

REMOVING THE GAG:

FEC Permits Some Speech

by Barnaby W. Zall

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Hidden under last year's Christmas tree was a tiny present from the Federal Election Commission: a revision of the rules on "electioneering communications" to permit exempt organizations to run ads mentioning federal candidates even close to elections. http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf. It was a grudging gift, forced by the U.S. Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*, 127 S.Ct. 2652 (June 25, 2007).

The 2002 Bipartisan Campaign Reform Act (sometimes called "McCain-Feingold") banned "electioneering communications" – the public mention of persons who are federal candidates during "black-out" periods prior to federal elections. Easier than figuring out whether the mentions were prohibited electioneering or permitted public policy discussions. So exempt organizations could not run "grass-roots advocacy" ads, for example, asking the public to contact their legislators about critical legislation.

The Supreme Court struck down the ban, saying that only ads which had no reasonable interpretation other than as "express advocacy" (promoting, attacking, supporting or opposing identified candidates) could be banned. Other ads, such as those addressing legislation or public policy issues, were protected speech. "Where the First Amendment is implicated, the tie goes to the speaker." 127 S. Ct. at 2669.

The FEC responded by crafting a new set of exceptions incorporating the Supreme Court's "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate" standard. The new regulation – 11 C.F.R. § 114.15 – has two major parts: a "safe harbor" and a "general exemption."

The "safe harbor" protects an ad if it:

- 1) does not mention an election, candidate, party or voting on a candidate;
- 2) does not take a position on a candidate's character, qualifications or fitness for office; and
- 3) focuses on a legislative, executive or judicial matter.

The "general exemption" is slightly broader, in that it does not require a specific legislative, executive or judicial matter, but can discuss public policy in general, and the FEC says it will "balance" the factors. In other words, the "safe harbor" gives the "tie" to the speaker; the "general exemption" may not.

The new regulations have examples of particular ads which are permissible or suspect, such as an ad which attacks a sitting Congressman for voting "12 out of 12

times to weaken environmental protections” because “big corporations . . . gave him thousands of dollars in contributions.” This ad does not qualify for the “safe harbor” because it did not discuss a specific legislative proposal and discussed the Congressman’s character and fitness for office. But it was within the “general exemption” because it did not mention an election or voting and was focused on a specific public policy matter on which it sought public action. Since there is a reasonable interpretation of the ad as directed at getting the sitting Congressman to change his views and support environmental protections, the ad was that new breed: the permitted electioneering communication.

Note that these are FEC rules, and not those of the other big regulator: the Internal Revenue Service. The two sets of regulations are not the same, but the new FEC regulations are closer to the IRS rules. In both cases, the main lesson is: focus on the issue, not the individual. The IRS has always been more likely to recognize ads which were genuinely addressed to impending legislation; now the FEC uses the same criterion as a fulcrum for balancing.

Of course, the news is not all good. Even if the proposed ad is permitted, the FEC will still require all of the mandatory disclaimers and disclosures for electioneering communications. Required disclaimers include the name, physical or Web address, and a statement that the communication is not authorized by any candidate or campaign. Required reporting ordinarily includes the name and address of any person contributing an amount aggregating \$1,000 or more preceding calendar year; the FEC loosened this reporting requirement, however, by requiring disclosure only of those who made contributions specifically to support the organization’s electioneering communications.

The new FEC rule eases the burden of exempt organizations which want to be active on public policy matters in an election year. Where the old rules would have required the organization to be silent even on matters critical to its exempt goals, the new rules provide a reasonable alternative, similar to the IRS tradition, permitting an organization to speak. This new freedom is doubly important in a presidential election year, where the “blackout period” runs from early December until the following November. That’s a long time to remain silent, and on the day after Christmas, the FEC released the gag.

1 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf

2 127 S.Ct. 2652 (June 25, 2007).

3 127 S.Ct. at 2669.

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