



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

## STATEMENT ON ADVISORY OPINION REQUEST 2012-20 (MULLIN)

Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly

May 31, 2012

Yesterday, the Federal Election Commission deadlocked on the expedited Advisory Opinion Request filed by Markwayne Mullin, a candidate for the Republican nomination for Congress in Oklahoma's Second Congressional District.<sup>1</sup> The requestor owns and runs Mullin Plumbing, Inc. and Mullin Plumbing West Division, Inc. (the "Mullin Companies"). His request asked the Commission to decide, among other things, whether certain of the Mullin Companies' television and radio advertisements, and a paid radio program, are electioneering communications under the Act. As explained in Draft C, which we supported, these communications clearly meet the statutory definition of "electioneering communications."

Our vote in favor of Draft C should not be interpreted to foreclose categorically the approach taken in Draft B, which concluded that the Mullin Companies' communications are exempt from the definition of "electioneering communications" despite meeting the statutory requirements for such communications. We agree that the Commission may grant such exemptions;<sup>2</sup> however, that delegated authority is quite limited. At most, there is legislative history suggesting that Congress intended to permit the Commission to exempt communications that are "plainly and unquestionably not related to the election."<sup>3</sup>

Draft B concludes that the Mullin Companies' communications should be exempted from the definition of electioneering communications based on the request's representations that the communications are wholly unrelated to Mr. Mullin's candidacy for Congress and designed only to promote the Mullin Companies' services in the exact same manner as they had been doing for

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<sup>1</sup> The requestor invoked the statutory requirement for expedited, 20-day treatment under 2 U.S.C. 437f(a)(2). Given that the request asks about ads by the Mullin Companies, *not* Mr. Mullin's campaign committee, it is not entirely clear whether expedited treatment was required. Nevertheless, in an effort to accommodate the requestor, we agreed to an expedited timeline. We note, however, that had there been more time, it might have been possible for the Commission to resolve the concerns discussed below.

<sup>2</sup> See 2 U.S.C. 434(f)(3)(B)(iv); 11 C.F.R. 100.29(c). While the text of the Act specifically authorizes the Commission to create exemptions through its regulations, there is legislative history suggesting that it might also be permissible to do so through its advisory opinion process. See 148 Cong. Rec. H411 (Feb. 13, 2002) (statement of Rep. Shays); 148 Cong. Rec. E178-03 (Feb. 13, 2002) (statement of Rep. Meehan). We are prepared to revisit this issue where the facts presented warrant an exemption.

<sup>3</sup> 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays).

the past decade. After the Commission made Draft B public, however, it received a number of comments challenging this version of the facts. Several of the comments attach copies of campaign literature distributed by Mr. Mullin's authorized campaign committee. This literature prominently features the name and logo of Mullin Plumbing, and points to the Mullin Companies' success as Mr. Mullin's primary qualification for election. The Mullin Companies have become intertwined with the Mullin campaign to the point where it can no longer be said that the companies' ads are "plainly and unquestionably not related to the election."

Comments from members of the public also represented that the commenters had difficulty distinguishing between the Mullin campaign literature and the Mullin Companies' ads, and noted that it seemed that the Mullin Companies' ads had become more frequent since Mr. Mullin began running for Congress. In light of the factual issues raised by the comments, we do not believe the Commission has authority under the Act to exempt the Mullin Companies' communications from the definition of "electioneering communications." Therefore, we could not support Draft B, and voted for Draft C.<sup>4</sup>

We are confident that Draft C fully comports with the Supreme Court's holdings, including in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*.<sup>5</sup> Requestor's final comment yesterday invoked *WRTL*'s discussion of when to consider an ad's "context" in determining whether it contains the functional equivalent of express advocacy – in which case, at that time, the ad would have been *prohibited*.<sup>6</sup> That discussion has no application here, where there has been no suggestion that either Mr. Mullin or the Mullin Companies be prohibited from running their ads. Rather, the Commission is deciding whether to create and apply for the first time a new, fact-specific, exception to its generally applicable *disclosure* requirements. The most pertinent guidance is that in *Citizens United v. FEC*, where the Court explained that "even if . . . ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."<sup>7</sup>

The communications at issue in this request clearly meet the statutory definition of "electioneering communications." Given the Commission's longstanding interpretation and application of the Act<sup>8</sup> and the potential confusion between the Mullin Companies' business ads

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<sup>4</sup> We note that the request did not seek any alternative relief, such as permission to use an alternative disclaimer, which might have addressed the practical concerns raised by the requestor. *See, e.g.*, Advisory Opinion 2004-37 (Waters); Advisory Opinion 2004-10 (Metro Networks); Advisory Opinion 2004-01 (Bush/Kerr). Without full consideration of this issue, we cannot say whether such relief would be appropriate.

<sup>5</sup> 551 U.S. 449, 127 S. Ct. 2652 (2007).

<sup>6</sup> *See id.* at 473-74.

<sup>7</sup> 558 U.S. \_\_\_, 130 S. Ct. 876, 915-16 (2010).

<sup>8</sup> *See, e.g.*, Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65200, 65202 (Oct. 23, 2002) (rejecting general exemption for business communications as "[in]consistent with the limited authority provided to the Commission by the statute"); MUR 5517 (Stork) (finding that ads run by candidate on behalf of his business were electioneering communications).

and those of the Mullin campaign committee, we are unable to grant an exemption from the statutory definition of "electioneering communication" to these particular communications.<sup>9</sup>

5-31-12  
Date

Ellen L. Weintraub  
Ellen L. Weintraub  
Vice Chair

5/31/12  
Date

Cynthia L. Bauerly  
Cynthia L. Bauerly  
Commissioner

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<sup>9</sup> Draft C makes clear that the decision of the United States District Court for the District of Columbia in *Van Hollen v. FEC*, No. 11-0766, \_\_ F. Supp. 2d. \_\_, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), does not require disclosure of the names of the Mullin Companies' customers in any electioneering communication reports, because those customers are not "contributors" under the Act.