

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY’S LIST,)	
)	
Plaintiff,)	Civ. No. 05-0049 (CKK)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	STATEMENT OF
)	MATERIAL FACTS
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE**

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h) (D.D.C.), defendant Federal Election Commission (“Commission” or “FEC”) presents the following statement of material facts as to which there is no genuine issue and that entitle the Commission to judgment as a matter of law:

A. THE PARTIES

1. The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret and civilly enforce the Federal Election Campaign Act of 1971, as amended (“Act” or “FECA”), 2 U.S.C. 431-455. See generally 2 U.S.C. 437c(b)(1), 437d(a) and 437g.

2. The Commission is empowered to “formulate policy with respect to” the Act, 2 U.S.C. 437c(b)(1), and to promulgate “such rules ... as are necessary to carry out the provisions” of the Act. 2 U.S.C. 437d(a)(8). See also 438(a)(8) and (d).

3. Plaintiff EMILY’s List has been registered with the Commission as a multi-candidate nonconnected political committee for more than 20 years. Complaint, filed Jan. 12,

2005 (“Complaint”), ¶ 10; Plaintiff’s Statement of Material Facts, filed May 17, 2005, ¶¶ 2 & 5; see also 2 U.S.C. 431(4)(A), 433(a), 441a(a)(4); 11 C.F.R. 106.6(a).

4. EMILY’s List has separate bank accounts to fund its federal (“hard money”) and nonfederal (“soft money”) activities, pursuant to 11 C.F.R. 102.5(a). Complaint ¶ 10.

5. EMILY’s List raised more than \$25 million in hard money contributions alone during the 2003-04 election cycle. See http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+C00193433 (data from FEC Web site) (Exh. 3).¹ “EMILY’s List is the biggest PAC, which means we have the most hard money, so it’s not an issue of not having it,” according to its president, Ellen Malcolm. Liz Sidoti, “Bush, Kerry to Pull Ads on Friday,” Associated Press Newswires, June 7, 2004 (Exh. 4).

6. During the rulemaking at issue here, EMILY’s List failed to file comments before April 9, 2004, the deadline for rulemaking comments. During the rulemaking, the Commission had indicated that it would not consider any late-filed comments, see notice available at <http://www.fec.gov/press/press2004/20040407advisory.html> (Exh. 5).

7. EMILY’s List has regularly filed an H1 Schedule reporting the “allocation” ratio of federal and nonfederal dollars for shared administrative expenses and the costs of generic voter drives. Over the past ten years, EMILY’s List has never filed a final H1 Schedule reporting less than 50% direct federal candidate support. See http://query.nictusa.com/cgi-bin/fecimg/?_25970012630+0, at 6 (final H1 for 2003-04 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_23990455760+0, at 5 (final H1 for 2001-02 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_21036814768+0, at 33 (final H1 for 1999-2000

¹ All exhibit references in this Statement are to the exhibits attached to the FEC’s Opposition to Plaintiff’s Application for a Preliminary Injunction filed January 24, 2005.

election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_99034233180+0, at 70 (final H1 for 1997-98 election cycle) (see Exh. 6).

8. At the end of the 1995-96 election cycle EMILY's List reported a final allocation ratio of 70% federal candidate support and 30% nonfederal. Available at http://query.nictusa.com/cgi-bin/fecimg/?_97031750959+0, at 92 (Exh. 7).

B. The Commission's Rulemaking Regarding Political Committee Status, Expenditures, Contributions, and Allocation

1. The Notice of Proposed Rulemaking

9. On March 11, 2004, the Commission published a detailed NPRM proposing a variety of possible amendments to regulations regarding the definitions of "political committee," "contribution," "expenditure," and the allocation requirements for nonconnected committees. See Political Committee Status, Proposed Rule, 69 Fed. Reg. 11,736 (March 11, 2004) (Exh. 1). Following a four-week comment period, the Commission held public hearings on April 14 and 15, 2004. Id.

a. Proposed 11 C.F.R. 100.57: Solicitations

10. In the NPRM, the Commission sought public comment regarding a new rule establishing that any funds received in response to particular types of solicitation are "for the purpose of influencing any election for Federal office" and, therefore, "contributions" under FECA. 69 Fed. Reg. 11,743.

11. The NPRM included proposed regulatory text stating that any funds provided in response to a solicitation that contained "express advocacy" for or against a clearly identified federal candidate are contributions. 69 Fed. Reg. 11,757 (proposed section 100.57 as a part of Alternative 1-B).

12. The NPRM sought public comment regarding different ways the express advocacy standard could be applied to solicitations, such as requiring that the solicitation state that the funds will be used for express advocacy, or including solicitations that expressly advocate the election or defeat of federal candidates of a particular party without specific references to clearly identified candidates. 69 Fed. Reg. 11,743.

13. The Commission also sought public comment regarding other possible standards that could be applied to solicitations:

Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack or oppose a clearly identified Federal candidate?

69 Fed. Reg. 11,743.

b. Proposed Changes to 11 C.F.R. 106.6: Allocation of Expenses

14. The Commission also sought comment on a number of possible changes to the allocation rules for nonconnected committees. The NPRM explained that the focus of BCRA and the Supreme Court's opinion upholding it in McConnell v. FEC, 540 U.S. 93 (2003), on the Commission's allocation regulations for political party committees prompted the Commission to examine more closely the allocation regulations in 11 C.F.R. 106.6. 69 Fed. Reg. 11,753.

15. The Commission sought public comment on the possibility of completely eliminating allocation to nonfederal accounts of any administrative expenses or generic voter drives costs for nonconnected committees (id.):

Given McConnell's criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?

16. A number of proposals in the NPRM would have imposed a minimum federal percentage on the funds expended method in 11 C.F.R. 106.6(c). 69 Fed. Reg. 11,754. The NPRM sought comment on several possible examples of a minimum percentage, ranging from 15% to 50%. Id. The Commission also stated that it was “considering other minimum Federal percentages as alternatives to those presented in the proposed rules,” and explicitly asked for comment on whether it “[s]hould ... adopt a fixed minimum Federal percentage.” Id.

17. The NPRM also sought public comment on proposals to change the allocation methods for certain voter drive activity and public communications that specifically mention federal candidates. 69 Fed. Reg. 11,753. The Commission proposed allocating the costs of public communications that promote or oppose a political party under the same method as administrative expenses in 11 C.F.R. 106.6(c). 69 Fed. Reg. 11,753.

18. The Commission sought public comment on a proposal to create a new section, 11 C.F.R. 106.6(f), requiring allocation of public communications that promote, attack, support, or oppose (“PASO”), or expressly advocate the election or defeat of, a clearly identified federal candidate and a political party. 69 Fed. Reg. 11,755. Proposed section 11 C.F.R. 106.6(f) would have required a combined application of the time/space allocation method, similar to that used in 11 C.F.R. 106.1, and the 11 C.F.R. 106.6(c) method for these public communications. Id. This proposal was similar to the approach used by the Commission in Advisory Opinion 2003-37, which evaluated some post-BCRA allocation questions by a political committee under the rules in 11 C.F.R. 106.6. Id.

2. Public Comment and Hearings on the NPRM

19. The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance

organizations, and Members of Congress that addressed the many contentious regulatory questions being examined in this rulemaking. See Administrative Record, filed May 4, 2005, Index of Documents at 3-60 and AR Disks 2-5.

20. The Commission's two days of public hearings included 31 witnesses, representing numerous organizations with a broad range of opinions and concerns about many different issues. A number of commenters addressed allocation questions. Some supported the elimination of allocation in favor of requiring the use of 100% federal funds for all expenditures under 11 C.F.R. 106.6, and some suggested abandoning the funds expended method entirely in favor of a simpler system. See, e.g., Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 12); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 14).

21. Other commenters supported specific percentages to be used as a federal minimum for administrative expenses, (see Comments of Democracy 21, Campaign Legal Center, Center for Responsible Politics, at 17-19 (April 5, 2004) (Exh. 15)) or simply urged the Commission to require a "significant minimum hard money share." See Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 10).

22. At least one commenter suggested that public communications should be allocated either 100% federal or 100% nonfederal based upon whether federal or nonfederal candidates were included in the communication. See Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 14).

23. One commenter argued that some revisions of the funds expended method would be too burdensome to committees because of the reporting and bookkeeping that would be required. See Comments of Media Fund, at 20 (April 5, 2004) (Exh. 16).

24. There was also testimony at the hearing regarding the complexities of the current allocation system and the proposal to move to a flat minimum federal percentage. See Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004 (“Apr. 14 Tr.”) at 160 (testimony of Craig Holman) (stating the current allocation ratio was “a mess” and suggesting “it would certainly be a healthier improvement to at least come out with some sort of fixed percentage, that is a clear bright line test of how much illegal money can be used in Federal elections”) (Exh. 8).

25. Other witnesses testified that the current allocation scheme permitted circumvention of the rules in BCRA. See, e.g., Apr. 14 Tr. at 158-59 (testimony of Craig Holman) (stating that nothing in FECA justifies any allocation ratio) (Exh. 8); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004 (“Apr. 15 Tr.”) at 27-28 (testimony of Lawrence Noble) (stating that the funds expended allocation method allowed a “wholesale evasion of the soft money rules as applied to political organizations”) (Exh. 9).

26. Witnesses specifically discussed the possibility of a 50% federal minimum for allocated expenses. See, e.g., Apr. 15 Tr. at 80-84 (testimony of Robert Bauer, counsel for plaintiff in this case, representing ACT) (responding to possibility of 50% federal minimum and other allocation proposals) (Exh. 9); id. at 80 (testimony of Lawrence Noble) (“We do suggest the 50 percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that’s 50 percent”).

27. Witnesses also addressed the Commission’s proposal that money given in response to solicitations stating funds received would be used to support or oppose a federal candidate would be “contributions” under FECA. See, e.g., Apr. 15 Tr. at 207-08 (testimony of

Margaret McCormick) (“under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the contributions come back in”) (Exh. 9).

3. The Final Rules

28. The Final Rules and accompanying Explanation and Justification were published in the Federal Register on November 23, 2004, with an effective date of January 1, 2005. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (Exh. 2).

29. New section 11 C.F.R. 100.57 includes a general rule establishing when funds received in response to certain solicitations must be treated as “contributions” under FECA, along with several exceptions to this rule “to avoid sweeping too broadly.” 69 Fed. Reg. 68,056. 11 C.F.R. 100.57(a) states that all money received in response to a solicitation is a “contribution” under FECA if the solicitation “indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.” 69 Fed. Reg. 68,066.

30. The Commission also adopted final rules changing the allocation scheme for nonconnected committees in 11 C.F.R. 106.6. 69 Fed. Reg. 68,059-63. The Commission explained that examination of the public comments and the history of public filings regarding allocation by committees led it to conclude that a revised allocation method was needed to enhance compliance with FECA and make the system easier for committees to understand and follow, and for the Commission to administer. 69 Fed. Reg. 68,060.

31. The new 11 C.F.R. 106.6(c) replaces the funds expended method with a flat 50% federal funds minimum for administrative expenses, generic voter drives, and public

communications that refer to a political party without any reference to clearly identified candidates. 69 Fed. Reg. 68,062.

32. A new section 11 C.F.R. 106.6(f), which governs certain public communications and voter drives, was also adopted. 69 Fed. Reg. 68,063. Public communications and voter drives that refer to one or more clearly identified federal candidates, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. 69 Fed. Reg. 68,063; 11 C.F.R. 106.6(f)(1). Conversely, public communications and voter drives that refer to a political party and only nonfederal candidates may be financed with 100% nonfederal funds. 69 Fed. Reg. 68,063; 11 C.F.R. 106.6(f)(2). Public communications and voter drives that refer to both federal and nonfederal candidates are subject to a time/space allocation between federal and nonfederal accounts, regardless of whether they also mention political parties. 69 Fed. Reg. 68,063; 11 C.F.R. 106.6(f)(3).

Respectfully submitted,

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