DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

January 18, 2006

VIA E-MAIL & REGULAR MAIL

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Mr. Deutsch:

Thank you for sending to us a copy of the Notice of Proposed Rulemaking (NPRM) regarding the proposed revisions to regulations regarding communications that have been coordinated with Federal candidates and political party committees. Your Notice proposes revisions to the current coordinated communications regulations at 11 C.F.R. 109.21, in part to comply with the district court's decision in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (*pet. for reh'g en banc denied* Oct. 21, 2005). Pursuant to 2 U.S.C. § 438(f), the Federal Election Commission and the Internal Revenue Service are to "consult and work together to promulgate rules, regulations, and forms which are mutually consistent."

In the existing regulations, determining whether there is a coordinated communication involves a three-prong test with a payment prong, a content prong, and a conduct prong. The content prong, which contains four content standards, tried to ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election. The fourth content standard is satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate; (2) is publicly distributed or publicly disseminated 120 days or fewer before an election; and (3) is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more candidates of a political party appear on the ballot. The Court of Appeals found that the Commission had not adequately explained why "120 days reasonably defines the period before an election when non-express advocacy likely relates to purposes other than influencing a Federal election." Shays, 414 F. 3d at 101.

You seek comments on whether a fourth content standard without time frame would still be effective in distinguishing communications made for the purpose of influencing a Federal election from other communications such as lobbying communications. The internal revenue laws differentiate "lobbying" with respect to legislation from activities that attempt to influence elections. In addition, other types of communications relating to a public policy issue may not be considered as attempts to

influence elections under the Federal tax laws. While the timing of a communication with an electoral campaign is one factor in determining whether a particular communication is made to influence an election or whether it is made for some other purpose such as lobbying, the IRS looks at all facts and circumstances to determine if there is a sufficient nexus between the communication and the election of a candidate. Many of the facts and circumstances that the IRS considers are described in Rev. Rul. 2004-6, 2004-04 I.R.B. 328. The revenue ruling contains several examples of how the IRS applies the facts and circumstances to determine whether a communication is an attempt to influence an election.

Your notice of proposed rulemaking specifically asked for comment on how the 120-day window regarding alternative content test versions of 11 C.F.R. 109.21(c)(4) should apply to entities organized under section 527 of the Internal Revenue Code that are not registered with the Commission as political committees. Accordingly, we will take this opportunity to discuss some of our rules that apply to "section 527" organizations.

Section 527 provides rules that govern the tax status of political organizations. The term "political organization," under section 527, covers parties, committees, funds, and other organizations (whether or not incorporated) that are organized and operated primarily for the purpose of accepting contributions or making expenditures to influence the selection of an individual to public office. If a section 527 organization complies with the applicable internal revenue reporting and disclosure requirements, it is exempt from tax on its exempt function income, i.e., political, contributions, but it is subject to tax on its non-exempt function income such as investment income and income that is used for other purposes like lobbying. Section 527(f)(2) defines "exempt function" as:

> the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

While section 527 covers organizations (including unincorporated funds) which are organized and operated primarily to conduct activities in an attempt to influence an election, or an appointment, of an individual to a Federal, State or local office, these organizations may engage in other types of activities so long as they are not the organization's primary activities. For example, a section 527 organization may engage in advocacy on a public policy issue that is not an attempt to influence an election or an appointment to public office, such as lobbying, as long these activities are not their primary activities. It is also possible that an organization may be classified as a section 527 organization even if its primary activities are limited to influencing the appointment of individual to public office, such as a judicial nominee. Thus, a section

527organization may engage in activities that are not designed to influence federal elections.

We hope our comments are helpful as you continue to consider these important campaign finance rules. If you would like to discuss any the issues involved, please feel free to call Cynthia Morton at (202) 622-6070 or me at (202) 622-7103.

Sincerely,

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