COMMENTS OF COMMISSIONER MICHAEL E. TONER
REGARDING NOTICE OF PROPOSED RULEMAKING ON
POLITICAL COMMITTEE STATUS
MARCH 4, 2004

I want to thank the Office of General Counsel, my colleagues, and their staffs, for all the hard work that has gone into the draft Notice of Proposed Rulemaking during the last couple of months. It has truly been a productive, collaborative effort.

I believe the proposed notice is very sound and will enable the Commission to comprehensively address the legal status of outside groups under the McCain-Feingold law and the Supreme Court's McConnell decision. The proposed notice contains a number of significant regulatory proposals. I am pleased that the proposed regulations are presented, in many instances, as alternatives. This makes sense because it allows the Commission to get comment on competing regulatory approaches and provides the Commission with maximum flexibility if it chooses to proceed in this area. It also reflects the fact that no Commissioner has made any final decisions. For all of these reasons, I strongly support the proposed notice.

As the Commission considers what action to take regarding outside organizations in the next two months, I will be guided by several important principles.

First, any rules that the Commission issues must be clear and understandable. This agency's actions affect every person in this country who is interested in supporting the candidates and political parties of their choice. A major point of emphasis for me while I have served at the FEC is that the Commission's rules must be intelligible to people at the grassroots level. I don't think this rulemaking should be any exception. Providing the American public with clear and understandable rules is a core obligation of this agency. As we consider various regulatory options, I will seek to keep this principle in mind.

Second, if the Commission decides to regulate in this area, its regulations must be effective. I suspect we are going to have a major debate, as we did during the ABC Advisory Opinion, about whether the Commission has the statutory authority under the McCain-Feingold law to issue any new regulations on outside groups, and that will be an important debate. However, if we decide that the FEC does have the statutory and constitutional authority to act, I think we must do so in a meaningful and effective manner. Anything less than that would be a disservice to the regulated community, and to the law we are responsible for enforcing.

In terms of issuing effective rules, I will be very interested in what commentators believe are the specific, concrete steps that the Commission must take to effectively regulate outside groups should it choose to do so in this rulemaking. For example, the Commission's allocation regulations governing non-connected organizations will be a major issue in this proceeding. One prominent outside group recently reported an allocation split for the 2004 election cycle of 2% hard money and 98% soft money. I have no reason to doubt the accuracy of this reported split under the Commission's current allocation rules. But are these allocation rules appropriate in the aftermath of BCRA and the McConnell ruling? As a point of reference, prior to BCRA, when national parties performed generic voter mobilization activities in presidential election years, they were required to pay for them with at least 65% hard dollars. For the Commission's regulations to be effective, should the same 65% minimum hard-dollar requirement apply to outside groups, who, after all, are seeking to do the same activities at the same time as the national parties used to do? If not, should the Commission require that outside groups pay for such activities with at least 50% hard dollars? Is a 50% hard-dollar requirement the bare minimum that the Commission must establish to be effective?

More broadly, the Commission seeks comment in the NPRM on whether any outside organization whose major purpose is to influence Federal elections should be permitted to pay for any of its activities with soft money? If the Commission adopted this position, it would take complex questions of allocation off the table altogether for outside groups who are political committees. Such organizations would have to pay for all of their activities entirely out of hard dollars. I support seeking comment on this issue because it is a fundamental, threshold question on how the Commission should approach outside groups whose major purpose is to elect and defeat federal candidates.

Moreover, in the ABC Advisory Opinion, the Commission concluded that Section 527 organizations that are political committees under the Act must use hard dollars to pay for advertisements that promote, support, attack, or oppose a Federal candidate. We seek comment in the draft notice on whether the Commission should apply the same rule to all 527 groups, regardless of whether they are political committees under the Act. We also seek comment on what the governing standard should be for 501(c) organizations.

All of these questions go to what steps the Commission must take to be effective if it chooses to regulate in this area. I look forward to the comments we receive on this key subject.

Third, I think the law is very different today than it was before the Supreme Court issued its ruling in McConnell. I seriously doubt we would be conducting this proceeding today if the Supreme Court had not ruled the way it did in McConnell. In upholding the constitutionality of the McCain-Feingold law, the Court repeatedly indicated that the government has the power – indeed the obligation -- to prevent circumvention of the campaign finance laws. In addition, the Court ruled that the express advocacy test is not constitutionally required, and upheld the constitutionality of the "promote, support, attack, oppose" standard against a vagueness challenge. The Court also sharply criticized

the Commission's longstanding allocation rules, at least with respect to political party committees.

Outside groups today are essentially seeking to replicate much of the advertising and voter mobilization activities that the national parties financed in part with soft money funds before the new law was enacted. In deciding whether this is legally permissible, I believe the Commission should keep the Supreme Court's admonitions in McConnell close in mind.

I support the draft Notice of Proposed Rulemaking before us today. I look forward to working with everyone at the Commission in the weeks ahead to address these critical issues.