

**Testimony of Ellen L. Weintraub,**  
Vice Chair of the Federal Election Commission,  
Before the Committee on House Administration  
May 20, 2004

Chairman Ney, Ranking Member Larson, and Members of the Committee:

Thank you for inviting me here today to discuss the Federal Election Commission's recent actions concerning entities organized under section 527 of the tax code and efforts to redefine the term "political committee."

Last week, the Commission, on a bipartisan 4-2 vote, rejected a hastily conceived proposal to change the definition of "political committee" in the middle of the election year. Instead, we approved the recommendation of our General Counsel to give ourselves another 90 days in which to gather further facts, give some thought to the tens of thousands of comments we received in response to our Notice of Proposed Rulemaking, and allow the Counsel time to formulate a considered action plan. The proposed regulation put forward by Commissioners Thomas and Toner did not have the support of our General Counsel and was not supported by any factual record. Although purportedly based on imported concepts from the tax law, a subject in which the Federal Election Commission has scant expertise, the proposal was also not supported by the testimony of any of the tax experts who appeared before us at our April hearing on this subject.

Albert Einstein once said: "Everything should be made as simple as possible, but not simpler." As appealing as it might be to envision a regulatory scheme in which the tax and election laws embody the same principles, decades of administrative and judicial construction of those two different bodies of law tell a different story. In my view, this proposal was based on oversimplified notions of tax law, and would have effectively nullified a law passed by Congress to address precisely the same issue, that is, activity by entities organized under section 527 of the tax code which do not register as political committees with the FEC. The proposed regulation also lacked key definitions that would have made it comprehensible to the regulated community. And the proposed allocation formula lacked any supporting data.

At our hearing last month, the four tax experts who testified did not agree on much, but they did all agree that 527 status under the tax code should not be the determining factor in adjudging political committee status under the Federal Election Campaign Act. I found the testimony of John Pomeranz, a respected tax practitioner here in DC, to be particularly helpful and illuminating on the scope of section 527. I have attached his written comments to my testimony.

Mr. Pomeranz pointed out that the IRS, unconstrained by the First Amendment concerns underlying much of campaign finance jurisprudence, has long construed section 527 so broadly that he described it as the regulatory equivalent of a "kitchen junk drawer." IRS rulings have included within section 527's scope organizations engaged in activities far from the traditional domain of campaign finance regulation, e.g.:

- an organization created to "elevat[e] the standards of ethics and morality in the conduct of campaigns for political office" by seeking candidate commitments to the organization's code of fair campaign practices;

- an organization that published ads to promote a particular state ballot measure where the effort would likely bring out voters who tended to support a federal candidate running for reelection on the same ballot;<sup>1</sup>
- an organization devoted to improving the quality of elected officials by rating and publishing qualifications based on nonpartisan criteria; in many cases all candidates shared same “qualified” rating.

The hastily constructed Thomas-Toner proposal does not appear to me adequately to take into account the myriad types of organizations covered by section 527. Mr. Pomeranz commented that campaign finance and tax law “begin from different policy rationales, meet in seemingly similar concepts, but then proceed to wildly different legal destinations.”<sup>2</sup> He opined that “the inherent uncertainty created by [the tax law’s] contextual, subjective standard [for determining 527 status] renders it wholly inadequate to the task of providing a predictable standard for those required to comply with federal election law.”<sup>3</sup> In his view, importing that standard into campaign finance regulation would infringe on constitutionally protected political speech.

Moreover, the Thomas-Toner proposal is inconsistent with the law that Congress actually did pass to regulate non-political committee 527 organizations. In 2000, Congress considered a variety of legislative proposals to address the issue of so-called “stealth PACs,” organized under section 527 but not registered with the FEC. One of those proposals, embodied in S. 2582, suggested an approach quite similar to that of the Thomas-Toner proposal: that with certain, again quite similar exemptions, any entity that wished to take advantage of section 527’s tax exempt status would have to register as a political committee with the FEC. That bill did not pass into law. Instead, Congress opted to require 527 organizations to disclose their financial activity to the IRS. The House report described the law as follows:

[T]hese enhanced disclosure and reporting rules are intended to make no changes to the present law substantive rules regarding the extent to which tax exempt organizations are permitted to engage in political activities. Thus the Committee bill is not intended to alter the involvement of such organizations in the political process, but rather is intended to shed sunlight on these activities so that the general public can be informed as to the types and extent of activities in which such organizations engage.<sup>4</sup>

Thus, Congress made a choice. It could have subjected 527 organizations to the FEC’s regulatory regime in 2000, or in 2002 (when it amended the 527 legislation after

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<sup>1</sup> The Toner-Thomas proposal contains an exclusion for organizations “organized solely” for the purpose of influencing state ballot initiatives, but it is not clear whether that exclusion would apply under these facts.

<sup>2</sup> Comments of Gail Harmon and John Pomeranz, at 1 (April 5, 2004).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> House Ways and Means Committee, Report on H.R. 4717, 106<sup>th</sup> Cong., 2d Sess. 18 (2002).

the passage of BCRA), but did not. Congress still could make that choice by amending that law again. For the FEC to adopt the Thomas-Toner proposal, however, would be to remake that choice for Congress, to reject the statutory plan enacted and substitute one of the Commission's choosing. It is not clear that we have the authority to do that, and I'm not sure you would want us to if we did.

I take very seriously my responsibility to administer the law that Congress wrote, as Congress intended it to be interpreted. Thus, I cannot ignore the view of 128 House Members and 19 Senators that "the proposed rules before the Commission would expand the reach of BCRA's limitations to independent organizations in a manner wholly unsupported by BCRA or the record of our deliberations on the new law. . . . There has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies."<sup>5</sup>

You were one of the signers of that letter, Congressman Larson. And I want to assure you that I listened carefully to what you and your colleagues had to say.

In upholding BCRA, the Supreme Court emphasized the corruption or appearance of corruption that stemmed from the direct involvement of officeholders in raising and spending soft money. That link has been broken, appropriately, by BCRA. The Court said: "To be sure, mere political favoritism or opportunity for influence alone is insufficient to justify regulation. . . . As the record demonstrates, it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence."<sup>6</sup>

Independent groups cannot sell access to officeholders. This was recognized during Congressional debate over BCRA. As Senator Levin pointed out:

Will contributors of these large sums want to buy access to the Sierra Club or the National Rifle Association? Dubious. Will they be able to buy access to us through these unlimited contributions to third parties? No.<sup>7</sup>

Similarly, Senator Snowe argued:

Some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo.'<sup>8</sup>

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<sup>5</sup> Comments dated April 9, 2004, from Sen. Daschle, *et al.*, Comments dated April 5, 2004, from Rep. Pelosi, *et al.*

<sup>6</sup> *McConnell v. FEC*, 124 S. Ct. 619, 666 (Stevens, J. and O'Connor, J., Opinion for the Court).

<sup>7</sup> 148 Cong. Rec. S2116 (Mar. 20, 2002) (statement of Sen. Levin).

<sup>8</sup> 148 Cong. Rec. S2136 (Mar. 20, 2002) (statement of Sen. Snowe).

BCRA's goal was to sever the connection between Federal officeholders and soft money. The Supreme Court understood that. It stated: "Interest groups . . . remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."<sup>9</sup> Congress understood that. During the pendency of the ABC advisory opinion, 8 Members of the Senate (seconded by 58 House Members) wrote to us to emphasize that Congress knowingly chose to address the raising and spending of soft money by parties and officeholders, and not to "aim similar restrictions at political organizations or tax-exempt groups that are neither controlled by, nor coordinated with, parties or candidates."<sup>10</sup>

That soft money would continue to be spent by 527 organizations, even after the passage of BCRA, was well-understood and left unaddressed in BCRA, in an effort to piece together a majority vote in Congress and to craft a narrow proposal that would withstand constitutional scrutiny by the Supreme Court (it turned out to be an extremely effective strategy). Senator Feinstein bluntly stated:

Meanwhile, one of the effects of McCain-Feingold is that as we ban soft money, which I am all for, the field is skewed because one has to say: Can you still give soft money? Some would say no. That is wrong. The answer is: Yes, you can still give soft money. But that soft money then goes toward the independent campaign; into so-called issues advocacy . . . It is likely that spending on so-called issue advocacy, most of which is thinly disguised electioneering, probably is going to surpass all hard money spending, and very soon.<sup>11</sup>

This view was seconded by Senator Murray:

This bill also has the potential to give a disproportionately larger role in elections to third party organizations."<sup>12</sup>

Senator Jeffords disclaimed any intent to force new entities to register and report to the FEC:

Now let me explain what the Snowe-Jeffords [electioneering communications] provision will not do:  
-The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;

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<sup>9</sup> *McConnell*, 124 S. Ct. 619, 686 (2003).

<sup>10</sup> Letter dated Feb. 12, 2004, from Senator Daschle, *et al.*, to Commissioners. *See also* Letter dated Feb. 10, 2004, from Representative Pelosi, *et al.*, to Commissioners.

<sup>11</sup> 147 Cong. Rec. S3011-12 (March 28, 2001) (Statement of Sen. Feinstein).

<sup>12</sup> 147 Cong. Rec. 3236 (April 2, 2001) (Statement of Senator Murray).

- It will not prohibit such groups from accepting corporate or labor funds;
- It will not require such groups to create a PAC or another separate entity;*
- It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;
- It will not require the invasive disclosure of all donors; and
- Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.”<sup>13</sup>

Thus it does not appear that BCRA attempted to address the issue of unregistered 527s, or that regulating those entities would be a necessary outgrowth of that law.

Even if I believed that the Thomas-Toner proposal was not inconsistent with Congressional action on section 527 organizations, I would have substantive problems with the proposals details. First, it extends the Commission’s regulatory reach to entities whose major purpose is the nomination or election of *non-Federal* candidates. I am not convinced we have jurisdiction over such entities.

Second, it incorporates into the definition of “political committee” a “major purpose” test (that is, a political committee must have, as its major purpose, “the nomination or election of one or more Federal or non-Federal candidates”), but provides absolutely no definition or other explanation as to the meaning of the term. It is a mystery to me how an entity can be expected to understand whether it is regulated or not if we provide so little guidance. Moreover, adopting such ill-defined concepts is an invitation to arbitrary enforcement. If we cannot agree on the parameters of basic definitions in the relatively dispassionate arena of rulemaking, we are unlikely to find greater common ground when individual fates hang in the balance.

The Supreme Court warned, in *Buckley v. Valeo*, that “vague laws may not only ‘trap the innocent by not providing fair warning’ or foster ‘arbitrary and discriminatory application’ but also operate to inhibit protected expression by inducing ‘citizens to “far wider of the unlawful zone’ than if the boundaries of the forbidden areas were clearly marked.””<sup>14</sup> These concerns were echoed in comments submitted on behalf of the NAACP Legal Defense and Educational Fund, Inc.: “Not only does the NPRM fail to offer guidance that will permit charitable organizations to conform their future conduct to the requirements of BCRA and FECA (to the extent they apply to such organizations), but it also provides little protection against arbitrary – because standardless – application of its provisions.”<sup>15</sup>

This rulemaking was prompted by concerns about the activities of two or three organizations. We are now proposing to regulate thousands. The proposed allocation formula, establishing a new minimum threshold of 50% hard money for all political committee disbursements, does not appear to be based on anything more substantial than

<sup>13</sup> 147 Cong. Rec. S2813 (March 27, 2001) (Statement of Sen. Jeffords) (emphasis added).

<sup>14</sup> *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360 (1964))).

<sup>15</sup> Comments of Norman J. Chachkin, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc., at 6 (April 5, 2004).

an intuitive response to the allocation formula adopted by one committee. Assuming for the sake of argument that the proposed regulation guesses right for that one committee, there is no indication that 50% is the right threshold for any other committee. Imagine a grassroots organization almost exclusively focused on promoting responsive candidates for school board, that spends 5% of its activities advocating for a favored Congressional candidate. Why should that organization have to pay for its activities with 50% Federal funds? Moreover, recall that the Commission ruled earlier this year that a political committee that makes a communication that promotes, supports, attacks or opposes only a clearly identified Federal candidate must pay for that communication with 100% hard dollars.<sup>16</sup> With tough standards like those on the books, it is not clear that the allocation rules are in such dire need of adjustment that we cannot wait 90 days to gather some data.

The Commission's rulemaking on political committee status has the potential to subject vast numbers of entities to new restrictions on their political speech, and it has the potential to mask from public view reams of information that are currently being disclosed. We must balance the need to craft a rule that is not capable of easy evasion with the requirement that we not be so overbroad as to impede legitimate advocacy.

If the Toner-Thomas proposal were adopted, it could result in entities dropping off our radar screen, for one of two reasons. First, an entity might argue, even though it has raised contributions or made expenditures of over \$1,000, that it need not register and report because its major purpose is not influencing elections. In addition, if we had adopted that proposal, some entities currently spending funds and disclosing that spending through a 527 organization would, I believe, re-organize and continue substantially the same activities through 501(c)(4) or (6) organizations, which do not have the same disclosure obligations. This is not a frivolous or hypothetical concern. Some of our witnesses, representing multi-faceted organizations with both 501(c)(4) and 527 components, frankly told us that they would do just that. We could end up with a net loss of disclosure about the funding of political activities. I do not believe that result would serve the purposes of reform.

The proposals under consideration could influence citizens' willingness and ability to support or oppose not only candidates, but also issues and policies. In the midst of an election year, it is easy to forget that not every criticism of the government has an electioneering purpose. Many commenters tried to bring that point home to the Commission. I was particularly moved by the example provided by Housing Works, Inc., a non-profit organization that helps homeless New Yorkers living with AIDS and HIV, and people living with HIV/AIDS all over the world. This witness wrote:

Over the course of the AIDS epidemic, one of the most persistent truths has been that democracy and free speech have saved lives. Advocacy has saved lives. Criticism of elected officials for their inaction on HIV/AIDS has spurred remarkable public and private responses to the epidemic. These responses have literally saved millions of lives all over the world.<sup>17</sup>

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<sup>16</sup> See Advisory Opinion 2003-37, at 9.

<sup>17</sup> Comments of Housing Works, Inc., at 1 (April 2, 2004) (attached hereto).

The non-profit advocacy community has been justifiably concerned about the ramifications of this rulemaking. I attach to my testimony the comments submitted by a coalition of over 600 nonprofit organizations in response to the Notice of Proposed Rulemaking. Several of these same organizations sent further comments (also attached) addressing the Thomas-Toner proposal, and noting that their concerns were not alleviated by it. Nor should they be. The proposal may not target 501(c) organizations, but neither does it exempt them. And Commissioner Thomas has forthrightly acknowledged that there are circumstances in which he foresees that the Commission would investigate 501(c) organizations to determine if they are acting “properly” and consistently with their tax status. He correctly notes that the FEC has investigated 501(c) organizations in the past, and offers as an example the AIPAC case, which has embroiled the respondent in litigation with the agency for almost two decades. I doubt that that example will provide much comfort to the nonprofit community.

I return to an example I offered at the beginning of this process. Earlier this year, I saw a full-page ad in the Sunday Washington Post. It was paid for by FRCAction, the 501(c)(4) legislative action arm of the Family Research Council (itself a 501(c)(3) organization). According to the organization’s website, it was part of a \$2 million ad campaign to appear in 22 newspapers across the country, including the New York Times, Los Angeles Times, Miami Herald, Dallas Morning News, Chicago Tribune, and Atlanta Journal-Constitution. The ad proclaimed:

DEAR MISTER PRESIDENT:

WE ARE DEEPLY GRATEFUL

We deeply appreciate your long-standing and deep-seated commitment to the preservation of the family. We especially thank you for the decision you have announced to support and work for the passage of the *Federal Marriage Amendment* . . .

WE APPLAUD YOUR COURAGE

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WE PLEDGE TO YOU

We will do everything in our power to inform and to educate our constituents about the importance and urgency of this issue both for the preservation of the family in America as well as the right ordering of our government. . . .

The ad compared the President to Abe Lincoln and contained what might be considered a tacit commitment to spread the good word about George W. Bush throughout sympathetic communities. Does it promote or support a clearly identified candidate? I think it does. Is this the kind of communication that the Federal Election Commission should be regulating? I think not. Yet if ads like these take up the “major” portion of FRCAction’s budget this year (whatever that means), FRCAction could be determined to be a political committee under the Toner-Thomas proposal. I don’t know that that would happen, because the “major purpose” test is totally undefined in the proposal, but it’s a plausible reading.

I strongly objected to proceeding with an NPRM so full of complicated, convoluted questions on such a fast track, especially in the middle of an election year. Some misread my concern as an unwillingness to enforce the law in an election year. Let me reiterate that I am fully prepared to enforce the law in an election year or any other time. What I am not prepared to do is to change the basic definitions of who gets regulated and who doesn't in the middle of an election year.

Both Congress and the courts have shown sensitivity to the disruptive effect that new rules can have in the midst of an election cycle. As we all know, BCRA passed in the spring of 2002, but its effective date was delayed until the day after the 2002 election. Thus, Congress intentionally allowed the corruption and appearance of corruption that it considered inherent in the pre-BCRA regime to continue until the law could be implemented in an orderly fashion at the beginning of an election cycle. Even the District Court, which labored for months to construe BCRA, agreed to grant a stay of its own opinion in *McConnell* and declined to subject the regulated community to a new set of rules in the middle of a cycle.

In the Commission's brief to the court requesting that stay, the Commission warned the court of the "tumultuous consequences for the Nation's federal electoral system," and the "significant confusion for the FEC and those subject to its regulation" that would arise from mid-cycle changes to the regulatory regime.<sup>18</sup> We noted in particular: "Many political organizations already have restructured their operations and planned their activities for the 2004 elections in compliance with BCRA's scheme."<sup>19</sup> We urged the court "[t]o minimize the potential chaos to which the Nation's campaign-financing system is subjected in the critical period leading up to the 2004 elections."<sup>20</sup>

We just went through one exercise in hopelessly confusing the regulated community, when we issued the ABC advisory opinion,<sup>21</sup> on a related topic, an opinion variously described as "almost incomprehensible" (by a liberal West coast law professor) and an "exquisite opacity" (by a conservative East coast commentator). I would like to think that we would have learned something from that experience. My colleagues say they want to codify that opinion, but the draft they produced goes beyond the issues that we decided there, and, at the same time, does nothing to clarify the points of confusion. In particular, their draft does not define the term "promote, support, attack, or oppose" the parameters of which (outside the context of political parties), according to numerous comments we received, are unclear to the regulated community.

It is irresponsible to issue a rule that will not provide clear guidance to the regulated community, but rather, will leave members of that community more confused after its issuance than they were before. I reject the notion that we must act in haste or forbear acting for all time. I'd rather do it right than do it fast. I would like to have the advice of our counsel when we do act, and not just shoot from the hip. If we do enact new regulations, our model should be the simplicity and clarity of the electioneering communications provision of BCRA. We cannot expect compliance if we shirk the hard

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<sup>18</sup> See Memorandum of Points and Authorities in Support of the Government Defendants' Motion for Stay of Final Judgment Pending Appeal to the Supreme Court of the United States at 4, 5, *McConnell v. FEC* (No. 02-582).

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> AO 2003-37.



and sometimes time-consuming work of writing clear regulations in favor of a quick, but ill-considered fix.

I appreciate your interest and attention and would be happy to answer any questions.