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Joan Claybrook, President

February 12, 2004

Federal Election Commission
Mary Dove, Commission Secretary
Lawrence Norton, General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Comments to

AOR 2004-5

2004 FEB 12 P 3:34

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VIA FAX

RE: Comments of Public Citizen, Inc., on Advisory Opinion Request 2004-5

Public Citizen, Inc., respectfully submits these comments on the request for an advisory opinion of America Coming Together ("ACT"), dated January 13, 2004. ACT's request concerns the applicability of FECA and the Commission's regulations to a number of types of activities that it intends to conduct as both a political organization under section 527 of the Internal Revenue Code and a non-connected political committee under FECA, and, in particular whether it may use non-federal funds for certain of its intended activities.

A. Interests of Public Citizen

Public Citizen has consistently advocated and worked for stronger campaign finance regulations in general, and the passage and defense of the Bipartisan Campaign Reform Act in particular. Public Citizen is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when the influence of corporate money is brought to bear on the electoral system. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in administrative proceedings and litigation raising campaign finance issues and related First Amendment issues arising out of the electoral process. In addition, Public Citizen has studied and reported extensively on the increasing involvement of so-called 527 groups and other non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues addressed by this opinion request.

Ralph Nader, Founder

Public Citizen continues to believe that 527 groups, in particular, should be subject to increased regulation comparable to that applicable to political committees under the Federal Election Campaign Act (FECA), and it has supported legislative reforms that have taken steps in that direction by imposing disclosure requirements on such groups. We have conducted extensive research on section 527s and have documented that many of these groups are in fact "stealth" political operatives attempting to evade federal campaign finance law.¹

While Public Citizen believes that further regulation of such groups is desirable, we remain troubled by some of the potential implications of a draft advisory opinion issued by the general counsel's office in a matter raising related issues, Americans for a Better Country ("ABC") [AO 2003-37], which was the subject of comments we submitted on February 4, 2004. To the extent that the ACT request raises related issues, we urge the Commission to make clear that any assertion of regulatory authority over election-related activities of section 527 groups whose primary purpose is to influence elections does not extend to non-express advocacy by other non-profit groups whose primary purpose is not campaign-related.

B. Possible Expanded FEC Regulation of Section 527 Groups Should Not Be a Vehicle for Regulation of Non-Profit Groups Organized Under Section 501(c)

Some of the issues raised by ACT's request differ from those addressed in the draft opinion in the ABC matter, and these comments do not address those issues. It appears, however, that other aspects of the ACT request will likely be viewed as raising similar issues about the application of FECA to communications by a 527 group that, while not involving "express advocacy," either praise or criticize a federal candidate and, thus, may be said to "promote or support, or attack or oppose a clearly identified federal candidate." The draft opinion in AO 2003-37 takes the view that such communications constitute "expenditures" under 2 U.S.C. § 431(9) and hence can be made by a political committee only with federal funds.

To the extent that ACT's opinion request raises overlapping issues about the application of FECA to non-express advocacy by a political organization, the concerns Public Citizen expressed in its comments on the draft opinion in AO 2003-37 may also be applicable to the Commission's response to ACT's request. We refer the Commission to those comments for an expression of our views about the possible extension of this reasoning to non-express advocacy by 501(c) organizations that engage in criticism of officeholders and candidates for advocacy purposes.

We add, however, that our concerns would be substantially allayed if the Commission were to make clear in any response to ACT's request (or any similar request concerning the activities of non-profit political organizations organized under section

¹ See, for example, *Cramming for the Mid-Term: 527 Stealth PACs Raise \$115 Million to Influence 2002 Congressional Elections* (Nov. 1, 2002); and *Déjà vu Soft Money: Outlawed Money Likely to Flow to Shadowy 527 Groups that Skirt Flawed Disclosure System* (Apr. 5, 2002).

527) that its reasoning is limited to groups whose principal purpose is influencing the election of federal candidates, and that under both *Buckley* and *McConnell*, “express advocacy,” while not a constitutionally required standard, remains part of the *statutory* definition of “expenditure” under § 431(9) of FECA for organizations (such as 501(c) groups) whose principal purpose is *not* electioneering. Thus, as long as they respect the limits on their tax status (which include the requirement that electioneering may not be their primary purpose) such organizations may continue to engage in non-express advocacy without subjecting themselves to regulation under FECA (provided, of course, that the non-express advocacy does not constitute an “electioneering communication” subject to BCRA).

We reiterate that Public Citizen shares the goal of bringing organizations that are in fact devoted to electioneering — in particular 527 groups — under more effective regulation. We urge the Commission, however, to avoid any implication that in doing so, it is — without authority in FECA — expanding the regulation of non-profits that are not principally engaged in electioneering and that refrain from expressly advocating the election or defeat of federal candidates.

Respectfully submitted,

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