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Campaign Finance Reform: Regulating Political Communications on the Internet

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Summary

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (FECA) to include a new term, "federal election activity," in order to expand the scope of federal campaign finance regulation. The definition of "federal election activity" includes a "public communication," i.e., a broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank communication made to the general public, "or any other form of general public political advertising." In October 2002, the Federal Election Commission (FEC) promulgated regulations exempting from the definition of "public communication" those communications that are made over the Internet. In response to the FEC's final rules, the two primary House sponsors of BCRA filed suit in U.S. district court against the FEC seeking to invalidate the regulations as opening a new avenue for circumvention of federal campaign finance law. In September 2004, in *Shays v. FEC,* the U.S. District Court for the District of Columbia overturned some of the FEC's new regulations. In response to the district court's decision, in April 2005, the FEC published proposed new rules in order to conform to the *Shays* ruling. The proposed regulations reflect an attempt by the FEC to leave web logs, or "blogs," created and wholly maintained by individuals, free of regulations under FECA, while extending limited regulation only to uses of the Internet involving substantial monetary transactions.

Background

The Bipartisan Campaign Reform Act. The Bipartisan Campaign Reform Act of 2002 (BCRA)[1] amended the Federal Election Campaign Act (FECA)[2] to include a new term, "federal election activity," in order to expand the scope of federal campaign finance regulation. BCRA defines "federal election activity" to include (1) voter registration drives in the last 120 days of a federal election; (2) voter identification, get-out-the vote drives (GOTV), and generic activity in connection with an election in which a federal candidate is on the ballot; (3) "public communications" that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether the communications expressly advocate a vote for or against); and (4) services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election.[3] BCRA further defines "public communication" as a broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank communication made to the general public, "or any other form of general public political advertising."[4] Therefore, under BCRA, state, district, and local political parties can only use hard, regulated federal funds[5] to pay for certain types of "federal election activity."

In October 2002, the FEC promulgated regulations, at 11 C.F.R. § 100.26,[6] exempting from the definition of "public communication" those communications that are made over the Internet. In its explanation and justification of the final rule, the FEC stated:

> The Internet is included in the list of exceptions in the final rules in section 100.29(c)(1) because, in most instances, it is not a broadcast, cable, or satellite communication. BCRA's legislative history ... establishes Congress's intent to exclude communications over the Internet from the electioneering communication provisions. The Commission concludes that Congress did not seek to regulate the Internet in subtitle A of Title II of BCRA. The relatively few commenters who opposed the Internet exemption did not disagree with this conclusion; rather, they argued that as the Internet develops, aspects of it might come to be used in a manner like radio or television. To these commenters, this potential evolution of the Internet calls for a more precise approach and makes the exemption as proposed too broad a treatment of this issue. The Commission has decided to include the exemption in the final rules, rather than attempt to craft a regulation that responds to unknown, future developments.[7]

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[1] P.L. 107-155 (2002).

[2] 2 U.S.C. § 431 *et seq.*

[3] 2 U.S.C. § 431(20).

[4] 2 U.S.C. § 431(22).

[5] Regulated "federal funds," also known as "hard money," are funds that are subject to the limitations, prohibitions, and reporting requirements of FECA. *See* 11 CFR § 300.2(k).

[6] "The term public communication shall not include communications over the Internet." 11 CFR § 100.26 (2005).

[7] Electioneering Communications, 67 Fed. Reg. 65,190 (2002).

Shays v. FEC. In response to the FEC's final rules, the two primary sponsors of BCRA in the House of Representatives, Congressmen Shays and Meehan, filed suit in U.S. district court against the FEC. In seeking to invalidate the regulations, the plaintiffs argued, *inter alia,* that by not regulating Internet activities, the FEC is opening a new avenue for circumvention of federal campaign finance law, contrary to Congress's intent in enacting BCRA. In September 2004, in *Shays v. FEC,*[8] the U.S. District Court for the District of Columbia agreed with the BCRA sponsors and overturned some of the FEC's new regulations.

The *Shays* court held that excluding all Internet communications from the FEC rule defining "public communication," at 11 CFR § 100.26, was inconsistent with Congress's use of the phrase, "or any other form of general public political advertising," in the BCRA definition of "public communication." Further, the court found that the FEC had failed to provide legislative history that would persuade the court to ignore the plain meaning of the statute.[9] While not all Internet communications fall within the phrase, "any other form of general public political advertising," the court observed that "some clearly do."[10] However, the court left it to the FEC to determine precisely what constitutes "general public political advertising" in the context of the Internet.[11] Furthermore, while the court specifically upheld the definition of "generic campaign activity" as a "public communication," it found that the 2002 Notice of Proposed Rulemaking (NPRM) failed to provide adequate notice to the public, under the Administrative Procedure Act (APA), that the FEC might establish such a definition. As the court noted, it could not "fathom how an interested party 'could have anticipated the final rulemaking from the draft rule.'"[12]

The *Shays* court also found that the FEC rule exempting Internet communications from the definition of "public communications" meant that no matter how closely such communications are coordinated with political parties or candidate campaigns, they cannot be considered "coordinated communications" and hence, subject to FECA regulation. As the court observed, it has long been a tenet of campaign finance law that, in order to prevent circumvention of regulation, FECA treats expenditures that are made "in cooperation, consultation, or concert, with or at the suggestion of a candidate" as a contribution to such candidate.[13] According to the court, the exclusion of Internet communications from coordinated communications contrasts with prior FEC rules and was contrary to Congress's intent in enacting the statute.[14] The court remanded the case for further action consistent with its decision.[15]

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[8] 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd,* No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005).

[9] *Id.* at 69.

[10] *Id.* at 67.

[11] *Id.* at 70.

[12] *Id.* at 112.

[13] *Id.* at 62, *quoting* McConnell v. FEC, 124 S. Ct. 619, 705 (2003).

[14] *Id.* at 65.

[15] *Id.*

FEC Internet Rulemaking

In response to the district court's decision, on April 4, 2005, the FEC published a NPRM seeking comment on its proposal to amend the definition of "public communication" to conform to the *Shays v. FEC* ruling.[16] The comment period closed on June 3, 2005, and a public hearing was held June 28 and 29, 2005. It is anticipated that once the FEC promulgates its final regulations, perhaps at the end of this year, many of the new regulations are likely to be once again challenged in court, by supporters of BCRA if they are perceived as too lax, and by free speech advocates if they are viewed as too burdensome on political speech.

In its NPRM, the FEC requested comments on proposed rules to include paid advertisements on the Internet in the definition of "public communication." In addition, the FEC sought comment on the related definition of "generic campaign activity," on proposed changes to the disclaimer regulations, and on proposed exceptions to the definitions of "contribution" and "expenditure" for certain Internet activities and communications that would qualify as individual volunteer activity or that would qualify for the "press exemption." According to the FEC, the proposed rules are intended to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections.

Summary of Proposed Regulations. Specifically, the proposed regulations reflect an attempt by the FEC to leave web logs, or "blogs," created and wholly maintained by individuals, free of regulations under FECA, while extending limited regulation only to uses of the Internet involving substantial monetary transactions. As a still evolving technology, the Internet poses many challenges for those regulating in this area, not least of which is how to place a financial value on Internet communications. As stated in its NPRM:

> The Commission's proposed rule attempts to strike a balance between provisions of the Act that regulate "general public political advertising" and significant public policy considerations that encourage the Internet as a forum for free or low-cost speech and open information exchange.[17]

Key issues addressed in the proposed FEC regulations include:

- *Definition of "public communication"* — the new regulations would amend the definition of "public communication" in 11 C.F.R. §100.26, to include paid Internet ads placed on another individual's or entity's website, as a form of "general public political advertising";

- *State and local party committees* — while state and local party committees must use entirely federal funds (i.e., regulated, hard money) to pay for public communications that support, oppose, attack, or promote federal candidates, the new regulations would continue FEC

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[16] Internet Communications, 70 Fed. Reg. 16,967 (2005).

[17] *Id.,* at 16,969.

policy of allowing them to make reference to federal candidates on their websites without triggering a total federalization of the process;

- *Disclaimer requirements* — current rules for disclaimers (statements of attribution) apply to any public communication, which in this context includes more than 500 substantially similar, unsolicited e-mails sent within a 30-day period. The new regulation would narrow the scope of this requirement to apply only to e-mail addresses acquired through a commercial transaction. Furthermore, as the changed definition of "public communication" (above), disclaimers would be required on paid Internet ads placed on another individual's or entity's website;

- *Bloggers paid by candidates* — the new regulations would leave intact the policy of requiring payments to bloggers by candidates to be disclosed on candidates' disclosure statements only, with no disclaimers of such required on blog sites;

- *Coordinated communications* — the FEC is not proposing any change to 11 CFR §109.21 at this time, dealing with coordinated communications, but by changing the definition of "public communication" to include some Internet activity, the proposed regulations would have an impact in this area. Thus, Internet ads placed on the website of another person or entity for a fee and coordinated with a candidate or party committee would be considered "coordinated communications" and thus in-kind contributions to the candidate or committee; in turn, the costs would be subject to contribution limits and source prohibitions of FECA;

- *Media exemption* — current law generally exempts news stories, commentaries, and editorials distributed through broadcasters, newspapers, and periodicals from being considered "expenditures" under FECA. The FEC is considering whether to extend this exemption to media activities that occur over the Internet, such as activities by bloggers. However, the proposed rules do not go this far, as some have proposed, and merely clarify that any media activities now covered by the media exemption would continue to be exempt when transmitted over the Internet; and

- *Exceptions for individual or volunteer activity on the Internet* — proposed rules would exclude from regulation, under the definitions of "contribution" and "expenditure," an uncompensated individual acting independently or as a volunteer by using computer equipment or Internet services in order to influence a federal election.

Congressional Activity

The subject of communications over the Internet was not addressed during the 107th Congress's consideration of BCRA in 2001 and 2002, when the law was enacted. However, the subject was raised in debate on a previous version of what became BCRA during House consideration of H.R. 417 (Shays-Meehan) in the 106th Congress. An

amendment was offered to that bill by Representative DeLay to exempt communications over the Internet from regulation under FECA. It was defeated by a vote of 160-268.[18]

During the 109th Congress, several bills have been proposed to exempt communications over the Internet from the BCRA definition of "public communication," and thus regulation under FECA. These proposals include H.R. 1605 and H.R. 1606 (Hensarling) and S. 678 (Reid). Similar language was added to two bills reported from House and Senate committees, which focus on the issue of 527 political organizations: S. 1051 (McCain-Feingold-Lott), reported by the Senate Rules and Administration Committee on May 17 as an original bill and placed on the Senate's legislative calendar; and H.R. 1316 (Pence-Wynn), reported by the House Administration Committee on June 22, 2005 (H.Rept. 109-146).

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[18] Bipartisan Campaign Reform Act of 1999. 145 CONG. REC. 21526 (Sept. 14, 1999).