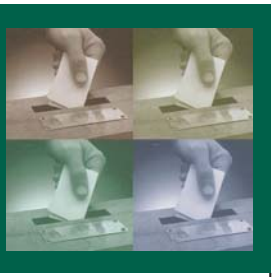
Wiley Rein & Fielding

May 2004

Election Law News

A Publication of the WRF Election Law Practice Group



FEC Wades into Controversy over 527s and Other Nonparty Groups

On March 11, 2004, the Federal Election Commission (FEC) published a Notice of Proposed Rulemaking (NPRM) entitled "Political Committee Status," 63 Fed. Reg. 11736, effectively continuing its prior, interrupted efforts to redefine or refine its definition of "political committee" and the related definition of "expenditure." *See* Definition of Political Committee, 66 Fed. Reg. 13681 (FEC Mar. 7, 2001). The FEC, in engaging in this rulemaking, hopes to address concerns that nonparty groups' advocacy activities may effectively circumvent or undermine the goals of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act (FECA).

The BCRA imposed new restrictions on political parties engaged in "federal election activity" (FEA) and on nonparty groups engaged in "electioneering communication." FEA under BCRA includes four categories of activities: (1) voter registration activity during the 120 days before a federal election, (2) voter identification, get-out-the-vote (GOTV) and generic campaign activity conducted in connection with an election in which a federal candidate is on the ballot, (3) a public communication that refers to a clearly identified candidate for federal office and promotes, supports, attacks or opposes a candidate for that office and (4) the services provided by certain political party committee employees. *See* 2 U.S.C. § 431(20)-(24). Limits on FEA were applied in BCRA only to state and local political parties, and in certain circumstances to officeholders soliciting funds.

An "electioneering communication" is any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed for a fee within 60 days of a general election or 30 days before a primary and is targeted to the relevant electorate. *See* 2 U.S.C. §434(f)(3)(C). This narrow definition was crafted to permit advocacy activities by nonparty groups.

continued on page 4

Practical Tip: Corporate Communications Guide

Watch Your Communications!!

The election-year frenzy is upon us, with Congressional primaries popping up all over the country and, with them, federal limits on corporate communications. Below are a few clear guidelines to assist those corporations and trade associations that want to continue their lobbying and other forms of communications featuring federal candidates and officeholders, but want to avoid the legal pitfalls of violating election laws. The dates for Congressional primary elections can be found at **www.fec.gov/pages/charts_ec_dates_cong.htm**.

No Express Advocacy

At no time may a corporation or trade association expressly advocate the election or defeat of a federal candidate beyond its "restricted class." This means that corporate paid ads—whether on television, radio or the Internet, or in newspapers or magazines—may never expressly ask persons to vote for or against a federal candidate. Phrases such as "Vote for the President," "Re-elect your Congressman," "Smith for Congress" and "Lamar!" are also prohibited, as are public corporate ads that solicit contributions for federal candidates.

No Reproduction of Campaign Materials

At no time may a corporation or trade association republish, distribute or disseminate the campaign materials of a federal candidate. Small quotes may be used for certain specific reasons, but reproduction, in whole or in part, is prohibited.

continued on page 3

Also in This Issue

Recent Advisory Opinions from the FEC

FEC ALLOWS USE OF NAME "AIRPAC"

In FEC Advisory Opinion 2004-1, the Federal Election Commission allowed the Air Transportation Association of America PAC to use the shortened name "AirPAC" on its checks and stationery. This March 11, 2004 opinion allowed such use because the association was the only trade association representing the American airline industry, the shortened name gave adequate notice to the public about the PAC's sponsor and the name incorporated the first and most important part of the association's name. The FEC did mandate that the PAC begin to identify itself publicly as "AirPAC" so that it begins to be commonly known by that name.

FEC LIMITS CONVERTED CAMPAIGN COMMITTEES

In an advisory opinion issued on March 11, 2004, the FEC allowed the campaign committee of a retiring Congressman to remain as a multicandidate PAC. However, in FEC Advisory Opinion 2004-3, the Commission limited the PAC, called Dooley for the Valley, to contributing $1,000 per election to federal candidates from funds the PAC had received as a campaign committee. This limit emanates, according to the FEC, from the Bipartisan Campaign Reform Act of 2002 (BCRA) four-prong limit on expenditures by campaign committees. The four areas of permissible disbursements are as follows:

- Expenditures in connection with the federal candidate's election.
- Ordinary and necessary officeholder expenses.
- Donations to 501(c)(3) charities.
- Transfers, without limit, to party committees.

The statute and corresponding FEC regulations no longer have a fifth option, which applied to disbursements for "any other legal purpose." Without this open-ended option available for disbursements from campaign committees, the FEC imposed the $1,000 contribution limit. (In a related matter, the FEC intends to ask Congress to increase this limit to $2,000 per election.)

FEDERAL CANDIDATES AND PACS MAY USE MEETUP.COM

On March 25, 2004, the FEC allowed federal candidates and political committees to be included by Meetup, Inc. in a list of Meetup topics and as "Featured Meetups" on Meetup.com. In FEC Advisory Opinion 2004-6, the FEC found Meetup's inclusion of federal candidates and committees in these features not to be contributions or expenditures for two reasons. First, Meetup provided its basic services without charge to all participants, so basic services were not "anything of value." Second, the premium services, such as the "Featured Meetup" services to be provided to federal candidates and committees, were allowable as long as the premium services were the same as those provided to similarly situated non-political customers for the same fee.

MTV MAY CONDUCT ITS 'PRELECTION' UNDER BCRA

In FEC Advisory Opinion 2004-7, issued on April 1, 2004, the FEC allowed MTV and its parent Viacom to conduct surveys of young people about the candidates for president and to air television shows about the results, albeit with two limits. The production and airing of "Prelection" was deemed by the Commission to qualify for the press exemption applicable to news stories, commentaries and editorials.

continued on page 6

Upcoming Filing Dates

Deadline	Filing
May 15, 2004	IRS Form 990 due from "national" nonfederal political organizations and from qualified state and local political organizations with taxable year gross receipts in excess of $100,000.
May 20, 2004	May monthly FEC report due for federal PACs filing monthly.
May 20, 2004	May monthly IRS Form 8872 due for nonfederal PACs filing monthly.*
June 20, 2004	June monthly FEC report due for federal PACs filling monthly.
June 20, 2004	June monthly IRS Form 8872 due for nonfederal PACs filing monthly.*

Deadlines are not extended if they fall on a weekend.

* Qualified state and local political organizations are not required to file Form 8872 with the IRS.

continued from page 1

120 Days before an Election

During the 120 days before an election—whether a primary or a general election—a corporation and trade association may not run a non-Internet advertisement that clearly identifies a candidate for federal office and is **coordinated** with that candidate, his or her opponent, a political party committee or the candidate, opponent or agent of the party. This restriction applies to advertisements in the newspaper, on radio and television and in all other types of non-Internet advertising, including outdoor signs and direct mail of more than 500 pieces.

For a candidate to be "clearly identified" in an ad means that he or she is mentioned in the ad, his or her picture, nickname or image is used, or he or she is referred to in a clear manner, such as "the Republican candidate for the Senate from Missouri." **Coordination** means that the ad was:

- Made at **the request or suggestion** of a candidate, authorized committee, political party committee or agent of any of the foregoing.
- Made **with the material involvement of** a candidate, authorized committee, political party committee or agent of any of the foregoing.
- Made **after substantial discussions about** the communication with a candidate, authorized committee, political party committee or agent of any of the foregoing.
- Made using a **common** political, media or production **vendor** (under certain conditions).
- Made using a **former employee or independent contractor** of a candidate, authorized committee, political party committee or agent of any of the foregoing.

60 Days before a General Election

During the 60 days before the general election on November 2, corporations, trade associations and entities using corporate money may not air ads on broadcast, cable or satellite television or radio that clearly identify a federal candidate and can be received by 50,000 or more persons in the relevant Congressional district or state. That's it. No coordination or express advocacy is required to trigger this prohibition. Simply mentioning or featuring a federal candidate in this time period violates the rules on "electioneering communications," even if the ad refers to legislation. This prohibition, which begins September 3, 2004, runs nationwide for presidential candidates.

30 Days before a Primary Election or Convention

During the 30 days before a primary election, corporations, trade associations and entities using corporate money may not air ads on broadcast, cable or satellite television or radio that clearly identify a federal candidate and can be received by 50,000 or more persons in the relevant Congressional district or state. For the national political party nominating conventions at the end of the summer, the "electioneering communication" blackout period extends nationwide for ads identifying candidates for president from the respective party.

Ads Permissible at any Time

As long as the communications do not expressly advocate the election or defeat of a federal candidate or solicit funds for a candidate's campaign, a corporation or trade association may mention a federal candidate in a public Internet or email communication. These types of communications are not covered by the 120, 60 and 30 day prohibitions.

Also, ads that do not clearly identify a federal candidate or political party may be aired by a corporation or trade association at any time. Further, no restrictions apply to **non-coordinated** ads by corporations or trade associations that are not aired on broadcast, cable or satellite radio or television. Such **non-coordinated** ads may identify a federal candidate but may not expressly advocate his or her election or defeat.

Finally, as mentioned in the March 2004 *Election Law News*, a corporation or trade association may at any time communicate with its "restricted class" on any topic. These communications to salaried executive, administrative and professional personnel and stockholders and their families may expressly advocate the election or defeat of a federal candidate and may also solicit contributions for federal candidates. As noted in the article, "Three Cheers for Corporate Communications," reporting by the corporation or trade association may be required for such communications. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

FEC Wades into 527 Controversy

continued from page 1

Among other things, and distilled to its most basic objectives, this rulemaking attempts to do two distinct but related things: (1) redefine the term "expenditure" as it is used throughout the FEC's regulations and (2) broaden the definition of "political committee" to incorporate the FEC's "major purpose" test. The NPRM includes a few proposals for the definition of "major purpose," which are related to the broader redefinition of "expenditure." The end result of this complicated NPRM is that many more nonparty groups would be subjected to the oversight, disclosure obligations and prohibitions of the federal campaign finance laws if a new regulation is passed.

Changing the Definition of "Expenditure"

At present, the term "expenditure" encompasses "(i) any purchase, payment, distribution, loan advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office; and (ii) a written contract, promise, or agreement to make an expenditure." 2 U.S.C. § 431(9)(A). Commission regulations currently implement this definition, but the FEC in this NPRM proposes to expand the general definition of "expenditure" by amending those regulations. The amendments would import certain aspects of FEA and "electioneering communication" into the more general definition of "expenditure," thus broadening the category of activities deemed "expenditures" under the campaign finance laws.

Mr. Baran asserted that these rules, if adopted, would usurp Congressional authority by effectively renegotiating the legislative bargain at the heart of BCRA.

For example, the FEC proposes adding 11 CFR 100.116, which would transform a public communication into an "expenditure" if it "(a) Refers to a clearly identified candidate for federal office, and promotes or supports, or attacks or opposes any candidate for federal office; or (b) Promotes or opposes any political party." 69 Fed. Reg. at 11741. The NPRM also suggests an amendment to 11 CFR 100.133, which is an exception to the definition of expenditure. Section 100.133 provides an exception from the definition of "expenditure" for certain GOTV voter registration activities; the NPRM proposes to narrow that exception by incorporating the "promote, support, attack or oppose" standard. To be excluded from the definition of expenditure under the new rules, the activity must "not include a communication that promotes, supports, attacks, or opposes a federal or non-federal candidate or that promotes or opposes a political party," further, "[i]nformation concerning likely party or candidate preference" must not have "been used to determine which individuals to encourage to register to vote or to vote." *See* Proposed 100.133, 69 Fed. Reg. at 11757.

These definitional changes import the "promote, support, attack or oppose" standard from BCRA's provisions on "federal election activity" into the general definition of "expenditure" that underlies the entire regime of campaign finance regulation. Such an expansion may subject a much broader class of advocacy activity to regulation than presently regulated by BCRA and its implementing regulations. The Commission acknowledges that its approach would "extend restrictions related to federal election activities beyond political party committees and federal candidates to all persons, including a State or local candidate or committee." 69 Fed. Reg. at 11739.

Changing the Definition of "Political Committee"

Currently, the regulations specify that groups spending more than $1,000 in statutorily enumerated "expenditures" qualify as "political committees" subject to the limitations and extensive reporting and disclosure obligations that accompany such a designation.

The NPRM would define an "expenditure" as the term is used in the definition of "political committee," as "payments for federal election activities described in 11 CFR 100.24(b)(1) through (b)(3) [FEA provisions] and payments for all or any part of an electioneering communication as defined in 11 CFR 100.29." 69 Fed. Reg. at 11756. Thus, the proposed rules incorporate the definition of FEA and "electioneering communication"

continued on page 5

FEC Wades into 527 Controversy

continued from page 4

used elsewhere in the statute into its new definition of "political committee."

In addition to expanding the definition of the type of "expenditure" that can satisfy the $1,000 threshold, the FEC proposes regulations to codify its longstanding use of a "major purpose" test to evaluate whether an entity is a "political committee" for the purposes of the campaign finance laws. The NPRM proposes a four-part disjunctive test for determining whether an entity has as its major purpose the nomination or election of a federal candidate. Satisfying any one of the four tests would subject an entity to treatment as an official "political committee." The "Avowed Purpose and Spending" prong would look at an organization's documents and public pronouncements, as well as its disbursements over $10,000 on expenditures, payments for FEA and payments for electioneering communications. *See* Proposed 11 CFR 100.5(a)(2)(i). The "50 Percent Disbursement Threshold" prong would consider an organization as having a major purpose to nominate or elect a federal candidate if more than 50 percent of its total annual disbursements in any of the previous four calendar years was spent on expenditures, payments for FEA and payments for electioneering communications. *See* Proposed 11 CFR 100.5(a)(2)(ii). The "$50,000 Disbursement Threshold" would look to the dollar amount, rather than the percentage, spent on the same activities, expenditures, payments for FEA and payments for electioneering communications to determine an organization's "major purpose." *See* Proposed 11 CFR 100.5(a)(2)(iii). Finally, there is a test proposed to govern Section 527 groups, which register with the Internal Revenue Service as "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." The proposed rules would define these groups as presumptive political committees, subject to certain exceptions, set forth as alternative rules. *See* Proposed 11 CFR 100.5(a)(2)(iv); 69 Fed. Reg. at 11748-11749.

WRF Advocacy on this NPRM

Wiley Rein & Fielding LLP Partner Jan Baran testified in opposition to many aspects of the proposed rules on behalf of the U.S. Chamber of Commerce at the FEC's April 14, 2004 public hearing. Mr. Baran asserted that these rules, if adopted, would usurp Congressional authority by effectively renegotiating the legislative bargain at the heart of BCRA. Second, even if the Commission were empowered to adopt the proposed rules, these rules are constitutionally infirm in their overbreadth and vagueness. Finally, Mr. Baran urged that any rules adopted in this area (1) should be delayed until after this election cycle and (2) should specifically exempt nonparty groups organized under Section 501(c) of the Internal Revenue Code. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

Tax Corner: Lobbying Restrictions for 501(c)(3) Organizations

Q: *What are the restrictions on a 501(c)(3) organization's ability to lobby?*

A: Lobbying may not constitute a "substantial part" of a 501(c)(3)'s overall activities. This is a subjective determination that has been interpreted differently among the courts and in various IRS rulings. However, most 501(c)(3) organizations can elect to be treated under the bright-line lobbying expenditure rules set forth in Section 501(h) of the tax code. An electing organization can spend a certain percentage of its overall expenses on lobbying-related activities. The percentage varies on a sliding scale and there is a more restrictive cap on grass-roots lobbying expenditures (*e.g.*, an organization with total expenses of $1 million can spend $175,000 on lobbying, $43,750 of which can be for grass-roots lobbying). Lobbying expenditures above these permissible amounts are subject to a 25 percent tax. The 501(h) election is made by filing IRS Form 5768. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Thomas W. Antonucci (202.719.7558 or tantonuc@wrf.com).

Recent Advisory Opinions

continued from page 2

According to the advisory opinion, the press exemption extends to promoting the show and announcing and publicizing the results of the surveys. None of the promotional or broadcast activities are deemed to be "electioneering communications" under BCRA, even though candidates for president are featured. Moreover, the FEC is allowing MTV to announce and publicize the show and results on the Internet and through email and text messages because Internet sites are common features of media organizations and because such organizations are turning to the latter two mediums.

The FEC did impose two important limits on MTV. First, the FEC said that providing election-related educational materials at community events was not within the normal sphere of press functions. Therefore, the dissemination of such information must follow the usual FEC regulations, including the rule against express advocacy. Second, the FEC stated that the distribution of follow-up emails and text messages some time after the results of "Prelection" had been announced did not qualify for the press exemption. As a result, such messages fall under the usual corporate communication rules, including a prohibition on express advocacy in corporation communications with the general public. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

Jan Baran Authors Primer, Co-Chairs Conference

The Election Law Primer for Corporations, Fourth Edition, authored by Jan Baran and published by the American Bar Association Section of Business Law, will be available in June.

The *Primer* provides a thorough analysis of the federal statutory and regulatory schemes affecting the political affairs of corporations, PACs, personnel and trade associations. Campaign finance, lobbying and soft money are also covered by the *Primer*, which has been revised to incorporate new advisory opinions and FEC regulations, such as "electioneering communications" and the 2002 amendments to Section 527 of the Internal Revenue Code, as well as *McConnell v. FEC.*

Mr. Baran will co-chair the annual **Practising Law Institute** conference, "Corporate Political Activities: 2004, Complying with Campaign Finance, Lobbying and Ethics Laws" on September 9-10, 2004 in Washington, DC. ✦

WRF Election Law Practice Group

Jan Witold Baran	202.719.7330	jbaran@wrf.com
Carol A. Laham	202.719.7301	claham@wrf.com
Thomas W. Kirby	202.719.7062	tkirby@wrf.com
Barbara Van Gelder	202.719.7032	bvangeld@wrf.com
Jason P. Cronic	202.719.7175	jcronic@wrf.com
Bruce L. McDonald	202.719.7014	bmcdonal@wrf.com
Lee E. Goodman	202.719.7378	lgoodman@wrf.com
Caleb P. Burns	202.719.7451	cburns@wrf.com
D. Mark Renaud	202.719.7405	mrenaud@wrf.com
Thomas W. Antonucci	202.719.7558	tantonuc@wrf.com

1776 K Street NW ✦ Washington, DC 20006 ✦ (ph) 202.719.7000 ✦ (fax) 202.719.7049

7925 Jones Branch Drive ✦ Suite 6200 ✦ McLean, VA 22102 ✦ (ph) 703.905.2800 ✦ (fax) 703.905.2820

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