

FEC Applies Controversial Legal Theories to Expand Regulation of Corporate Express Advocacy and 527 Organizations

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In the span of roughly one month, the FEC announced a number of novel and controversial settlements in enforcement actions regarding prohibited corporate expenditures for communications that expressly advocate electoral action as well as the regulation of 527 organizations as political committees.

On November 15, 2006, the FEC announced that it had agreed to settle a case with the Sierra Club for disseminating a pamphlet that expressly advocated electoral action on behalf of various federal candidates. As a corporation, the Sierra Club is prohibited by law from making expenditures for such express advocacy. What made this settlement noteworthy was that the FEC pursued its case based on a broadened – and seemingly dormant – definition of express advocacy.

Express advocacy was traditionally understood to require so-called "magic words" that explicitly advocate electoral action such as "vote for" or "defeat." Over a decade ago, the FEC promulgated a regulation expanding the definition of express advocacy to include references to external events, such as proximity to an election, to determine whether it is reasonable to interpret the communication as containing advocacy of the election or defeat of a federal candidate. Various courts struck this regulation down as unconstitutionally vague and overbroad. The FEC's press release accompanying the settlement suggests that the Supreme Court's 2003 decision in *FEC v. McConnell* altered the validity of these prior court cases. However, subsequent judicial precedent, including *Center for Individual Freedom v. Carmouche*, which was successfully handled by Wiley Rein & Fielding

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in the United States Court of Appeals for the Fifth Circuit, does not support the FEC's position.

Furthermore, the recently issued *Wisconsin Right to Life, Inc. v. FEC* majority opinion (see article on page 4) includes language supporting a more limited view of the bounds of regulated political speech.

Building on this expanded definition of express advocacy, the FEC announced on December 13 that it had reached settlements with three 527 organizations that had violated the contribution limits and reporting requirements that apply to federal political committees. The 527 organizations were the League of Conservation Voters 527 and 527II, MoveOn.org Voter Fund and Swift Boat Veterans and POWs for Truth. Although a 527 is an organizations with an avowedly political purpose, a 527 is only subject to regulation as a federal political committee if it engages in certain activity.

In these settlements, the FEC claimed that regulation attaches if a 527 accepts "contributions" or makes "expenditures," and has the "major purpose" of electing or defeating federal candidates as those terms are defined by statute and understood by judicial precedent. What made the settlements controversial was that the FEC relied on the reasoning of the Sierra Club settlement, an isolated court case, and a standard that it previously had been unable to clarify when applying these criteria to the 527s. The FEC used the broadened express advocacy standard it had resurrected in the Sierra Club matter to satisfy the "expenditure" criterion. To implement the "contribution" component, the FEC applied a 1995 interpretation by a court from another jurisdiction that had been previously ignored. Lastly, the FEC applied the "major purpose" criterion even though it was unable in previous rulemaking proceedings to define exactly how "major purpose" is to be measured.

It is also worth noting that the FEC also settled a case against a 501(c)(4) organization called Freedom, Inc. It appears, however, that Freedom, Inc., was engaged in activities that were clearly regulated by the campaign finance laws. Accordingly, the settlement does not appear to break any new ground.

All of these matters were settled in administrative proceedings, so they will not be directly reviewed by a court. It remains to be seen, however, whether the FEC's use of these novel and controversial legal theories will withstand judicial scrutiny in other cases that do not settle.