



Sai Seigel <sseigel@ncg.org> on 04/09/2004 02:51:46 PM

To: politicalcommitteestatus@fec.gov

cc:

Subject: Comments Re: Notice of Proposed Rulemaking on Political Committee Status

Northern California Grantmakers - Realizing the Promise of Philanthropy to Advance  
the Common Good

116 New Montgomery St., Suite 720, San Francisco, CA94105  
415-777-5761 [www.ncg.org](http://www.ncg.org) [ncg@ncg.org](mailto:ncg@ncg.org)

April 8, 2004

VIA EMAIL: [politicalcommitteestatus@fec.gov](mailto:politicalcommitteestatus@fec.gov)

Federal Election Commission

999 E Street, N.W.

Washington, D.C. 20463

Attn: Ms. Mai T. Dinh, Acting Assistant General Counsel

Re: Notice of Proposed Rulemaking on Political Committee Status

69 Fed. Reg. 11736 (March 11, 2004)

Ladies and Gentlemen:

Northern California Grantmakers (“NCG”) is an association of foundations, corporate contributions programs and other private grantmakers. NCG’s mission is to enhance the effectiveness of philanthropy, and to strengthen the ties between philanthropy and its many stakeholders; including nonprofit organizations, government, business, media, academia, and the public at large. Our membership consists of 160 grantmakers in the Bay Area, with combined grantmaking of over \$1 billion annually. NCG is a public charity under Section 501(c)(3) of the Internal Revenue Code (“IRC”); its members are primarily private and community foundations also exempt under Section 501(c)(3).

NCG’s interest in this rulemaking arises from our members’ grantmaking to organizations, primarily 501(c)(3) public charities, who could be affected by the rules proposed by the Commission. Measures that limit the effectiveness of our grantees or chill the likelihood that they will receive support from foundations are very much our concern.

We are aware that numerous other commenters will address the concerns of other groups, so we will confine this letter to some brief comments specific to the philanthropic sector.

First, foundation grantmakers historically have had no dealings with the Commission. This is not surprising, given that we are generally exempt under Section 501(c)(3), and so prohibited from participating or intervening in any political campaign for or against any candidate for public office. The Commission, unlike the Internal Revenue Service, is simply not on our radars. Practically speaking, this means that our members are only just becoming aware of the existence of the proposed rulemaking and its potential effects on our grantees. The Commission’s extremely tight comment schedule is simply not enough time for affected foundations to digest the proposed rulemaking, understand how it could affect their operations, and respond thoughtfully.

Second, just as the Commission is unfamiliar to us, we believe we – 501(c)(3) organizations generally, and private and community foundations specifically – are unfamiliar to the Commission. The Commission’s proposed rules, if adopted as drafted, would be a fundamental change in approach to the regulation of political speech, with effects ranging far beyond the types of entities the Commission has regulated in the past. We know how much difficulty we are having understanding the Commission’s proposals – even the basic terms are foreign – and we are deeply concerned that the truncated period the Commission has given itself to consider comments and promulgate new rules does not allow the Commission to carefully consider the consequences on us and our grantees. To minimize unintended consequences, the Commission must take the time to craft appropriate definitions and

carve out appropriate exceptions to highly complex rules.

We offer two such unintended consequences as examples. Since the Tax Reform Act of 1969 which created the concept of private foundations, private foundations have been expressly permitted by IRC Section 4945(d)(2) to fund certain nonpartisan, large-scale voter registration drives, as described in IRC Section 4945(f). It appears the proposed regulations, depending on their final form, could cause our grantees who carry on such activities to become political committees. Since the vast majority of grantmakers are incorporated, grants to these newly-minted political committees would be illegal, making the current IRC provisions largely meaningless and unusable. We do not believe the Commission intends this result, but it could happen just the same unless the Commission pays careful attention to how these new rules would interact with existing federal tax laws, and takes the time to address these issues in the new rules.

A second example of another sort of unintended consequence further illustrates our concern. Foundations, accustomed to operating in a heavily-regulated environment and having deep pockets, are generally risk averse and cautious about strict compliance with legal rules, including in their grantmaking decisions. The proposed Commission rules provide several alternative tests for whether an organization qualifies as a political committee. For example, public communications that “promote, attack, support, or oppose” a federal candidate under certain circumstances may trigger political committee status. Other commenters have observed the difficulties in interpreting such a vague phrase, or the phrase “a major purpose” as used in the proposed rules, and have pointed out several other serious problems with lack of precision in the proposed alternative political committee tests. We will not repeat those concerns here; however, we do share them, and have concluded that it is unclear exactly what actions will qualify an organization as a political committee under the proposed rules. As noted above, most foundation grantmakers are incorporated, making grants to a political committee illegal, so the consequences to a foundation of guessing wrong are substantial. Under those circumstances, many foundations choosing among grantees will believe they have no choice but to consider whether a prospective grantee’s activities may have caused it to qualify as a political committee under any possible interpretation of the facts, and, as a matter of self-protection, avoid making grants to them in favor of less controversial, less outspoken grantees. This will be true even if a potential grantee is not, in fact, ever deemed to be a political committee by the Commission. The vagueness of the standards proposed by the Commission will have a chilling effect on grantmaking that is likely to far exceed the actual reach of the new rules. Again, we believe this is not an outcome the Commission intends with its proposed rules, but unless the problem is addressed before the rules are passed, it will occur.

An additional concern that could have profound consequences for our members is the lack of clarity around past grantmaking activities. Specifically, it is unclear whether the proposed rulemaking would be applied retroactively, affecting past grants to 501(c)(3)

organizations that are newly classified as political committees. In effect, past grants could be construed as violations of IRS rules against contributions to political committees. The consequences for such retroactive applications could be far reaching for our members and all grantmaking entities.

Accordingly, we urge the Commission in the strongest terms to give itself adequate time to consider all the impacts of the proposed rules, and slow down the rulemaking process. While we have provided several potentially serious consequences of the proposed rules above, we would likely have more substantive comments if more time was available to review and consider consequences to these proposed rules. No effort to enact such wide-ranging new rules properly can be made in good faith by May 2004. If the Commission acts in haste, it will not be only the Commission who will regret at leisure.

Respectfully submitted,

Dan Quigley

Chair, Board of Directors

Northern California Grantmakers

Northern California Grantmakers  
Realizing the Promise of Philanthropy  
to Advance the Common Good



A handwritten signature in black ink that reads "Dan C. Quigley".



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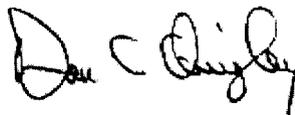
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