

FEC Revisits Electioneering Communication Rules

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Pursuant to court decisions from the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the District of Columbia, the Federal Election Commission (FEC) has issued a notice of proposed rulemaking (NPRM) that will affect the contours of the definition of "electioneering communication" and the scope of the blackout periods for unions and corporations. Specifically, the NPRM targets for deletion the exceptions in the current rules for public service announcements (PSAs) and communications made by 501(c)(3) charities, and proposes to add an exception related to advertisements, including movies and books. Comments are due on the rulemaking by September 30, 2005, and the Commission has scheduled a hearing on October 19, 2005.

Under the Bipartisan Campaign Reform Act of 2002, corporations and labor unions (and organizations funded by corporations and unions) are prohibited from making "electioneering communications," while others are required to file reports of such activity. Electioneering communications are broadcast, cable and satellite radio and TV ads that mention or feature a federal candidate, are aired within 30 days of a primary or 60 days of a general election and are able to be received by 50,000 or more persons in the relevant jurisdiction.

The NPRM addresses one issue raised when the U.S. Court of Appeals for the D.C. Circuit in *Shays v. FEC* (see related article on page 2 about the appeal of this ruling) upheld a lower court ruling striking down, among other things, the FEC's rules related to electioneering communications distributed for free. In the current FEC rules, there is an exception for PSAs because the definition of electioneering communications requires that it be "distributed for a fee" in order to be regulated. The would do away with this exception

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and prohibit PSAs produced or distributed with corporate or union funds.

The NPRM also addresses an issue not raised on appeal by the FEC to the D.C. Circuit. The issue relates to an exception in the FEC's current rules for electioneering communications sponsored by a 501(c)(3) organization. The FEC initially created this exception because, under the tax code and IRS rules, such charities are not permitted to participate in federal elections. In response to a district court ruling, the NPRM proposes to eliminate this exception, unless the communication "does not promote, support, attack, or oppose a federal candidate," known as "PASO" in FEC circles.

Finally, moving in another direction and not pursuant to a court decision, the proposed rules in the NPRM add an exception for a communication that "[p]romotes a movie, book, or play, provided that the communication is within the ordinary course of business of the person that pays for such communications" and the communication does not PASO a federal candidate.

The Commission, in the NPRM, asks for comments by September 30, 2005, on all of these proposed actions.