BEFORE THE FEDERAL ELECTION COMMISSION

In re:	)	
Notice of Proposed Rulemaking	)	Notice 2005-10
Internet Communications	)	
(Federal Register, April 4, 2005)	)	

COMMENTS ON THE FEC's PROPOSED REGULATIONS ON INTERNET COMMUNICATIONS

by
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on behalf of the
Free Speech Coalition, Inc.
and
Free Speech Legal Defense and Education Fund, Inc.

The **Free Speech Coalition, Inc.** (hereinafter "FSC"), founded in 1993, is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC's purpose is to help protect First Amendment rights through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights. The **Free Speech Legal Defense and Education Fund** ("FSDEF") is an educational organization, working to defend the interests of nonprofit organizations and the for-profit firms that work with them against dangerous governmental regulation. (FSC – (703) 356-6912 (telephone); (703) 356-5085 (fax); www.freespeechcoalition.org; freespeech@mindspring.com.)

I. The Proposed Redefinition of "Public Communication" Should Be Clarified.

The Commission's current rules at 11 CFR 100.26, "Public communication," are as follows:

> *Public communication* means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. **The term public communication shall not include communications over the Internet.** [Emphasis added.]

The Notice of Proposed Rulemaking ("NPRM") that was published in the Federal Register (Vol. 70, No. 63) on April 4, 2005 suggests that the second sentence in the current § 100.26 (bolded above) be deleted and the following sentence be added to § 100.26 (*see* 70 Fed. Reg. at 16977):

> The term ***general public political advertising*** shall not include communications over the Internet, except for **announcements** placed for a fee on another person's or entity's Web site. [Emphasis added.]

If any such final rule were adopted by the Commission regarding § 100.26, the new terms "general public political advertising" and "announcements" should be defined. Vague new terms should not be introduced into federal regulations leaving the enforcement of those regulations subject to different interpretation by regulated committees and the discretion of the Commission's enforcement function.

For example, it is unclear whether these terms would be limited to a communication that promotes, supports, attacks, or opposes ("PASOs") a federal candidate. *See* 2 U.S.C. 431(20)(A)(iii), and 11 CFR 100.24(b)(3) and (c)(1), which pertain to state, district and local committees. *See also* 70 Fed. Reg. 16969.

Further, it is unclear whether these terms mean advertisements that "either solicit contributions or expressly advocate the election or defeat of a clearly identified candidate for Federal office." *See* 70 Fed. Reg. 16969, which relates to the proposed modification in the NRPM to the rules regarding disclaimers at 11 CFR 100.11(a).

FSC and FSDEF urge that, in any regulatory change, the Commission make it clear that "announcements" must be of a particular type to be regulated, and that it is only **express advocacy** that is being regulated. This could be accomplished by modifying the term "announcements" with a term of established meaning — "express advocacy."

II. Beyond the Issue of Any and All Needed Substantive Modifications, the Proposed Regulations Should Not Apply Outside of the District of Columbia.

Assuming that the Commission, after considering these comments of FSC, FSDEF, and other commenters with respect to needed substantive modifications of the proposed regulation, should decide ultimately to adopt regulations which would include Internet communications within the scope of "public communication" — a departure from the Commission's earlier determination on this subject — those newly-adopted regulations should be limited geographically in their application, and **should not be applicable to communications originating outside of the geographical bounds of the District of Columbia federal judicial district**.

As pointed out in the NPRM, the Commission adopted regulations in 2002 and 2003 implementing certain provisions in the Bipartisan Campaign Reform Act of 2002 ("BCRA") with respect to the definitions of "public communication" and "generic campaign activity," which are the critical definitions now again before the Commission. *See id.*, at 16968. Those

definitions were determined to be erroneous and unlawful by a single federal district court judge of the **United States District Court for the District of Columbia** in Shays v. Federal Election Commission, 337 F.Supp.2d 28 (D.D.C. 2004).

Certain of the district court's determinations in Shays are now on appeal to the United States District Court for the District of Columbia Circuit, but apparently not the determinations regarding the definitions of "public communication" and "generic campaign activity." *See* 70 Fed. Reg at 16968. *See also* 30 FEC Record, No. 12 (Dec. 2004), at 1-2. Inexplicably, the Commission did not appeal those aspects of the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit. In failing to appeal, the Commission seems to be unnecessarily conceding that the District Court's badly flawed decision is to go into effect, but there is no requirement that this erroneous decision be given nationwide effect.

The Free Speech Coalition respectfully submits that, whatever modification of its current definition of "public communication" is adopted by the Commission in response to the Shays decision, that modified regulation should apply only to public communications originating in the District of Columbia. Although we have had reservations about this prior Commission policy, **only this approach would appear to be consistent with Commission actions in the past regarding judicial determinations made in a particular judicial circuit.**

The Commission should not act inconsistently, acceding to decisions of federal courts which limit the rights of Americans to participate in the electoral system, when it has previously sought to limit the application of other decisions of federal courts which increase the rights of Americans to participate in the electoral process.

For example, in the face of the determinations of several federal court decisions holding its "express advocacy" regulation to be unconstitutional, and one decision arguably holding to the contrary, the Commission twice denied petitions to rescind its regulation in light of such possible judicial divergence. *See* 63 Fed. Reg. 8363 (2/19/98); 64 Fed. Reg. 27478 (5/20/99).

It appears to be common federal agency practice to seek review of a regulation in several judicial circuits to help facilitate United States Supreme Court review of difficult issues, presumably on the theory that nonmutual collateral estoppel does not apply against the federal government. *See* United States v. Mendoza, 464 U.S. 154 (1984).

The Commission continued to attempt to enforce its "express advocacy" regulation in every circuit other than the three federal judicial circuits that had determined that regulation to be unconstitutional. *See* Maine Right to Life Committee, Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997); Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999); Virginia Society for Human Life v. FEC, 263 F.3d 379 (2001).

There was no apparent reason for the Commission not appealing the district court's determination in Shays with respect to the current regulations defining "public communication"

and "generic campaign activity," and that was an incorrect decision. In any event, the Commission now should seek to achieve some modicum of consistency in the manner in which it responds to adverse federal court rulings by keeping its regulations intact, except insofar as may be required within the jurisdiction of the specific federal court, pending any further judicial tests of those regulations.

Respectfully submitted,

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