



THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

**RESPONSES TO QUESTIONS SUBMITTED BY MEMBERS OF THE
SENATE COMMITTEE ON RULES AND ADMINISTRATION**

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July 6, 2007

Questions From Senator Feinstein:

1. Because of the alternating practices of determining the Chair and Vice Chair of the Federal Election Commission, if confirmed, you will likely be voted FEC Chairman in 2008. As such, we would like a preview of some of your potential initiatives for next year – no matter your position at the Commission. Please provide a brief description of what you have done or plan to do regarding the following issues on the FEC's agenda:
 - Coordinated Definition
 - Grassroots Lobbying
 - Hybrid Ads
 - Political Committee Definition

RESPONSE:

First, it is worth recalling that the Chair has one of six votes on the Federal Election Commission (FEC), *see* 2 U.S.C. § 437c.a.1 (1997), and it takes four votes for the FEC to act. *See, e.g., id.* § 437g.a.2, a.4.A.i (2002). For that reason and many others, it is important that Commissioners work together in fulfilling the duties Congress sets for the agency.

Coordination

The Bipartisan Campaign Reform Act of 2002 (BCRA) repealed the FEC's pre-BCRA coordination regulation and directed the FEC to promulgate a new one. Aside from the requirement that the new regulation “not require agreement or formal collaboration to establish coordination ...,” BCRA left it to the FEC to draft the new regulation, which the FEC promulgated in 2002. In 2004, a federal district court struck down one part of the new coordination regulation. A federal appellate court rejected the district court's coordination analysis in 2005 and held, without striking down the coordination regulation, that the FEC had not adequately explained it. The FEC then issued another notice of proposed rulemaking (NPRM), seeking comment on several alternatives and requesting particular data. When no commenter offered these data, the FEC acquired them on its own. Based on the comments received and data acquired, the FEC in 2006 amended the

coordination regulation and issued a revised explanation and justification (E&J), *see Coordinated Communications*, 71 Fed. Reg. 33190, 33190-93 (F.E.C. June 8, 2006) (citations omitted), which I supported.

A federal district court is considering a challenge to the coordination regulation, as revised. *See Shays-Meehan v. FEC*, No. 06-1427 (D.D.C.) (*Shays III*). I would advocate following the regulations the FEC adopted in 2006 and considering the court's ruling when it issues.

Grass Roots Lobbying

In light of the Supreme Court's decision in *Wisconsin Right to Life v. FEC*, No. 06-969, ___ U.S. ___, ___ S.Ct. ___, 2007 WL 1804336 (U.S. June 25, 2007), the Commission will likely need to commence a rulemaking to conform our electioneering communication regulations with that ruling.

Hybrid Ads

The FEC has issued an NPRM, is reviewing the comments it has received, and will hold hearings July 11. *See Hybrid Communications*, 72 Fed. Reg. 26569 (F.E.C. May 10, 2007). The NPRM issued with my support.

Political Committee Status

The FEC's consideration of this issue began with an NPRM issued in 2004. After extensive testimony and written comments, the FEC (1) adopted a definition of "contribution," (2) revised its allocation regulations, and (3) declined to redefine "political committee" or single out entities organized under Section 527 of the Internal Revenue Code. In considering a challenge to (3), a federal district court rejected the plaintiffs' request to direct the FEC to promulgate a rule addressing whether all 527s are political committees. Instead, the court held that the FEC had not sufficiently explained its reasons for not proceeding. Rather than appeal this aspect of the court's decision, the FEC, after careful consideration, issued its 2007 supplemental E&J, *see Political Committee Status*, 72 Fed. Reg. 5595, 5596 (F.E.C. Feb. 7, 2007) (citations omitted), which I supported.

A federal district court is considering a challenge to the FEC's decision. *See Shays-Meehan v. FEC*, No. 04-1597 (D.D.C.) (*Shays II*). As with the coordination regulation, I would advocate following the E&J the FEC adopted in 2007 and considering the court's ruling when it issues.

2. Some critics would charge that the FEC is viewed as an ineffective agency. Watchdog groups are vigilant to ensure that FEC Commissioners will enforce the laws on the books, as well as highlight any attempts to undermine implementation of the Bipartisan Campaign Reform Act of 2002. We are interested in Commissioners' perspectives on how they view the Commission's compliance with the campaign finance laws.

How would you describe your record at the FEC in terms of effective enforcement of campaign finance laws?

RESPONSE:

As detailed in Commissioner Lenhard's testimony, the Commission had a "record" year in 2006 in many aspects of its enforcement efforts. The Commission substantially expanded the amount of fines collected, increased significantly the number of enforcement actions completed, and improved significantly the timeliness of case processing.

As suggested in my own testimony, these improvements were accomplished by altering and improving our enforcement methods and by focusing on core violations of the law rather than pursuing marginal enforcement theories. I believe these methods have been extraordinarily effective, as demonstrated by the results of our enforcement program in recent years.

Critics nonetheless continue to express concerns about argued circumvention of campaign finance laws, and about the timeliness and scope of our remedies. I believe the first of these concerns is misdirected and the latter two are based on fundamental misconceptions about the nature of law enforcement and the limits of the Commission's powers.

It sometimes is necessary to pursue cases at the margin of any legal system. Yet some of our critics would elevate peripheral over core cases: an inversion of what justice and common sense seem to require. Policing violations of the core provisions of the FECA ensures that the Commission uses its resources wisely. Given the increasing volume of campaign spending and complexity of campaign finance laws there is, unfortunately, more than enough for the Commission to do in policing those core provisions.

Critics sometimes ask why the Commission does not stop violations before they occur. Indeed, a critical purpose of any enforcement system is to deter violations of the substantive provisions of the law. But, when violations of any law occur, investigation and adjudication *follow* rather than precede the disputed conduct. Thus, our enforcement actions will *always* be after a violation occurs. Due process requires no less.

Various provisions of the FECA, designed to ensure certain due process rights, limit the ability to the Commission to act more quickly, and in particular make it effectively impossible for the Commission to secure injunctive relief during the course of an election. I believe the balances struck in the statute in these regards are appropriate. Our critics who wish for government intervention in the midst of a campaign are actually complaining about the statute. Those who argue that the Commission should stop ongoing violations as they occur should describe how the FECA and the Constitution permit the Commission to stop citizens or groups from participating in ongoing political campaigns.

Some of our critics may also be frustrated by the practical limits of our remedial powers. In most regulatory systems, financial penalties are sufficient to remedy fully any harm. Excess profits can be disgorged and wronged parties recompensed to the full extent of their damages. In contrast to markets, elections are a single-point, winner-takes-all system. If a candidate were to win due to an improper financial advantage, a financial penalty is both too late and insufficient to remedy the harm completely. The Commission lacks the power

to overturn election results or to order other remedies related to elections themselves. The Commission's effectiveness should be assessed with the recognition that the financial remedies the Commission is empowered to seek are not always equal to the harms alleged to result from violations of the FECA.

3. Since the 1970s, the Department of Justice and the FEC have operated under a Memorandum of Understanding to effectuate referrals for potential criminal violations of the campaign finance laws. While such criminal violations should be investigated and prosecuted, it is in the FEC's interest to have a well-understood referral process. This relationship has been settled for some time. From your perspective, what is the FEC's public policy on referrals to the Attorney General of the Department of Justice for prosecution?

RESPONSE:

The Commission's authority to refer matters to the Attorney General is contained in 2 U.S.C. § 437g(a)(5)(C). The Commission's practice is to make referrals after the Commission has found Probable Cause to Believe that a knowing and willful violation of the law has occurred if the Commission believes that criminal prosecution of the violation may be warranted.

Since January 1, 2001, the Commission has made four referrals to the Attorney General concerning a total of nine respondents.

Because many allegations of serious violations of campaign finance laws are made concurrently to the Commission and to the Department of Justice, it frequently is unnecessary for the Commission to refer matters because the Department already is cognizant of them.

4. One of the split votes that the Federal Election Commission has made during your tenure on the Commission is in respect to the Audit of Bush-Cheney '04, Inc., on March 22, 2007. That audit involved "hybrid advertisements," where the national candidates as well as references to Members of Congress were mentioned. Please explain your vote on this matter and your general perspective on handling disputes related to such advertisements.

RESPONSE:

My vote in the Bush-Cheney audit, which also applied to the Kerry-Edwards audit, is explained in two statements issued in connection with these audits. *Final Audit Report on Kerry Edward 2004, Inc.*, Statement of Vice Chairman Mason and Comm'r von Spakovsky (F.E.C. May 31, 2007), available at http://www.fec.gov/audits/2004/20070531kerry_edwards_stmt_01.pdf; *Final Audit Report Bush Cheney '04, Inc.*, Statement of Vice Chairman Mason & Comm'r von Spakovsky (F.E.C. March 22,2007), available at http://www.fec.gov/audits/2004/20070322bush_cheney_stmt_02.pdf.
