Curt Coffing <ccoffing@selp.org> on 04/08/2004 06:06:01 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: NPRM on Political Committee Status Comments

Attached please find our comments on the NPRM on Political Committee Status. The attached comments are in Word (.doc) format as requested.

Thank you for your consideration.

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STATE ENVIRONMENTAL LEADERSHIP PROGRAM

April 8, 2004

Via Electronic Mail

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

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

Ms. Dinh:

The State Environmental Leadership Program (SELP) and the undersigned state environmental organizations submit these comments in response to the Federal Election Commission's March 11, 2004 Notice of Proposed Rulemaking on Political Committee Status ("NPRM").[1]

SELP is a membership-based group organized as a nonprofit corporation under state law and exempt from federal income taxation under § 501 (c)(3) of the Internal Revenue Code ("Code"). It represents a network of 50 state and regional environmental organizations. Many of the member organizations have affiliated 501 (c)(4) organizations, which in turn have established affiliated nonfederal political organizations under §527 of the Code that are not required to register with the Commission. As such, we have a significant interest in the pending action.

If adopted, the overreaching proposals in the NPRM would dramatically impact fundamental rights by stifling free speech and advocacy. The proposals would also result in a further decrease in voter participation, a trend this country can ill afford. The pervasive proposed rules would bring under regulation untold numbers of non-profit organizations focused on state level policy. This harried attempt to bring non-profit organizations under the umbrella of rules intended to regulate political party committees exceeds the Commission's authority. All of the undersigned organizations strongly oppose the rules proposed in the NPRM and urge the Commission to withdraw the NPRM.

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The Proposals In The NPRM Will Significantly Impede Nonprofit Organizations' Ability To Participate In Legitimate Issue Advocacy.

The democratic process, a cornerstone of United States governance, depends on public debate and the active engagement of an informed citizenry. Nonprofit advocacy organizations play a critical role in encouraging voter participation, as well as educating and energizing the electorate on current issue including pending legislation, proposed policies and acts of public officials through issue advocacy. Nonprofit organizations also help inform the public debate, which the Supreme Court recognized may need to include "...vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[2] The pervasive proposals in the NPRM offend the free-speech protections guaranteed in the first amendment by making it virtually impossible for nonprofit advocates to speak out on important public policy issues. Regulations burdening the special protections afforded to speech on public issues are allowed only if justified by a compelling state interest. Such an interest does not exist in this instance.

The Commission's desire to develop and enact rules to guard against actual corruption, or even the appearance of corruption in the political process is critical, but the NPRM proposals go too far. Using the rubric of the Bipartisan Campaign Reform Act ("BCRA") to effectively treat nonprofit advocacy organizations the same as political party committees ignores the obvious and important differences in purpose and the concomitant potential for corruption. The proposals ignore long-standing principles that recognize the fundamental differences. For example, the Internal Revenue Code permits both §501(c)(3) and §501(c)(4) organizations to make expenditures for lobbying communications that also refer to federal policymakers by name, and which may be found to promote, support, attack or oppose those policymakers who are federal candidates. Indeed the Code even recognizes that §501(c)(4) organizations may engage in political campaign activities as long as they do not constitute the organization's primary activity.[3] The Commission should carefully consider the impact of its actions and avoid enacting overbroad rules that exacerbate the current dismal level of voter participation and citizen activism, and discourage citizens and nonprofit advocates from fully participating in the democratic process.

A.) Expanded Definition of Expenditure

The proposal to expand the definition of "expenditure" to include any public communication that "promotes, supports, attacks or opposes" any candidate for federal office, or political party, will certainly have far-reaching consequences. Since corporations (including nonprofits) are currently strictly prohibited under the Federal Election Campaign Act ("FECA") rules from making "expenditures" for communications, the threat of civil or criminal penalties for violating FECA would effectively silence nonprofit organizations in significant public debate and advocacy.

While the Supreme Court in *McConnell v. FEC*[4] suggested that any person can determine what "promote, support, oppose or attack" means in the context of considering political party committee communications, the same cannot be said about nonprofit organization

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communications; there is no similar rebuttable presumption that "actions taken ...are in connection with election campaigns."[5] The Commission clearly illustrated the difficulty in applying this standard in its Advisory Opinion on the issue earlier this year.[6] Without further direction and clarification in the definition of the "promote, support, attack or oppose" standard, nonprofit advocates and the agency alike will find it impossible to know and understand the kinds of communications that are prohibited.

As a result of the undefined, overbroad, vague standard, a nonprofit environmental advocacy organization focused on state level policy could find itself in violation of FECA by simply running an otherwise legitimate issue ad in support of a state policy that mirrors federal policy, or proposed legislation, if that policy or legislation could arguably be associated with a political party. Such a result cannot possibly be intended, or allowed by the Commission.

B) Issue Advocacy Does Not Equal Electoral Activity

Even if the Commission were to forego the expanded definition of expenditure, the proposed definition of "political committee" would wreak havoc on the ability of nonprofit organizations to conduct genuine issue advocacy, not to mention resulting in an explosion in the number of 501 (c) organizations that would fall under FECA regulation. The definition should not be expanded to incorporate or encroach on the legitimate, nonpartisan activities of 501(c) organizations. Activities in which 501(c) organizations engage are more appropriately characterized as lobbying or nonpartisan voter activation. The advocacy activities of most nonprofit organizations enable greater public participation and encourage public discourse, ultimately achieving the intended purpose of BCRA.

By taking the definition of "federal election activity" from BCRA provisions intended to regulate political party committees, the NPRM incorporates the "promote, support, attack or oppose" standard for determining whether a nonprofit organization qualifies as a federal political committee. Such a definition could effectively require nonprofit organizations to significantly alter or forego issue advocacy altogether, since FECA source and amount limitations would apply. FECA prohibits contributions over $5000 from individuals, grants and contributions from corporations and foundations (the primary source of funding for most 501(c)(3) organizations). Consequently, 501(c)(3) advocacy organizations, often the only voice for the disenfranchised and those without voices, will be severely impeded in their efforts.

The scope of activities that may cause an organization to be defined as a "political committee" is very broad. For example, they could include the following scenario:

- A 501(c)(3) state environmental organization encourages its members to oppose a bill sponsored by state assemblyperson "Q" that will cut funding for environmental enforcement in the state. "Q" 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 "Q," a candidate for federal office.

This certainly cannot be indicative of the corruption of the political process that the Commission is concerned with, is it? We hope not, and strongly urge the Commission to protect such speech.

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The Commission recognized in earlier BCRA-related rulemaking that the Code prohibits §501(c) organizations from supporting or opposing candidates for public office. Thus, any Commission rule that defines legitimate §501(c) activities under the Code also as an "expenditure" under BCRA, would create unavoidable conflicts for organizations seeking to comply with both tax and election laws. As stated by the Commission, "the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity."[7] Therefore it should remain consistent with its earlier decision.

The impact of treating all §527 organizations as "political committees" regardless of the nature of their activities, as suggested by the NPRM, presents nonprofits with a no-win situation in which they would be required to create a separate segregated fund ("SSF") in order to maintain their federal tax exemption, only to have the commission treat the SSF as a federal political committee because of its tax status alone. Currently, non-Federal SSFs are permitted to receive and spend soft-money contributions, including transfers from their connected §501(c) organizations, as long as they do not make contributions or independent expenditures as defined under FECA. However under the NPRM, the same connected §527s would be prohibited from accepting soft-money from any source, including their own sponsoring organization. Such a result would seriously impede the sponsoring 501(c)(4) organization.

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.

The NPRM Will Significantly Restrict The Ability To Conduct Nonpartisan Voter Participation Activities.

The amended definition of nonpartisan voter registration and GOTV activity in the NPRM would prohibit almost all forms of voter participation activity now undertaken by nonprofit organizations, including those focused specifically at the state level. The proposed amendment prohibits any voter participation activities in which the message "promotes, supports, attacks or opposes a federal or non-federal candidate, or a political party." Because there is no requirement for a reference to a clearly identified candidate, almost any messages that urge citizens to vote out of concern for a particular issue could subject many nonprofit organizations to criminal or civil penalties for violating the FECA ban on corporate expenditures if the message could possibly be construed as promoting or opposing a federal candidate.

In addition, the proposed definition could prevent members of the SELP network from targeting voters who have indicated support for environmental issues if some data suggests that such individuals are "likely" to prefer one candidate or party over another. While the NPRM states that the proposed changes are intended to harmonize the Commission's position with the IRS approach, the reasoning is flawed. The IRS approach considers the totality of facts and circumstances presented in each instance in determining whether campaign related activities are non-partisan. It is ludicrous to work this "approach" into a single, all-encompassing ruling with no precedent. In addition, the IRS has explicitly approved voter registration and GOTV

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activities that target groups based on generic criteria such as gender or race, economic circumstances, or other criteria such as students or farmers.

Even if the amended definition of nonpartisan voter registration and GOTV activities was not included as a prohibited "expenditure", the overreaching definition of "political committee" would still prevent many nonprofit organizations from undertaking these important activities. Applying the rule designed only for state and local political party committees to §501(c) and non-Federal §527 organizations, and bringing "voter identification" and GOTV activity that takes place in connection with any election in which one or more candidates for federal office appears on the ballot under the umbrella of "federal election activity" would effectively stymie legitimate efforts to encourage voter participation. Many, if not most nonprofit organizations rely on grants from private foundations and major donors to support voter participation activities, which would not be allowed under the proposed rule, effectively imposing a strong chilling effect on such an important and fundamental activity. With voter participation at dismal levels, the Commission should tread carefully on any activity that discourages individuals from making it to the election booth.

The Commission Does Not Have the Authority To Carry Out The Proposals In The NPRM

The Federal Election Campaign Act delegates authority to the Commission only to "prescribe rules, regulations, and forms to carry out the provisions of this Act..." This provision both grants authority and limits its scope. Indeed, any regulation that is not authorized by the Act itself is beyond the power delegated by Congress. Congress has considered many of the issues raised in the NPRM, and has specifically not taken the sweeping action being considered by the Commission. The Commission cannot limit speech that Congress itself has refused to limit.

The proposed expansion of the definition of "expenditure" is not authorized by the FECA as repeatedly construed by the Supreme Court. Further, nothing in BCRA gives the Commission permission 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. In fact, the Supreme Court in its opinion upholding BCRA, stated that interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." [8]

Congress has fully considered the differences between political party committees and other nonprofit organizations, and the potential for corruption in the enactment of BCRA. It is evident that Congress believed that the risk of soft-money abuse by §501(c) and non-Federal §527s was not as great as that presented by political party committees. Indeed it stopped short of prohibiting nonprofit entities from engaging in election-related activities. Congress also understood the crucial role of nonprofit issue advocacy, specifically prohibiting only the narrowly defined category of broadcast communications, not the far more encompassing range of public communications. In *McConnell* the plaintiffs challenged the difference in treatment of independent interest groups and political party committees, in regard to the entities' ability "to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising

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(other than electioneering communications)." The Supreme Court upheld the distinction and disparate treatment, stating that Congress "is fully entitled to consider the real world differences between political parties and interest groups when crafting a system of campaign finance regulation.

The Lack Of A Sufficient Record On Which To Base Decisions Creates Serious Legal Consequences

Even if the Commission had the appropriate authority, and its actions did not violate free speech protections, the Commission remains ill prepared to adequately address the issues raised in the NPRM.

Because there are legitimate concerns that the proposals in the NPRM directly impact freedoms of speech and association, the Commission must be prepared to meet a higher level of scrutiny. It must be able to demonstrate that its rules are required by compelling governmental interest and are narrowly tailored to serve those interests.[9] The assumption that nonprofit organizations with no connection to federal candidates or political parties are subject to the same risk of corruption as political party committees is simply not reasonable or justified. It ignores the legislative judgment of Congress on the subject and the paucity of information on the record does not satisfy the Commission's constitutional burden.

Additionally, the Commission must also create an adequate record to satisfy the Regulatory Flexibility Act. Under the Act, the Commission must ensure that the NPRM proposals will not have an unnecessary impact on small entities, including small nonprofit organizations, like the signatories to this letter.[10] The NPRM does not include an initial analysis, because the Commission erroneously concluded that the rules would not have an impact on a substantial number of small entities.[11] This conclusion was reached, as far as we can determine, by only considering the non-Federal §527 organizations that would be reclassified as Federal political committees under the proposed rules. The Commission failed to take into account the hundreds and possibly thousands of other nonprofits that would fall under the definition of "political committee" proposed in the NPRM.

As mentioned earlier, since many 501(c) organizations depend heavily on donations from foundations, large gifts from individuals, the economic impact of suddenly being unable to accept a donation over $5000 would certainly be considered significant. The Commission also erred in stating that it is "highly unlikely that a political committee would need to hire additional staff or retain professional services to comply with the reporting requirements."[12] With the very real possibility of fines and subsequent audits, and the large number of small nonprofit organizations newly swept into the regulations, it is extremely likely that professional assistance will be needed. Not only is the need for professional assistance likely, with the organization's existence on the line it is certainly prudent and advisable.

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It Is Inappropriate To Change The Campaign Finance Rules In Mid-Cycle

Changing the definition of the fundamental terms "political committee," "expenditure," and "contribution" in the middle of an election cycle would cause undue disruption to the regulated community. Simple fairness dictates that no new rules should be applied during this election season, nor applied retroactively.

An organization cannot and should not be held to standards before they are presented and adopted. Nonprofits and the public need clarity and reasonable notice on all rules. The Commission recognized this when it urged the District Court to grant a stay in *McConnell* while the case was on appeal to the Supreme Court in order to avoid creating confusion during an election cycle.

This rulemaking has already created great confusion in the nonprofit community, causing nonpartisan organizations to question the types of advocacy activities in which they can safely engage. Due to the confusion and potentially criminal consequences of being found in violation of federal campaign finance laws, the proposed rule will have an incredible chilling effect on nonprofit organizations. Such stifling of voter education and GOTV activities is not in the best interest of promoting an educated and informed electorate in our country. All rules must be carefully crafted to avoid a chilling effect on genuine issue advocacy and nonpartisan voter mobilization activity. This can only be done if the Commission takes the time necessary to compile an adequate record and consider the issues more carefully.

Conclusion

The proposals in the NPRM significantly impede the ability of nonprofit organizations to undertake vital issue advocacy and nonpartisan voter participation activities. Such a result contradicts the Congressional intent in passage of BCRA. In addition, the NPRM raises important issues regarding the role of independent nonprofit interest groups in our political system, which should properly be resolved by Congress. Finally, the Commission has not made the full inquiry required by the First Amendment and other legal requirements. For these reasons, the Commission should withdraw the NPRM.

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[1] 69 Fed. Reg. 11736
[2] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[3] Rev. Rul. 81-95, 1981-1 C.B. 332.
[4] *McConnell v. FEC,* 124 S. Ct 619 (2003)
[5] McConnell v. FEC, 124 S. Ct. at 675, n. 64.
[6] See FEC Advisory Opinion 2003-37
[7] "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002)
[8] McConnell v. FEC, 124 S. Ct at 619, 686.
[9] See Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (2002)
[10] 5 U.S.C. §§601 *et seq.*
[11] See 69 Fed. Reg. at 11755-56.
[12] 69 Fed. Reg. At 11756

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