Diane Hartz Warsoff <diane.warsoff@csbs.utah.edu> on 04/09/2004 01:57:56 PM

Please respond to dwarsoff@utahnonprofits.org

To: politicalcommitteestatus@fec.gov
cc:

Subject: Comments on Proposed FEC Rulings and Nonprofit organizations

Please see attached comments from UNA on this important issue.

Regards-

Diane Hartz Warsoff, Executive Director

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OUR MISSION...to strengthen the Utah nonprofit community.
OUR VISION...a strong, vibrant, mutually-supportive Utah nonprofit community.

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- UNA FEC comments 4-04.doc

April 9, 2004

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

Via electronic mail: politicalcommitteestatus@fec.gov

Re: Notice of Proposed Rulemaking on Political Committee Status, 69 Fed. Reg. 11736 (March 11, 2004)

Dear Ms. Dinh:

The Utah Nonprofits Association (UNA) urges the Federal Election Commission (Commission) to exclude 501(c)(3) organizations from the definition of "political committee." This letter outlines the rationale for our recommendation.

UNA serves a variety of nonprofit organizations throughout the state of Utah. We have over 315 member organizations, nearly all of which are charitable organizations exempt under the Internal Revenue Code Section 501 (c)(3). UNA is submitting these comments regarding political committee status on behalf of our members, as we will be unable to testify before the Commission.

One of the activities that UNA undertakes is training nonprofit organizations in performing issue-based advocacy for their individual constituents. As a matter of fact, UNA often acts in an umbrella role in advocating on issues at the local, state and national level on issue which have an impact on the nonprofit sector as a whole. The proposed FEC regulations would only cause our member organizations to be more wary of undertaking allowed advocacy activities out of fear of losing their nonprofit status, even if that threat were only perceived. The confusion of these rule changes would make both our and their work in this area even more difficult.

The proposed rules seek input regarding organizations that qualify under expenditure and "major purpose" amendments of the political committee regulations. As proposed, the new rules would apply to a wide variety of organizations, including organizations exempt from taxation under I.R.C. § 501(c). In particular, the definitions would apply to organizations created for charitable, educational, or religious purposes under I.R.C. § 501(c)(3). UNA strongly believes that 501(c)(3) organizations are beyond the scope of organizations these proposed rules were designed to regulate. UNA also believes that 501(c)(3) organizations have a unique nature and purpose that is at odds with the proposed regulations. As a result, the proposed rules, as applied to 501(c)(3) organizations would be confusing, burdensome, and may chill the issue advocacy vital to the nonprofit sector. These comments outline the unique nature of 501(c)(3) organizations and why that nature should exempt them from the rulemaking as proposed in 69 Fed. Reg. 11736 (March 11, 2004).

The grant of tax-exempt status under I.R.C. § 501(c)(3) is not without restrictions that are relevant to this discussion. First, the IRS can deny exempt status to any organization that does

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not meet the definition. Specifically, the IRS grants 501(c)(3) status only to those organizations where "no substantial part of the activities of which is carrying on propaganda . . . and *which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.*" I.R.C. § 501(c)(3) (2004) (emphasis added). Cases have shown that the IRS may deny initial tax-exempt status or later revoke such status if the organization is found to not comply with this requirement. *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). As a result, other than the exception provided by I.R.C. § 501(h), these organizations are not currently within the scope of the proposed regulations.

However, as proposed, the vast majority of 501(c)(3) organizations would not meet the thresholds of any of proposed "major purpose" tests. The Commission acknowledges as much in the proposed rulemaking. *See* 69 Fed. Reg. 11749 (March 11, 2004). As a result, any of the proposed tests would have minimal enforcement impact on 501(c)(3) organizations. And yet, the confusion that would follow the inclusion of 501(c)(3) organizations in this proposed rule would be harmful to ongoing attempts to educate the nonprofit sector about their ability to lobby. Nonprofits and their boards of directors currently require training, education, and encouragement in order to exercise their current rights to lobby. If 501(c)(3) organizations were included under these proposed rulings, there would be significant confusion regarding permitted activities under IRS and FEC rules. Such confusion may discourage some charities from exercising their right to lobby at all. Unlike the Employee Retirement Income Security Act (ERISA), where the Department of Labor and the IRS coordinated efforts to ensure that corporations were following one set of rules, rather than this situation where the FEC regulations are different than the IRS requirements for 501(c)(3) organizations.

Genuine issue advocacy must be left free of Commission regulation.

The democratic process depends not only on citizens voting, but on people and nongovernmental organizations being actively engaged and informed about the issues of the day, including pending legislation and acts by public officials. The charitable sector has a long and distinguished history of promoting active citizen engagement. The Constitution protects such advocacy from being burdened by laws and regulations unless a compelling state interest justifies it. At a time in our history with the lowest level of voter participation and citizen activism, government entities such as the Commission should be wary of making any rules that will discourage citizens and nonprofit organizations from participating in the democratic process.

Advocacy is an essential role of the nonprofit sector. Through advocacy, nonprofits provide a vehicle for civic engagement in the democratic process. We encourage all state associations—and in fact all 501(c)(3) organizations—to get involved in advocacy activities and have recently launched a campaign to encourage them to participate in nonpartisan election activities. The new rules that the Commission is considering may prevent us from fulfilling our advocacy role.

Existing federal law prohibits 501(c)(3) organizations from engaging in partisan political activity. Title 26 of the United States Code, the Internal Revenue Code, explicitly bars 501(c)(3) organizations from participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. The prohibition is absolute; there is no *de minimis* exception to that rule. Nonprofits are heavily regulated, and rightly so, from engaging in direct partisan political activities. Nonprofit leaders and boards are well aware of this limitation. They are careful not to cross the threshold into non-permitted activities, and we have found them to be overly cautious about kinds and extent of their advocacy efforts.

What is a Political Committee?
As the Commission struggles to more clearly define a "political committee" and the appropriate activities of such a committee, the definition should not be expanded to incorporate or encroach on the legitimate, nonpartisan activities of 501(c)(3) organizations. Activities in which 501(c)(3) organizations engage are more appropriately characterized as lobbying or nonpartisan voter activation. The advocacy activities of 501(c)(3) organizations allow more people to participate and more voices to be heard, which achieves the ultimate purpose of the Bipartisan Campaign Reform Act (BCRA).

As described above and as the Commission recognized in its earlier BCRA rulemaking when it exempted the communications of 501(c)(3) organizations from the definition of "electioneering communication," federal tax law requires that 501(c)(3) organizations avoid even the slightest hint of support for or opposition to candidates for public office. Thus, any Commission rule that legitimate 501(c)(3) activities might also be an expenditure under BCRA would create inevitable complications for charitable organizations seeking to comply with both tax and election laws. The Commission has already stated that "the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity," and we encourage the Commission to remain consistent with its earlier decision.

The proposed rules could deem the following organizations as political committees:

- A 501(c)(3) organization that spends its entire budget registering college students to vote.
- A 501(c)(3) anti-poverty organization that spends $50,000 in ads this election season criticizing the Administration and Congress for failing to provide adequate funding for the neediest Americans.

If 501(c)(3) organizations are deemed to be political committees, the result would be that we and most of the 501(c)(3) community could no longer conduct advocacy activities unless we raise and spend funds in accordance with the source and contribution limits of the Federal Election Campaign Act ("FECA"). FECA prohibits contributions over $5000 from individuals and grants and contributions from corporations and foundations, the primary source of funding for most 501(c)(3) organizations. Consequently, 501(c)(3) organizations, often the only voice for the voiceless on all sides of the political spectrum, will be severely hampered in their efforts to conduct worthy efforts.

Meaning of "Expenditures"
The Commission should not redefine "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office. In doing so, the Commission would be creating a new test, one that far exceeds the broadcast limits contained in BCRA. BCRA does not allow the Commission to extend the definition of "expenditures" to include all communication, including print ads, letters to members, fundraising letters, web sites, and messages from door-to-door canvassers. Moreover, in upholding BCRA, the United States Supreme Court stated that interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." McConnell v. FEC, 540 U.S. ___ at ___ [slip op. at 80]. The Commission cannot limit speech that Congress itself refused to limit.

The NCNA network is actively engaged in educating the public and advocating positions on legislative and policy issues related to our charitable missions. In our advocacy work, it is

frequently valuable to refer to current elected federal officeholders who support or oppose our positions. Any rule must define clearly what speech and activities fall within the ambit of "promotes, supports, attacks, or opposes" a candidate for federal office. The Commission itself has recognized that it is difficult to make such definitions.

Likewise, any rule must distinguish between speech that "promotes, supports, attacks, or opposes" a policy position of an elected official acting in her official capacity and speech that praises or criticizes a candidate for public office, even if already an elected official. Of course, federal law, through the tax code, already prohibits 501(c)(3) organizations to participate in, or intervene in political campaigns on behalf of (or opposition to) candidates for public office. That same law allows for criticism and support of actions of elected officials.

As can be imagined, the scope of activities that may meet this vague test is very broad. For example, they could include:

- A 501(c)(3) state association holds a briefing to educate its members about a proposal to cut the Earned Income Tax Credit (EITC) and the significant negative impact such cuts will have on millions of low-income working people. Congressman A, a strong proponent of the EITC who is also up for reelection this year, will speak about his views on the proposal. An invitation was sent to his opponent to offer his views, but the invitation was declined. By having Congressman A speak at the briefing, the state association may be considered to promote or support him.

- A 501(c)(3) educational organization encourages its members to oppose a bill sponsored by state senator B that will cut funding for all-day kindergarten in the state. State senator B is a candidate for the U.S. Congress. Such advocacy efforts, even though targeted at a state-level legislative issue, may be seen as opposing or attacking state senator B, a candidate for federal office.

Are these examples of the corruption of the political process that must be stopped? UNA does not think so, and urges the Commission to protect such speech.

The restrictions would not apply just to commentary on incumbents in Congress or the White House but also to others who are running for federal office. Those running might include state or local officials, business leaders, and others, thus affecting advocacy at the state or local level.

<u>The proposed rule is so long, confusing, and full of alternatives that the public has no clear notice of what is actually being proposed, making meaningful comment impossible.</u>

The Notice of Proposed Rulemaking (NPR) is too complex and confusing to produce a clear, coherent, and constitutional rule that will improve the campaign finance system. The NPR seeks to drastically reshape the landscape of activities regulated by the Commission. A rulemaking of such significant consequence should not be rushed. This rulemaking will impact entities and organizations that do not even realize they could be subjected to Commission regulation.

Many organizations may suddenly and unexpectedly find themselves regulated by the Commission. New rules—especially those that would apply to those previously unregulated by the Commission—should not take effect until such time that all 501(c)(3) organizations have an opportunity to be fully informed and educated about them.

This rulemaking raises legal issues about whether the Commission has the authority to regulate constitutionally protected speech.

Deference should be given to protection of the First Amendment's right of free speech and association. Where ambiguity in the law exists, regulation or restriction of speech not expressly provided for by the Bipartisan Campaign Reform Act of 2002 or the Federal Election Campaign Act must be imposed by Congress, and not through an administrative rulemaking.

We strongly urge that the FEC regulations either (i) exclude 501(c)(3) organizations entirely—which is the preferable approach or (ii) be jointly issued by both the FEC and the IRS--similar to the Employee Retirement Income Security Act (ERISA), where the Department of Labor and the IRS coordinated efforts to ensure that corporations were following one set of regulations rather than two competing sets of rules.

Thank you for this opportunity to practice those freedoms that make our country great – voicing our opposition to a proposed action that will have detrimental and disastrous effects on the practice of democracy in our country.

Sincerely,

Diane Hartz Warsoff
Executive Director, Utah Nonprofits Association