



national committee for
responsive philanthropy

FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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April 2, 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, 69 Fed. Reg. 11736 (March 11, 2004)

Dear Ms. Dinh:

The National Committee for Responsive Philanthropy (NCRP) is a national nonprofit research and advocacy organization promoting increased philanthropic grantmaking and increased philanthropic access for people with the least wealth and least opportunity in our society. With nearly thirty years of functions as a 501(c)(3) advocacy organization, we have serious concerns about the above-referenced proposed rulemaking.

We urge you not to act on the current Notice of Proposed Rulemaking on Political Committee Status (the NPR) this year. After this election cycle the FEC can take the time it needs to consider the many serious and complicated issues raised in the rulemaking. It would make more sense for the FEC to refine its proposed rule and conduct the rulemaking proceeding, if it is even needed, in 2005.

It is inappropriate for the Commission to change the campaign finance rules in the midst of this election cycle.

Simple fairness dictates that no new rules should be applied during this election season, nor applied retroactively. 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 v. FEC* while the case was on appeal to the Supreme Court in order to avoid creating confusion during an election cycle.

The proposed rules appear to be a solution in search of a problem. There is no evidence that independent groups seeking to participate in the democratic process present a threat of corrupting government.

The constitutional rights of free speech and association should only be limited by campaign finance laws when there is a compelling need to prevent corruption or the appearance of corruption in the federal government. That is why the McCain-Feingold law bans federal officials

and political parties from raising soft money. The proposed rule would sweep in and restrict far more than is necessary to prevent corruption.

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.

The Notice of Proposed Rulemaking 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 FEC regulation.

This proposed rulemaking will chill speech protected by the Constitution.

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. Our organization has encountered numerous examples of nonprofits, particularly 501(c)(3) organizations expressing concern and confusion about engaging in issue advocacy given the multiple and confusing interpretations they have received from various sources about the proposed FEC regulation. This organization itself could be impacted in our own grassroots lobbying on issues of concern to us on philanthropy, for example, providing information on proposed federal legislation on charity and philanthropy and mentioning the names of current and prospective candidates for office who may have expressed positions on the bills.

Due to the vast confusion and severe (criminal) consequences of being found in violation of federal campaign finance laws, the proposed rule will have a strong chilling effect. 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 FEC defers action until 2005, and takes the time to sort through the issues more carefully.

Genuine issue advocacy must be left free of the Commission's regulation.

The democratic process depends not only on citizens voting, but also on people and nongovernmental organizations speaking up about the issues of the day, including pending legislation and acts by public officials. The Constitution protects such advocacy from being burdened by laws and regulations unless a compelling state interest justifies it. Government should be wary of making any rules that will discourage citizens and nonprofit organizations from participating in our democratic process. The Commission has no legitimate interest in attempting to regulate genuine issue advocacy, which addresses issues and public officials in their role as policymakers, not as candidates for federal office.

Tax law should not be imported wholesale into election law.

We encourage the Commission to draw on tax law principles in developing its regulations. However, tax and election law serve different purposes. The tax code imposes restrictions on the lobbying and election-related activities of 501(c)(3) organizations that request to be treated as tax-exempt. Tax exemption is voluntary and carries with it certain privileges and benefits; the more tax benefits an organization receives, the more restrictions are imposed on its advocacy activities. However, regulation by the Commission is not voluntary, and violation carries criminal penalties. It is intended to prevent undue corporate influence in government, not stifle citizen participation.

It is our experience that 501(c)(3) organizations are increasingly knowledgeable and protective about the legal restrictions on election-related activities.

Not all activity that is considered "electioneering" for tax purposes is subject to Commission regulation, and the Commission should look to its own purposes and authority before it extends its reach beyond current regulations. We see no reason for the Commission to slip into an area of regulation that would constitute an unnecessary extension and diffusion of the Commission's scope.

This NPR 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.

Most importantly, 501(c)(3) organizations should be excluded from the Commission's definition of political committee. 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. Nonprofit leaders and boards are well aware of this limitation. They are careful not to cross the threshold into unpermitted activities. As a membership organization, NCRP is quite aware of this limitation, as are all of our member organizations.

In the past, the Commission exempted the communications of 501(c)(3) organizations from its 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. The Commission should refrain from altering the definition of political committees and electioneering communication in a way that would encroach on the legitimate, nonpartisan activities of 501(c)(3) organizations. We see the activities of 501(c)(3) organizations engaged in lobbying and nonpartisan voter mobilization, not electioneering.

Please consider this statement as the Commission reviews the Notice of Proposed Rulemaking. Thank you very much for your attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Cohen", with a long horizontal flourish extending to the right.

Rick Cohen
Executive Director