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NEWSLETTER

D.C. Circuit Strikes Down FEC Campaign Coordination Regulations

July 2008

On June 13, 2008, the United States Court of Appeals for the District of Columbia Circuit struck down Federal Election Commission (FEC) regulations on coordinated expenditures in the case of *Shays v. Federal Election Commission (Shays IV)*. *Shays IV* is the latest decision in protracted litigation brought by Representative Chris Shays, a Connecticut Democrat and co-sponsor of the Bipartisan Campaign Reform Act (BCRA) of 2002, challenging the FEC's rules implementing BCRA.

BCRA requires the FEC to promulgate new regulations defining coordinated communications, which were at issue in *Shays IV*. Under the promulgated FEC regulations, a communication is coordinated if it is paid for by someone other than the candidate, party or campaign; it meets the "content standards"; and the payer's interaction with the candidate meets the "conduct standards." The content standard of the coordinated communication test is satisfied by a communication that clearly identifies a Congressional candidate in his or her respective district within the 90-day time period before the election. (Notably, the FEC's previous regulations, which were struck down by the D.C. Circuit as problematic in *Shays II*, set a longer 120-day window for Congressional candidates. The FEC justified the shorter window on its findings that most advertisements occur in the time period close to the election.)

The content standard of the coordinated communication test also is satisfied by a communication that clearly identifies a Presidential or Vice Presidential candidate within the 120-day time period before the primary in a given state through the general election. Outside of the 90-/120-day windows, the FEC regulations prohibit republishing

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campaign materials and express advocacy, but allow issue advertisements. Thus, outside of the 90-/120-day windows, groups could coordinate communications that feature or mention federal candidates as long as campaign materials and express advocacy were not used.

The district court found that the FEC had justified the 90-/120-day windows because most candidate advertising occurred within those periods. The district court, however, struck down the regulations as arbitrary and capricious because the FEC "ma[de] no attempt whatsoever to justify the Commission's continued reliance on the express advocacy standard" outside of the windows.

On appeal, Circuit Judge Tatel, writing for a unanimous three-judge panel, found that the majority of advertising by candidates occurs within the 90-/120-day windows, candidates and outside groups run a significant number of advertisements in the pre-window period and very few advertisements contain the express advocacy magic words. The D.C. Circuit held, "These facts lead us to two inexorable conclusions: the FEC's decision to regulate advertisements more strictly within the 90/120-day windows was perfectly reasonable, but its decision to apply a 'functionally meaningless' standard outside those windows was not." Thus, the D.C. Circuit struck down the FEC's decision to regulate only express advocacy outside of the 90-/120-day windows.

After *Shays II*, which struck down the original FEC coordination regulations, the FEC kept using its rejected regulations until it promulgated new regulations. Based on that chain of events, the FEC is likely to continue to follow the regulations struck down in *Shays IV* until it passes new regulations.