



"McGinley, William"
<WMcGinley@PattonBoggs.com>

01/19/2010 06:59 PM

To <CoordinationShays3@fec.gov>

cc

bcc

Subject Coordinated Communications Notice of Proposed Rulemaking

Ms. Rothstein:

Please find attached my comments submitted in response to the Federal Election Commission's notice of proposed rulemaking in the wake of *Shays v. FEC*, 528 F. 3d 914 (D.C. Cir. 2008) ("*Shays III*"). 74 Fed. Reg. 53893 (Oct. 21, 2009) ("NPRM"). I appreciate the opportunity to submit these comments and hereby request that I be permitted to testify at the Commission's hearing on this matter.

Please do not hesitate to contact me with any questions.

Regards,
William McGinley

William McGinley | Patton Boggs LLP

2550 M Street, NW | Washington, DC 20037

P: (202) 457-6561 | F: (202) 457-6315

E: WMcGinley@pattonboggs.com | www.pattonboggs.com

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.



FEC Coord Comm NPRM WJM Comments 01 19 2010.pdf

January 19, 2010

William J. McGinley
202-457-6561
wmcginley@pattonboggs.com

VIA E-MAIL: COORDINATIONSHAYS3@FEC.GOV

Amy L. Rothstein, Esquire
Assistant General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Coordinated Communications
Notice of Proposed Rulemaking
Comments

Dear Ms. Rothstein:

These comments are submitted in response to the Federal Election Commission's notice of proposed rulemaking in the wake of *Shays v. FEC*, 528 F. 3d 914 (D.C. Cir. 2008) ("*Shays IIP*"). 74 Fed. Reg. 53893 (Oct. 21, 2009) ("*NPRM*"). I appreciate the opportunity to submit these comments and hereby request that I be permitted to testify at the Commission's hearing on this matter.

These comments are submitted in my personal capacity and represent my personal views as a practitioner before the Federal Election Commission ("*Commission*"). They are not submitted on behalf of any client, or any other individual or organization.

INTRODUCTION

The Commission's coordination regulations impact every participant in the political marketplace, including candidates, political party committees, and issue advocacy or grassroots lobbying groups. The regulations also affect vendors retained by such participants to produce and distribute communications and to provide strategic advice. The current coordination rules have provided the regulated community with clear notice concerning which communications are subject to the Commission coordination regulations. Any changes to these rules must provide the regulated community with clear notice as well.

The Commission must reject any proposed changes that would create subjective, expansive standards for determining which communications are subject to analysis under the coordination rules. Similarly, the coordination rules must not be developed through the enforcement process

Amy L. Rothstein, Esquire
January 19, 2010
Page 2

or by advisory opinion. The coordination regulations must not fall victim to the same type of confusing, subjective standards employed by the Commission under its case-by-case political committee regime. The regulated community must have clear notice concerning the types of communications subject to the coordination rules to prevent the type of speech-chilling discovery practices referenced by the United States Supreme Court in *Wisconsin Right to Life v. FEC*. *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 468 n.5 (2007) (hereinafter “WRTL”) (describing the extensive discovery and concluding that “[s]uch litigation constitutes a severe burden on political speech.”) (“*WRTL*”).

Finally, if the Commission elects to expand the types of communications subject to the coordination regulations, the effective date should be postponed until after the 2010 general election. On the other hand, if the Commission revises the regulations by limiting the types of the communications (including limiting the applicable time frames under the fourth content prong) covered by the regulations, the regulations should take effect immediately.

CONTENT STANDARD

- I. The Commission must adopt the *Wisconsin Right to Life* test as the content standard. Any content standard adopted by the Commission must not sweep in constitutionally protected political speech that is not election-related within the scope of the coordination regulations.**

The Commission must continue to use the content standard as a filter to determine which public communications are subject to analysis under the coordination regulations.¹ The content of a public communication is one of the few factors that a speaker may control. This means that the content standard adopted by the Commission must provide the regulated community with clear notice concerning the types of public communications that are eligible for the coordination analysis. For this reason, the Commission must reject the promote, attack, support or oppose (“PASO”) test as the content standard for the coordination regulations. The PASO test is not defined in the Act or Commission regulations and the enforcement matters do not provide the regulated community with adequate notice.

¹ *Citizens United v. FEC* is currently pending before the United States Supreme Court. The Court’s decision in *Citizens United* may be relevant to the content standard proposals under consideration in this NPRM. Therefore, I reserve the right to supplement these comments after the *Citizens United* opinion is released by the Court.

Amy L. Rothstein, Esquire
January 19, 2010
Page 3

- A. The content standard should apply to only public communications containing express advocacy or its functional equivalent.

In *WRTL*, the United States Supreme Court upheld the group's as-applied constitutional challenge to BCRA's electioneering communication provision. The Court's holding in the case, and its explanation of the basis for its holding, provides the appropriate content standard for the Commission's coordination regulations.

The Court rejected the Commission's argument that the advertisements at issue were the functional equivalent of express advocacy because the Court found that the communications may be reasonably interpreted as something other than an appeal to vote for or against a particular candidate. In doing so, the Court articulated the test for determining whether an advertisement constitutes the functional equivalent of express advocacy and therefore is subject to regulation by the Commission.

In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, *WRTL*'s ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue: The ads focus on a legislative issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party or a challenger; and they do not take a position on a candidate's, character, qualifications, or fitness for office.

WRTL, 551 U.S. at 469-70 (emphasis added). The clear import of the Court's test is that the plain meaning of the communication's words and images must be an appeal for the recipient, viewer or listener to "vote for or against a specific candidate." The Court reaffirmed that the intent and effect of a communication are barred as legitimate considerations in determining whether a specific communication is subject to regulation by the Commission. *Id.* at 468-69. Any other action urged or appeal contained in the communication such as one asking the viewer or listener to call the public figure identified in the communication cannot support a finding of express advocacy or its functional equivalent. *Id.* at 474 n.7 ("[W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.") (emphasis in original and added).

Amy L. Rothstein, Esquire
January 19, 2010
Page 4

- B. The Commission is precluded from engaging in burden shifting using a subjective content standard, such as the PASO standard, by inferring an electoral advocacy message in a communication that is not supported by the plain meaning of the words actually contained in the communication.

The Court also held that the FEC cannot engage in burden shifting by placing a speaker in the position of proving that an advertisement does not constitute express advocacy or its functional equivalent. Any analysis of a communication must begin from the standpoint that the communication contains protected political speech and is not subject to regulation. *Id.* at 481-82. The Commission bears the burden of proving that there is no other reasonable interpretation of the communication other than express advocacy or its functional equivalent. *Id.* at 474 (“Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election.”). In fact, any doubt concerning the meaning of a phrase or word must be resolved in favor of a finding of no express advocacy or its functional equivalent. *Id.* (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”); *id.* at 469 (“In short, it must give the benefit of any doubt to protecting rather than stifling speech.”).

In addition, the Court reasoned that the Commission cannot misconstrue a non-electoral call to action in a communication as evidence of some type of “subtle” or effective express advocacy or its functional equivalent. *Id.* at 469-71. In fact, the Court emphatically closed the door on this type of flawed analysis.

Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This “heads I win, tails you lose” approach cannot be correct.

Id. at 471 (emphasis in original). Each communication must be evaluated based upon a plain review of the four-corners of the advertisement. The FEC does not have the authority to create or infer an election meaning or message where there is none, or to impute an election meaning into words that contradict the plain meaning of those words. If a communication contains a clear non-electoral call to action, the plain meaning of those words control the analysis of the communication. *Id.* at 470 (“An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor into their voting decisions.”).

Amy L. Rothstein, Esquire
January 19, 2010
Page 5

- C. The Court in *WRTL* specifically bars the Commission from considering contextual factors when determining whether an advertisement constitutes express advocacy or its functional equivalent.

Under *WRTL*, the Commission can no longer – nor could it ever -- use contextual factors to create an electoral meaning in a communication that is not supported by the plain language of the communication – a Commission practice that was argued before the Court and which was specifically rejected. *See id.* at 469-72.

In *WRTL*, the FEC argued that several contextual factors prove that the ads in question were the functional equivalent of express advocacy. *Id.* at 472. The purpose of examining the contextual factors was to create evidence of *WRTL*'s subjective intent concerning the purpose of the advertisements at issue. Specifically, the FEC argued that *WRTL*'s other activities, the timing of the communications, and the reference to a website that contained express advocacy were relevant factors to determining whether *WRTL*'s communications constituted express advocacy or its functional equivalent. Any inquiries that go beyond the four-corners, plain meaning of the public communication – only lead to evidence of intent and effect. Evidence that the Court held is irrelevant to an express advocacy or its functional equivalent inquiry.

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. . . . It would also lead to burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not actually predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

Id. at 468-69; *see also id.* at 468 n.5 (“Such litigation constitutes a severe burden on political speech.”). Indeed, the only relevant factor in an inquiry concerning express advocacy or its functional equivalent is an objective review of the communication at issue. *See id.* at 474 n.7 (“[T]here generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors. . . .”).

The Court in *WRTL* specifically held that a communication must contain an appeal to vote for or against a candidate for it to constitute express advocacy or its functional equivalent. Any other reasonable interpretation of a communication places it outside constitutional regulation, outside the Commission's jurisdiction, and it cannot be used as a basis for initiating an inquiry concerning whether a public communication may constitute a coordinate communication under the Act and Commission regulations. The Commission must follow the Court's command in *WRTL*:

Amy L. Rothstein, Esquire
January 19, 2010
Page 6

As should be evident, we agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.

Id. at 474 n. 7. The Court’s clear command is that only communications that in express terms advocate the election or defeat of a specific candidate can constitute express advocacy or its functional equivalent. Any other reasonable reading of a communication based upon its plain language must compel a finding of no express advocacy or its functional equivalent.

Finally, the Court flatly rejected the types of subjective studies used by pro-regulation groups as the factual predicate for advocating that the Commission adopt a subjective content standard. *See id.* at 466-67. Specifically, the *WRTL* Court criticized the studies that served as the evidentiary record in *McConnell*. “Those studies asked ‘student coders’ to separate ads based on whether the students thought the ‘purpose’ of the ad was ‘to provide information about or urge action on a bill or issue’ or ‘to generate support or opposition for a particular candidate.’” *Id.* at 466. In fact, the contextual factors utilized by pro-regulation groups in their studies, including newspaper and other media publications, include the same factors that were considered and specifically rejected by the Court in *WRTL* as irrelevant, such as the timing of the communication and intent. *Id.* at 466-74. Therefore, the Commission must not be swayed by a study that includes the contextual factors rejected by the Court in *WRTL*.

For the reasons set forth above, the Commission must adopt the functional equivalent of express advocacy test established by the Court in *WRTL* as the content standard for the Commission’s coordination regulations.

II. The express advocacy definition must not include 11 C.F.R. § 100.22(b).

If the Commission continues to use the express advocacy definition as the content standard outside of the current coordination windows, it must not include 11 C.F.R. § 100.22(b). At least three federal courts have held that section 100.22(b) or its state law equivalent is invalid and unenforceable. *See, e.g., Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999). Moreover, several federal circuit courts have held that that *Buckley*’s “express advocacy” requirement survived *McConnell* in tact. *See, e.g., Anderson v. Spear*, 356 F.3d 651, 664

Amy L. Rothstein, Esquire
January 19, 2010
Page 7

(6th Cir. 2004) (noting *McConnell* “left intact the ability of courts to make distinction between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.”); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), cert. denied, 549 U.S. ___ (2007) (“*McConnell* does not obviate the applicability of *Buckley*’s line-drawing exercise where, as in this case, we are confronted with a vague statute.”) (citations omitted).

In addition, in *FEC v. Furgatch*, the Ninth Circuit case the Commission cites as the legal basis for 11 C.F.R. § 100.22(b), the court commands that the analysis of any communication under the case’s express advocacy test must focus on the action advocated. *See* 807 F.2d 857, 864-65 (9th Cir. 1987) (“The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are ‘don’t let him.’”). Thus, the proper focus of any express advocacy inquiry under the express advocacy definition must be on the command of some type of action, and not the effect or intent of the communication. *Id.* at 863-64 (“Our concern here is with the clarity of the communication rather than its harmful effects. . . . [C]ontext cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.”). Contacting a public figure concerning an issue is an unmistakable, unambiguous, non-electoral call to action and does not satisfy the definition of express advocacy even under *Furgatch* and cannot be regulated under the content standard to the Commission’s coordination regulations.

III. The Commission must establish a safe harbor for communications featuring federal candidates or officeholders sponsored by charities seeking assistance.

In recent years we have witnessed a number of disasters that galvanized the nation to support charitable organizations providing assistance to victims. Hurricane Katrina and the recent earthquake in Haiti are two examples. Federal candidates and officeholders are frequently asked to assist charities by appearing in advertisements soliciting donations and other support for the charity. The Commission should adopt a safe harbor permitting federal candidates and officeholders to appear in any form of communication for a qualified charity asking viewers, listeners or readers to contribute to such organizations. The safe harbor should apply regardless of the timing of the advertisement or whether it is a national ad buy or appears solely in the candidate or officeholder’s jurisdiction.

Amy L. Rothstein, Esquire
January 19, 2010
Page 8

CONDUCT STANDARD

IV. The proposed “explicit agreement” standard must not vitiate the existing firewall safe harbor for groups and vendors.

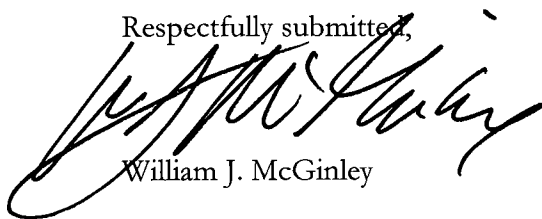
In the NPRM, the Commission seeks comment on a new proposed explicit agreement standard that would apply to all election-related communications. I oppose the explicit agreement proposal because it creates the danger that groups will be subject to investigation even if the public communication in question does not constitute express advocacy or its functional equivalent. *WRTL* discourages the Commission from engaging in open-ended discovery that would have the effect of depleting a respondent’s resources and chilling its First Amendment rights and activities without sufficient cause. *See id.* at 468 n.5, 474. The Court specifically singled out the discovery practices employed by the Commission and intervenors for criticism as a “severe burden on political speech.” *Id.* at 468 n. 5. Preserving the content standard as a filter mitigates this danger.

In addition, the explicit agreement standard essentially creates a new conduct standard that must not be used to vitiate the firewall safe harbor upheld by the Court in *Shays III*. In addition, OGC must not be permitted to create a rebuttable presumption that coordination exists based upon circumstantial evidence if the respondent or its vendors designed and implemented firewall policies that prevented private information from being exchanged or used by the parties. The firewall safe harbor must be preserved if the Commission adopts this standard.

V. The 120 day period for the common vendor and former employee conduct standards.

The Commission should retain the 120 day window for the common vendor and former employee conduct standards under the coordination regulations and revise the explanation.

Respectfully submitted,



William J. McGinley