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NEWSLETTER

BCRA Regulations in Legal Limbo; FEC to Appeal

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The 2004 election is being held under some Federal Election Commission (FEC) regulations that have been declared legally defective but that remain in effect. Fortunately, because virtually all of the impaired regulations were intended to ameliorate BCRA and because the FEC is unlikely to seek penalties for relying on its regulations, the immediate practical effects likely will be limited. However, things could get interesting if private FEC complainants go to court under Section 437g of the Federal Election Campaign Act of 1971, as amended, to compel the FEC to enforce BCRA directly, ignoring the regulations.

Congressmen Shays and Meehan, sponsors of BCRA, brought the underlying lawsuit in U.S. District Court for the District of Columbia. They challenged 18 FEC regulations that, in their view, tended to water down BCRA. The suit was assigned to Judge Kollar-Kotelly, one of three who heard the first-round constitutional challenge to BCRA and distinguished herself by writing a 706-page opinion explaining why virtually every clause was valid, a position that a narrow U.S. Supreme Court majority largely vindicated.

On September 18, 2004, Judge Kollar-Kotelly issued a lengthy opinion ruling that 14 of the 18 challenged regulations were defective on grounds ranging from inconsistency with BCRA's language or its perceived intent to failure to give sufficient advance public notice of the proposed rule or sufficient explanation of the underlying reasoning.

Strikingly, Judge Kollar-Kotelly stopped short of explicitly declaring the regulations invalid. Instead, she remanded the case to the FEC "for further action consistent with this opinion."

When the befuddled FEC asked her to stay her opinion or otherwise clarify the legal status of the 14 regulations, she refused in a 27-page ruling issued October 19, 2004. In the course of berating the FEC, however, she made clear that "the deficient rules technically remain 'on the books,'" and that it is up to the FEC, at least in the first instance, to figure out what curative steps should be taken. For example, the FEC could begin drafting more complete explanations to be released promptly if the D.C. Circuit upholds her rulings that some initial explanations were inadequate.

According to an FEC press release dated October 29, 2004, the FEC has voted to appeal to the U.S. Court of Appeals for the D.C. Circuit. In addition to challenging the plaintiffs' standing to sue (which could overturn the whole decision), the FEC will argue that the following regulatory provisions were wrongly struck down by the District Court:

- The district court's decision regarding the coordinated communications content standards, including the specific regulations found at 11 C.F.R. 109.21(c)(4)(i), (ii), and (iii).
- The district court's decision regarding the definition of "solicit" at 11 C.F.R. 300.2(m) and "direct" at 11 C. F.R. 300.2(n).
- The district court's decision regarding the regulation governing payment of state, district, or local party employee wages or salaries at 11 C.F.R. 300.33(c)(2).
- The district court's decision regarding the de minimis exemption for Levin Amendment funds in 11 C.F.R. 300.32(c)(4).
- The district court's decision regarding the requirement that public distribution be "for a fee" in 11 C.F.R. 100.29(b)(3)(i).

The FEC will initiate a rulemaking to address regulations struck down on procedural rather than substantive grounds.

Judge Kollar-Kotelly's two opinions and related court papers, including FEC filings, may be found on the FEC website at www.fec.gov/pages/bcra/litigation.shtml#shaysmeehan.