BEFORE THE FEDERAL ELECTION COMMISSION

In re:	)	
Notice of Proposed Rulemaking	)	Notice 2005-20
Electioneering Communications	)	
(Federal Register, August 24, 2005)	)	

COMMENTS ON THE FEC's PROPOSED REGULATIONS ON ELECTIONEERING COMMUNICATIONS AND RELATED ISSUES (70 FR 49508)

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

by
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The Free Speech Coalition, Inc. (hereinafter "FSC"), founded in 1993, and tax-exempt under section 501(c)(4) of the Internal Revenue Code ("IRC"), 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. (Free Speech Coalition, Inc., (703) 356-6912 (telephone); (703) 356-5085 (fax); www.freespeechcoalition.org; freespeech@mindspring.com.)

The Free Speech Defense and Education Fund, Inc. ("FSDEF"), established in 1996, is the education and litigation sister organization of FSC. FSDEF is tax-exempt under IRC section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

Neither FSC nor FSDEF engages in activity that would require registration or reporting with the Federal Election Commission ("FEC"). Neither organization, in its communications with the public or otherwise, expressly advocates the election or defeat of candidates for election of candidates for office. Indeed, FSDEF and the 501(c)(3) organizations which support it must comply with long-established law regulating their tax-exempt status, and may not engage in such electoral activity; if they did, they would be subject to the loss of their federal tax-

exempt status. In addition, responsible individuals directing the affairs and decisions of the organizations would be subject to severe financial sanctions under IRC section 4955.

GENERAL COMMENTS

Background. The breadth and complexity of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, and the voluminous regulations that it has spawned (*see, e.g.*, 11 CFR 1.1-116.12, *et seq.*), cannot be overstated. Both FSC and FSDEF — along with members and supporters — are vitally concerned with, and opposed to, excessive government regulation. The pending rulemaking proceeding proposes additional regulations — particularly insofar as such regulations would impact on 501(c)(3) organizations, which already are under strict IRS rules and scrutiny — that would unnecessarily inhibit, and even prevent, the otherwise lawful and constitutionally-protected activity of those tax-exempt organizations.

The Bipartisan Campaign Reform Act of 2002 ("BCRA") introduced the concept of "electioneering communication" to campaign finance law. *See* 2 U.S.C. § 434(f)(3). The statute set out a definition, and then exempted certain acts from the definition of "electioneering communication"; furthermore, the FEC was given authority to adopt regulations exempting other communications from that definition, provided the exempted communications do not promote, support, attack, or oppose ("PASO") a candidate. *See* 2 U.S.C. § 434(f)(3)(B)(iv), citing 2 U.S.C. § 431(20)(A)(iii). *See also* Notice of Proposed Rulemaking ("NPRM"), 70 FR 49508 (August 24, 2005).

Following a hearing in August of 2002, the FEC adopted its electioneering communications regulations on October 23, 2002. *See* Final Rules, including Explanation and Justification, 67 FR 65190 (Oct. 23, 2002). Included was an exemption from the definition of "electioneering communication" of any communication "paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986." 11 CFR 100.29(c)(6). According to the FEC's Explanation and Justification, the FEC had received written comment from various witnesses on both sides of the question whether an exemption should be created for communications of IRC section 501(c)(3) organizations. Such commentary also was received from congressional sponsors of BCRA, indicating that, before creating a statutory exemption for 501(c)(3)'s, the FEC must be convinced that such an exemption "would not create opportunities for evasion of the statute." 67 FR at 65200. Based upon the administrative record before it, the FEC noted testimony that there was "no demonstrated record of abuse by public charities in terms of electioneering," that all of the examples of ads (*i.e.*, ads that Congress meant to prohibit in passing BCRA) mentioned in testimony before it were based on ads run by organizations that are not 501(c)(3) organizations, and that there could be a significant, adverse effect on charitable organizations if 501(c)(3)'s did not receive an exemption from the new law governing electioneering communications. *Id.* In creating the 501(c)(3) exemption set forth in 11 CFR 100.29(c)(6), the FEC recognized that these organizations are "barred as a matter of law from being involved in partisan political activity." *Id.*

Recommendation. In this rulemaking proceeding, the FEC is considering, *inter alia*, whether 501(c)(3) organizations should continue to be exempt from the definition of "electioneering communication," as set forth in 11 CFR 100.29(c)(6). That regulatory exemption expressly provides that "electioneering communication" **does not include any communication** that:

> (6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

With respect to the question of whether 501(c)(3)'s should be exempt from the definition of "electioneering communication," of course, we are aware that the FEC's current regulation, 11 CFR 100.29(c)(6), adopted on October 23, 2002, was found by the district court in the Shays[1] case to have failed to satisfy the requirements of the Administrative Procedure Act ("APA") in its adoption.[2] **FSC and FSDEF submit, however, that the purport of the original regulation — to exempt the communications of section 501(c)(3) organizations from the reach of the electioneering communication prohibition — was correct, and that the FEC, in reconsidering the matter, should confirm the exemption provided in 11 CFR 100.29(c)(6), or adopt a new regulation that reaches that same result.**

The reasons for exempting communications paid for by 501(c)(3) organizations from the definition of electioneering communication include those related to the great public benefit that is realized from the activities of such organizations, coupled with the burdens and serious chilling effect on the free speech and related activities of such organizations if any other rule were adopted. The commenters and witnesses in the FEC's 2002 administrative hearing provided ample evidence of these facts. *See* 67 FR 65199-200. In reliance on such evidence, and other factors, the FEC adopted the regulation exempting (c)(3) communications from the definition of electioneering communications. That was the correct decision then, and it is the correct decision today.

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[1] Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004), *aff'd*, No. 04-5352, 2005 W.L. 1653053 (D.C. Cir. July 15, 2005)

[2] As explained in the NPRM of August 24, 2005, the district court in Shays determined that the FEC's Final Rules and Explanation and Justification for Regulations on Electioneering Communications, 67 FR 65190 (Oct. 23, 2002) (EC E&J), was deficient, and did not address certain important questions, leading the court to conclude that the FEC "failed to conduct a reasoned analysis." *See* Shays, 337 F. Supp. 2d at 127-28. 70 FR 49509-10.

One of the fundamental justifications for providing an exemption for section 501(c)(3)'s from the definition of "electioneering communication" is the fact that the type of election-related activity contemplated by BCRA's electioneering communication law is prohibited for 501(c)(3) organizations. By absolute proscription of law, 501(c)(3)'s may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." IRC § 501(c)(3). It is well known that this proscription is strictly applied, and that the standard is absolute, allowing for no *de minimis* exception. *See, e.g.*, IRC § 4955; Treas. Reg (26 CFR) § 1.501(c)(3)-1(c)(3)(iii); IRS Advisory Article IR-2004-59 (April 28, 2004). *See also* Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000). In other words, there simply is no need for another federal agency to extend jurisdiction over these section 501(c)(3) organizations by the inclusion of 501(c)(3) communications within the definition of electioneering communication. In any reasonable balancing of the competing considerations — allowing 501(c)(3) programs, already sanctioned by the IRS in recognizing the tax-exempt status of 501(c)(3) organizations, to continue to function, versus the stifling of free speech and charitable activity by section 501(c)(3) organizations merely to guarantee that a possible electioneering communication will be subject to FEC sanctions in addition to the penalties imposed by the IRS — there can only be one reasonable answer: retain the (c)(3) exemption.

FSC and FSDEF do not engage in the type of press activity that would be impacted by the FECA rules governing electioneering communications and, further, they have no evidence of section 501(c)(3) organizations airing ads close to elections. But a large segment of the nonprofit community is comprised of section 501(c)(3) organizations that broadcast their messages and that, *inter alia*, may be subject to the filing of malicious and groundless complaints by their ideological adversaries before the FEC if the exemption provided for (c)(3) communications currently set forth in 11 CFR 100.29(c)(6) is not retained. Hopefully, the administrative record compiled in this proceeding will strengthen the record developed in 2002, and will allow the FEC to fully articulate the considered reasons for its retention of the (c)(3) exemption set forth in 11 CFR 100.29(c)(6).

SPECIFIC COMMENTS

I. CONCERNS OF THE SHAYS COURT SHOULD BE SATISFIED BY THE ADMINISTRATIVE RECORD.

The district court in Shays did not deny the truth of the underlying facts relied on by the FEC in 2002 when 11 CFR 100.29(c)(6) was adopted, nor did it contradict any aspect of the FEC's rationale for promulgating the regulation; rather, it found the FEC's Explanation and Justification wanting because it did not adequately address the question of the interplay between IRS enforcement of the prohibition against political activity by 501(c)(3)'s and FECA's requirements. *See* 70 FR at 49509-10. The FEC, in attempting to address the district court's concerns by developing a further administrative record through the pending NPRM and

reconsidering the correctness of the (c)(3) exemption, has isolated three specific questions mentioned by the district court that the court felt had not been sufficiently considered or explained by the FEC in 2002:

A. 501(c)(3)'s Are, by Definition, Prohibited from Electioneering.

Perhaps the most serious concern of the district court in Shays was whether the tax laws, as well as their enforcement, effectively precluded 501(c)(3) organizations from engaging in the kind of political activity that the electioneering communication rules were designed to prevent. The NPRM thus posits the necessity of the FEC determining "that section 501(c)(3) organizations cannot make PASO communications when acting lawfully within their tax-exempt status." 70 FR at 49510.

We would submit that the answer to this question is almost crystal clear. **Section 501(c)(3) organizations mentioning candidates for public office in public communications put their tax-exempt status on the line**. As vague as the FEC's PASO rubric may be, it certainly cannot be more restrictive than the anti-electioneering prohibition that is a part of the very definition of an IRC 501(c)(3) organization.

Of course, the FEC has requested more specific information with respect to whether 501(c)(3) organizations have a history of airing ads close to elections, and whether such ads would satisfy the definition of "electioneering communication." FSC and FSDEF have no historical evidence to offer on this specific matter.

Nevertheless, FSC and FSDEF submit that the comments submitted to the FEC during its 2002 rulemaking proceeding to the effect that 501(c)(3) organizations may not permissibly engage in PASO communications (*see* 70 FR 49510) were on the mark. Part of the problem is that it is difficult to prove that something does not exist, particularly by soliciting evidence of its absence. It is possible that there may be anecdotal evidence to the contrary, but the overall record should be clear that there is no appreciable danger of PASO communications emanating from 501(c)(3) organizations.

The district court claimed that the Commission failed to explain the interplay of the IRS regulations concerning 501(c)(3) political activity and the PASO limitation. Although such explanation is difficult given the lack of a coherent PASO definition, the Commission should, in its new Explanation and Justification, reassure the court that the tax code and regulations adequately restrict the political activity of section 501(c)(3) organizations.

B. Lobbying Activities Are Not PASO.

The Shays court also criticized the FEC's rationale for exempting communications of 501(c)(3) organizations from "electioneering communication" because there was no showing in the FEC's analysis that the FEC had considered the possible risk that the possibility of 501(c)(3)

organizations engaging in limited lobbying activity could lead to violations of the anti-PASO restriction in FECA. *See* 2 U.S.C. § 434(f)(3)(B)(iv) (permitting the FEC to adopt further exemptions to the definition of electioneering communication, provided that such exemptions would not allow what would otherwise fit the definition of electioneering communication if the communication PASO'd a federal candidate). 70 FR at 49512. FSC and FSDEF have no statistics to offer on how often 501(c)(3) organizations make grassroots lobbying communications. *See* 70 FR at 49512. We would submit, however, that **the statistics already gathered by the FEC should lead to the conclusion that the possibility of grassroots lobbying communications by 501(c)(3) organizations does not present a serious risk** of such organizations being involved in airing what would otherwise be considered "electioneering communications" that PASO'd a federal candidate. Furthermore, **it should be remembered that the limited lobbying allowance for 501(c)(3) organizations in no way permits such organizations to engage in electioneering activity**. Thus, any mention of candidates by 501(c)(3) organizations — at any time, and not just in the "electioneering communications" windows — would expose such organizations to penalties and loss of their tax-exempt status, and would make their managers vulnerable to financial penalties under IRC section 4955.

C. The Commission Is Not Delegating Election Law Enforcement to the IRS.

Finally, the Shays court criticized the FEC for not considering the problems of the FEC adopting an enforcement policy that relies on adequate enforcement of the tax code by the IRS. 70 FR at 49512. Obviously, however, no government agency — even the FEC — is beyond criticism with respect to the perfection of its enforcement activity. Furthermore, we know of no statute of limitation on impermissible electioneering activity by a 501(c)(3) organization, and such an organization would be taking an unreasonable and irrevocable risk in broadcasting messages to the public that jeopardized its very existence, to say nothing of the pocketbooks of its officers and directors. The short answer to the concern about IRS enforcement standards is that, while it is an impossible question to resolve definitively, there are few agencies that are more feared and/or whose power respected, particularly by tax-exempt organizations, than the IRS is feared and/or respected.

Further, it appears the district court in Shays may not have understood the full import of the 2002 EC E&J. The court faulted the Commission for failing to "address the implication of allowing the IRS to take the lead in campaign finance law enforcement." Shays v. FEC, 337 F. Supp. 2d 28, at 128. However, the EC E&J states "the Commission is not delegating enforcement of the electioneering communication provision to the Internal Revenue Service." 67 F.R. 65200. It then indicated that any IRS enforcement of electioneering prohibitions against section 501(c)(3) organizations would not be overlooked by the Commission. Perhaps the Commission could reassure the court of its duty and intention to continue to "take the lead" in cases of suspected FECA violations, and that such duty includes following up on IRS' enforcement prohibitions against possible 501(c)(3) electioneering activity.

II. THE LIMITATIONS ON EXEMPTION IN THE PROPOSED REGULATIONS SHOULD BE REJECTED.

A. The PASO Question.

Perhaps recognizing the impossibility of answering such a question definitively, the FEC has suggested that limiting the 501(c)(3) exemption from "electioneering communications" to communications that do not PASO a federal candidate, as discussed above, might resolve the issue. 70 FR at 49513. We would submit that taking such an approach is an attempt to find an easy way out, without addressing the critical and harmful results that would follow. Exposing 501(c)(3) organizations to the threat of the electioneering communication restrictions would stifle free speech. Public charities would be subject not only to the constant threat of complaints and oversight and involvement in their affairs of the FEC, **as well as** the IRS; public charities would be vulnerable to the potential attacks of those who disagree with their mission, who would initiate groundless complaints with the FEC, causing the charities to bear all of the burdens that those time-consuming processes entail, including significant expense.

As already mentioned above, the proposed PASO limitation on communications should not be adopted. Although it could be effective in helping to provide a superficial answer to the point made by the Shays court, it would impose a substantial shadow on the activities of section 501(c)(3) organizations and would negatively impact their free speech and free press activities which are protected by the First Amendment. It would thus be an example of the wrong way for government to proceed — imposing overlapping restrictions and regulations by multiple federal agencies, to zealously try to make absolutely sure that the problem sought to be addressed is supposedly covered, irrespective of the cost to the nonprofit organizations.

B. Connections Between Section 501(c)(3) organizations and Federal Candidates/Officeholders.

With respect to the proposed rule setting forth the 501(c)(3) exemption from electioneering communications — imposing limitations on the exemption, so that it would not apply if the 501(c)(3) communication did PASO a federal candidate, and also would not apply to 501(c)(3) organizations that are directly or indirectly established, financed, maintained or controlled by a federal officeholder or candidate — it is submitted that **neither limitation should be adopted.** First, as already mentioned above, the **FEC's PASO limitation is vague, as well as broad. It could be arbitrarily and unreasonably enforced, and thus used as a means of chilling the free speech and charitable activities of tax-exempt organizations. Furthermore, such a restriction should be unnecessary.** If the communication of a section 501(c)(3) organization even mentions a federal candidate, the invitation to IRS scrutiny and action is substantial. There is no need to impose a limitation on the 501(c)(3) exemption in 11 CFR 100.29(c)(6), for its only major effect would be to subject the tax-exempt organization to regulation by two separate government agencies. The potential chilling effect of such a limitation would be indeed significant. As the NPRM itself questions or implies, application of

the PASO limitation, at least for most organizations, would severely limit any possible benefit of the 501(c)(3) exemption and would undoubtedly confuse, if not directly inhibit, many 501(c)(3)'s from even making the communication that they had intended.

The second proposed limitation also should be unnecessary, and in some ways presents an even easier question for resolution. There is no necessary correlation between the type of communication sought to be regulated and the identity of persons involved in a section 501(c)(3) making communications to the public. The definition of "electioneering communication" should not be tied to the identity of persons involved in an organization which is not making such a communication. The question of an exemption for communications of section 501(c)(3) organizations should not be influenced by the type of fact intensive considerations that the proposed limitation concerning ownership or control by a federal officeholder or candidate would involve.

III. SHAYS ONLY GOVERNS SECTION 501(c)(3) ORGANIZATIONS IN THE DISTRICT OF COLUMBIA

The Free Speech Coalition and the Free Speech Defense and Education Fund respectfully submit that the Shays decision should apply only to organizations 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).

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.

CONCLUSION

FSC and FSDEF submit that the FEC "got it right" in October 2002, when it adopted the exemption now embodied in 11 CFR 100.29(c)(6). The court in Shays determined only that the APA standards were not satisfied by the FEC when it took that action. Hopefully, this proceeding will result in a more complete administrative record, and will allow the FEC to complete the analysis it undertook in 2002 and persuade the FEC to confirm its conclusion and retain the 501(c)(3) exemption set forth in 11 CFR 100.29(c)(6).

Respectfully submitted,

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