INDEPENDENT SECTOR

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September 30, 2005

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

Re: Notice of Proposed Rulemaking on Electioneering Communications, 70 Fed Reg. 49508 (Aug. 24, 2005)

Dear Ms. Dinh:

INDEPENDENT SECTOR, a nonprofit, nonpartisan coalition of nearly 500 national organizations, foundations, and corporate philanthropy programs, welcomes this opportunity to comment on the Federal Election Commission's Notice of Proposed Rulemaking on Electioneering Communications (Notice 2005-20).

I. Background

The Bipartisan Campaign Reform Act ("BCRA") prohibits corporations, including nonprofit corporations exempt from federal income tax under section 501(c)(3), from making "electioneering communications." BCRA defines "electioneering communications" as communications (1) occurring within 30 days of a primary election for federal office or within 60 days of a general election for federal office that (2) include the name and/or likeness of or otherwise "clearly identify" a candidate for a federal office being contested in that primary or general election, and (3) are targeted to the relevant electorate for that candidate.

BCRA authorizes the FEC to establish by regulations exemptions from the definition of "electioneering communications" subject to the limitation that the Commission cannot exempt any communications that "promote, support, attack, or oppose" ("PASO") a federal candidate or officeholder.[1] In its initial regulations implementing the electioneering communication rule, the FEC excluded from the definition of "electioneering communications": (1) communications by section 501(c)(3) organizations, whether paid or unpaid,

[1] 2 U.S.C. § 434(f)(3)(B)(iv), citing 2 U.S.C. § 431(20)(A)(iii).

and (2) unpaid communications regardless of the tax status of the communicating entity (the so-called "for-a-fee" rule).[2]

In *Shays* the courts invalidated both exclusions, but on fundamentally different grounds.[3] The District Court invalidated the section 501(c)(3) exemption on the ground that the FEC had not met the requirements of the Administrative Procedure Act to establish a record demonstrating that the exemption is consistent with the relevant provisions of BCRA.[4] By contrast, the District Court and the D.C. Circuit invalidated the for-a-fee rule on the ground that exempting Public Service Announcements and other unpaid communications was inherently inconsistent with BCRA.[5] Thus, the FEC is barred from re-proposing the for-a-fee rule but may, consistent with the court decisions, re-propose the section 501(c)(3) exemption provided that the Commission can establish an adequate record.

Pursuant to the *Shays* litigation, the Commission on August 24, 2005 issued new proposed regulations that would exempt communications by section 501(c)(3) organizations from the definition of electioneering communications, provided that those communications do not PASO a federal candidate or officeholder.[6] In other words, the Commission re-proposed the section 501(c)(3) exemption but with the PASO prohibition as an overlay.

II. Summary of INDEPENDENT SECTOR Position

INDEPENDENT SECTOR strongly encourages the Commission to retain the categorical section 501(c)(3) exemption, and not to overlay the PASO standard. INDEPENDENT SECTOR believes that the PASO overlay is not required for faithful and effective implementation of the BCRA electioneering rule and would unnecessarily burden hundreds of thousands of section 501(c)(3) organizations with the need to understand two complex and ultimately duplicative sets of legal requirements – the section 501(c)(3) campaign intervention rules and the BCRA electioneering communications rules – when compliance with the section 501(c)(3) rules as enforced by the IRS would alone ensure that section 501(c)(3) organizations do not engage in the PASO communications barred by BCRA. Accordingly, INDEPENDENT SECTOR urges the Commission to re-propose the section 501(c)(3) exemption without the PASO overlay.

We regard two questions as central to this analysis. First, is it possible for a charity to comply with the section 501(c)(3) prohibition on campaign intervention and still make PASO communications within the 30 and 60 day pre-election windows? Second, assuming that this is not possible (i.e., that compliance with the tax law prohibition ensures compliance with the BCRA PASO prohibition), does the IRS effectively enforce this prohibition? For the reasons outlined below, we believe that compliance with the tax law prohibition does ensure compliance with the PASO rule, and that the IRS effectively enforces this prohibition. Accordingly, we

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[2] *Final Rules and Explanation and Justification for Regulations on Electioneering Communications*, 67 Fed. Reg. 65190 (Oct. 23, 2002).
[3] *Shays v. FEC*, 337 F. Supp. 2d. 28 (D.D.C. 2004), *aff'd* No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005).
[4] *Shays*, 337 F. Supp. 2d. at 124-129. The Commission did not appeal this part of the District Court's opinion.
[5] *Id., aff'd Shays v. FEC*, 414 F.3d 76, 107-108 (D.C. Cir. 2005).
[6] *Notice of Proposed Rulemaking on Electioneering Communications*, 70 Fed. Reg. 49508, 49511 (Aug. 24, 2005).

believe the Commission can reasonably rely on IRS enforcement of the tax law prohibition to ensure that section 501(c)(3) organizations do not engage in PASO communications within the 30 and 60 day pre-election windows.

III. Compliance With the Section 501(c)(3) Prohibition on Partisan Campaign Intervention Ensures that Charities Do Not "Promote, Support, Attack, or Oppose" Federal Candidates During the Pre-Election Windows Regulated by the Electioneering Communication Rules

A. The section 501(c)(3) Prohibition on Partisan Campaign Intervention Is At Least as Broad as the BCRA Prohibition on PASO Communications During the 30 and 60-Day Pre-Election Windows

Section 501(c)(3) prohibits organizations subject to its provisions from intervening in a campaign in support of or in opposition to a candidate for public office. Linguistically, the tax code standard, while shorter, seems substantively identical to the PASO standard. The tax code standard is framed in terms of "support[ing]" or oppos[ing]" a candidate. While "support" and "oppose" are only two of the four terms used in defining the PASO standard, when understood in their ordinary meaning (as principles of statutory construction require) the concepts of "support" and "oppose" encompass respectively the concepts of "promote" and "attack." Any communication that "promotes" a candidate necessarily "supports" that candidate, and any communication that "attacks" a candidate necessarily "opposes" that candidate. Thus, the PASO standard must be reasonably interpreted as a slightly more verbose version of the tax law's ban on supporting or opposing a candidate – different in words but identical in substance.

Moreover, the IRS has construed this prohibition quite broadly, further supporting the conclusion that the tax law prohibition as applied is at least as broad as any reasonable FEC interpretation of the PASO standard.[7] Specifically, the IRS has interpreted the section 501(c)(3) standard to encompass any communication, paid or unpaid, that is intended to and/or has the effect of supporting or opposing a candidate for public office. The IRS considers all relevant facts and circumstances in determining whether a communication constitutes prohibited campaign intervention.[8] In particular, the IRS considers not only the content of the communication but also the subjective intent of those involved in shaping and delivering the communication, the process through which the communication is developed, the audience to which it is directed, the manner in which that audience is selected, and the proximity of the communication to the election.

B. The IRS Benefits from a More Permissive Constitutional Framework Than Applies to FEC Enforcement of BCRA

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[7] "Election Year Issues," IRS Exempt Organizations Division Continuing Professional Education Technical Instruction Program for FY 2002, at 349, available at www.irs.gov/pub/irs-tege/eotopici02.pdf. Hereafter, "IRS CPE Text."

[8] Id. at 339.

Very significantly, the Supreme Court has explicitly ruled that in enforcing this prohibition the IRS operates within a much more permissive constitutional framework than that which governs the Commission's interpretation and enforcement of BCRA. All the way up to and including *McConnell v. FEC*, the Supreme Court's campaign finance jurisprudence has applied strict scrutiny to campaign finance expenditure limitations.[9] Unlike those cases, however, the Court specifically ruled in *Taxation with Representation* that the section 501(c)(3) restrictions on lobbying are not subject to the strict scrutiny standard since the provision of a tax-exemption for particular donations really amounts to a government subsidy of the activities for which those funds are used.[10] Subsequently, in *Branch* Ministries, the Court explicitly relied on *Taxation with Representation* to uphold the section 501(c)(3) prohibition on campaign intervention.[11] Thus, in contrast to the strict scrutiny standard the Court has applied to BCRA, the Court has made clear that governmental decisions about taxation and tax exemption are subject to the much lower rational basis standard.[12]

Thus, the IRS may – and does -- aggressively enforce the campaign intervention prohibition without continually worrying, as the FEC inevitably must, about the threat of a successful constitutional challenge. This difference can be starkly illustrated by the Court's holding in *McConnell* that the specificity of the 30 and 60 day pre-election limits on the reach of the electioneering communications rules is necessary to avoid unconstitutional vagueness in the election law context. By contrast, because the tax law prohibition on campaign intervention is not viewed by the courts as a direct restriction on political speech, and thus not subject to the strict scrutiny standard, the IRS is free to challenge partisan communications based on a flexible facts and circumstance test unconstrained by the need for a bright line rule on proximity to an election.

C. The section 501(c)(3) Lobbying Rules Do Not Override or Buffer the Ban on Partisan Political Activities

It is also important to note that while section 501(c)(3) organizations are expressly permitted to engage in lobbying and public education on legislative and public policy issues, this permission does not over-ride the prohibition on campaign intervention. In other words, the fact that a section 501(c)(3) communication meets the tax law standards defining lobbying or educational activity does not protect that communication from challenge as prohibited campaign intervention or alter the criteria the IRS applies in making that determination. Thus, for example, if during an election campaign a section 501(c)(3) issues a lobbying communication that refers to a candidate for federal office, the fact that this communication is permitted under the section 501(c)(3) lobbying rules does not insulate it from challenge as prohibited campaign intervention.[13]

IV. IRS Enforcement is Vigorous and Effective, and Sufficient to Ensure Charities Will Comply With BCRA

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[9] *McConnell v. FEC*, 540 U.S. 93 (2003). See also *Buckley v. Valeo*, 424 U.S. 1 at 44-45 (1976).
[10] *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).
[11] *Branch Ministries v. Rossotti* (D.C. Cir. 2000), 211 F.3rd 137, 143.
[12] *Taxation With Representation,* at 550-51.
[13] IRS CPE Text.

A. Congress Has Given the IRS Flexible and Effective Enforcement Tools

Congress has given the IRS strong and flexible tools with which to enforce the campaign intervention rules. In sharp contrast to virtually all other Internal Revenue Code provisions, the IRS does not have to wait for the close of the taxable year and the filing of a tax return (in the case of charities, the Form 990) to audit a charity's conduct and impose sanctions.[14] Nor is the sanction limited to after-the-fact revocation of the organization's tax exemption.[15] On the contrary, Congress has empowered the IRS to intervene during a campaign immediately upon obtaining reasonable cause to suspect that a charity has violated the campaign intervention ban. Moreover, either in addition to or in lieu of proposing revocation of the organization's exempt status, the IRS can also seek an immediate injunction to halt the partisan campaign activity and can impose stiff monetary penalties on both the organization and on individual directors and officers who knowingly and willfully participate in the partisan activity.[16]

B. The IRS Has Made Political Activities an Enforcement Priority

In recent years, the IRS has given increasingly high priority to enforcement of the campaign intervention ban. This has involved both an extensive effort to provide detailed guidance to charities on application of the campaign intervention rules to a broad range of common public education and advocacy activities and an energetic effort to identify and sanction charities that violate these rules. Illustrative of the IRS education efforts is the 140-plus page explication of the campaign intervention rules publicly released by the IRS in its 2002 Continuing Professional Education text. Illustrative of the Service's increasingly energetic enforcement efforts is the Service's establishment during the 2004 election cycle of a targeted national compliance program to provide accelerated review of and response to possible violations during the election campaign rather than waiting to review charities' conduct after they have filed their Forms 990 for the year.[17]

C. There is No Evidence in the BCRA Record That the Tax Rules are Ineffective in Prohibiting PASO Communications

The extensive legislative and judicial records related to BCRA provide strong evidence that IRS enforcement of the section 501(c)(3) ban on campaign intervention has effectively prevented section 501(c)(3) organizations from making the type of PASO communications barred by the BCRA electioneering communications rules. Indeed, both the legislative and judicial records are entirely void of examples of section 501(c)(3) organizations sponsoring sham issue ads or other PASO communications during the 30 and 60 day pre-election windows.

V. Conclusion

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[14] Internal Revenue Code, § 6852.

[15] Id.

[16] Id., § § 4955 and 7409.

[17] Treasury Inspector General for Tax Administration "Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations" (February 2005), available at www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf.

A. A section 501(c)(3) Exemption Without the PASO Overlay is a Reasonable Interpretation of BCRA

Taken as a whole, the foregoing analysis strongly supports the conclusion that the Commission may reasonably rely on IRS enforcement of the section 501(c)(3) ban on campaign intervention to ensure that section 501(c)(3) organizations comply with the BCRA ban on pre-election PASO communications. This provides the reasonable basis the APA requires for the Commission to re-propose the section 501(c)(3) exemption without the PASO overlay.

B. Imposing the PASO Overlay Could Actually Reduce Compliance with Both the section 501(c)(3) Prohibition and the Electioneering Rules

Finally, there is a real risk that if the Commission adopts the section 501(c)(3) exemption ***with*** the PASO overlay, the resulting increase in complexity and confusion might actually decrease rather than increase compliance with both the section 501(c)(3) and BCRA rules. The great majority of charities are strongly committed to compliance with all applicable laws and regulations – including the Internal Revenue Code and BCRA – but have very limited resources to devote to analyzing and complying with complex and overlapping regulatory requirements. INDEPENDENT SECTOR and other charitable sector leadership organizations, in close collaboration with the IRS, have spent many years promoting broad understanding of, and compliance with, the section 501(c)(3) ban on campaign intervention. Given the relative complexity of the rules and the limited access of many charities to legal counsel, this has been a challenging endeavor. Requiring charities to understand and comply with a second set of overlapping rules aimed at the same objective but interpreted and enforced by a different administrative agency would inevitably lead to widespread confusion and frustration. One fears that this confusion and frustration would lead, in turn, to a growing sense among charities that the rules are just too complex to make strict compliance a practical option.

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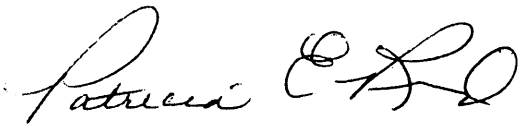
We very much appreciate your consideration of these comments. If we can provide any additional information or analysis, please let me know.

Respectfully submitted,



Patricia Read