BIGNATLegal@aol.com on 04/09/2004 11:23:16 PM

To: politicalcommitteestatus@fec.gov
cc: president@bignet.org, legal.review@bignet.org

Subject: March 11, 2004 NPRM

Please find attached comments from the National President/CEO of Blacks In Government regarding the subject matter noted above.

 - FEC Comments Final.doc

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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

Dear Ms. Dinh:

I am writing this letter on behalf of the National Organization of Blacks In Government (BIG). As a nonprofit organization whose purpose does not include the nomination or election of federal candidates, and as an organization that consists of members who participate in other nonprofit organizations whose purpose do not include the nomination or election of federal candidates, BIG has numerous concerns regarding the proposed Federal Election Commission (FEC) regulations. Please find comments below regarding the FEC's Notice of Proposed Rulemaking (NPRM) published on March 11, 2004 in Volume 69, Number 48 of the Federal Register.

As noted in the NPRM, the Commission seeks comment on whether the Supreme Court's treatment of Federal election activity or electioneering communications in *McConnell* requires or permits the Commission to change

its regulations defining "expenditure" and "contribution" in 11 CFR part 100, subparts B, C, D and E to include those concepts. In the alternative, the Commission seeks comment on whether *McConnell* recognizes additional activities that may be constitutionally regulated by Congress, but in the absence of new legislation doing so, the Commission is prohibited from expanding the regulatory definitions of "expenditure" and "contribution." The Commission further seeks comment on whether, even if it may so amend its regulations, the Commission should refrain from redefining such fundamental and statutorily defined terms, in the absence of further guidance from Congress.

BIG asserts that the FEC is not required or permitted to change its regulations defining "expenditure" and "contribution" based on the Supreme Court's treatment of Federal election activity and electioneering. Whereas the role of the Supreme Court is to interpret and apply statutes and regulations, the FEC is tasked with implementing rules pursuant to the statutes set forth by Congress. As part of our country's system of checks and balances, Congress is free to enact new statutes to avoid unintended applications by the Supreme Court subject to the Constitution and other limitations. However, federal agencies such as the FEC are limited to providing detailed regulations implementing Congressional statutes.

BIG asserts that in the absence of specific legislation that authorizes the expansion of the regulatory definitions of "expenditure" and "contribution," the FEC is prohibited from doing so. Even if the FEC was permitted to make such amendments to its regulations, the FEC should refrain from doing so. Such expansion creates a serious risk that nonprofit organizations and other groups will fall within the purview of the regulations, and that this expansion would be against Congressional intent.

It is inconsistent with the Congressional intent underlying the Federal Election Campaign Act and Bipartisan Campaign Reform Act of 2002 for the FEC to categorize voter registration, voter identification, get-out-the-vote and generic campaign activities by a State or local candidate committee as for the purpose of influencing any election to Federal office. Such categorization presumes that the primary purpose of voter registration, voter identification, and get-out-the-vote and generic campaign activities is to promote the political interests of federal candidates affiliated with the state or local candidates. This interpretation ignores the low turnout and registration of eligible voters throughout the United States, and ignores the benefit of voter registration and education activities to the community at large.

On pages 11739 and 11740 of the Federal Register, the NPRM asks whether persons other than political party committees should be subject to a rule that treats the first three types of Federal election activities as "expenditures" for purposes of the $1,000 threshold in the definition of "political committee." The NPRM asks whether all Federal election activity and electioneering communications count toward political committee status, or should the Commission make distinctions to count only certain types of Federal election activity or only certain electioneering communications toward political committee status. For example, should Federal election activity that does not refer to a clearly identified Federal candidate count towards political committee status.

BIG asserts that persons other than political party committees should not be subject to a rule that treats the first three types of Federal election activities as "expenditures" for purposes of the $1,000 threshold in the definition of "political

committee." If the FEC expands its regulations to include persons other than political party committees, the risk is increased that nonprofit community service organizations and groups that participate in incidental activity, as defined in the NPRM, will fall within the scope of the FEC's proposed regulations. Small community service organizations and groups, in addition to chapters of larger organizations, are likely to sponsor voter registration activity in the months immediately preceding federal elections, get-out-the-vote drives, and public communications that address issues associated with incumbent federal candidates. These groups easily participate in activities that could be classified as federal election activities even though they are not and should not be characterized as political committees. The main interest of these organizations is the pursuit of various community concerns such as education, healthcare and civil rights. The members of these organizations often consists of persons that are not familiar with FEC regulations. These members could easily associate an incumbent federal candidate with the actions that the candidate has taken on an issue. Furthermore, the $1,000 threshold could easily be reached by smaller organizations and groups. Under the proposed FEC regulations these organizations would fall within the FEC's regulations, and ultimately, the ability of community service organizations to pursue their interests would be seriously limited.

In analyzing cases involving allegations of Federal election activities that have an effect on Federal elections, the Supreme Court and other lower courts analyze all circumstances underlying the allegations. The conclusions formulated by the Supreme Court are guidelines for interpreting the statutes, and the courts are able to identify varying facts and situations. The Supreme Court can carve out exceptions

where appropriate. The FEC, however, is recommending regulations that must be applicable to all persons that fall within the scope of the regulations. In the absence of statutory guidelines, it is not appropriate for the FEC to incorporate the Supreme Court's standards within the regulations. The FEC does not have the flexibility that the Supreme Court has in interpreting and developing the law. Furthermore, the FEC's regulations will be overbroad and will exceed the scope of Congress' intent. While it is understandable that the FEC wants to insure that its regulations encompass all parties that Congress intended to be governed, the FEC must insure that its regulations do not exceed the scope of Congress' intent.

BIG asserts that the FEC's proposal to incorporate the Supreme Court's definition of partisan voter drives would encompass organizations that are attempting to address issues and benefit the community. Whereas the Supreme Court can develop the law on a case-by-case basis considering the facts underlying each case, the FEC's proposed rule would create an inflexible category that would encompass numerous organizations that possess no intent to confer substantial benefits on federal candidates.

As noted in the NPRM, Alternative 1-B includes proposed changes to section 100.133. The proposal would expressly state that if voter registration or get-out-the-vote activities included a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or if it promotes or opposes a political party, then the voter registration or get-out-the-vote activities is partisan. Second, the proposal would add a provision that if information concerning likely party or candidate preference has been used to determine which voters to encourage to register to vote or to vote, the voter registration and get-out-the-vote activities would be partisan.

BIG asserts that community service and public interest organizations who take issue with the policies and programs established by incumbent federal candidates and who express their concern regarding such issues will be subject to the proposed regulations. Organizations and groups will be deterred from criticizing issues set forth by federal elected officials for fear of being subject to the proposed regulations. The proposed regulations would stifle the efforts of public interest groups who are not trying to confer benefits on a federal candidate. Furthermore, the proposed regulations would deter groups from praising policies and programs that they support for fear of their public communications being interpreted as support of an incumbent federal candidate responsible for these programs.

Furthermore, the proposed changes would not create more harmony between the FEC and the IRS. In actuality, the proposed rules would expand definitions established in the Internal Revenue Code, and would force the IRS to revisit its rules. The FEC's proposed changes would change the definition of nonpartisan voter registration and create confusion with regards to the IRS's approach. Litigation would be generated and administrative and judicial forums would be forced to reconcile the FEC's proposed expanded definitions with the IRS's precedent.

In the absence of statutory guidance it is not appropriate for the FEC to adopt or even clarify an IRS private ruling regarding partisan voter drives based on the intentional and deliberate targeting of individual voters or groups of voters based on their pro-issue candidates. The adoption, expansion or rejection of the IRS ruling should be determined by the IRS, Congress, or a judicial forum. As a governmental entity the FEC must have some sort of statutory or legal authorization to make

incorporate such provisions. Yet, the NPRM does not identify any such authorization.

The FEC should adopt a standard for 501(c) organizations (other tax exempt organizations) that would require not only "promote, support, attack or oppose" content, but also some basis for concluding the message is to influence a Federal election. The standard should be very specific so as to exclude organizations that don't fall clearly within the scope of the Bipartisan Campaign Reform Act and Federal Election Campaign Act. An acceptable basis would be reference to the clearly identified candidate as a candidate, reference to the election or to the voting process, *and* an intent to influence a Federal election. At the very least, the FEC should provide an exception for a message that is confined to expressly advocating seeking action by the clearly identified candidate on an upcoming legislative or executive decision without reference to any candidacy, election, voting, opponent, character, or fitness for office.

Payments for public communications that promote, support, attack or oppose a Federal candidate should be expenditures only if made by a Federal political committee. Payments by a tax-exempt, charitable organization operating under 26 U.S.C. 501(c)(3) should be exempt from the definition of "expenditure. These measures would insure that the FEC regulations extend only to those persons that Congress intended to fall within the FEC's purview.

The FEC has an obligation to insure that its regulations extend only to those funds received in response to a solicitation that contains express advocacy for or against a clearly identified federal candidate and that states that the funds received are for the purpose of influencing an election for Federal office. Even if a solicitation

states that the solicitor intends to take actions to defeat or elect a particular candidate, if the solicitor has additional functions or conducts additional activities, it is feasible that the contributor of the funds may intend for his contribution to go those additional activities. If proposed section 100.57 is enacted and includes solicitations that expressly advocate the election or defeat of Federal candidates of a particular party without clearly identifying the particular candidates, the FEC will be enacting a regulation that is overbroad and extends to organizations and groups that were never intended to fall within the scope of the FEC's regulations. The new rule must be strictly constructed and requires a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a clearly identified Federal candidate in an election, or indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate.

For reasons noted herein, the FEC should not amend the definition of political committee by incorporating the Supreme Court's major purpose requirement. Only the courts have the flexibility to analyze the requirement and carve out appropriate exceptions. The FEC's enactment of a regulation encompassing this rule would be overbroad, would not include the appropriate exceptions, and would not have the flexibility and insight granted by the courts.

In conclusion, BIG contends that the FEC's regulations must be limited to those groups or persons whose primary objective is to influence political campaigns in accord with provisions of the Federal Election Campaign Act and Bipartisan Campaign Reform Act.

National Organization of
Blacks In Government (BIG)