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Re: Notice of Availability, Rulemaking Petition: Exception for
Certain "Grassroots Lobbying" Communications From the
Definition of "Electioneering Communication," 71 Fed. Reg. 13557
(March 16, 2006)

Dear Mr. Deutsch:

These comments are submitted on behalf of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") in response to the above-referenced notice.

The reasons favoring a rule excepting certain union or corporate-funded grassroots lobbying communications from the definition of "electioneering communication" have been fully and ably set forth by the Petitioners. Without commenting further on those reasons, except to say that we are in accord with them, AFSCME respectfully urges the Commission to undertake the proposed rulemaking proceeding.¹ We do, however, offer comments on an additional justification for a grassroots lobbying communication exception to the definition of "electioneering communication." As explained below, we view such an exception as necessary to avoid the harsh and unintended tax consequences incurred by unions and other 501(c) entities when they must use a separate segregated fund to pay for "electioneering communications" that are not intended to influence elections.²

¹ AFSCME agrees that all of the principles of a proposed exemption identified by the Petitioners are essential for a grassroots lobbying exemption to the definition of "electioneering communication." However, we are not necessarily of the opinion that the principles required for such an exemption are limited to those identified by the Petitioners.

² Exempting certain grassroots lobbying communications from the definition of "electioneering communications" would also fulfill the statutory requirement that the Commission and the Internal Revenue Service "promulgate rules, regulations and forms which are mutually consistent." 2 U.S.C. § 438(f).

Brad C. Deutsch
April 17, 2006
Page 2

I. Background

AFSCME is a labor union with a membership of 1.4 million men and women who are mostly public employees and employees of private entities that receive public funding. These include health care workers, social services providers, school employees, corrections officers and emergency first responders, and many others. The jobs, pay scales, working conditions, benefits and pensions of AFSCME's members depend upon decisions made by public officials at every level of government. AFSCME represents the interests of its members not only in the workplace, but also through legislative advocacy and political action.

When legislative or executive action on a matter of public policy important to our members is impending, AFSCME may pay for grassroots lobbying communications. These communications are intended to advocate to the general public a particular position on issues of public policy and to influence the outcome of legislative proceedings or executive actions on issues important to our membership. AFSCME uses its treasury funds to pay for these communications, so long as they are not electioneering communications.³

AFSCME also engages in political activity on behalf of its members. AFSCME maintains a separate segregated fund ("SSF"),⁴ AFSCME Public Employees Organized to Promote Legislative Equality ("AFSCME PEOPLE") which is registered with the Commission as a political committee ("PAC"), and complies with the contribution limits, source restrictions and reporting requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. 431, *et seq.*, as amended ("FECA"). AFSCME PEOPLE makes contributions to Federal candidates, party committees and other PACs. AFSCME PEOPLE also makes Independent Expenditures to influence Federal elections. In addition, if AFSCME wishes to fund television or radio advertising that falls within the definition of "electioneering communications," whether or not the advertising is directed at influencing a Federal election, AFSCME PEOPLE must pay the costs of those ads.

³ An electioneering communication is a broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is distributed in the 60 days before a general election or 30 days before a primary election, nominating caucus or convention and may be received by at least 50,000 persons within the candidate's electorate. 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. §§ 100.29(a)(1-3).

⁴ The term "separate segregated fund" or "SSF" as used herein means a separate segregated fund within the meaning of 26 U.S.C. § 527(f)(3), unless otherwise indicated.

Brad C. Deutsch
April 17, 2006
Page 3

II. PAC Funds and the Constitutionality of Electioneering Communication

When Congress crafted the electioneering communication provision of the Bipartisan Campaign Reform Act ("BCRA"), a primary concern was designing a ban on union and corporate funded electioneering communications that would withstand a constitutional challenge.⁵ Both the framers of the ban and the Supreme Court cited as a key to the constitutionality of the provision the fact that unions and corporations are not entirely precluded from paying for television and radio ads referencing candidates during the electioneering communications periods.⁶ BCRA prohibits the use of union and corporate treasury funds to pay for those ads, but allows unions and corporations to fund these ads by using their Federal PACs.⁷

During the Congressional debates on BCRA and in the Supreme Court's *McConnell* decision it was acknowledged that at least some of the television and radio ads proscribed by the electioneering communications provision were "legitimate issue ads" with no electioneering purpose.⁸ Because these ads, too, could be paid for by a union or corporation's SSF, the prohibition on using treasury funds to pay for them amounted to a constitutional "no harm, no foul."

III. Use of SSFs to Fund Certain Grassroots Lobbying Electioneering Communications May Subject Nonprofit Organizations to Severe Tax Penalties

When Congress prohibited electioneering communications from being funded with union or corporate treasury dollars, it was primarily concerned with "sham issue ads."⁹ Because the vast majority of ads falling into the definition of "electioneering communications" were perceived to be truly campaign related, little consideration was given to those ads that were not.¹⁰ And, even less consideration, if any, was given to the tax consequences of requiring "legitimate issue ads" to be paid for from an SSF. Because the Internal Revenue Code ("IRC") and Internal Revenue Service ("IRS")

⁵ See 147 Cong. Rec. S3042-3043 (Mar. 28, 2001) (statement of Sen. Snowe).

⁶ See *id.* at S3071 (Mar. 29, 2001) (statement of Sen. Jeffords); *McConnell v. Federal Election Commission*, 540 U.S. 93, 204-205 (2003).

⁷ BCRA does permit certain 501(c)(4) corporations, known as Qualified Nonprofit Corporations, to fund electioneering communications from their treasury funds. See 11 C.F.R. § 114.10.

⁸ See 147 Cong. Rec. S3040-3041 (Mar. 28, 2001) (statement of Sen. Edwards); *McConnell*, 540 U.S. at 205.

⁹ See 147 Cong. Rec. S3040 (Mar. 28, 2001) (Statement of Sen. Edwards).

¹⁰ Congress did, though, assure itself that so few of these ads were "legitimate issue ads" that the definition of Electioneering Communication would not be unconstitutionally overbroad. See 147 Cong. Rec. S3041 (Mar. 28, 2001) (Statement of Sen. Edwards). The *McConnell* Court agreed. See *McConnell*, 540 U.S. at 207.

Brad C. Deutsch
April 17, 2006
Page 4

regulations view the payment for the costs of such ads as not for the exempt function of an SSF, the SSF or its sponsoring nonprofit organization is subject to harsh tax penalties for funding these ads. These penalties include a tax on funds the SSF spends on grassroots lobbying communications unrelated to an election; and, if the SSF spends "more than an insubstantial amount" of its funds on these communications, it loses its tax exemption (and its SSF status) for the entire tax year.

a. Nonprofit Organizations May Establish Tax-Exempt SSFs, Such as Federal PACs, to Fund "Exempt Function" Activities

Social welfare organizations, labor unions, trade associations and other entities described at IRC § 501(c) ("501(c) organizations") that are exempt from Federal income tax under IRC § 501(a) are permitted to—and regularly do—use their general treasury funds to engage in grassroots lobbying or public policy advocacy communications consistent with their exempt purpose. Treasury funds used to pay for these communications are not subject to taxation unless the communication is for an "exempt function" as described at IRC § 527(e)(2). "Exempt function" is defined 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."¹¹

If a 501(c) organization uses its treasury funds to pay for grassroots lobbying communications that are for an exempt function, the organization is subject to a tax, at the highest corporate tax rate, on the lesser of its net investment income or the amount expended for exempt function activity during the tax year.¹²

However, the IRC permits 501(c) organizations to establish one or more SSFs to fund exempt function activity without incurring such a tax.¹³ This is a common practice for 501(c) organizations. Indeed, it is a practice for every 501(c) organization with a connected Federal PAC. SSFs are not, though, limited to Federal PACs. A labor union, for instance, may segregate a portion of its dues receipts into an SSF to pay for exempt function activity conducted at the state or local level, or it may

¹¹ 26 U.S.C. § 527(e)(2).

¹² See *id.* § 527(f)(1).

¹³ See *id.* § 527(f)(3).

Brad C. Deutsch
April 17, 2006
Page 5

establish an SSF that only makes contributions to 527 organizations, or it may establish an SSF that registers with the Commission as a political committee and receives voluntary contributions from the union's restricted class for the purpose of funding exempt function activity. Or, it may do all of those.

These SSFs are treated as separate organizations from their sponsoring 501(c) organization,¹⁴ and the tax-exempt status of monies segregated into these SSFs is contingent upon the use of those funds for exempt function activity.¹⁵ In fact, all funds in the SSF must be "dedicated for use only for an exempt function."¹⁶ If "more than an insubstantial amount" of the SSF's funds in a tax year are used for non-exempt function activity, the SSF loses its status as a separate organization for that tax year.¹⁷ The sponsoring 501(c) organization is then subject to the tax it lawfully sought to avoid by establishing the SSF in the first place.

b. Some Grassroots Lobbying Communications are Electioneering Communications But Are Not Exempt Function Activities

Some electioneering communications are not sufficiently related to elections for the IRS to deem them "exempt function" activity. In 2004, the IRS issued guidance to 501(c) organizations, advising that certain advocacy communication that refer to candidates do not constitute exempt function activity.¹⁸ IRS Revenue Ruling 2004-6 provided a list of various facts and circumstances to be used in determining whether a communication is for an exempt function. The ruling also analyzed six factual situations to determine whether the communications described therein were for an exempt function. Three of the communications described in the factual situations were grassroots lobbying communications that, if distributed via broadcast, cable or satellite during the applicable 30 or 60-day period, would constitute electioneering communications, though the IRS determined that only one of the three communications was for an exempt function.¹⁹

¹⁴ See *id.*

¹⁵ See *id.* § 527(c).

¹⁶ See 26 C.F.R. 1-527(b)(1).

¹⁷ See *id.*

¹⁸ See generally, I.R.S. Rev. Rul. 2004-6.

¹⁹ See IRS Rev. Rul 2004-6, Factual Situations 1-3. In Factual Situation 1, for instance, a labor organization funded a series of advertisements advocating for increased spending on law enforcement. The increased spending would require legislative appropriation. The advertisements referred to Senator A and Senator B, who represent the same state in the U.S. Senate. One of these advertisements is distributed in that state shortly before an election in which Senator A, but not Senator B, is a candidate for reelection. This particular advertisement stresses the importance of increased federal funding of law enforcement and refers to statistics indicating a high crime rate in the state. Although the advertisement does not mention Senator A's or Senator B's position on law enforcement issues, it ends with the statement "Call or write Senator A and Senator B to ask them to support increased federal funding for

Brad C. Deutsch
 April 17, 2006
 Page 6

c. Certain PAC-Funded Electioneering Communications are Taxable and May Subject the PAC to the Loss of Its Tax-Exemption and Its Status as an SSF

Because these communications would fall within the current definition of "electioneering communication," many 501(c) organizations, such as labor unions, must pay for these non-exempt function electioneering communications using an SSF that is a Federal PAC.²⁰ This is due to the fact that the organization's Federal PAC is likely to be the only SSF it maintains that is funded with voluntary contributions rather than treasury funds. When a Federal PAC funds these grassroots lobbying electioneering communications because FECA required it to do so, it is subject to the 527(f) tax since IRS has determined that these ads are not for an exempt function.²¹

Even more troubling is the fact that, if a PAC must pay for "more than an insubstantial amount" of these non-exempt function electioneering communications, it is subject to the loss of its tax exemption for the entire tax year, and "will not be treated as a separate segregated fund" for the year.²²

IV. Exempting Certain Grassroots Lobbying Communications from the Definition of "Electioneering Communication" Will Likely Lessen Tax Penalties Imposed on Nonprofit Organizations Funding Those Communications

Certain grassroots lobbying or public policy advocacy communications should be exempted from the definition of "electioneering communications," so as to help nonprofit organizations lessen or avoid the harsh tax penalties described above.

local law enforcement." Law enforcement has not been raised as an issue that distinguishes Senator A from any opponent in the election, and no legislative vote or other major legislative activity is scheduled in the U.S. Senate on increased funding for law enforcement.

The IRS determined, based on the facts and circumstances, the communication was not for an exempt function.

²⁰ *But see supra* note 6.

²¹ *See* 26 C.F.R. 1-527(b)(1).

²² *See id.* The Commission has never addressed the question of whether a Federal PAC that loses its SSF status for the purpose of the IRC also loses its status as an SSF for the purpose of FECA, but there exists the possible absurd result that a 501(c) that complies with BCRA's electioneering communications provision by funding its non-exempt function electioneering communications with its Federal PAC, may have ceased to have a Federal PAC for a particular tax year because the Federal PAC is no longer an SSF, as required by FECA. *See* 2 U.S.C. 441b(b)(2).

Brad C. Deutsch
April 17, 2006
Page 7

An exemption similar to the one proposed by the Petitioners, or an exemption drawn from the facts and circumstances set forth in IRS Revenue Ruling 2004-6²³ is likely to allow 501(c) organizations to fund most grassroots lobbying communications that refer to Federal candidates, but are not directed at influencing an election, with treasury funds. This would prevent the bizarre situation where a Federal PAC incurs a tax penalty or loses its status as an SSF as a result of funding "electioneering communications" as required by FECA.

For the reasons set forth above, AFSCME encourages the Commission to initiate the rulemaking proceeding requested by the Petitioners. We thank the Commission for the opportunity to comment on this matter.

Respectfully submitted,



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²³ Several of Petitioners' proposed principles for a grassroots lobbying exception to the definition of "electioneering communications" are similar to facts and circumstances described in I.R.S. Rev. Rul. 2004-6.