VIA E-MAIL AND HAND DELIVERY

September 30, 2005

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

Re: Notice 2005-20

Dear Ms. Dinh:

The American Cancer Society (ACS) is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer through research, education, advocacy and service.

ACS is a public charity organized under section 501(c)(3) of the Internal Revenue Code. The Federal Election Commission (FEC)'s proposed changes to the definition of "electioneering communications" under the Bipartisan Campaign Reform Act of 2002 ("BCRA") directly impact ACS and our ability to advocate as a 501(c)(3) charity. We hope to assist the FEC in formulating standards in a manner that ensures government oversight while permitting us to advocate effectively for our mission.

Sincerely,

F. Sheffield Hale
Chief Counsel

Mary Rouvelas
Associate Counsel

National Government Relation Office
901 E Street NW
Suite 500
Washington, DC 20004
202.661.5700 telephone
202.661.5750 fascimile

COMMENTS OF THE AMERICAN CANCER SOCIETY, INC. ON
THE PROPOSED RULES
REGARDING ELECTIONEERING COMMUNICATIONS
(NOTICE 2005-20)

The American Cancer Society, Inc. (ACS) submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Federal Election Commission ("the Commission"), Notice 2005-13. The Notice seeks comments on proposed changes to its rule defining "electioneering communications" under the Federal Election Campaign Act of 1971, as amended (FECA). The Commission is considering a range of options that would modify or replace current exemptions in order to comply with the ruling of the U.S. District Court for the District of Columbia in *Shays v. FEC*.[1] Specifically, the Commission is considering repealing two exemptions that greatly affect charities organized under section 501(c)(3) of the Internal Revenue Code.

ACS is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy and service. The definition of "electioneering communication" directly impacts ACS's ability to advocate for our mission, because it affects our ability to educate the public and lawmakers about policies that can help conquer cancer.

Our comments are intended to share current practices, and request that the Commission issue clear standards with which we can comply. Resources expended on complying with complex standards are diverted from other needs, such as researching cures for cancer, community outreach to help educate the public about preventing the disease, and programs to assist individuals who have been diagnosed. If the Commission creates tests that are difficult for ACS to interpret and apply, it results directly in less funds available to do our program work.

The comments are presented in an order that corresponds to the sequence of the NPRM, and are not intended to reflect the relative importance of the individual comments.

A. 11 CFR 100.29(b)(3)(i) – Communications Publicly Distributed Without a Fee

In 11 CFR 100.29(b)(3)(i), the Commission defined "publicly distributed" as "aired, broadcast, cablecast or otherwise disseminated *for a fee* through the facilities of a television station, radio station, cable television system, or satellite system" (emphasis added). The intent behind this wording was to ensure that public service announcements (PSAs) could continue to air during an election. Both the District Court and the Court of Appeals struck down this exemption in *Shays*, as violating the *Chevron* doctrine.[2]

Although the exemption was struck down, ACS strongly agrees with the original intent of the PSA provision. Federal lawmakers – and their candidate opponents – may be highly

[1] 337 F. Supp. 2d 28 (D.D.C. 2004), aff'd No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005).
[2] 337 F. Supp. 2d at 128-29; No. 04-5352, slip op. at 54-5, 57, 2005 WL 1653053, at *29-31.

respected members of their communities unrelated to their candidacy. Charities and the communities they serve can benefit from these individuals helping to disseminate mission-related information. We would like to ensure that these practices do not run afoul of any federal election laws. We would also like to ensure that ACS and other charities do not bear liability for communications that they do not control (see below).

Under current ACS practice, ACS creates a PSA, and sends it to media outlets. ***ACS does not retain control over whether and if a PSA is then used or discarded***. The only expiration dates used in PSAs pertain to talent expirations, where the actor has agreed to allow the image to be used for a certain length of time. Currently, the Screen Actors Guild only allows one year at a time. In the case where a lawmaker or other prominent member of the community volunteers to appear in the ad, no time restriction is requested by ACS. In the paid actor scenario, ACS sends notices to media outlets requesting them to limit use of the ads and asking them to discard it, but does not ultimately decide whether an ad will receive air time and when. It is not clear to what extent broadcasters actually comply with this restriction. Indeed, ACS often does not know when a PSA has been broadcast: although it can pay a service to track this information, it is expensive to do so, and therefore not customary.

Our primary concern in the area of PSAs is that a media outlet will run a PSA in a manner not dictated by our organization, and then ACS would have unintentionally violated the law. For example, ACS worked with First Lady Hillary Clinton to create a PSA in 1998 urging individuals to get colorectal screenings.[3] The PSA included an image of the First Lady, who was then the Honorary Chair of the National Colorectal Cancer Roundtable. In March of 2000, when candidate Hillary Clinton was engaged in a heated senate race, *The New York Post* ran the PSA without ACS or the campaign's knowledge. ACS discovered that the ad had run in 2000 after receiving complaints from members of Congress and the public. We then sent a number of letters and other external communications to ensure that we did not appear partisan, and in particular did not want to appear to violate our limitations under the tax code.

Charities should not be at risk of violating campaign finance law for PSAs that were created with no electoral purpose. Although the "for a fee" requirement attempted to reflect this intention, we believe the FEC could craft a different rule that will withstand scrutiny.

Organizations would benefit from a safe harbor on PSAs. The safe harbor could include ensuring that the content does not refer to the individual's candidacy, that the individual is endorsing the organization (in direct contrast to the organization endorsing the candidate), with an overarching message promoting goals consistent with the organization's mission. At a minimum, the Commission should craft a rule that protects charities from liability for PSAs that run within the electioneering communication time frame if the charity exercised no control over that timing. If no safe harbor exists,

[3] This PSA was a print ad. Although we understand that the ban on electioneering communications only applies to broadcast ads, the ad could easily have been created in broadcast form, so we believe the example is salient.

charities will hesitate to use lawmakers or politically oriented members of the community in PSAs at all, for fear legal communications will become illegal in time.

In addition, we agree with the Commission that PSA communications "promot[e] a wide range of worthy endeavors. Subjecting these communications to the electioneering communication regulations may discourage broadcasters from performing an important public service in providing free airtime for these ads."[4] It is already difficult to obtain enough air time for a number of these worthy messages, and subjecting the communications to additional regulations may prevent some of them from occurring altogether. We hope that any standard the Commission adopts will balance these important community needs with BCRA's intent to ensure an open electoral process.

The Commission also seeks comment on whether it could create a new exemption for ads for which there is no compensation, if the ad does not promote, attack, support or oppose (PASO) a federal candidate. We cannot comment on this alternative unless the PASO standard is defined. Our comments on defining PASO are included in the following section.

B. 11 CFR 100.29(c)(6) – Exemption for Section 501(c)(3) Organizations

In 2002, the Commission exempted communications by charities organized under section 501(c)(3) of the Internal Revenue Code because charities may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[5] The District Court found the record unclear as to whether the regulation's reliance on the Internal Revenue Code prohibitions would allow advertisements that PASO a candidate.[6] The Commission has been tasked with developing a record to support retaining the exemption, if it decides to do so.

ACS cannot comment on whether, generally speaking, the 501(c)(3) exemption would impermissibly exempt ads that PASO a federal candidate. What we can speak to is our own current practices, and the desirability of forming a clear standard that organizations understand and can use. We hope to help the Commission formulate a standard that fulfills BCRA's intent to ensure open and fair elections, without illegal expenditures by outside groups. Indeed, as an advocate for public health, we believe that society benefits from an open political process and dialogue.

The Commission could certainly create an exemption for 501(c)(3) organization communications that do not PASO a candidate; however, PASO is not a self-executing standard, and would create confusion unless defined. The Commission needs to define PASO for charitable and other organizations. The Commission specifically indicated that it is not proposing to define PASO in this NPRM, so we are not proposing such a

---

[4] Federal Election Commission, Notice of Proposed Rulemaking on Electioneering Communications, Notice 2005-20, 70 Fed. Reg. 49508, 49509 (proposed Aug. 21, 2005) (NPRM).
[5] I.R.C. § 501(c)(3).
[6] See Shays, 337 F. Supp. 2d at 127-28.

definition. At the same time, ACS and other organizations would benefit from certainty in this area, and appreciate the opportunity to comment on it in a later rulemaking.

One of our primary concerns in this area is ensuring compliance with the intent and spirit of BCRA without adding unnecessary complexity. As a charity that is prohibited from political campaign intervention, we are already complying with an absolute bar on supporting or opposing candidates. The "facts and circumstances"[7] standard used by the IRS to determine whether political intervention has occurred is murky, and we incur significant costs complying with that standard already. ACS has established a number of practices and procedures to ensure that it does not violate the IRS prohibition. These practices include staff training, circulating reminder notices, requiring legal review of ads and press releases, and staff attorneys available to answer inquiries on specific activities.

Because we do not believe that ACS engages in any of the activities originally intended to be curtailed in BCRA, we want to ensure that any definition of PASO does not add to the complexity of an already difficult area of the law. Again, resources used for compliance in this arena are diverted from program directed at our mission. If the Commission adopts regulations that incorporate the PASO standard, it should include a workable definition. In addition, the definition should be consistent with the standard already applicable to charities under the Internal Revenue Code. That is, an organization that has taken pains to avoid campaign intervention as a 501(c)(3) charity should be confident that it will not be violating the PASO standard. Charities and their advisors should not be required to perform a separate analysis of the organization's communications beyond that already required to maintain the charity's tax status.

The Commission has specifically asked for "data on whether 501(c)(3) organizations have a history of airing ads close to elections, particularly those that satisfy the definition of 'electioneering communication.'"[8] ACS has been conservative in its communications during election time because we want to ensure no violation of the IRS standard. We generally neither systematically track nor halt ongoing communications within the 30/60 day window (as we have not had a reason to do so); however, we could find no recent examples of these types of broadcast communications. We have done a limited number of these lobbying communications in print ads, and want to continue to have the ability to do so.

We certainly believe that legitimate lobbying communications advocating for or against specific legislative proposals should be able to continue throughout the year, even if they include a call to action that mentions a lawmaker. If communications are part of an ongoing legislative campaign, these communications should not cease simply because there is a primary or general election. For example, ACS advocates for federal funding of cancer research throughout the year. There may be times when ACS asks the public to contact their lawmakers to support specific funding goals through an ad. The FEC should

---

[7] See generally, Judith E. Kindell & John Francis Reilly, "Election Year Issues," IRS FY 2002 Exempt Organizations Continuing Professional Education Technical Instruction Program Handbook (2002 CPE Text), pp. 336-382.

[8] See NPRM at 49510.

continue to recognize the importance of these kinds of communications by a charity clearly geared towards influencing a legislative result.

The Commission has also sought comments on whether a federal candidate endorsing a 501(c)(3) organization should be considered to PASO a candidate. In general, we believe fundraising appeals or PSAs for the organization should not be considered as such. The example cited by the Commission in Advisory Opinion 2004-14, in which Congressman Tom Davis raises awareness about the problem of kidney disease, and provides publicity for a fundraising event for the National Kidney Foundation, should remain a permissible communication. Similar to the PSA scenario, charities should be able to ask lawmakers or other prominent members of the community to help disseminate mission data throughout the year without running afoul of election law.

C. Eliminating All Regulatory Exemptions From the Electioneering Communications Restriction

ACS does not specifically advocate for the exemptions; we simply want to ensure the ability to continue communicating in a nonpartisan manner throughout the year. This goal could be achieved through exemptions, or by staking out safe harbors within which charities may safely operate. Either way, we hope for clarity in the law. We believe Congress did not intend to curtail nonpartisan PSA or lobbying activities by charities in BCRA, and are concerned that having no special provisions for charities will result in this curtailment.

D. Exempting All Communications That Do Not PASO a Federal Candidate

The Commission proposed the idea of exempting all communications that do not PASO a federal candidate. If the Commission were to adopt such a standard, it must define PASO. Because 501(c)(3) organizations already bear such a heavy burden of compliance under the tax law, at a minimum the election law should not provide additional complexity. Organizations should know that if they are in keeping with the IRS standards prohibiting campaign intervention, they are safe with the same practices under election law.

E. Petition for Rulemaking to Exempt Advertisements Promoting Films, Books, and Plays

We do not comment on this area.

* * * *

The American Cancer Society thanks the Commission for its consideration of these comments.