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02/08/2005 04:46 PM

To "agentnprm@fec.gov" <agentnprm@fec.gov>
cc
bcc
Subject Comments On Proposed Definition of Agent

Brad Deutsch,
Please find attached the comments of the Association of State Democratic
Chairs on the proposed revision of the definition of "agent". If you are
unable to open the document or have any questions, please feel free to
contact me. Thanks, Karl Sandstrom

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Brad Deutsch /FEC/US
03/07/2005 10:43 AM

To
cc
bcc
Subject ASDC comments on NPRM

"Sandstrom, Karl J." <KSandstrom@perkinscoie.com>

02/10/2005 10:23 AM

To "Bdeutsch@fec.gov" <Bdeutsch@fec.gov>
cc
Subject ASDC comments on NPRM

This e-mail is to notify the Commission that I represent the Association of State Democratic Chairs in connection with the Commission's Notice of Proposed Rulemaking on the definition of "agent". All inquiries can be addressed to me at the e-mail address given below or at Perkins Coie, 607 14th Street NW, Suite 800, Washington, DC 20005-2011. If you have any questions, you can also call me at the phone number listed below. Regards,

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Mark Brewer
President

Comments of the Association of State Democratic Chairs

By Mark Brewer, President

On the Proposed Definition of Agent

On behalf of the Association of State Democratic Chairs, I am submitting the following comments on the proposed revision of the definition of "agent". The revised regulation will govern the use of that term in the Commission regulations that limit who may solicit non-federal dollars for state and local committees of political parties. This regulation will have a direct and substantial impact on state parties. It will identify a class of individuals who may be foreclosed in assisting state parties in their funding efforts. Therefore the proposed regulation is of great interest to all the state parties that are represented by the Association. It is our hope that the practical experience of the members of the Association reflected in these comments can assist the Commission in crafting a regulation that fosters rather than deters participation in our political parties.

430 SOUTH CAPITOL STREET, S.E. • WASHINGTON, DC 20003

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2/8/05



COMMENTS

If one begins from the premise that ordinary Americans have the right to solicit others to participate in politics, then the Commission's proposal to extend the definition of "agent" to persons with apparent authority to act on behalf of a principal is ill-conceived. The notion that a citizen enjoys such a basic right only at the sufferance of an elected official or a candidate is pernicious. A citizen does not lose her right to raise funds for a political cause to which she is devoted based on the errant words of an elected official. Nevertheless this is precisely what the Commission proposes doing in extending the definition of "agent" to persons with apparent authority.

As the Commission notes in the NPRM, apparent authority arises not from a consensual relationship between a principal and an agent, but from manifestations of consent made to a third party. The law in this regard is intended to protect the expectations of a third party to the extent that the purported principal is responsible for them. It is not a limitation on the freedom of the agent to pursue her own objectives independently.

Citizens do not need the consent of a candidate or an elected official to raise money for their chosen causes. The fact that a candidate approves of what they are doing and tells others does not enhance or diminish a citizen's right to do so. A candidate may need to be careful that his praise for some activity does not itself

constitute a prohibited solicitation, but those words cannot deprive another without her consent of her right to solicit others for another candidate, political organization or public advocacy group.

The very fact that the Commission has struggled with the concept of apparent authority should serve as a caution to adopting it as a legal standard for regulating associational activity. Given the severe penalties that now exist for violating the law, uncertain liability serves only to dampen legitimate political activity. The discussion of apparent authority in the NPRM offers little insight into the circumstances where the Commission would find it a basis for imposing liability. The Commission should not lose sight of the fact that most people who participate in politics are civic-minded volunteers who regularly lend their support to multiple groups, candidates and causes. It does a great disservice to our political system to leave those people always wondering whether they are doing something illegal.

Rather than extending the definition of "agent" to persons with apparent authority, the Commission asks whether it makes sense to adopt a more narrowly tailored definition of "agent." The answer is that the Commission will inevitably have to do so either through a regulation or through advisory opinions and enforcement matters. The reason is that neither the existing regulation nor the proposed regulation spells out the elements of an agency relationship. Even in the commercial setting where the law is more developed, determining whether an individual is acting as an

agent is a matter of regular dispute. In the political setting where the concept of agent is untethered to its commercial purpose of settling expectations, and where the need for clarity is more pronounced, the Commission must provide guidance. The appropriate place to do so is in the regulations. One cannot reasonably expect citizens to seek advisory opinions whenever they decide to support multiple political candidates or causes.

The starting point should be the definition set forth below of the agency relationship found in the Restatement of Agency (Second) (1958) ("R2d") published by the American Law Institute. That definition provides: "(a)agency is the fiduciary relation which results from the manifestation of consent by one person to another that a person shall act on his behalf and subject to his control, and consent by the other so to act." The three elements that must be present are consent, control, and acting on behalf of the principal. For the reasons given below, each of these elements must be present before the Commission should find an agency relationship to exist.

Beginning with consent, the Commission should not be able to find that a citizen has relinquished his associational rights unless he has agreed to do so. Conversely no candidate or officeholder should be held liable for an act unless he has assented to that act. Consent must either be express or unambiguously manifested. It cannot be implied or inferred merely because two share a common goal and that goal is widely known. Nor can it be a product of mere acquiescence. Candidates have no

affirmative obligation to prohibit supporters from exercising their rights to support other political causes. Nearly every person who raises funds for a state party also raises money for other candidates and causes. Nothing in the law should be read to prevent them from doing so.

The second element of an agency relationship is control. If a principal is not in position to direct another to act, the element of control is absent. Control is most commonly found where there is an employee/employer relationship, or is provided for by contract. It is seldom present where the relationship between the purported principal and agent is voluntary. In such instances the purported principal is seldom in the position to command an act. In politics, which is largely populated by volunteers, candidates and officeholders are ordinarily not in a position to command individuals either to support or oppose other political actors.

Consequently, the Commission's regulation should be focused on the limited circumstances where the candidate is either in a position to command a person to act or where an individual is acting at the actual direction of the candidate. Any expansion beyond those occasions is not only contrary to generally accepted principles of the law of agency, but is offensive to our democratic traditions where citizens are free to lend their support to political causes of their choosing. The Commission would be myopic if it viewed our nation's politics through a federal

candidate centric lens. For a state party and its supporters, politics is about much more than who gets elected to federal office.

The last element of agency is acting on behalf of the principal. Merely acting in a manner that benefits another is not necessarily acting on behalf of that person, even where there is some control present.(see §§ 12 and 13 of R2d) In politics, a prime example is the professional fundraiser. For instance, a direct mail fundraiser may raise funds in a state concurrently for federal candidates, state candidates, the state party and a IRC 501(c)(3) organization engaged in voter registration. The federal candidates may benefit from the success of the other organizations, but the direct mail firm is acting for the independent benefit of each client. The Commission should not foreclose vendors and others from organizing their businesses to provide services to multiple clients by reading the agency relationship to be broader than found in the Restatement. Unless a fundraiser invokes a candidate's name and authority, it should never be presumed that she is acting on behalf of that candidate.

It is for the above reasons that the Commission should include the elements of the agency relationship as identified in the Restatement in its regulation. Leaving them out will only postpone the day that the Commission will need to articulate the standard that it is applying. Until that day comes, unnecessary doubt will be cast on legitimate salutary political activity. It is far better to take the occasion of this

rulemaking to provide the people with the guidance that they deserve than to wait and leave the law uncertain.

Along similar lines, the Commission should make clear in the regulations that the legal restraints on an agent terminate when the agency relationship no longer exists. As a general rule a principal has the power to terminate an agent's authority at any time. This rule is particularly relevant in the political arena where relationships are often short term and voluntary and can often end because of a political falling-out. A candidate or officeholder should not be held responsible for the acts of a person who is no longer subject to his control. Additionally, there is simply no basis in the statute to limit even a former employee, when the relationship that gave rise to the agency relationship ceases. At that point an individual who may have previously been an agent is free to exercise his right to support other political causes. Of course, if the person continues to act as an agent notwithstanding a contrary public declaration, the law should still apply.

There is another compelling reason for the Commission to tailor the definition of agent more narrowly. Narrow tailoring appears to be required under *McConnell v. Federal Election Commission*, 540 U.S. 93. In its decision, the Court on two occasions, when rejecting challenges to the solicitation restrictions imposed on national party officers acting in their official capacities, cited the ability of national party officers to raise soft money in their personal capacities. (See *McConnell v.*

Federal Election Commission, 540 U.S. at 157 and 177.) It would be difficult to square a reading of the law by the Supreme Court that allows national party officers to raise soft money for various political causes, with a broad prohibition imposed on individuals who are cloaked only in apparent authority. A right broadly enjoyed by a national party officer can hardly be denied to someone acting in a lesser capacity who has not agreed to relinquish that right.

Lastly, the Commission's freedom to pursue policy objectives in its regulations is limited by the words of the statute. The Commission is simply not free to redefine agent as it sees fit, even if some novel definition reduced the appearance of corruption or prevented the circumvention of the policy aspirations of some of the law's sponsors. The Commission should not lose sight of the fact that it is not acting as a legislature. A regulatory agency should not assume that Congress intended to invest it with broad power to determine who can speak on behalf of a political cause. The Commission should respect the legislative choice rather than to try to "improve" upon it based on its view of the law's greater objectives. Therefore I urge the Commission to adopt a definition of "agent" that rejects the use of apparent authority and recites all the elements of the agency relationship.

On behalf of the Association, I want to thank the Commission for considering these comments and would ask that the Commission inform me if it decides to hold a hearing on the proposed regulation.