

CAMPAIGN For TOBACCO-FREE Kids®

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TO: Mai T. Dinh

ORGANIZATION: Federal Election Commission

FROM: Campaign for Tobacco-Free Kids

FAX NUMBER: (202) 219-3923

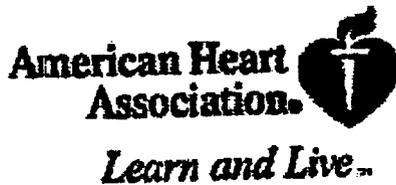
DATE: 04/09/04

SUBJECT: _____

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COMMENT: _____



April 9, 2004

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

Submitted Via FAX: 202-219-3923

Re: Notice of Proposed Rulemaking [Notice 2004-6]
Political Committee Status, 11 CFR Parts 100, 102, 104, 106 & 114

Dear Ms. Dinh:

The organizations submitting these comments are all independent, nonpartisan 501(c)(3) charitable and educational nonprofits that work to promote the public health. For example, the Campaign for Tobacco-Free Kids works to promote public and private policies that will prevent and reduce tobacco use and its related harms and costs. The American Lung Association works to prevent and reduce lung diseases through education, research, and supporting effective public and private policies. In much the same way, the American Heart Association works to prevent and reduce heart disease.

We are all extremely concerned that the Federal Election Commission's (FEC) proposed new rule relating to political committees and election-related activities could seriously limit our ability to continue much of our effective work to prevent and reduce disease and promote public health by placing unnecessary and excessive restrictions on all nonpartisan charitable and educational organizations that do important work to inform and influence public policy debates relating to important issues.

Pursuant to federal tax laws, none of the undersigned 501(c)(3) nonprofits take any actions to oppose or support any candidate to elected office. While the federal tax laws and the Internal Revenue Service's (IRS) related rules in this regard could be clearer and more specific, they provide adequate guidance to enable 501(c)(3) organizations to avoid taking any actions to support or oppose any candidates for elected office without interfering with the nonprofits' ability to educate the public and policymakers and advocate for constructive policy changes, including limited direct and grassroots lobbying, on a purely nonpartisan basis.

The proposed rule, however, would drastically expand the scope of prohibited political activities under federal election laws well beyond the existing restrictions in either federal election or tax laws. These proposed changes threaten to make it illegal for nonpartisan 501(c)(3) organizations to make any public communications that put a person serving in an elected federal office in either a favorable or unfavorable light if that person is a candidate for reelection or for some

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other federal office. Interpreted broadly, this new restriction would prohibit 501(c)(3) nonprofits from saying almost anything at all about any federal elected officeholder unless that person has announced an intention to retire or is a lame duck with no announced plan for running for any other federal office.

Narrower interpretations are possible, but the proposed rule provides no clear information on how narrowly or broadly it would be interpreted and even narrower interpretations would still be too restrictive. For example, even a much narrower interpretation of the new restriction would still prohibit 501(c)(3) nonprofits from saying anything positive or negative about any person holding a federal elected office if he or she has announced plans to run for reelection or for some other federal office (or perhaps simply not announced plans not to run). Indeed, a careful reading of the proposed rule indicates that this new restriction would make it illegal for a 501(c)(3) organization to make any communication to the public, the media, or others that identifies one or more federal officeholders as having a position on an issue that either parallels the position of the organization or conflicts with it.

Even if construed most conservatively – and applied only to communications immediately prior to an election – this kind of broad and far-reaching change to existing laws and regulations would directly block constructive, nonpartisan communications by 501(c)(3) nonprofits relating to important federal policies and related debates, thereby diminishing, if not eliminating in some contexts, the kind of vigorous exchange of ideas and information that is required for the healthy operation of our democratic system.

While adding another element for evaluating communications – how close the communication is to an upcoming election – could narrow the application of this new restriction, nothing in the proposed rule suggests that it would apply differently depending on the time until the relevant election. But even with such a modification, the proposed new rule would block certain purely issue-directed communications by nonpartisan nonprofits during the pre-election time period – even if critical public policy debates and decisions were also being made at that time.

Because the proposed rule is so complex – not only on its face but in terms of the preexisting framework of federal laws, regulations, IRS and FEC advisory opinions, and court rulings – we will not try, here, to provide any sort of comprehensive legal analysis or to consider the many issues and questions regarding the scope of the FEC's authority and the related permissible scope of any final rule, the Commission's capacity to fully consider the many issues raised by the proposed rule within the presented schedule, or related issues in regard to timing and the upcoming election. But we do want to raise a few key points of special concern to 501(c)(3) organizations engaged in nonpartisan education and advocacy relating to public health and other important public policy issues.

First, as noted above, it is critically important that 501(c)(3) nonprofits be able to engage in public education and advocacy regarding public policy issues without any new restrictions on that work. Any commission rule should avoid interfering with the issue-directed work of 501(c)(3) organizations that are already adequately prohibited from doing any work to support or oppose any candidate's election to office under federal tax laws and regulations.

Second, it is not sufficient protection for 501(c)(3) organizations for the Commission to state in any new rule that changes existing definitions and interpretations of key terms in federal election

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laws that these new definitions and rules are not meant to apply to 501(c)(3) organizations. To avoid confusion and any risk of curtailing legitimate 501(c)(3) activities, any new rule should establish clear and consistent definitions of the key terms (such as what constitutes supporting or opposing a candidate for federal office or what a "political committee" is) so that those terms and definitions can be consistently applied in all contexts and in relation to all of the various types of organizations without eliminating the legitimate role of 501(c)(3) nonprofits in debates over federal policies and policy making.

Third, it is clear that the issue of intent plays a key role in determining what actions are taken to influence the outcome of an election and which are taken for other purposes. Inevitably, certain actions taken for the purpose of influencing public policy debates can also reflect favorably or negatively on federal officeholders and possibly have some impact on their candidacies for reelection or other federal office (especially when those issue-directed actions are taken close to the election). We believe that such purely issue-directed activities, especially when undertaken by nonpartisan 501(c)(3) nonprofits, should not in any way be infringed upon by any new rule. Accordingly, it is important that any new rule structure its definition of activities taken to "promote, support, attack, or oppose" the election of a federal candidate so that actions taken for other legitimate purposes unrelated to electoral outcomes, such as informing or influencing specific public policy debates, are expressly excluded. At the same time, any such criteria related to the purpose of an activity or the intent behind a particular communication should to the extent possible relate only to objective, externally visible characteristics or information – and avoid any need for investigations into the internal documents and workings of any particular organization or the states of mind of its leadership.

Finally, we encourage the Commission to consider carefully the impact of the proposed rule, or any related rule it finally issues, in areas beyond the Commission's scope or purpose. As is so often the case, well-intentioned efforts in one area can have disastrous effects in others. While working to preserve and protect democratic elections, the Commission could be simultaneously restricting other activities that are equally crucial to our democratic system of government.

For these reasons, we urge the Commission to reject the proposed rule and to carefully consider the issues raised in these comments in its development of any new proposed or final rule.

Sincerely,

Action on Smoking and Health
American College of Chest Physicians
American Heart Association
American Lung Association
American Public Health Association
American Thoracic Society
Association of Maternal and Child Health Programs
Association of Teachers of Preventative Medicine
Campaign for Tobacco-Free Kids
National Mental Health Association
The Praxis Project
Society of Critical Care Medicine