Campaign Finance: Regulating Political Communications on the Internet

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Summary

The Federal Election Campaign Act (FECA) regulates "federal election activity," which is defined to include a "public communication" (i.e., a broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank communication made to the general public) or "any other form of general public political advertising." In 2006, in response to a federal district court decision, the FEC promulgated regulations amending the definition of "public communication" to include paid Internet advertisements placed on another individual or entity's website. As a result, a key element of online political activity—*paid* political advertising—is subject to federal campaign finance law and regulations.

During the 110th Congress, the regulation of political communications on the Internet was not the subject of major legislative action. H.R. 894 (Price, NC) would have extended "stand by your ad" disclaimer requirements to Internet communications, among others. H.R. 5699 (Hensarling) would have exempted from treatment as a contribution or expenditure any uncompensated Internet services by individuals and certain corporations. Similar legislation has not yet been introduced in the 111th Congress. This report will be updated in the event of major legislative, regulatory, or legal developments.

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Background

The Federal Election Campaign Act

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA),[1] regulates "federal election activity," which is defined to include (1) voter registration drives in the last 120 days of a federal election; (2) voter identification, get-out-the vote drives (GOTV), and generic activity in connection with an election in which a federal candidate is on the ballot; (3) "public communications" that refer to a clearly identified federal candidate and promote, support, attack, or oppose that candidate (regardless of whether the communications expressly advocate a vote for or against a candidate); and (4) services by a state or local party employee who spends at least 25% of paid time per month on activities in connection with a federal election.[2] FECA further defines "public communications" as broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank communications made to the general public, "or any other form of general public political advertising."[3] As a result, candidate and party committees can only use regulated federal funds to pay for such "federal election activity." Regulated federal funds, also known as "hard money," are funds that are subject to FECA's contribution limitations, source restrictions, and reporting requirements.[4]

Shays v. FEC

Shortly after enactment of the BCRA amendments to FECA in 2002, the FEC promulgated regulations that exempted Internet communications from federal campaign finance regulation altogether by excluding such communications from the definition of "public communication."[5] In response, the two primary sponsors of BCRA in the House of Representatives, Representatives Shays and Meehan, filed suit in U.S. district court against the FEC. In seeking to invalidate the regulations, the plaintiffs argued, *inter alia*, that by not regulating Internet activities, the FEC was opening a new avenue for circumvention of federal campaign finance law, contrary to Congress's

[1] P.L. 107-155 (2002).

[2] 2 U.S.C. § 431(20).

[3] 2 U.S.C. § 431(22).

[4] *See* 11 C.F.R. § 300.2(k).

[5] "The term public communication shall not include communications over the Internet." 11 C.F.R. § 100.26 (2005). The FEC also determined that Internet communications should not be considered "electioneering communications," which is a specific type of broadcast, cable, or satellite advertising. According to the FEC: The Internet is included in the list of exceptions in the final rules in section 100.29(c)(1) because, in most instances, it is not a broadcast, cable, or satellite communication. BCRA's legislative history.... establishes Congress's intent to exclude communications over the Internet from the electioneering communication provisions. The Commission concludes that Congress did not seek to regulate the Internet in subtitle A of Title II of BCRA. The relatively few commenters who opposed the Internet exemption did not disagree with this conclusion; rather, they argued that as the Internet develops, aspects of it might come to be used in a manner like radio or television. To these commenters, this potential evolution of the Internet calls for a more precise approach and makes the exemption as proposed too broad a treatment of this issue. The Commission has decided to include the exemption in the final rules, rather than attempt to craft a regulation that responds to unknown, future developments. Electioneering Communications, 67 *Fed. Reg*. 65,190 (2002). *See* 11 CFR § 100.29 for the definition of "electioneering communication."

intent in enacting BCRA. In 2004, in *Shays v. FEC*,[6] the U.S. District Court for the District of Columbia agreed with the BCRA sponsors and generally overturned the FEC's initial regulations governing political communications on the Internet.

The *Shays* court held that excluding all Internet communications from the FEC rule defining "public communication," at 11 CFR § 100.26, was inconsistent with Congress's use of the phrase, "or any other form of general public political advertising," in the BCRA definition of "public communication." Further, the court found that the FEC had failed to provide legislative history that would persuade the court to ignore the plain meaning of the statute.[7] While not all Internet communications fall within the phrase, "any other form of general public political advertising," the court observed that "some clearly do."[8] However, the court left it to the FEC to determine precisely what constitutes "general public political advertising" in the context of the Internet.[9] Furthermore, while the court specifically upheld the definition of "generic campaign activity" as a "public communication," it found that the FEC's 2002 Notice of Proposed Rulemaking (NPRM) failed to provide adequate notice to the public, under the Administrative Procedure Act (APA), that the FEC might establish such a definition. As the court noted, it could not "fathom how an interested party 'could have anticipated the final rulemaking from the draft rule.'"[10]

The *Shays* court also found that the FEC rule exempting Internet communications from the definition of "public communications" meant that no matter how closely such communications were coordinated with political parties or candidate campaigns, they could not be considered "coordinated communications" and hence, subject to FECA regulation.[11] As the court observed, it had long been a tenet of campaign finance law that, in order to prevent circumvention of regulation, FECA treated expenditures made "in cooperation, consultation, or concert, with or at the suggestion of a candidate" as a contribution to such candidate.[12] According to the court, the exclusion of Internet communications from coordinated communications contrasted with prior FEC rules and was contrary to Congress's intent in enacting the statute.[13] The court remanded the case to the FEC for further action consistent with its decision.[14]

FEC Rulemaking

Background

In response to the district court's decision in *Shays v. FEC*, in April 2005, the FEC published an NPRM seeking comment on its proposal to amend the definition of "public communication" to

[6] 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F. 3d 76 (D.C. Cir. 2005), *reh'g en banc denied*, No. 04-5352 (October 21, 2005).

[7] *Id.* at 69.

[8] *Id.* at 67.

[9] *Id.* at 70.

[10] *Id.* at 112 (quoting Anne Arundel Co., Maryland v. U.S. EPA., 963 F.2d 412, 418 (D.C. Cir. 1999)).

[11] For further discussion of coordination, *see* CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

[12] Shays, 337 F. Supp. 2d at 62 (quoting McConnell v. FEC, 124 S. Ct. 619, 705 (2003)).

[13] *Id.* at 65, 70.

[14] *Id.* at 130.

conform to the ruling.[15] In its NPRM, the FEC requested comments on proposed rules to include paid Internet advertisements in the definition of "public communication." In addition, the FEC sought comment on the related definition of "generic campaign activity," on proposed changes to disclaimer regulations, and on proposed exceptions to the definitions of "contribution" and "expenditure" for certain Internet activities and communications that would qualify as individual volunteer activity or that would qualify for the "press exemption." According to the FEC, the proposed rules were intended to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections (e.g., blogging).

The comment period closed and a public hearing was held in June 2005, and in anticipation of congressional action, the FEC delayed consideration of the Internet regulations. However, in the absence of congressional legislation, in March 2006, the FEC voted unanimously to approve the new regulations. In so doing, the commissioners cited the 2004 *Shays v. FEC* federal district court decision as requiring them to take such action.

Summary of Regulations

Generally, the Internet regulations reflect an attempt by the FEC to leave blogs, created and wholly maintained by individuals, free of FECA regulation, so long as such services are not performed for a fee. As stated in its NPRM:

> While drafting a proposed rule, the Commission recognized the important purpose of BCRA in preventing actual and apparent corruption and the circumvention of the Act as well as the plain meaning of "general public political advertising," and the significant public policy considerations that encourage the promotion of the Internet as a unique forum for free or low-cost speech and open information exchange. The Commission was also mindful that there is no record that Internet activities present any significant danger of corruption or the appearance of corruption, nor has the Commission seen evidence that its 2002 definition of "public communication" has led to circumvention of the law or fostered corruption or the appearance thereof. Therefore the Commission proposed to treat paid Internet advertising on another person's website as a "public communication," but otherwise sought to exclude all Internet communications from the definition of "public communication."[16]

The regulations apply only when money is exchanged for Internet-related campaign advertisements. Accordingly, the funds expended for such advertisements are subject to the limitations, source restrictions, and reporting requirements of FECA.

Key aspects of the FEC regulations include the following:

- *Regulation of paid Internet ads as "public communications"*—The definition of "public communication" includes paid Internet ads placed on another individual or entity's website as a form of "general public political advertising," with no dollar threshold required; the advertiser, not the website operator, is considered to be making the public communication. Accordingly, the fees for such ads are

[15] Internet Communications, 70 Fed. Reg. 16,967 (April 4, 2005).

[16] Internet Communications, 71 Fed. Reg. 18,589, 18,593 (April 12, 2006) (codified at 11 C.F.R. pts. 100, 110, and 114).

subject to FECA contribution limits, source restrictions, and disclosure requirements.[17]

- *Disclaimer requirements*—Disclaimers (statements of attribution) are required on all political committee websites available to the public. As "public communications," paid Internet ads must contain disclaimers if they expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions. Disclaimers are not required on e-mails from individuals or groups unless they are political committees, in which case disclaimers are required if more than 500 substantially similar, unsolicited e-mails are sent within a 30-day period.[18]
- *Disclosure of fees paid by candidates to bloggers*—Payments to bloggers from candidates are required to be disclosed only on candidate disclosure statements; no such disclaimers are required on blog sites.[19]
- *Coordinated communications*—Internet advertisements made for the purpose of influencing a federal election, placed on the website of another person or entity *for a fee*—and coordinated with a candidate or party committee—are considered "coordinated communications" and as such, constitute in-kind contributions to the candidate or committee. Accordingly, the fees for such ads are subject to FECA contribution limits, source restrictions, and disclosure requirements.[20]
- *Media exemption*—Under the definition of "contribution," the general exemption from FECA coverage of news stories, commentaries, and editorials distributed through broadcasters, newspapers, and periodicals applies to such communications that are distributed over the Internet.[21]
- *Exceptions for individual or volunteer activity on the Internet*—Under the definitions of "contribution" and "expenditure," an uncompensated individual or group of individuals using Internet equipment and services in order to influence a federal election, whether or not such services were known by or coordinated with a campaign, are excluded from FECA regulation.[22]

Congressional Activity

Brief History

During Congress's consideration of BCRA in 2001 and 2002, the subject of communications over the Internet was not addressed, but it was discussed during debate on a previous version of what became BCRA during House consideration of H.R. 417 (Shays-Meehan) in the 106th Congress.

[17] *See* 11 C.F.R. § 100.26.

[18] *See* 11 C.F.R. § 110.11.

[19] *See* 11 C.F.R. § 104.3(b).

[20] *See* 11 C.F.R. § 109.21(b).

[21] *See* 11 C.F.R. § 100.73.

[22] *See* 11 C.F.R. §§ 100.94, 100.32.

An amendment was offered to that bill by Representative DeLay to exempt communications over the Internet from regulation under FECA, but was defeated by a vote of 160-268.[23]

During the 109th Congress, several bills were proposed to exempt all communications over the Internet from the BCRA definition of "public communication," and therefore, regulation under FECA. These proposals included H.R. 1606 (Hensarling), the Online Freedom of Speech Act, which was considered by the House under suspension of the rules but, on a 225-182 vote, failed to receive the two-thirds necessary for passage. The bill was brought up again and ordered reported favorably by the House Administration Committee on March 9, 2006, setting up consideration by the House, but the vote was postponed pending FEC regulatory action. Also during the 109th Congress, in response to concerns that the Online Freedom of Speech Act could open the door to FECA circumvention (for example, by allowing corporations and unions to finance advertisements), two additional bills were offered: H.R. 4194 (Shays-Meehan) would have excluded Internet communications from FECA regulation, but regulated communications placed on a website for a fee and those made by most corporations and unions, by any political committee, and by state and local parties; and H.R. 4900 (Allen-Bass) would have exempted from FECA regulation most individual online communications and advertisements below a dollar threshold. In the wake of the new FEC regulations approved on March 27, 2006, however, House floor action was postponed indefinitely.

110th Congress

During the 110th Congress, the regulation of political communications on the Internet was not the subject of major legislative action. H.R. 894 (Price, NC) would have extended "stand by your ad" disclaimer requirements to Internet communications, among others. It was referred to the Committee on House Administration.

H.R. 5699 (Hensarling) would have exempted from treatment as a contribution or expenditure any uncompensated Internet services by individuals and corporations that are wholly owned by individuals engaging primarily in Internet activities, which do not derive a substantial portion of revenue from sources other than income from Internet activities, except payment for (1) a public communication (other than a nominal fee), (2) the purchase or rental of an email address list made at the direction of a political committee, or (3) an email address list that is transferred to a political committee. H.R. 5699 also would have exempted blogs and other Internet and electronic publications from treatment as an expenditure by including such communications in the general media exemption applicable to broadcast stations and newspapers. It was referred to the Committee on House Administration.

111th Congress

Similar legislation has not yet been introduced in the 111th Congress.

[23] Bipartisan Campaign Reform Act of 1999. 145 CONG. REC. 21526 (September 14, 1999).
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