

# FEC Appeals D.C. Circuit Decision on BCRA Regulations

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On August 29, 2005, the Federal Election Commission (FEC) announced that it was appealing a recent decision regarding FEC regulations to the full U.S. Court of Appeals for the District of Columbia Circuit. A panel of the D.C. Circuit had ruled on July 15, 2005, that the FEC must rewrite or better explain five regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA). *Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005). The panel's ruling stemmed from an appeal of a district court decision that had similarly required revision or further justification of these and other rules the FEC had promulgated. The FEC decided to appeal the decision of the district court as it applied to five of the rules while beginning rulemaking proceedings to address the rest. While the FEC appeals the three-judge panel's decision to the *en banc* D.C. Circuit, it is also proceeding with rulemakings in some of these areas. See related article on page 1.

The appellate panel ruled against the FEC on all five regulations that were subject to the appeal. A summary of the court's ruling with regard to each of the five regulations follows:

## **Standards for "Coordinated Communication"**

FEC regulations explain that an expenditure can be considered "coordinated" with a candidate or political party if, among other things, it refers to a clearly identified candidate or party within 120 days of an election and is directed to the relevant electorate. An expenditure that is "coordinated" is treated as an in-kind contribution subject to federal limitations and prohibitions. However, the court of appeals determined that the FEC had not sufficiently justified the 120-day time period and invalidated the regulation as arbitrary and capricious.

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### **Definitions of "Solicit" and "Direct"**

The BCRA disallows various individuals, including officials of national political parties, federal candidates and federal officeholders, to "solicit" or "direct" funds not compliant with federal amount and source limitations, *i. e.*, "soft money." The FEC's regulations took a strict view of the meaning of these terms requiring that they be interpreted to apply only to explicit and direct requests for money. The court of appeals ruled that this contravened the BCRA, which the court understood to require a broader interpretation that reaches indirect requests for funds.

### **Interpretation of "Electioneering Communication"**

FEC regulations had carved out an exception from the definition of "electioneering communications" (communications by television and radio within 30 days of a primary or 60 days of a general election that are directed to the relevant electorate) for those that are not disseminated for a fee. The court of appeals ruled that such an exemption was not contemplated by the language of the BCRA and did not meet the BCRA's specific criteria for establishing exemptions to the definition of "electioneering communication."

### **Allocation Rules for State Party Employee Salaries**

The BCRA requires that salaries for state party employees who spend more than 25% of their time on federal elections be paid entirely with federally regulated funds. The FEC determined in its rulemaking that those employees who do not exceed the 25% threshold may be paid entirely with non-federal funds. The court of appeals determined that the FEC had not provided an adequate justification for this conclusion in light of the fact that pre-existing FEC rules generally require that administrative expenses be allocated between federal and non-federal funds and not paid entirely by one or the other.

### ***De Minimis* Exemption from Allocation Rules for "Levin Funds"**

State parties that are permitted to operate "Levin" accounts by virtue of state law must allocate expenditures for certain federal election activity between "Levin" and federal funds. However, the FEC's regulations provided a *de minimis* exemption from this requirement for allocable activity that does not exceed \$5,000. Again, the court of appeals held that the FEC had not adequately justified the basis for this exemption.