

Three FEC Commissioners Support Broad Interpretation of "Media Exemption"

November 2003

Three Federal Election Commission (FEC) Commissioners recently issued a non-binding opinion of importance for any corporation or business association that regularly publishes a magazine or newsletter.

On August 12, the FEC voted in MUR 5315 to dismiss a complaint filed against Wal-Mart Stores, Inc. The complaint had alleged that Sam's Club's *Source* magazine promoted North Carolina Senate candidate Elizabeth Dole in its September 2002 issue. *Source* was mailed nationally to Sam's Club members, including nearly 200,000 in North Carolina. The magazine also was distributed to Sam's Club stores in North Carolina.

The Federal Election Campaign Act's contribution and expenditure limitations do not apply to "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." (2 U.S.C. § 431(9)(B)(i)) Historically the FEC applied this "media exemption" to conventional media and press organizations. However, on one prior occasion the FEC interpreted the media exemption to include political commentary by a business corporation that published a *bona fide* magazine. In that case Northwest Airlines published the *World Traveler* and featured profiles of congressional candidates in the in-flight magazine. (FEC MUR 3607)

Although the complaint was dismissed on the basis of the FEC's enforcement priority system, Commissioners Michael Toner, Bradley Smith and David Mason issued a statement of reasons expressing the opinion that Sam's Club's *Source* magazine qualifies for the "media exemption." They reasoned that there is "no justification for a narrower application of the exemption grounded in a notion that some publishers are *bona fide* while others are not." They concluded that the "Commission should declare that a story—no matter how complimentary, critical, or 'political' and without reference to motive, intent, or publisher's viability—published in a periodical, is protected by the press exemption."

Commissioner Scott Thomas issued an opposing statement of reasons expressing his view that "Sam's Club/Wal-Mart is not a media or press entity" but a business corporation in the retail business. He also advocated a narrow interpretation of the media exemption to cover "[o]nly magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising." He likened *Source* to "a sophisticated advertising brochure." Citing the Supreme Court's decision in *Massachusetts Citizens for Life v. FEC*, Commissioner Thomas

concluded that a "contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition."

Two other commissioners did not express any position on the breadth of the "media exemption."