"Schiff, Bob (Judiciary)" <Bob_Schiff@judiciary-dem.senate.gov> on 04/09/2004 03:26:01 PM

To: politicalcommitteestatus@fec.gov
cc: mdinh@fec.gov, "Schiff, Bob (Judiciary)" <Bob_Schiff@judiciary-dem.senate.gov>

Subject: Notice 2004-6

Dear Ms. Dinh:

Attached are the comments of Senators John McCain and Russell D. Feingold and Representatives Christopher Shays and Marty Meehan on Notice 2004-6. If you have any questions, please contact me at 202-224-8059. Thank you for your attention.

Bob Schiff

Chief Counsel

Sen. Feingold

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April 9, 2004

VIA FAX and E-MAIL

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2004-6

Dear Ms. Dinh:

We appreciate the opportunity to comment in response to the Commission's Notice of Proposed Rulemaking on the definition of "political committee," issued as Notice 2004-6, and published in the Federal Register on March 11, 2004, at 69 Fed. Reg. 11736.

As the primary congressional sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which was signed by President Bush on March 27, 2002, and upheld by the Supreme Court in *McConnell v. FEC*, 124 S. Ct. 619 (2003), we have a keen interest in the implementation and enforcement of the federal election laws. We believe that the Commission's failure to properly enforce the Federal Election Campaign Act of 1974 ("FECA") made necessary our seven-year legislative effort to enact BCRA. The Supreme Court agrees. *See McConnell*, slip op. at 32-33 & n. 44, 35-36. We urge the Commission to learn from this history and to take measured, but decisive action to apply the law correctly and prevent the development of a massive new loophole that would allow 527 organizations to spend unlimited soft money on activities plainly designed to influence federal elections.

While our interest in this proceeding stems from our long involvement in the enactment of BCRA, the legal issues that the Commission must address do not. Our conviction that many 527 organizations must register as political committees is based not on BCRA, but on FECA. That is a very important point. A number of our colleagues in the Congress have commented in this rulemaking, and in connection with the recent Advisory Opinion proceeding, AO 2003-37, that BCRA was not intended to address 527s. They are correct. Our bill was

concerned with the raising and spending of soft money by the political parties and federal candidates, and with phony issue ads run by any organization in close proximity to an election. That does not mean, however, that 527s are free to operate without restrictions. BCRA is not the only law that Congress has passed to address the financing of federal election campaigns. The question of whether and how 527s should be regulated in their fundraising and in their spending on activities other than electioneering communications is a question that has to be answered under FECA.

527 Organizations as Political Committees

527 organizations by definition have the primary purpose of influencing elections. *See* 26 U.S.C. § 527(e). That is the basic characteristic of tax-exempt political organizations that distinguishes them from other entities, including other tax-exempt groups. The Commission's pre-BCRA approach permitted certain 527s active in federal elections not to register as federal political committees if they did not engage in express advocacy. In light of the *McConnell* court's holding that the express advocacy test is not constitutionally mandated, and indeed is "functionally meaningless," that approach was clearly wrong. *See McConnell,* slip op. at 62 n.64, 84, 86.

Groups that claim a tax exemption because their primary purpose is to influence elections should be required to register as political committees unless their activities are entirely directed at state and local elections. 527s should be subject to the same rules that all other political committees are bound by, the rules that Congress has enacted to protect the integrity of our political process. They should be required to raise and spend money that complies with federal contribution limits and source prohibitions for ads they run that promote or attack federal candidates. In addition, like other political committees, a reasonable portion of their spending on partisan voter mobilization activities that are intended to influence federal elections should come from federal funds.

Regulation of 501(c) Organizations

The Supreme Court made it plain in *Buckley v. Valeo,* 424 U.S. 1 (1976), that the FECA must be narrowly interpreted with respect to 501(c) organizations and other groups that do not have as their major purpose the influencing of elections. *See Buckley,* 424 U.S. at 42-44 & n.52. That is why the term "expenditure" has a different meaning in the federal election laws depending on what entity is doing the spending. The *Buckley* court did not apply the "express advocacy" test to political parties or other political committees. *See Buckley,* 424 U.S. at 79. It is wholly appropriate for the Commission to undertake in this rulemaking to regulate 527s, whose major purpose *is* to influence elections, but

not 501(c) organizations, whose major purpose, under the tax laws, must be something other than influencing elections.

It is very unfortunate that this NPRM included proposals that would cover a wide variety of 501(c) organizations, and also corporations and unions. In light of *Buckley* and *McConnell,* we cannot imagine that the Commission would adopt a proposal that would apply the "promote, support, attack, or oppose" test to 501(c) organizations or would require any organization that spends $50,000 or more on voter registration activities within four months of an election, regardless of the rest of its activities, to register as a political committee under FECA. It was irresponsible for the Commission to put such an absurd and patently unconstitutional test on the table for comment.

We want to be very clear. We oppose the proposals for regulation of 501(c) organizations contained in the Commission's Notice. The Commission should instead focus on deciding when a 527 is required to register as a political committee. This is an important test for the Commission in the post-BCRA world.

Allocation Rules

The Commission must also revise the allocation formulas applicable to organizations that engage in partisan voter mobilization activities. Commission regulations already make clear that any organization engaging in such activities must register as a political committee. But they also allow the allocation of expenses between federal and nonfederal accounts. *See* 11 CFR 106.6(c).

The formulas for that allocation, however, allow for absurd results. In particular, political organizations that aim to influence federal elections through targeted, partisan voter drives can exploit those formulas to use almost exclusively soft money to finance their activities. It is just this kind of result that brings public scorn on the election laws and on the agency sworn to uphold them. The Commission must revise its allocation rules to require a significant minimum hard money share for spending on voter mobilization in a federal election year.

Conclusion

We believe that the Commission improperly applied the law to 527 organizations in previous election cycles. Those errors are now magnified because BCRA's restrictions on state and federal political party committees have increased the prominence of the 527s' fundraising and campaign activities. The Commission's responsibility to clarify and properly enforce the federal election laws with respect to 527 organizations is clear. We believe that the Commission must address now the two key issues identified in these comments. To do nothing

would be to bless a loophole that will have grave consequences for the efficacy of both BCRA and FECA and again leave the public with the impression that the election laws can be treated with disdain without any consequence. This result, coming so soon after Congress closed the last loophole created by the Commission, would be most unfortunate.

Thank you for your consideration of these comments.

Sincerely,

_____/s/_____
John McCain
United States Senate

_____/s/_____
Christopher Shays
Member of Congress

_____/s/_____
Russell D. Feingold
United States Senate

_____/s/_____
Marty Meehan
Member of Congress