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NEWSLETTER

FEC Wades into Controversy over 527s and Other Nonparty Groups

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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

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crafted to permit advocacy activities by nonparty groups.

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.

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" 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.