must be received on or before January 19, 2010. Comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, fax or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to CoordinationShays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E St. NW, Washington, DC 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.

A public hearing on the proposed rules will be held at a later date in the Commission's ninth floor hearing room, 999 E St., NW, Washington, DC.

—*Katherine Wurzbach*

Notice of Proposed Rulemaking on Federal Election Activity

On October 8, 2009, the Commission approved a Notice of Proposed Rulemaking seeking comment on certain aspects of federal election activity (FEA). The rulemaking is in response to the court of appeals' 2008 holding in *Shays v. FEC* ("*Shays III*") which found the Commission's regulatory definitions of "voter registration activity" and "get-out-the-vote (GOTV) activity" contravened the purpose of the Bipartisan Campaign Reform Act of 2002 (BCRA) by creating loopholes that allowed the use of soft money for federal elections. The court remanded the regulations to the FEC "to issue regulations consistent with the Act's text and purpose."

Voter Registration Activity

Under current regulations, "voter registration activity" is defined as "contacting individuals by telephone, in person, or by other individualized means in order to assist them in registering to vote." 100.24(a)(2). The court of appeals in *Shays III* found this definition to be deficient for two reasons. First, it requires that the party contacting potential voters actually "assist" them in voting or registering to vote, thus excluding efforts that actively encourage people to vote or register to vote and dramatically narrowing which activities are covered. Second, the definition requires the contact to be "by telephone, in person, or by other individualized means," thus entirely excluding mass communications targeted to many people. The court concluded that these elements of the definition created loopholes in violation of BCRA's purpose and allowed the use of soft money to influence federal elections.

To comply with the court's decision, the Commission proposes amending the definition of "voter registration activity" to include "encouraging or assisting potential voters in registering to vote." The proposed definition attempts to close both loopholes identified by the court and would cover activities such as:

- Providing an individual with a flier that reads "Register to Vote" and that includes the URL and address of the appropriate state or local office handling voter registration;
- Providing an individual with a voter registration form and verbally encouraging the recipient to fill out the form and submit it to the appropriate state or local office; or
- Mailing voter registration forms to individuals and encouraging them, in a cover letter, to fill out and submit the forms in advance of the registration deadline.

The Commission seeks comment on whether the proposed definition of "voter registration activity" adequately addresses the concerns of the *Shays III* court, including closing the loopholes identified by the court. The Commission also asks whether the proposed definition provides sufficient guidance as to which activities are covered and which are not.

GOTV

Commission regulations define GOTV activity as "contacting registered voters by telephone, in person or by other individualized means to assist them in voting." 100.24(a)(3). As it did with the definition of voter registration activity, the court of appeals in *Shays III* found the definition of GOTV activity to be deficient in that it required actual assistance by individualized means, thereby creating two loopholes in the definition that violated BCRA's purpose. The Commission proposes revising the definition of GOTV activity by eliminating the "assistance" and "individualized means" requirements from the current definition. Specifically, the Commission proposes redefining GOTV activity as "encouraging or assisting potential voters to vote." The proposed definition would cover such activities as:

- Driving through a neighborhood in a sound truck that plays a message urging listeners to "Vote next Tuesday at the Main Street community center";
- Mailing a flier to registered voters with the date of the election but not the location of polling places or their hours of operation; and
- Making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day.

The Commission seeks comment on whether the proposed definition of "GOTV activity" adequately addresses the concerns of the *Shays III* court, including closing the loophole sidentified by the court. The Commission also asks whether the proposed definition provides sufficient guidance as to which activities are covered and which are not.

Exclusion for Public Communications Relating to State and Local Elections

The Commission's proposed definition of GOTV also specifically excludes any "public communication that refers solely to one or more clearly identified candidate for state or local office and notes the date of the election." The Commission seeks comments on whether the proposed exclusion correctly implements the statutory definition.

Exemption for Mere Exhortations

The *Shays III* court seemingly acknowledged that exclusions to the definitions of "voter registration

activity" and "GOTV activity" for "routine or spontaneous speech-ending exhortations" and "mere exhortations...made at the end of a political event or speech" would be permissible. Therefore, the Commission's proposed definitions of voter registration activity and GOTV activity exempt speeches or events that include exhortations to vote or to register to vote that are incidental to the speech or event. This exemption would not inoculate speeches or events that otherwise qualify as FEA under the proposed definitions, such as a speech given 60 days before an election that provides listeners with information on how to register to vote but that also includes an exhortation to register to vote. The Commission asks if has properly established the scope of the proposed exemption and whether it provides clear guidance as to the activities exempted from the definitions of voter registration activity and GOTV activity.

Other Issues

The Commission also asks whether it should explicitly supersede, in whole or in part, Advisory Opinion (AO) 2006-19 in light of *Shays III* and the proposed definitions for "voter registration activity" and "GOTV activity." In *Shays III*, the court of appeals cited AO 2006-19 in which the Commission found that letters and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming election did not count as GOTV activity in part because the communications did not provide individualized assistance to voters. The court held that this definition of GOTV activity was contrary to the statute, but did not address whether communications made solely in connection with a nonfederal election may be excluded from the definition of GOTV activity or FEA. The Commission seeks comment on whether it should supersede AO 2006-19 and, if so, whether it should explicitly address the circumstances involved in the AO either in the regulation or its E&J.

Voter Identification and GOTV Activity in Connection with a Nonfederal Election

In 2006, the Commission adopted an Interim Final Rule that revised the definition of "in connection with an election in which a candidate for federal office appears on the ballot." Prior to the revision, the definition covered municipalities, counties and states that conducted separate, nonfederal elections. The Interim Final Rule excluded purely nonfederal voter identification and GOTV activity from the definition of "in connection with an election in which a candidate for federal office appears on the ballot." It specifically excluded voter identification or GOTV activities that were "in connection with a nonfederal election that is held on a date separate from a date of any federal election" and that referred exclusively to:

- Nonfederal candidates participating in the nonfederal election, provided the nonfederal candidates are not also federal candidates;
- Ballot referenda or initiatives scheduled for the date of the nonfederal election; or
- The date, polling hours and locations of the nonfederal election.

This component of the "in connection with an election" sunsetted in 2007, and subsequent attempts by the Commission to reintroduce the rule were not completed. The Commission proposes adding 11 CFR 100.24(c)(5) to reintroduce much of the exclusion originally contained in the Interim Final Rule. The proposed rule would exclude from the definition of FEA any voter identification activities or GOTV activities that are "solely in connection with a nonfederal election held on a date separate from any federal election." The proposed rule is based on the premise that voter identification and GOTV activity for nonfederal elections held on a different date from any federal election will have no effect on subsequent federal elections. The Commission asks whether voter identification and GOTV efforts in connection with a nonfederal election have any meaningful effect on voter turnout in a subsequent federal election, or otherwise confer benefits on federal candidates. The Commission specifically requests comments supplemented by empirical data.

Comments

All comments must be in writing and addressed to Amy L. Rothstein, Assistant General Counsel, and submitted on or before Friday, November 20, 2009. Comments may be submitted in electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to FEA-Shays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft word (.doc) format. Faxed comments should be sent to 202-219-3923 with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW, 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 Commission will hold a hearing on these proposed rules on Wednesday, December 16, 2009, at 9:30 a.m. in the Commission's ninth floor hearing room, 999 E Street NW, Washington D.C. 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.

Additional Information

The Notice of Proposed Rulemaking on Federal Election Activity was published in the October 20, 2009, *Federal Register* and is available on the FEC web site at http://www.fec.gov/pdf/nprm/fea_definition/2009/notice_2009-22.pdf.

—*Zainab Smith*

Advisory Opinions

AO 2009-22

National Party Committee may File Lobbyist Bundling Reports Quarterly

The Democratic Senatorial Campaign Committee (DSCC), a national committee of a political party, may file Lobbyist Bundling Reports on a quarterly basis instead of monthly. The applicable covered periods for these reports in election years would be semi-annually, quarterly and any applicable pre-and post-election reporting periods. In non-election years, the covered periods would be the semi-annual periods beginning on January 1 and July 1.

Background

As a national committee of a political party, the DSCC is required by the Federal Election Campaign Act (the Act) to file monthly campaign finance reports with the Commission. 2 U.S.C. §434(a)(4)(B) and 11 CFR 104.5(c)(4). It may also need to file Lobbyist Bundling reports periodically and has the option of filing those reports on a quarterly basis instead of monthly. 11 CFR 104.22(a)(5)(iii).

Analysis

The Act and Commission regulations require certain political committees ("reporting committees")[1] to disclose information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of a certain amount within a specified period of time ("covered period"). 2 U.S.C. §434(i) and 11 CFR 104.22. The covered periods for Lobbyist Bundling Reports generally correspond to the reporting periods for the reporting committee's regular campaign finance reports. However, reporting committees that file monthly campaign finance reports may elect to file their Lobbyist Bundling reports "pursuant to the quarterly covered period…instead of the monthly covered period…" 11 CFR 104.22(a)(5)(iv). Overlapping semi-annual covered periods apply to all reporting committees.

A reporting committee required to file campaign finance reports quarterly with the Commission must file its Lobbyist Bundling reports for the quarters beginning January 1, April 1, July 1 and October 1 of each calendar year and the applicable pre-and post-election reporting periods in election years; in a non-election year, reporting committees not authorized by a candidate [i.e. a political party committee] need only observe the semi-annual reporting period. 11 CFR 104.22(a)(5)(ii). This schedule applies both to reporting committees who file campaign finance reports quarterly and to those that file campaign finance reports monthly, but choose to file Lobbyist Bundling reports on a quarterly basis.

Thus, if the DSCC elects to file its Lobbyist Bundling Report on a quarterly basis, the reporting schedule is as follows: in election years, semi-annually, quarterly and the applicable pre-and post-election reporting periods, as appropriate; in nonelection years, the DSCC need observe only the semi-annual covered periods beginning on January 1 and July 1, as appropriate. Additionally, the Committee must file Lobbyist Bundling Reports for any special election covered periods in which it receives bundled contributions above the threshold amount from lobbyists/registrants and lobbyist/registrant PACs. 11 CFR 104.22(a)(5)(v).

Date Issued: October 9, 2009; Length: 3 pages.

—*Myles Martin*

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[1] *"Reporting committees" means political party committees, political committees authorized by candidates (i.e., candidate committees) and leadership PACs. 11 CFR 104.22(a)(1).*