OMB WATCH
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Mai T. Dinh, Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2002-13, Proposed Rules on Electioneering Communications

Dear Ms. Smith,

OMB Watch, a nonprofit organization that promotes government accountability and citizen participation in public issues and decision-making, welcomes this opportunity to comment on proposed rules relating to electioneering communications. We work with and through the nonprofit sector because of its vital place in communities and our faith that the sector can play a powerful role in reinforcing our democratic principles. Because of our commitment to strengthening the voice of the nonprofit sector in public policy debates, we work to protect their advocacy rights and educate them about laws and regulations that impact their advocacy work. In addition, we promote public accountability of the nonprofit sector through government oversight that is not unduly burdensome.

We request the opportunity to testify on this NRPM at the August 29 public hearing date. I will be out of town on August 28.

OMB Watch supports and appreciates the Commission's general approach to the electioneering communications issue. While the goals of the electioneering provisions of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA) are clearly focused on broadcasts that attack or promote federal candidates and are funded by unregulated soft money, the language, if narrowly construed, could result in a "blackout" of many nonpartisan, non-electoral advocacy communications by nonprofits. This kind of genuine issue advocacy is entitled to constitutional protection, and the Commission has taken an important step in providing this protection in its proposed rules. We believe this is the

intended and appropriate result, since BCRA, at 2 U.S.C. 434(f)(3)(B)(iv) gives the Commission the power to create additional exemptions.

The sponsors of BCRA clearly indicated their desire for the Commission to take on this task. In a colloquy addressing the purpose of Section (B)(iv) in floor debate in the House of Representatives, Rep. Shays said "...it is possible that there could be some communications that will fall within this definition even though they are plainly and unquestionable not related to the election. Section 201(b)(iv) was added to the bill to provide the 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."

In these comments we wish to provide input on alternatives and specific issues raised in the NPRM and suggest an additional exemptions that would provide greater simplicity for nonpartisan nonprofits. Additionally, we will share the results of research on advocacy by 501(c)(3) organizations we published in May of this year, in conjunction with Tufts University and Charity Lobbying in the Public Interest. The research results demonstrate the widespread impact overbroad application of the electioneering communications ban could have.

Proposed Rules We Support

OMB Watch supports the proposed general definition of "electioneering communications" in the NPRM. For Presidential primaries we support Alternative 1-B limiting application of the proposed regulation to broadcasts mentioning Presidential candidates to 50,000 or more persons in a State where a primary, convention or caucus will be held. This avoids a national "blackout", which we believe was not a result Congress intended.

We also support the proposed exclusion of Internet, low power radio and television and citizens band radio from the definition of "broadcast, cable or satellite communications" as being consistent with the letter and spirit of BCRA.

The Commission takes an important step in providing guidance and clarity by listing the types of communications and media that are not covered by the regulations. For example, the proposed rules correctly state that print media and news stories are not electioneering communications. The exception for candidate debates and forums properly includes non-media sponsors, such as the League of Women Voters. The proposed exemption for references to legislation by popular name when a bill is widely known by the name of its sponsors also avoids an absurd result. However, the proposed regulation should clarify what constitutes a popular name, so that references to co-sponsors in their home districts are not used to broadcast a message that would otherwise be unallowable. We suggest that the "popular name" be limited the original sponsors of a bill.

The proposal to allow independent expenditures for electioneering communications by qualified nonprofit organizations brings otherwise unconstitutional language in BCRA within the limits set by the Supreme Court in *FEC vs. Massachusetts Citizens for Life* (479 U.S. 238 (1986). We support a definition of "qualified nonprofit organization" that permits de minimis corporate or labor contributions to nonprofitss, consistent with recent court decisions, such as *Minnesota Citizens Concerned for Life v. FEC*, a 1997 decision by the 8th Circuit Court of Appeals.

This year, in *Beaumont v. FEC*, (No. 01-1348) the 4th Circuit upheld a federal District Court ruling finding the ban on corporate contributions to federal candidates in the Federal Election Campaign Act unconstitutional as applied to nonprofit organizations. The court distinguished between nonprofits, which serve as vehicles for citizen participation in the political process, and for-profit corporations, which are concerned with "aggregation of capital or the issuance of equity shares." The court pointed out that "nonprofit advocacy organizations play a distinctive role in the political scheme," and "through their expressive activities, groups such as NCFL and NCRL help empower citizens to make informed political choices.... That the functioning of these groups is vital to our democratic political process is abundantly clear from looking at the types of activities in which they engage." Activities cited by the court include public education activities, conferences and debates, grassroots fundraising, membership participation, legislative lobbying and media programs. This case proves the necessity of the independent expenditures for electioneering communications if BCRA is to be mplemented in a manner consistent with free speech protections provided by the First Amendment.

Alternative I-C is an Appropriate Exemption for Grassroots Advocacy Broadcasts

The proposed regulations recognize the importance of nonpartisan grassroots issue advocacy, and the fact that not all issue advocacy is "sham" issue advocacy. Four alternatives are presented, ranging from a narrow exemption for limited legislative calls to action to one that includes action by an executive branch. For the reasons discussed below, we urge the Commission to adopt Alternative I-C as the only approach that provides adequate constitutional protection for the "distinctive role" nonprofits play in the policy process, as recognized by the *Beaumont* case..

Alternative I-A would exempt broadcasts that solely urge the public to contact Members of Congress in support or opposition to pending legislation, but would not allow the message to promote or attack the Member or indicate his or her position on the bill. There are four significant problems with this exemption:

- Not all policy debates take place in the legislative context. Often nonprofits need to encourage the executive branch to take action, and must appeal to the public to support or oppose their position. This can include agency action, or appeals to mayors, governors or the President or Vice-President. In other instances, general public education on an issue, without reference to specific government action, helps build public understanding of it.

- Not all federal candidates are Members of Congress. Since the ban on electioneering communications applies to all clearly identified federal candidates, broadcasts that mention challengers would not be exempted under this alternative. A broadcast urging the public to contact a state legislator, Mayor or governor who also happens to be challenging a Member of Congress in a primary or general election should have the same legal protection as a broadcast mentioning a Member of Congress in a similar context.
- While we agree that the broadcast exemptions should not apply to broadcasts that attack or promote federal candidates, we do not agree that nonprofits should be prohibited from informing the public about what positions candidates take on issues. Nonpartisanship in elections means being neutral about candidates, not issues. If nonprofits are barred from broadcasting a candidate's position Congress will have effectively insulated itself from criticism during the election season. Controversial legislation could then be scheduled for action during the blackout periods. This result is contrary to the spirit of BCRA and unduly limits the free speech rights of nonprofits.
- The requirement that legislation be "pending" is vague. Does this require it be scheduled for a vote or merely introduced? A bill may be introduced but held up in committee, and an advocacy group should be able to ask the public to help get the bill moving. This is exactly what happened with BCRA when proponents sought a discharge petition. In addition, an issue campaign may involve asking the candidate to initiate action, whether legislative or regulatory.

These problems, taken separately or together, make Alternative 1-A the most unsatisfactory solution to the problem of protecting nonpartisan issue advocacy. For example, a broadcast urging a mayor, who is a challenger in a Congressional race, to veto an ordinance that comes before her in October, and states her past position on the issue, should be legal under BCRA. If not, the law reaches well beyond what is necessary to address the problem of soft money funded attack or promotional ads.

Alternative 1-B is a step in the right direction, in that it would exempt broadcasts on legislative or executive matters, and applies to all federal candidates, not just Members of Congress. However, the following elements make it unduly restrictive:

- The problems associated with the requirement that the official action be "pending", as discussed above, remain.
- It confuses partisan support or attack broadcasts with issue advocacy by prohibiting any mention of the "candidate's record, position, statement, character, qualifications or fitness for office or to an election, candidacy, or voting." The exemption needs to distinguish between statements about an official's position and voting record on issues and comments that indicate support or opposition to their election to federal office. We agree that exempt broadcasts should not refer to a public official in their capacity as a federal candidate, or comment on their fitness or qualifications for office. However, genuine issue advocacy broadcasts should be permitted to inform the public about what action the official has taken in the past, and what their position on the issue is. Otherwise, the public is deprived of crucial information, and public officials are insulated from criticism.

Alternative 1-D improves on Alternatives 1-A and 1-B in that it applies to legislative, executive action and public education in general. However, it carries over two significant problems from Alternative 1-A:

- It is unnecessary limited to references to candidates that are legislators, when executive action is also a major component of government decision making.
- It prohibits the broadcast sponsor from informing the public about the past or present positions the official/candidate has taken on the relevant issue.

Alternative 1-C solves all of the problems discussed above.

- It applies to all forums, whether legislative, executive or the public at large.
- It would allow the public to be informed about the official/candidate's position on the issues, and applies to broadcasts mentioning any federal candidate, not just a Member of Congress.
- It prevents abuse by prohibiting the broadcast from advocating election or defeat of the candidate and by requiring a call to action, with information on how the public can contact the official.

The Electioneering Communications Regulations Should Only Apply to Paid Advertising

The Commission seeks comment on whether the definition of an electioneering communication should be limited to paid advertising. We believe such a limitation is consistent with BCRA, and enhances its constitutionality by clearly targeting the kinds of broadcasts generally described as "sham issue advocacy". Most studies on this issue, including *Buying Time 2000* by the Brennan Center for Justice, focus exclusively on paid advertising.

Free broadcast resources, such as public service announcements, community cable access and radio time, are not subject to hijacking by soft money interests. But these free communications channels enable nonprofits to inform the public about issues and events that may involve nonpartisan reference to federal candidates. For example, a public service announcement could encourage the public to attend a community event, mentioning that the Governor (who is also running for President) will attend. Prohibiting this kind of announcement would not further the interests of campaign finance reform, but it would limit the speech rights of nonprofits and prevent the public from receiving useful information.

An exemption for unpaid broadcasts would provide a simple, clear way for nonprofits to determine what is allowed and what is not, while focusing regulatory action on the source of the problem (paid attack or promotional ads) and away from constitutionally protected speech.

The Regulations Should Exempt Broadcasts Made or Funded by 501(c)(3) Organizations

OMB Watch supports the Alliance for Justice proposal to exempt communications by nonprofits exempt under Section 501(c)(3) of the Internal Revenue Code, for the reasons stated in their comments.

Broadcasts Relating to Referendums and Ballot Measures Should Be Exempt

Campaigns involving referendums and ballot measures do not involve federal law or candidates for office. They are inherently legislative in nature, with the voters acting as the legislators. Mention of a federal candidate in connection with a referendum or ballot measure should not be prohibited.

Strengthening Nonprofit Advocacy Project: Recent Research Supports Need for 501(c)(3) Exemption

In 1999 Tufts University, OMB Watch, and Charity Lobbying in the Public Interest launched a multi-year research to action project, called the Strengthening Nonprofit Advocacy Project (SNAP), to investigate factors that motivate nonprofit organizations to engage in public policy matters. SNAP is the first national research effort designed to investigate the public policy role of charitable organizations. Past research on nonprofit advocacy has not distinguished nonprofits based on tax exempt status. Since 501(c)(3) organizations are the only nonprofits prohibited from supporting or opposing candidates for office and the only nonprofits with limitations on legislative lobbying, there was a compelling need to look at advocacy within the constraints of 501(c)(3) status.

The goals of the research are to determine charities' level of involvement in public policy issues, and to identify factors that motivate their involvement as well as impede them. In May of this year we published an Overview of Findings, which is available on our website at www.ombwatch.org/snap. The final report will be published in late 2002.

The findings are based on a three part research process including: 1) A national survey of a random sample of 1,738 nonprofit organizations – tax-exempt public charities organized under Section 501(c)(3) of the federal tax code – conducted between January and June, 2000; 2) Data on survey respondents from IRS Form 990, the annual information return most nonprofits must file with the IRS; 3.) Telephone interviews with 45 of the survey respondents (primarily executive directors) – conducted from September, 2000 to February, 2001; and 4) 17 focus groups with executive directors, board members, and foundation staff held in different parts of the country from February through September, 2001. Religious organizations, private foundations, hospitals and universities were excluded from the sample.

The data provides a profile of the charitable community. The average age of organizations in the sample was 34 years. Two-thirds have 11 or fewer professionals on their staff, and half have a total paid staff of 11 or less. The number of volunteers is impressive: the average minus the ten largest groups is 150, and increases to 2,084 when they are included. More than two-thirds of the survey sample have members. The median expenses of the sample is $450,000 per year. One-quarter of their revenue comes

from individual contributions. Overall, the vast majority of 501(c)(3) organizations are relatively small and modestly funded.

Our analysis looked at nine types of policy participation, and found charities engage in all of them. These include:

- testifying before government bodies,
- direct lobbying,
- grassroots lobbying,
- responding to government requests for information,
- working in planning or advisory groups with government officials,
- meeting with government officials about the organization's work,
- discussing grants or contracts with government officials, and
- interacting socially with government officials.

We found that 86% of the charities in the study engage in advocacy work involving testifying or lobbying. 78% are involved in grassroots lobbying. This result clearly indicates that charities are communicating with the public on legislative issues, and the final regulations on electioneering communications will have a significant impact on the only segment of the nonprofit sector that is already prohibited from supporting or opposing candidates for office.

The charitable community is well aware of these prohibition. The survey results indicate that 87% of charities know they cannot endorse candidates for office. In fact, many have an overly restrictive understanding of the tax rules, since 43% thought they could not sponsor a candidate debate or fourm.

Although the level of policy participation by charities is high, the frequency of their participation is low. For example, a total of 69% say they lobby infrequently or not at all. The responses to questions about barriers to policy participation indicated that the complexity of tax rules is the second highest barrier to participation. A significant majority, 68% of respondents, made is second only to lack of financial resources (81%) as a barrier.

OMB Watch believes these research findings demonstrate a need to remove or reduce barriers to policy participation so the frequency of charity involvement increases. Society and government can only benefit if the most nonpartisan segment of society is more involved in policy debates and discussions. This makes simplification of rules governing advocacy a priority. The FEC should take all possible steps to avoid further complication by adopting the recommendations we have made in these comments.

Conclusion

Undue influence of money in politics can be addressed most effectively by a two-pronged approach. The first step is to limit contributions and funding for paid advertising that attacks or promotes federal candidates, which BCRA addresses directly. The second step is to counter the influence of money by increasing the influence of citizens. Since

citizens primarily act through nonprofit organizations, protecting the advocacy capacity of these groups promotes a healthy democracy and furthers the goals of campaign finance reform. BCRA gives the Commission the power to protect these rights, and we urge to fully exercise that power in the final regulations on electioneering communications.

Yours truly,

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