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RE: NARAL PRO-CHOICE AMERICA, INC.

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April 9, 2004

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

RE: Notice of Proposed Rulemaking on Political Committee Status

Dear Mr. Norton:

NARAL Pro-Choice America, Inc. ("NARAL") respectfully submits these comments on the Notice of Proposed Rulemaking dated March 11, 2004, in which the Federal Election Commission ("FEC" or the "Commission") proposed changing current regulations regarding "political committee status" (the "NPRM"). NARAL opposes the NPRM and submits that the NPRM as drafted is unconstitutional, beyond the authorization of the Commission, and imprudent policy. NARAL submits that the Commission must refrain from enacting any regulation of independent groups and must defer to Congress for any further action on any of the subjects included in the NPRM.

Statement of Interest. NARAL is a corporation that is tax exempt pursuant to section 501(c)(4) of the tax code. It is a social welfare organization and political activity is not its primary purpose. NARAL's primary purpose is to protect and preserve women's right to choose while promoting policies and programs that improve women's health and make abortion less necessary. NARAL educates Americans and officeholders about reproductive rights. As such, NARAL engages many types of activities, including lobbying, educational programs, and advocacy activities. As required by the Internal Revenue Code ("IRC"), NARAL's political activity (as defined by the IRC) is not NARAL's primary activity.

However, NARAL does conduct permissible political activity. NARAL is an "MCFL" organization. As such, NARAL has a policy against accepting, directly or indirectly, any contributions from corporations or labor unions -- all money received by NARAL is from individual contributors. As an MCFL organization, pursuant to Supreme Court precedent as well as Commission regulations, NARAL is permitted to conduct independent expenditures in connection with federal elections. All independent expenditures undertaken by NARAL are reported to the Commission on Form 5.

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The NPRM would seriously affect the activities of many independent organizations, including NARAL. The definition of political committee proposed in the NPRM could encompass activities conducted by NARAL, including its independent expenditures, as well as lobbying, fundraising and other social welfare activity.

The Commission Cannot Change the Definition of Political Committee; Any Such Change to the Law Must be Undertaken by Congress

(1) Federal Election Activity Cannot Be Imported Into The Definition of Expenditures.

NPRM proposes to import "federal election activity" into the definition of expenditures and thereby expand the legal definition of political committees to many different types of organizations, including independent organizations that have never been subject to the FECA. This proposal is neither authorized by BCRA, nor consistent with its terms.

In BCRA, Congress chose to limit "Federal Election Activity" conducted by party organizations and candidates. 2 U.S.C. § 441i(c); 2 U.S.C. § 441i(b); and 2 U.S.C. § 441i(e). BCRA did not impose such restrictions on independent groups. Indeed, there is absolutely no evidence that Congress contemplated these restrictions applying to § 501(c) entities or the majority of § 527 entities. Rather, BCRA's restrictions on independent groups were limited to electioneering communications.

Moreover, there is clear evidence in BCRA that Congress intended independent groups to continue raising "soft" money for their activities, which include federal election activities. 2 U.S.C. § 441i(e)(4) provides that federal candidates may make unlimited general solicitations for § 501(c) entities "other than an entity whose principal purpose is to conduct" two of the four types¹ of activities included in the definition of federal election activity in 2 U.S.C. § 431(20)(A). Thus, examination of 2 U.S.C. § 441i(e)(4)(A) leads to two unequivocal conclusions: First, Congress intended for organizations like NARAL to continue to raise unlimited money that could be used for, among other things, political activity and federal election activity (as long as that was not the organization's principal purpose). Congress could not have meant to restrict such raising and spending if it authorized federal candidates to raise unlimited contributions for it. Provided that an organization's principal purpose is not voter registration, voter identification, get-out the vote or generic campaign activity,

¹ Specifically, vis-à-vis this statutory provision, federal election activity only extends to voter registration activity, voter identification, get-out the vote activity and generic campaign activity conducted in a year in which there are federal candidates on the ballot. Congress specifically declined to include the third and fourth prongs of federal election activity in this section. Notably, the third prong, public communications mentioning federal candidates, was not included.

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federal candidates may raise unlimited amounts of money for such organizations, and the organizations may in turn spend such money on any activities it chooses.

Second, Congress did not intend for the restrictions on public communications to extend to tax-exempt entities. Rather, 2 U.S.C § 441i(e)(4) specifically excludes public communications (used for the definition of federal activity with respect to party committees and candidates only) from the definition of federal election activity as it applies to tax exempt entities. This exclusion indicates that Congress did not intend the federal candidate solicitations rules to apply, or intend to impose any other restrictions, on tax exempt organizations that made public communications that referred to a clearly identified candidate.

This decision by Congress is supported by both Constitutional precedent as well as good policy. Issue-orientated independent groups regularly communicate to the public about issues of concerns to their members. These communications include press releases, direct mail, emails, and television and radio advertising. Such communications often focus on the Federal Government or legislation pending in Congress, and often praise or criticize federal officeholders who may be candidates for election. NARAL has a long record of educating the public on issues related to women's health and reproductive rights, and for mobilizing public support for or against legislation or government policy. For example, NARAL's public communications this year include:

- Urging activists to send a message to the FDA to stand up to pressure from the Bush Administration regarding Access to Emergency Contraception;
- Urging elected officials to support sex education for teens;
- Urging specifically identified Senators to vote against the pending "Unborn Victims of Violence Act"; and
- Urging elected officials to defeat the Partial Birth Abortion bill, and to criticizing federal officials who supported the bill.

These communications are issue-directed communications that constitute core First Amendment speech. "When a group spends money advocating its political opinions, the First Amendment is implicated." Fed. Election Comm. v. Nat'l Org. for Women, 713 F.Supp. 428, 429 (D.D.C. 1989). This conclusion is true regardless of whether the communication mentions an office holder, which all of the above referenced communications by NARAL did. Such communications could be interpreted as public communications that support or attack such officials based on the discussion of officials' positions on issues of importance to NARAL and its members. However, these communications should not be regulated or limited by the FECA. As acknowledged in McConnell v. FEC, 540 U.S. _____, 124 S.Ct 619, 686 (2003) "[i]nterest groups. . . remain free to raise soft money to fund voter

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registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."

In addition to conducting issue advocacy, NARAL has in the past, and will continue in the future, to conduct independent expenditures that advocate for and against candidates in the period immediately before an election. NARAL's independent expenditures could trigger the definition of federal election activity in the NPRM and thereby political committee status. This result would violate the clear and unambiguous decision in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 263 (1986),

Moreover, even if it were constitutionally permissible to limit such communication, such communications should not be limited. Issue advocacy often includes attempts to influence elections involving candidates whose position an organization's members support or oppose. Such advocacy efforts are protected by the First Amendment, and there is no legal justification for the limitations on this speech proposed in the NPRM. As acknowledged in Massachusetts Citizens for Life, this is "core political speech" that should not be regulated:

Thus the concerns underlying the regulation of corporate political activity are simply absent with respect to MCFL. . . . It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright line rule. This hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom.

Id. at 263.

(2) The Major Purpose Test in The NPRM is Unconstitutional

The NPRM suggests changing the definition of political committee to include organizations that have political activity as one of their "major purposes." This is contrary to Supreme Court precedent. In Massachusetts Citizens for Life, the Supreme Court held that independent groups (that do not accept corporate or labor money) may make independent expenditures unless the organization's "primary objective is to influence political campaigns." Id. at 262. The FEC is not permitted to change this test and limit the funds NARAL may spend on independent expenditures simply because NARAL may spend more than \$50,000 in independent expenditures in a four-year period. Indeed, such a rule would be in direct contradiction to Massachusetts Citizens for Life, which set no limit on independent expenditure amounts – a holding grounded in the First Amendment to the Constitution. Simply put, such a regulation triggers First Amendment analysis, and no compelling state

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interest justifies such regulation. Nothing in the NPRM in any way discusses or presents a compelling state interest to support the new and expansive regulations and limitations the FEC proposes to impose on independent organizations whose purposes include political activity. As a result, there is no constitutional basis for the restrictions proposed in the NPRM.

Even if the changes in the NPRM could withstand constitutional scrutiny, NARAL submits that the changes to the law proposed in the NPRM could only be implemented by Congress. Under longstanding Supreme Court precedents and administrative proceedings, the definition of expenditure has been limited to express advocacy. Buckley v. Valeo, 424 U.S. 1, 77-78 (1976). Furthermore, the prohibitions and limitations of the FECA have not been applied to MCFL organizations. Indeed, courts and the FEC had interpreted the definitions of expenditure and political committees for 20 years when Congress enacted BCRA. BCRA did not change these provisions, and the Commission cannot do so without express authority, which it does not have. "When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426, 437 (1986). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (citations omitted). Accordingly, the changes proposed in the NPRM should not be adopted by the FEC because they require legislative action.

Fundraising Solicitations Should Not Be Considered When Determining Political Committee Status

Fundraising solicitations are not indicative of an organization's major purpose and should not be considered to determine political committee status. Indeed, fundraising solicitations have always been treated differently from advocacy materials. Most recently, in the ABC Advisory Opinion, the Commission differentiated between fundraising materials and advocacy communications and created different treatment for them. Advisory Opinion 2003-37. As explained in NOW, 713 F. Supp. at 431:

The established way to attract members is to use "direct mail campaign." Direct mail became extremely popular in the 1980s as a way for groups of all political persuasions to increase membership rolls. Groups contract with direct mail firms to send out broad appeals in hopes of attracting enough contributions to pay for the mailing and expand their mailing and membership lists. Direct mail campaigns have less to do with getting action than with getting members.

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Fundraising communications are sent to the public, but they are not sent "for the purpose of influencing any election for Federal office." Rather the purpose of fundraising communications is to increase membership and raise money.

Advocacy language is often used as a fundraising tool. Promotion of an organization's political abilities, plans and beliefs is a necessary fundraising tool. Indeed, the period preceding a federal election is a particularly good time to fundraise for many independent issue organizations. Supporters often join organizations and contribute to them when an issue of concern is in the news. The election season is a time when the national profile for issue debates is heightened.

Issue-based organizations will frequently fundraise with materials that emphasize the organization's ability to be influential in the election, to utilize an issue of national prominence – such as a woman's right to choose – to increase members and raise funds. Under the NPRM, a NARAL fundraising solicitation that mentioned the organization's political plans could cause a finding of political committee status. This extension of the law is unwarranted.

First, as an MCFL organization, NARAL is legally permitted to advocate in connection with the election. Because NARAL does not accept corporate or labor union money, the Supreme Court has determined that it may sponsor broadcast advertisements advocating for or against federal candidates. This holding would be meaningless if NARAL could not raise money informing potential contributors of the organization's ability to advocate in connection with an election. In an election year, fundraising solicitations for an MCFL organization will likely emphasize the organization's ability to run independent expenditures. Such solicitations should not affect the organization's legal status under the FECA.

Second, issue organizations, like NARAL, have a First Amendment right to associate with whom they choose, and to appeal to like-minded individuals to join the organization. This includes the right to appeal to potential new members by emphasizing the aspects of the organization's activities that like-minded individuals support. To limit NARAL's ability to appeal to potential members and supporters by limiting the organization's ability to reference its electoral activities in the solicitations violates the First Amendment. Nixon v. Shrink Mo. Gov't PAC, 825 U.S. 377 (1989).

The NPRM Would Restrict the Rights of All American Citizens

The ramifications of the changes proposed in the NPRM are vast. The affected organizations would not be limited to party committees and candidates – the principal targets of BCRA – but would extend to virtually every tax exempt entity under either § 527 or § 501(c). All such organizations would be at risk of being considered a federal political committee and

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having their activities regulated as such. NARAL, and its 27 state affiliates, could all be affected and restricted by these proposed new rules.

Indeed, not only would the NPRM restrict the core political speech of independent organizations, it would seriously affect the First Amendment rights of every citizen of the United States. Federal law limits the amount of money citizens can contribute to federal political committees. In BCRA, Congress increased this limit, specifically creating separate limits for different types of federal political committees, principal campaign committees, party committees, nonconnected political action committees and separate segregated funds. 2 U.S.C. § 441a(a)(3). The various limits encompassed by the \$95,000 limit evidence a careful balancing by Congress. Neither the debate nor the statute indicates any evidence that Congress contemplated limiting the ability of Americans to contribute to independent § 501(c) organizations or § 527 organizations other than those that were currently encompassed by the existing definition of federal political committee. "It is a canon of statutory construction that when Congress includes specific terms, it does not intend the inclusion of unnamed terms." Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) ("Expressio unius est exclusio alterius."). If the Commission were to adopt the current NPRM, it would not only limit the money used by independent groups, but would also limit the ability of citizens to associate with and contribute to issue organizations swept into the definition of "political committee." The \$95,000 biannual limit was not contemplated to limit citizens' contributions to independent groups, and the FEC has developed absolutely no factual record to support this proposed vast restriction on associational rights.

For all of the forgoing reasons, NARAL Pro-Choice America submits that the Commission should withdraw the NPRM and defer to Congress to enact further changes in this area.

I would be happy to provide additional information. You may contact me via our legal counsel Cassandra Lentchner, Perkins Coie LLP, at clentchner@perkinscoie.com or (202) 434-1611.

Very truly yours,

<signed>

Kate Michelman
President
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