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August 29, 2002

Via E-Mail, Fax and Hand Delivery

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

Re: Notice of Proposed Rulemaking: Electioneering Communications

Dear Ms. Dinh:

Concerned Women for America ("CWA") submits, through counsel, the following comments on the Notice of Proposed Rulemaking, 67 Fed. Reg. 51131 (August 7, 2002), to implement certain provisions of the Federal Election Campaign Act of 1971 as amended ("FECA"), as further amended by the Bipartisan Campaign Reform Act of 2002, P.L. 107-55 ("BCRA").

CWA is a § 501(c)(3) organization whose mission is to protect and promote Biblical values among all citizens – through prayer, education, and by influencing society – to reverse the decline in moral values in our nation. CWA accomplishes this mission, in part, by helping people bring Biblical principles into public policy through its grassroots lobbying. CWA has a nationally syndicated radio show which airs daily and seeks to make a difference in communities and this nation through its examination of the issues of the day.

In submitting these comments, CWA does not concede that any of the proposed regulations addressed, or the statutory provisions underlying them, are constitutional. CWA believes that many provisions of the BCRA unconstitutionally regulate protected speech, including direct and grassroots lobbying and issue advocacy, and are not justified by any compelling governmental interest. Furthermore, CWA believes that many provisions of the BCRA will effectively

dissuade individuals and non-profit organizations from participating in our democratic process.

Nevertheless, CWA is aware of Congress' directive to the Commission to promulgate rules to implement the BCRA. And, although the court has the power to rule on the constitutionality of BCRA's provisions currently being challenged, the Commission must independently exercise its discretion, whenever possible, and only promulgate regulations within Constitutional limits. If the Commission fails to exercise discretion, it will be difficult, if not impossible, to fashion regulations that are least hostile to the First Amendment.

These comments generally assume, for purposes of this regulatory process only, that the applicable provisions of the BCRA will survive judicial challenge and that the Commission's regulations will govern CWA, and therefore, urges the Commission to implement the BCRA in a manner that least infringes upon the rights of non-profit organizations to engage in constitutionally protected speech.

I. Role of Section 501(c)(3) Charitable Organizations

To craft an exception which permits § 501(c)(3)s to engage in lobbying activities, but which does not conflict with the plain text of BCRA, it is important for the Commission to understand the role of § 501(c)(3) charitable organizations and how the electioneering provisions of the BCRA specifically affect them.

When examining the tax laws under the Internal Revenue Code, it should be noted that Congress generally has not sought to encourage lobbying or political activities through the tax laws. Different tax rules apply to political campaign and lobbying activities of tax-exempt organizations depending upon the category of § 501(c) under which the organization is described. However, it is no coincidence that the restriction on an organization's lobbying and political campaign activities generally become more stringent as the federal tax benefits potentially available to the organization or its donors increase. Section 501(c)(3) is the category most favored and sought after and, therefore, has the greatest and most detailed restrictions.

In general, although advocacy activities of all sorts are often viewed broadly as "political" in the sense that advocacy may be politically motivated or have political implications, the Internal Revenue Code distinguishes lobbying with respect to legislation from political campaign intervention. Section 501(c)(3) *expressly* provides that tax-exempt organizations described in that section may not,

directly or indirectly, participate in, or intervene in, *any* political campaign on behalf of (or in opposition to) any candidate for public office. This statutory prohibition is absolute.[1] The reason for this prohibition is clear. Contributions to § 501(c)(3) organizations are deductible for federal income tax purposes, but contributions to candidates and PACs are not. The use of § 501(c)(3) organizations to support or oppose candidates or PACs would circumvent federal tax law by enabling candidates or PACs to attract tax-deductible contributions to finance their election activities.

The statutory prohibition is interpreted broadly. It applies to "candidates for public office," whether at the federal, state or local level. Under some circumstances, the IRS may consider an individual who has not yet formally announced an intention to seek public office to be a candidate for § 501(c)(3) purposes. Furthermore, an organization may violate the prohibition even if it does not identify a candidate by name. Additionally, a § 501(c)(3) organization does not need to violate the express advocacy standard of *Buckley v. Valeo*, 424 U.S. 1 (1976) for it to violate the political campaign prohibition of § 501(c)(3). Therefore, because the IRS broadly interprets political campaign activity, a § 501(c)(3)'s lobbying communications cannot also be electoral in nature without violating the statutory prohibition. In other words, due to the statutory prohibition on campaign intervention, a communication cannot be both a lobbying communication, which is permitted, and political campaign activity, which is not permitted, without risking loss of tax-exempt status, a death knell to the organization. Creating an exception for a § 501(c)(3) organizations will not create a so-called loophole because the absolute prohibition on campaign intervention does not permit § 501(c)(3) organization to use lobbying communications to influence elections without jeopardizing their tax-exempt status.

Section 501(c)(3) organizations are permitted under the Internal Revenue Code to engage only in an insubstantial amount of lobbying. Organizations may choose to measure their lobbying with an objective sliding scale, which caps lobbying by any § 501(c)(3) organization at $1 million. Organizations violate the substantial part test of § 501(c)(3) if a substantial part of their activities involve carrying on propaganda (grass roots lobbying) or other otherwise attempting to influence legislation. Attempts to influence legislation may be aimed directly at legislators or indirectly at them through the "grass roots" public.

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[1] As observed by the IRS, "intervention in a political campaign may be subtle or blatant. It may seem to be justified by the press of events. It may even be inadvertent. The law prohibits all forms of participation or intervention in 'any' political campaign." PLR 9609007.

Section 4911(d) of the IRC defines grassroots lobbying as any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof. A communication is treated as a grass roots lobbying communication only if the communication refers to specific legislation, reflects a view on such legislation, and encourages the recipient of the communication to take action with respect to such legislation. Reg § 56.4911-2(b)(2)(ii). A communication encourages a recipient to take action with respect to legislation if the communication (Reg § 56.4911-2(b)(2)(iii)): (1) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation); (2) states the address, telephone number, or similar information of a legislator or an employee of a legislative body; (3) or specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee that will consider the legislation.

A communication may encourage the recipient to take action with respect to legislation, but it would not "directly" encourage such action under (3) above, if the communication does no more than identify one or more legislators who will vote on legislation and how they will vote. Reg § 56.4911-2(b)(2)(iv). A communication that encourages the recipient to take action with respect to legislation but that does not "directly" encourage the recipient to take such action may be within the exception for nonpartisan analysis, study or research. Reg § 56.4911-2(b)(3). With one exception, the grass roots definition of lobbying is also applicable to mass media communications. Reg § 56.4911-2(b)(5).[2]

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[2] A communication is presumed to be grass roots lobbying if the communication is in the mass media within two weeks before a vote by a legislative body, or by a legislative committee, on a highly publicized piece of legislation, if the communication reflects a view on the general subject of the legislation or encourages the public to communicate with legislators on the general subject of the legislation. Reg § 56.4911-2(b)(5)(ii). The organization can rebut the presumption by demonstrating that the communication is a type of communication regularly made by the organization in the mass media without regard to the timing of legislation or that the timing of the communication was unrelated to the upcoming legislative action. Reg § 56.4911-2(b)(5).

Because § 501(c)(3) organizations are only permitted to engage in an insubstantial amount of lobbying, of which grass roots lobbying may comprise only 25%, organizations that are approaching the cap under § 501(h)'s safe harbor[3] will often remove one of the required elements under the definition of grass roots lobbying in order to distribute the communication. For example, a § 501(c)(3) organization may create a lobbying ad, but leave off the call to action (statement urging the recipient to contact the legislator, as well as the name and address of the legislator). Although less effective, this type of modification generally permits the organization to distribute the communication, while avoiding reaching or exceeding the cap on lobbying expenditures, and the imposition of an excise tax. The simple removal of one or more elements of the lobbying definition does not automatically cause the IRS to view the communication as political campaign intervention.

The proposed regulations affect § 501(c)(3) organizations in several critical ways. Clearly, the BCRA's requirements that § 501(c)(3) organizations disclose donors of $1,000 or more if they air electioneering communications will have a significant impact on non-profit organizations. Non-profits that choose to exercise their First Amendment rights before an election will see their donor bases shrink, and/or will see donors refusing to give more than $1,000. Non-profits that receive donations from corporations to engage in charitable activities will have to make a choice between continued receipt of these funds and speaking or lobbying on issues before an election.

The proposed regulations also significantly affect the speech and activities of § 501(c)(3) organizations. If § 501(c)(3)s choose to air grass roots lobbying advertisements before an election, they will have to structure their communications so that they are not targeted and, therefore, banned electioneering communications, thus significantly reducing the effectiveness of their ads in their ability to educate and lobby the public. Faced with such a choice, many non-profits will simply decide

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[3] The lobbying ceiling amount for § 501(c)(3) organizations that make the § 501(h) safe harbor election is 150% of the lobbying nontaxable amount and grass roots nontaxable amount. The nontaxable amounts are a defined portion of the organization's exempt purpose expenditures, which basically are the organization's expenditures for normal charitable functions. The lobbying nontaxable amount is a declining percentage of the exempt purpose expenditures, with a $1 million cap that is reached when the organization's exempt purpose expenditures exceed $17 million. The grass roots nontaxable amount is defined separately as 25% of the lobbying nontaxable amount and thus has a $250,000 maximum. Under the sliding scale, an organization is permitted to expend for direct lobbying 20% of the first $500,000 of exempt purpose expenditures, 15% of the next $500,000, 10% of the next $500,000, and 5% of all exempt purpose expenditures over $1,500,000, subject to the $1,000,000 cap. Expenditures in excess of these two amounts are subject to an excise tax.

that lobbying in such a manner is not effective and thus not worth the money, and will refrain from speaking.

The reach of the definition of electioneering communication to ads run 30 or 60 days before an election significantly hamstrings CWA and other non-profits in their lobbying and education efforts, especially if Congress is still in session. The timing of CWA's speech and lobbying on these public issues is largely dictated by Congress. Assuming funds are available, CWA's lobbying advertisements are driven by whether the issue is being debated, about to be debated, or should be debated, by Congress. Therefore, to avoid sitting on the sidelines during a crucial debate in Congress, CWA would be forced to dilute its speech to avoid it falling within the definition of "targeted."

Consistent with the Constitution, the Commission should fashion regulations that permit § 501(c)(3) organizations to retain as much freedom over their lobbying, speech, and activities as possible. CWA submits that the discretion given the Commission by Congress permits a categorical exception for § 501(c)(3) organizations.

II. Specific Comments on Proposed Regulations

As a § 501(c)(3) organization, CWA is constrained by the Internal Revenue Code's prohibition on campaign intervention, and for that reason, will only comment on those provisions which specifically affect the activities of CWA. Moreover, because the BCRA, including the electioneering provision of the statute which the Commission is tasked with implementing, is currently being challenged in court, CWA will not discuss its constitutionality. However, no implication should be drawn from its failure to comment on particular issues raised by the Commission, or its choice not to debate the Act's constitutionality.

What is Not an Electioneering Communication?

Other Exceptions

While Congress did not expressly include an exception for § 501(c)(3) organizations, the Commission may promulgate one consistent with the discretion granted it by Congress under 2 U.S.C. 434(f)(3)(B)(iv). Should the Commission exercise this discretion and promulgate an exception, it must otherwise comply with the new electioneering communication provision and not be described in 2 U.S.C. 431(20)(A)(iii) ("public communications" that refer to a clearly identified candidate

for Federal office that promote or support a candidate for that office, or attack or oppose a candidate for that office).

CWA submits that in light of the prohibition on political campaign intervention, which is broadly interpreted by the IRS, a categorical exception for § 501(c)(3) organizations would be consistent with Congress' directive that any exception not permit communications that promote, support, attack or oppose a candidate. Rep. Shays discussed the purpose of this authority, and its limitations:

> The definition of "electioneering communication" is a bright line test covering all broadcast, satellite and cable communications that refer to a clearly identified federal candidate and that are made within the immediate pre-election period of 60 days before a general election or 30 days before a primary. But it is possible that there could be some communications that will fall within this definition even though they are plainly and unquestionably not related to the election.
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> Section 201(3)(B)(iv) was added to the bill to provide Commission with some limited discretion in administering the statute so that it can issue regulations to exempt such communications from the definition of "electioneering communications" because they are wholly unrelated to an election.
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> There could be other examples where the Commission could conclude that the broadcast communication in the immediate pre-election period does not in any way promote or support any candidate, or oppose his opponent.

Comments of Senators McCain, Feingold, Snowe and Jeffords and Reps. Shays and Meehan at 6 (quoting Cong. Rec. H410-411 (Feb. 13, 2002)(statement of Rep. Shays)).

By definition, § 501(c)(3) organizations must be dedicated to charitable and educational pursuits, are permitted to influence legislative outcomes, subject to certain limits, but are expressly prohibited from attempting to influence electoral outcomes. The Internal Revenue Code's statutory prohibition on political campaign intervention is broader than, and therefore includes, "promote, support, attack or oppose a candidate." Any communication distributed by § 501(c)(3) organizations must be wholly unrelated to attempting to influence electoral outcomes and,

therefore, categorically cannot promote, support, attack or oppose a candidate. Such a categorical exception, which is consistent with § 431(20)(A)(iii), would, however, permit § 501(c)(3) organizations to engage in lobbying communications (subject of course to limits imposed under the Internal Revenue Code). No so-called "loophole" is created because a lobbying communication cannot also "promote, support, attack or oppose a candidate;" if it did, it would be prohibited campaign intervention. Consequently, the Commission may properly exercise its discretion and promulgate a categorical exception for § 501(c)(3) organizations.

A categorical exception for § 501(c)(3) organizations is also constitutionally required because § 501(c)(3) organizations may not simply set up a PAC to engage in electioneering communications. On the floor, Senator McCain stated that the electioneering communications provisions did not ban this type of speech because "entities could, however, use their PACs to finance such ads." 148 Cong. Rec. S2141 (March 20, 2002). However, the Internal Revenue Code does not permit § 501(c)(3) organizations to establish a § 527 organization to conduct political intervention activities that it could not directly conduct. *See* S. Rep. No. 93-1374, 93d Cong., 2d Sess. 30 (1974), 1975-1 C.B. 517, 534 and Reg. 1.527-6(g). Therefore, a § 501(c)(3) organization is not permitted to form a PAC.

In the alternative to exempting all § 501(c)(3) organizations from the reach of the BCRA, the Commission should exempt any communication that meets the IRC definition of grass roots lobbying from the definition of electioneering communication. The exceptions listed in proposed 11 CFR 100.29(c)(1), (c)(5), (c)(6) and (c)(7) are a good start at ensuring that the Proposed Regulations are least offensive to the constitutional rights of § 501(c)(3) organizations. As noted above, Congress dictates when nonprofits air most ads. If Congress is in session 30 or 60 days before an election, non-profits are prevented from airing targeted grass roots lobbying ads that merely mention a federal candidate. To prevent such a significant infringement of non-profits' First Amendment rights, a broad exception for direct and grassroots lobbying ads should be included in the final rules. However, because grass roots lobbying is any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof, the IRC's definition of lobbying should not be the only criterion in formulating an exception.

An exception that requires non-profits to meet all the requirements of the IRC's definition of grass roots lobbying would still exclude a substantial amount of speech that is intended to influence legislative outcomes rather than electoral outcomes. CWA, as well as other non-profits, frequently do grass roots lobbying ads to influence public opinion on general issues, rather than specific pending

legislation. There are several reasons for this. First, a § 501(c)(3) may be close to reaching its lobbying cap and may not be permitted to distribute a communication that meets the definition of lobbying. Second, there may be several competing pieces of legislation, none of which completely reflect the non-profit's position. Third, there may be proposals being bandied about, but none formally introduced. Fourth, a non-profit may want to air an ad that generally discusses a Member's proposal, not yet formally introduced, regarding a particular issue. Fifth, a non-profit may not want to take a position on particular legislation but may want to lobby generally on an issue addressed by the legislation.

The exception should not be so narrowly drawn that it would force non-profits to take a stand on one particular piece of legislation, and prohibit them from lobbying the public generally on an issue. For example, a non-profit should be able to air ads on abortion without being forced to take a position on a specific piece of legislation merely to fall within a narrowly drafted exception. Because of the way in which the political process works, with multiple pieces of legislation introduced and numerous amendments offered, many non-profits have found that sometimes it is easier and more effective to educate and lobby generally on the issue and let the viewer, armed with this knowledge, decide how best to lobby, rather than try to address specific bills. Therefore, any exception the Commission adopts should not rigidly require that ads mention a specific piece of legislation and contain a telephone number.

Whatever exceptions the Commission creates, the Commission must avoid drafting ambiguous exceptions that place the power in the hands of bureaucrats to determine whether a communication is issue advocacy or a so-called "sham issue ad." Furthermore, any exception must permit non-profits to determine at the outset whether their proposed communications fall outside the definition of electioneering communication.

What Information Must Be Reported About Electioneering Communications?

The Commission has proposed to require the identification of any person sharing or exercising direction or control over the activities of the person making the disbursement. CWA believes that this provision is unnecessary, intrusive and burdensome. Proposed § 114.14 already restricts corporations or labor organizations from providing funds to another to pay for an electioneering communication, and the proposed regulations also require disclosure of all donors of over $1,000.

Although this information is not required of political committees or other organizations making independent or coordinated expenditures, the Commission has proposed to delve into the decisionmaking processes of non-profits and require them to disclose confidential strategic information by requiring under proposed § 114.14, that the name of any officer, director, employee, volunteer, or donor that shares or exercises direction or control over the activities of the non-profit making the disbursement be disclosed. Competitors and opponents will be able to see who makes the non-profit's decisions. Non-profits that have state affiliates, like CWA, will have an even more difficult time complying with this requirement. Not only is this requirement incredibly burdensome by requiring non-profits to keep track of every individual who participates in decisionmaking, it is intrusive and serves no compelling purpose. It will further harm non-profits by eroding individual involvement in non-profit activities. Individuals who do not want their names disclosed if they donate more than $1,000, will be even further dissuaded from becoming involved with a non-profit if they know that their volunteering will be disclosed. Therefore, ATA urges the Commission to except non-profit corporations from this requirement.

III. Conclusion

Although the Commission is constrained to implement the BCRA, there exist opportunities for the Commission to exercise its discretion, consistent with the authority granted it under the BCRA, and remove a large constitutional deficiency of the Act – the infringement on the right to lobby and speak by § 501(c)(3) organizations. While portions of the BCRA will chill free speech and association, the Act should be implemented in a way that is least offensive to the First Amendment rights of corporations, and in particular, § 501(c)(3) charitable organizations.

Respectfully submitted,

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