

FEC Continues to Apply Controversial Legal Theories to Regulate 527 Organizations

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In an apparent continuation of its negotiations with various 527 organizations accused of operating as federally regulated political committees (see *Election Law News*, January 2007), the Federal Election Commission announced on February 28 that it had reached a settlement with the Progress for America Voter Fund, which agreed to pay a penalty of \$750,000. (This case was designated Matter Under Review 5487, publicly available documents can be found at www.fec.gov/press/press2007/20070228MUR.html.)

As was the case with the previous settlements, the FEC again relied on controversial legal theories to find that the Progress for America Voter Fund engaged in political activity that triggered regulation as a political committee. The consequences of such regulation are severe. As a political committee, a 527 is required to abide by contribution limits that otherwise do not apply.

The FEC claimed that political committee regulation attached to the Progress for America Voter Fund because it accepted "contributions," made "expenditures," and had the "major purpose" of electing or defeating federal candidates as those terms are defined by statute and understood by judicial precedent. As it had in the previous settlements with the other 527 organizations, the FEC reached these conclusions by applying (1) an interpretation of "expenditure" that had been struck down by numerous federal courts, (2) a previously ignored interpretation of "contribution" by a court from another jurisdiction, and (3) a "major purpose" test even though it has failed to articulate the parameters of such a test in rulemaking proceedings.

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The lengths the FEC has gone to regulate these organizations is troublesome given the sensitive area in which the FEC is charged with regulating – political speech and association. Though these settlements will not be directly reviewed by a court, the legal theories employed by the FEC may still be subject to review as part of the ongoing legal proceedings in *Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) (*Shays II*). The FEC recently relied on these settlements to justify to the court in *Shays II* that the FEC's treatment of 527s is adequate. However, it remains to be seen whether—or to what extent—the court in *Shays II* will examine the particulars of these settlements.