FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 23, 2005

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Mai T. Dinh
Assistant General Counsel

SUBJECT: Late Comment on Electioneering Communications

Attached please find one late comment from The Arc of Montgomery County submitted in response to Notice 2005-20, Notice of Proposed Rulemaking on Electioneering Communications, published in the *Federal Register* on August 24, 2005 (70 FR 49508). The comment period ended on September 30, 2005.

Attachments

cc: Deputy General Counsel
Associate General Counsel
Congressional Affairs Officer
Executive Assistants

T h e
A r c
Montgomery
C o u n t y

The Arc of Montgomery County
Continental Plaza
1010 W. Ninth Avenue
King of Prussia, PA 19406

October 16, 2005

Ms. Mai T. Dinh, Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking on Electioneering Communications (11 CFR 100.29)
Federal Register Vol. 70 No.163 Page 49506 August 24, 2005

Dear Ms. Dinh,

The Arc of Montgomery County (MARC), recognized by the Internal Revenue Service (IRS) as an exempt nonprofit under Section 501(c)(3) of the federal tax code, urges the Federal Election Commission (FEC) to retain the 501(c)(3) exemption under the electioneering communications rule. The ability of nonprofits to use broadcast media for genuine issue advocacy and to encourage citizen participation in public policy debates would be severely limited if broadcasts by 501(c)(3) organizations are included in the definition of electioneering communications. FEC rules should regulate federal campaign finance, not legitimate public policy debates.

501(c)(3) organizations do not engage in partisan political activities.

The FEC should retain the 501(c)(3) exemption because the Internal Revenue Code (IRC) already clearly prohibits religious, charitable, scientific, and educational organizations from engaging in partisan electioneering. IRC Section 501(c)(3) states that we must "not participate in, or intervene in (including publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Neither federal law or IRS rules contain any exceptions or exemptions for *de minimus* partisan activity. In addition, this total ban on political intervention applies to elections at the local, state and federal levels. Compliance with such an absolute prohibition virtually guarantees that a 501(c)(3) organization would not engage in activity that comes within the jurisdiction of the Federal Election Commission or that is covered by the purposes of the Federal Election Campaign Act.

Nonprofit law expert Bruce Hopkins says, "The requirement that a tax-exempt charitable organization not engage in political campaign activities is relatively clear as to its meaning. Because of this relative clarity, the matter has infrequently been the subject of discussion in court opinions or in IRS rulings." [1] Charitable and religious organizations know what they can and cannot do, and take pains to comply with the law, since the sanctions for violations are significant. These sanctions range from excise taxes on the organization and its managers to loss of tax-exempt status.

There is no record of abuse of the 501(c)(3) exemption.

501(c)(3) organizations are permitted to engage in issue advocacy supporting or opposing legislation or policy proposals. Research on so-called "sham issue advocacy" has never uncovered abuses by 501(c)(3) organizations. There is no available objective or anecdotal record from the 2004 election that indicates such abuse. Absent a record of abuse, there is no justification for limiting fundamental constitutional speech rights of these organizations. Speculation about the potential for loopholes does not equal a record of abuse. Indeed, restrictions aimed at preventing an unthreatened harm amounts to an unconstitutional prior restraint on speech.

Issue advocacy and grassroots lobbying are protected speech.

Issue advocacy and grassroots lobbying by religious, charitable, scientific, and educational organizations has long been recognized by Congress as protected speech that provides valuable information and insight to the public and to elected officials. This legitimate activity poses no meaningful risk of intervening in federal elections.

However, silencing this speech, even if only for the limited time periods defined by "electioneering communications," poses a substantial risk of chilling legitimate grassroots advocacy year-round. The NPRM asks if charities' general unfamiliarity with campaign finance law would cause them to stop advertising advocacy

messages that refer to federal candidates. The answer is that yes, this is likely to happen if the FEC does not retain the exemption and adopt IRS standards to define partisan activities by 501(c)(3) organizations.

The NPRM also asks to what extent grassroots lobbying would result in a communication that "promotes, attacks, supports or opposes" a federal candidates. Because the FEC has declined to offer a definition of this standard, the question is impossible to answer. If the IRS rules are used, the answer is that no grassroots lobbying communications will "promote, attack, support or oppose" federal candidates. However, these communications are very likely to "promote, attack, support or oppose" public policies and ideas. But regulation of ideas is not within the jurisdiction of the FEC.

IRS enforcement of ban on intervention in elections is compatible with FEC enforcement of campaign finance laws.

Since 501(c)(3) organizations have been following the IRC prohibition for over 50 years, it makes sense for the FEC to incorporate IRS rules and standards into its exemption to the electioneering communications restrictions.
The IRS rulings and materials interpreting this ban on intervention in elections have historically defined intervention very broadly, including both direct and indirect intervention. This leaves no room for "loopholes" that would result in partisan broadcasts by 501(c)(3) organizations during the 60/30 day blackout period.
The IRS has a rigorous enforcement program that monitors and enforces the campaign intervention prohibition under federal tax law. To bolster this enforcement, the Political Intervention Project (PIP) was established in June 2004 to "fast track" any election-time violations by 501(c)(3) groups. The IRS is focused on taking action against alleged violations as they become aware of them and has indicated that they will continue to use PIP in 2006.
Even given the IRS's enhanced enforcement of political intervention violations, nothing in the current 501(c)(3) exemption prevents the FEC from initiating an enforcement proceeding if a group were to expressly endorse or oppose a federal candidate.

Conclusion

We urge you to:

- Exempt 501(c)(3) organizations that are in compliance with IRS rules as part of your own enforcement program;
- Use Internal Revenue Service rules to define what is and is not a partisan broadcast communication for a 501(c)(3) organization so there will be one, consistent body of law governing our communications;

If you propose a definition under the "promote, support, attack, or oppose" standard publish a new proposed rule for public comment.

Yours truly,

Paul Stengle

Paul Stengle
Executive Director, The Arc of Montgomery County (MARC)

PS/jm

[1] *The Law of Tax-Exempt Organizations, 8th Edition*, by Bruce R. Hopkins, published by John Wiley & Sons, 2003 (p. 585)