

FEC Removes Unconstitutional Rules and Requests Comments on Additional Rules; Raises Specter of Regulating the Internet

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Even as the Federal Election Commission (FEC) recently removed certain regulations from its rulebooks, it asked for public comment on whether it should add other regulations. Commissioners also raised the possibility that the agency may start regulating more extensively political speech on the Internet.

The Supreme Court ruled in April in *McCutcheon v. FEC* that the biennial limits on the amounts that individuals could give in the aggregate to federal candidates, parties, and political action committees (PACs) were unconstitutional. Individuals are subject to limits on how much they may give to each candidate for federal office, national party committee, state party's federal account, and federal PAC; together, these were known as the "base" limits in *McCutcheon*. Under the former biennial limits held to be unconstitutional, individuals were additionally subject to aggregate limits of giving no more than \$48,600 in total to all federal candidates and no more than \$74,600 to all parties and PACs every two years.

At its October 9 meeting, the FEC rescinded regulations implementing the aggregate limits. At the same time, the FEC issued an "advance notice of proposed rulemaking" (ANPRM) asking for public comment on whether the agency should adopt additional rules to address various concerns about fundraising that had been raised in the *McCutcheon* case. One of the primary arguments made in defense of the aggregate limits was that they prevented individuals from circumventing the "base" limits by contributing to PACs, party committees, joint fundraising committees, or even to other candidates with the implicit understanding that those contributions would be

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redirected to a specific candidate to whom the contributor had already given the maximum amount permitted.

To that end, the FEC's ANPRM asks whether it should adjust its regulations concerning several issues: (1) "earmarking" (when contributions made to a particular recipient are considered to be "earmarked" to benefit a specific candidate); (2) "affiliation" (when particular recipients of contributions are considered to be "affiliated" with each other such that a contribution to one is deemed to be a contribution to all); (3) joint fundraising committees (when various candidates and entities solicit and accept contributions together); and (4) disclosure to the FEC of political spending including, as discussed further below, that for Internet-based political activity. Specifically, the FEC also asks for comment on whether it should issue new rules establishing a minimum number of candidates a PAC is required to support, or a cap on the percentage of a PAC's funds that may go to a single candidate.

Unlike a "notice of proposed rulemaking" (NPRM), which a regulatory agency uses to propose specific regulatory language, an ANPRM is more general and is used to signal possible approaches an agency may take. Thus, although regulation of political speech on the Internet was not specifically raised by either the *McCutcheon* decision or the ANPRM, commissioners at the FEC also are using the open-ended notice as a vehicle to solicit public comment on whether the agency should take a more hands-on approach to the Internet.

In 2006, when the FEC last undertook a comprehensive approach to formulating rules regarding the Internet, the agency implemented what has come to be known as the "Internet exemption." Generally, under this rule, unless a political communication over the Internet is a paid ad, it would not be subject to the registration and reporting requirements that typically apply to political speech in other media. Examples of unregulated activities include blog posts, unpaid Facebook posts and Twitter "tweets," and the like.

The FEC's Internet exemption is less than clear, however, about how political speech created by an organization should be treated if the speech is posted or uploaded to a free website such as YouTube. In a recent enforcement matter concerning this particular issue (MUR 6729; Checks and Balances for Economic Growth), the commissioners deadlocked on the question, which prompted Vice Chair Ann Ravel to issue a statement soliciting public comment concerning a "re-examination of the Commission's approach to the Internet and other emerging technologies." The three Republican commissioners countered with a statement soliciting the public to oppose such an approach in their comments responding to the *McCutcheon* ANPRM.

Written comments for the ANPRM are due by January 15, 2015, and the FEC will hold a hearing on the ANPRM on February 11, 2015, at which members of the public may testify (requests to appear are due by the January 15 written comment deadline). Wiley Rein's Election Law practice group routinely prepares comments and presents testimony on behalf of clients with interests in regulatory rulemakings and solicitations such as this one.