Orrin Baird <bairdo@seiu.org> on 04/09/2004 08:17:22 PM

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Subject: Comments on Political Committee Status rulemaking

Attached please find the comments of SEIU, IBT, UFCW, CWA, IBEW and AFGE on the NPRM on Political Committee Status. They are in Word format. Please contact me at the telephone number or e-mail address below if you have questions or concerns or there are any problems with transmission.

Very truly yours,

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- SEIU et al Comments.doc

April 13, 2004

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

Re: **Notice of Proposed Rulemaking, "Political Committee Status," 69 Fed. Reg. 11736 (March 11, 2004)**

Dear Ms. Dinh:

These comments on the Commission's notice of proposed rulemaking entitled "Political Committee Status" are submitted jointly by the Service Employees International Union, AFL-CIO (SEIU), International Brotherhood of Teamsters, AFL-CIO (IBT), United Food and Commercial Workers, AFL-CIO (UFCW), Communication Workers of America, AFL-CIO (CWA), International Brotherhood of Electrical Workers, AFL-CIO (IBEW) and American Federation of Government Employees, AFL-CIO (AFGE). Combined, these unions represent 5.5 million workers.

The SEIU has 1.6 million members working in the health care and building services industries and in the public sector. The IBT has 1.4 M members working in virtually every sector and industry in the economy. The UFCW has 1.4 million members working in retail, food processing, manufacturing and other industries. The CWA represents over 700,000 employees in the telecommunications, broadcast, publishing, manufacturing, airline and other industries. The IBEW has approximately 700,000 members working in the utility, construction, telephone and electrical manufacturing industries, and AFGE represents over 600,000 persons employed by the Federal government in innumerable occupations. All of these organizations are tax-exempt under § 501(c)(5) of the Internal Revenue Code

Each of these unions joins in and endorses the comments previously filed by the AFL-CIO, the Building and Construction Trades Department, AFL-CIO, and the NEA.[1]

Like most international and national unions, these unions maintain federal political committees registered with and reporting to the Commission pursuant to §§433 and 434 of the Federal Election Campaign Act. They (except for AFGE) also sponsor one or more non-federal separate segregated funds registered with and reporting to state election boards and commissions and to the Internal Revenue Service pursuant to § 527 of the Internal Revenue Code.

Operating within the framework of the labor laws, the tax code and FECA, these unions have for decades engaged in a wide range of political activities of importance to their millions of members. In addition to raising and contributing hard money through their FEC-registered

[1] The AFL-CIO, the BCTD, AFL-CIO, and the NEA, which previously filed their own comments, have authorized us to state that they also join in these comments.

PACs, these unions engage in partisan and nonpartisan communications with their members regarding both federal and state elections and conduct partisan and nonpartisan voter registration and GOTV activities among their members. On occasion, they may engage in nonpartisan voter registration and GOTV activities aimed at the general public or financially support organizations that engage in such activities. These activities may be paid out of the union's general treasury or out of a separate segregated soft money fund.

In addition, they engage in legislative activities and public advocacy around issues of concern to the working families that they represent. These activities would include lobbying on the Federal, state and local level as well as public communications to solicit public support for their positions on legislative issues and ballot initiatives. These public communications, intended to influence legislative or executive branch actions, may in some instances mention Federal officeholders who may or may not be candidates for Federal office at the time the communications are made. For tax reasons under Section 527 of the Internal Revenue Code, these legislative and public issue advocacy activities are paid for out of the union's general treasury. There are hundreds of local unions, joint and district councils and other subordinate labor unions that are affiliated with these international and national labor organizations, many of which engage in the same types of activities.

I. The Proposed Amendment to 11 C.F.R. 100.33 Are Unauthorized and Should Be Withdrawn

The proposed regulations would narrow the type of *nonpartisan* voter registration and get-out-the-vote ("GOTV") activity that can be conducted by unions, corporations and unincorporated associations. Payments for nonpartisan voter registration and GOTV activity have been exempt from the statutory definition of "expenditure" since 1971, in the case of unions and corporations, and since 1974 in the case of other organizations. The exemption for nonpartisan activity reflects a congressional desire not to curtail voter registration and GOTV efforts that are intended to increase voter participation rather than to turn out particular individual voters predisposed in favor of a particular candidate or party. *See, e.g.*, H.R. Rep. No. 1239, 93rd Cong., 2nd Sess., at 4 (1974) (stating that language in what would become the definition of "expenditure" in 2 U.S.C. § 431(9)(B)(ii) "assures the *unfettered right* of organizations to engage in non-partisan registration drives" (emphasis added)); see also remarks of Congressman Hansen, 117 Cong. Record H11478 (daily ed. November 30, 1971[2] (stating that the intent of the nonpartisan voter registration exemption in 441b is to maximize voter participation).

The Commission's current regulations reflect this intent by exempting from the definition of "expenditure" any "activity designed to encourage individuals to register to vote or to vote ...

[2] "[I]t has long been recognized that it is proper to allow corporations and unions to conduct nonpartisan registration and get-out-the-vote campaigns. Indeed, any other conclusion would have been contrary to the basic precept that the exercise of the franchise is not merely a political right but a civic duty. The health of our representative form of government requires that every possible step be taken to maximize the number of eligible voters who go to the polls. *Attempts to restrict the number who vote are inimical to the democratic precepts upon which the political process rests.")*(emphasis added).

if no effort has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote..." 11 CFR § 100.133. And, the regulations similarly provide that a union or a corporation may conduct voter registration or GOTV that is aimed at general public provided that such drives are not directed primarily individuals registered with or intending to register with a favored political party. See 11 C.F.R. 114.4(d)(3).[3] Union and corporate-sponsored voter registration and GOTV drives aimed at the general public are also subject to a single content restriction, namely, a prohibition on making communications that expressly advocate the election or defeat of a clearly identified candidate or candidates of a particular party. 11 C.F.R. 114.4(d)(2).

The proposed amendment to Section 100.33 dramatically and improperly narrows the scope of permissible voter registration and GOTV drives. First, it adds to the ban on "express advocacy" a new prohibition on any communication that "promotes, supports, attacks, or opposes" a federal candidate or promotes or opposes a political party. *See* 69 Fed Reg. at 11757. This restriction -- drawn from the statutory language applicable only to state and local party committees (*see* 2 U.S.C. §431(20)(A)(iii)) and from a restriction on regulatory exemptions from the scope of the term "electioneering communications" *see* 2 U.S.C. §434(f)(3)(B)(iv) – simply exceeds the Commission's authority, as other commenters have argued at length; we join in those arguments.

Moreover, this proposed restriction does not even clearly require that either a candidate or political party be named or identified in the communication. So, this might jeopardize union or corporate sponsorship of a voter registration or GOTV drive that urges people to vote because they care about a particular issue (*e.g.*, "vote today if you oppose the war in Iraq"), since both candidates and political parties take positions on public issues and a reference to a particular issue might be construed as either promoting or opposing a particular party or candidate who has spoken out on that issue. Thus, for example, under the proposed regulation, a union that sponsors a public communication saying "vote today if you care about your Medicare benefit" could be charged with violating 2 U.S.C. § 441b if there is some statement in either the Democratic or Republican Party's platform concerning Medicare or even if the chair of the Republican or Democratic Party had made a speech stating that Medicare is an important election issue.

Second, the proposed amendment to Section 100.33 also adds a restriction prohibiting sponsoring organizations from using "[i]nformation concerning likely party or candidate preference ...to determine which individuals to encourage to register to vote or to vote." Proposed 100.33(c). This vague restriction (which, presumably, means something different from current 100.33, as retained in proposed 100.33(b)) will have a chilling effect on unions and other organizations seeking to increase voter participation in federal elections. For example, a union desiring to increase voter participation among young women by conducting a nonpartisan voter drive at day-care centers might be deterred from doing so because there might be *some* data *somewhere* that the union knows, or would be presumed to know, showing that in some previous election, more young women voted Democratic than Republican, and therefore it might be assumed that they would be "likely" do so again. This restriction also could mean that a union may not engage in nonpartisan voter registration or GOTV activities or make voter

[3] We note that even this restriction appears nowhere on the face of the Act.

communications to ethnic or demographic groups or neighborhoods that have historically under-voted in federal elections because there might be data showing -- or it might even be "common knowledge" -- that such groups or neighborhoods are more likely to vote for one party than another.

The focus on "information concerning likely party or candidate preference "is also problematic because it is entirely subjective. For example, what kind of information shows a voting group's "likely" party or candidate preference? What if a union or nonprofit corporation polls a test group of its members to find out what they think about several federal candidates and their political party preferences? Does the fact that a poll of a small group of members conducted four months before the general election showing that 45% of the members polled favor a particular incumbent Senator mean that the "likely" candidate preference of *all* union members will be the same?

In contrast to proposed 100.133(c), the current requirements for "nonpartisan" voter registration and get-out-the-vote in both 100.133 and 114.4(d) are objective. The focus is on how the sponsoring organizations act: is the drive targeted at individuals that the organization has *identified* as having a *certain* candidate or political party preference? Are services withheld based on candidate or party preference? Are individuals paid on the basis of how many voters they register for a particular political party? These are facts that can be easily ascertained as opposed to conjecture concerning what type of information an organization "knows" and whether that information shows that it is "likely" a group of individuals will vote a certain way.

Finally, we object to proposed 100.133(c) because it will require organizations engaging in the beneficent activity of increasing civic and voter participation to prove a negative, *i.e.*, that they did not use information regarding possible group voting preference in connection with their voter registration or GOTV drive. More likely, however, this will simply kill all such efforts entirely due to the risk of provoking a complaint, investigation and FECA penalties – all for seeking to expand the voting electorate.

Given that the legislative history of Sections 431 and 441b clearly indicates that Congress intended to encourage, not discourage, organizations, including unions and corporations, to engage in nonpartisan voter registration and GOTV activities in order to boost voter involvement, the Commission's sudden decision to create new restrictions on that activity is wholly misplaced. This is particularly so since the NPRM is devoid of any factual finding that such a change is needed. What factual record has the Commission compiled to show that the current definition of nonpartisan voter registration and GOTV is unsound? What showing has been made that any of the nonpartisan voter registration or get-out-the-vote activities conducted by nonprofit organizations, unions, or corporations in previous elections have posed any threat to the integrity of the federal election process? None. In the absence of such facts, there is no basis for the Commission to alter its longstanding regulations in this area. Nor is there any policy basis for the Commission to impose further restrictions on nonpartisan registration and GOTV activity. If anything, given the low voter turnout in recent federal elections, there is every reason for the Commission to make conducting "nonpartisan" registration and GOTV drives easier, not more difficult.

Moreover, there is certainly no legal basis for the change. BCRA did *not* change the rules for nonpartisan voter activities or direct the Commission to revise its regulations on that subject. And, Congress did not amend the definition of "expenditure" in either 2 U.S.C. § 431 and 2 U.S.C. § 441b (other than to incorporate the Section 431 definitions in Section 441b), and it did not change the exemption for nonpartisan voter registration and GOTV activity in either section.

It is well-settled that a federal agency must amply justify any such rewriting of a long-settled rule. Indeed, the D.C. Circuit has long held that "an agency changing its course [must] supply a reasoned analysis indicating that prior policies are being deliberately changed not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970). More pointedly, the D.C. Circuit has explained that "[w]hile an agency is always expected to rationalize its action in the rulemaking context, *a new rule constituting a departure from past policy or practice amplifies the need for adequate explanation.*" Simmons v. ICC, 829 F.2d 150, 155-56 (D.C. Cir. 1987) (emphasis added); *see also* ILGWU v. Donovan, 722 F.2d 795, 812-815 (D.C. Cir. 1983). Of course, if an agency's decision to change a longstanding rule is arbitrary or capricious, the new rule is invalid. *See e.g.,* Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29(1983); ILGWU v. Donovan, 722 F.2d at 812.

In the NPRM, the Commission explains its proposed departure from current Section 100.133 by asserting that the newly restricted definition of partisan registration and GOTV activity "would achieve more harmony between the Commission's approach to this issue and the Internal Revenue Service's approach." 69 Fed. Reg. 11736, 11740 (2004). But the scope of the FECA and IRC provisions dealing with political activity have never been "harmonized," and Congress plainly has never done anything to conform these two very different statutes serving very different purposes. Furthermore, the Commission has never before seen a need to "harmonize" its regulations with IRS rules. The only reason to do so would be to avoid a conflict between the IRS rules and the Commission's regulations. But there is no conflict. The rules are simply different because they have a different purpose.

In addition to changing the standard for "nonpartisan" activity, the proposed amendment to Section 114.4(d) would prohibit unions and corporations from giving dues money or nonfederal PAC money to outside organizations engaged in voter registration and GOTV activities unless those activities were conducted in accordance with the new restrictions in proposed Section 100.33. *See* 69 Fed. Reg. at 11760. There is no authority for this amendment in either BCRA or FECA. In fact, BCRA authorizes just the *opposite*, by allowing unions and corporations to make treasury money contributions to state or local party Levin Fund accounts, which in turn can be used to pay for part of the costs of "federal election activity" conducted by the party -- activity that includes partisan voter registration, voter ID, GOTV, and indeed, generic party promotional messages. If unions may lawfully contribute to party committees (state law permitting) to fund partisan voter registration and get-out-the-vote activity, it does not make sense to prohibit such contributions to independent organizations, since their connection with candidates is far more tenuous than that of party committees, as the Supreme Court emphasized

in *McConnell v. FEC*, 124 S.Ct. 619, 686.[4]

Furthermore, under the Commission's current regulations, unions themselves are permitted to spend soft money to pay for the nonfederal share of their own partisan voter registration and GOTV activities aimed at the general public. Indeed, even the proposed amendments to 106.6 in the NPRM, with which we disagree on other grounds, would permit a union to pay for the nonfederal share of *partisan* voter registration and GOTV activities out of segregated dues money. *See* proposed 106.6, 69 Fed. Reg. at 11759. Thus, since BCRA and the Commission's own regulations allow unions to spend dues money for the nonfederal share of voter registration and GOTV conducted either by the union or by a state or local party committee, the Commission's proposal to amend Section 114.4(d) to prohibit unions from contributing dues money to other organizations that is used for partisan voter registration or GOTV is beyond its authority, illogical, and arbitrary.

We also emphatically reject the suggested purpose in the NPRM of "ensur[ing] that corporations and labor organizations would be subject to the same conditions as political committees...when spending non-Federal funds on these voter registration and get-out-the-vote activities. " 69 Fed. Reg. At 11743. With all due respect, this is dangerous nonsense –unions and corporations are *not* political committees, and neither FECA nor the Internal Revenue Code reflects a glimmer of thought that they should be similarly regulated.

In sum, the regulated community has been conducting nonpartisan voter registration and GOTV activities, as currently defined in Sections 100.33 and 114.4, for more than three decades. In BCRA, Congress left the term "expenditure" in both Sections 431 and 441b and the definition of "nonpartisan" voter registration and GOTV unchanged. The NPRM offers no factual or persuasive policy basis for changing those standards, let alone doing so in the heat of a presidential election year. Finally, the new restrictions proposed by the Commission are overbroad and contradictory. Since there is nothing wrong with the current definition of "nonpartisan", or the many years of experience under it, we ask that the proposed revisions to §100.133 and 114.4 be withdrawn.

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[4] Moreover, whatever Congress' view in BCRA or the Court's view in *McConnell* about the national party committees' receipt and use of union and corporate soft money in previous years, literally amounting to hundreds of millions of dollars, the Commission, the parties, unions, corporations, "reformers," and others in the regulated community *never* took the position that the use by those party committees of those funds for partisan activities violated 441b or 114.4(d). Thus the novel notion, recently put forth, that the word "indirect" in Section 441b extends to the non-earmarked use by other organizations of union or corporate funds has no basis in the regulations or 30 years of practice and enforcement. Indeed, when Congress in FECA has sought to deal with the "use" of union and corporate funds it has done so explicitly. See BCRA §204(b), codified at 2 U.S.C. 441b(c)(1)(defining an "applicable electioneering communication" to include one "made by" a 441b-restricted entity "or any other person using funds donated by [such] an entity ...".) As the NPRM correctly recognizes, it would be a *new* approach to extend the restriction on union and corporate voter registration and GOTV "to any person or entity who uses corporate or labor organization general treasury funds for these purposes." *See* 69 Fed. Reg. at 11743.

II. The Proposed Definition of "Political Committee" Conflicts With Unions' First Amendment Rights

Under the proposed definition of "political committee", a union could become a "political committee" under FECA simply by engaging in legislative activity or making membership communications that are otherwise subject to constitutional or statutory protection. If a union's public communications on legislative issues mentioned the name of an officeholder who is also a candidate for re-election, and the costs of such communications exceeded $10,000 in a given calendar year, those communications could be used to show that the union qualified as a "political committee." Similarly, a union's internal communications urging its members to support certain candidates also could provide evidence of its status as a "political committee." As "political committees" under FECA, labor unions would only be able to solicit and use "voluntary contributions," not membership dues -- an absurd result in the context of a labor union or any other voluntary membership organization. In sum, the proposed definition of "political committee" would conflict with a labor union's rights under the First Amendment and Section 441b(b) of FECA.

The Commission's attempt to modify the definition of "political committee" to include unions flies in the face of the lengthy legislative history of Section 441b, which reflects a careful congressional balancing of the need to regulate union and corporate treasury account payments in connection with federal elections while not interfering with the organization's First Amendment rights. The proposal would drastically expand the scope of 441b's prohibition on the use of dues money in connection with Federal elections to include the use of dues money for issue advocacy and legislative activity. The Commission lacks authority to do this; only Congress could take such a step. The McConnell Court approved Congress's *only* step in this direction, namely, the restraint on union- and corporate-paid "electioneering communications."

Neither FECA nor BCRA imposes greater regulation. And even if the Act did so, as the NPRM suggests, such an unprecedented restriction of a labor union's ability to communicate would be unlikely to withstand judicial scrutiny. Organizations like labor unions and corporations have First Amendment rights of free speech and the ability and duty to represent their members' interests. *See, e.g.*, First National Bank of Boston v. Belotti, 435 U.S.765 (1978); United States v. C.I.O., 335 U.S. 106, 121 (1948); Toledo AFL-CIO Council v. Pizza, 154 F.3d 307 (6th Cir. 1998). As such, any burden the government would seek to impose on labor unions' issue advocacy or legislative activity would have to be justified by a compelling state interest. *See, e.g.*, Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 251-52 (1986) ("MCFL"). That the proposed regulations would impose such a burden is not open to dispute. Treating a labor union as a political committee for purposes of FECA would effectively end its ability to publicly advocate with respect to matters before Congress or the White House, since it would require those communications to be paid for with voluntary contributions rather than with dues, thereby "creat[ing] a disincentive . . . to engage in" such speech. MCFL, 479 U.S. at 254.

A. Major Purpose Test

The proposed definition of "political committee" relies on a "major purpose" test. For example, a union could become a federal political committee if its "major purpose" or "a" major purpose of the organization were established to be to "nominate, elect, defeat, promote, support, or oppose" a federal candidate or candidates of a clearly identified party. Leaving aside for the moment how that major purpose would be established, the use of any form of "major purpose" standard to determine when an organization qualifies as a political committee turns established jurisprudence in this area on its head. The Supreme Court has used such a test not as a standard for inclusion but to prevent the term "political committee" from cutting too broad a swath and bringing other kinds of groups within the ambit of the term. Buckley v. Valeo, 424 U.S. 1, 79 (1976); MCFL, 479 U.S. at 262.

Moreover, the suggestion that the test be based on the finding of "a" major purpose suffers from the same constitutional flaw. Use of "a" in this context is inconsistent with the Supreme Court's application of the major purpose test -- which focused on "*the*" major purpose of the organization -- for the very reason that the Court applied the test: to eliminate "vagueness problems." *See* Buckley, 424 U.S. at 79. Accordingly, adopting a standard under which an organization with multiple "purposes" *might* become a "political committee" is entirely at odds with the Court's teachings.

Using a union's legislative and other "political" activities to determine the organization's purpose is also misguided, since it misunderstands the reason why unions engage in such activities. They do so not principally, significantly, or even at all to elect candidates or to support party committees, but to further the economic and social well being of their members and to achieve social justice for all workers. Legislative and other "political" activity is simply a means to that end. In order to serve its tax-exempt mission under 26 U.S.C. § 501(c)(5), a labor organization routinely deals directly with the employers of its members in collective bargaining, contract administration and enforcement, and other matters related to their employment, and its representational activities take it to other public forums -- the courts, legislative bodies, and the general public when matters before them affect union members' employment and general economic and social welfare. The inappropriateness of using any of the proposed "major purpose" tests to determine when an organization qualifies as a "political committee" is further evinced by an examination of the elements of that test in the context of a labor union.

1. Reliance On Organizational Documents, Solicitations, Advertising, Other Similar Written Materials, Public Pronouncements Or Any Other Communication Is Vague

Relying on a labor union's "organizational documents, solicitations, advertising, other written materials, public pronouncements, or any other communication" to determine its major purpose is unconstitutionally vague and subject to manipulation and other mischief. The proposal would require the Commission to make highly subjective judgments regarding the relative importance of various communications and other pronouncements. What standards would govern such judgments? Would some communications and pronouncements be weighted

more heavily than others? The Commission has offered no guidance in the NPRM, nor do we believe any rational guidance could be devised or would pass constitutional muster.

What is meant by "organizational documents"? While an organization's constitution and bylaws presumably would be encompassed by the term, would such documents include program budgets, agenda documents for executive board meetings, and the like? If so, it must be recognized that labor unions often speak in "organizational shorthand," *i.e.*, using words, brief phrases, and concepts that would mean one thing to the membership and leaders but might mean something totally different to an outsider lacking institutional knowledge. For example, if a labor union budgets $2,000,000 to "elect a pro-union President," an outside entity, such as the Commission, might construe that phrase to mean that the union planned to spend $2,000,000 in dues money for public communications or activities in support of or opposition to a candidate for President, when in reality, the union -- fully understanding its legal rights and obligations under Section 441b -- intended to spend that money on internal communications urging members to support a candidate.

The proposal is also chilling. Without the requisite guidance, labor union leaders would be reluctant to speak out on public policy issues that involved federal officeholders/candidates. For example, if the President makes free trade legislation a major part of his agenda and personally advocates on its behalf, and a labor union publicly opposes his position on that issue, would that constitute a public pronouncement on a presidential candidate? Similarly, if a labor union opposes an Act of Congress and wishes to build public support for its position, would public advertisements calling on voters in a particular jurisdiction to urge their Congressman -- who is running for re-election -- to reconsider his support for the bill support a conclusion that the union is a political committee? That is, would communications that fall outside the parameters of prohibited "electioneering communications" nonetheless be subject to the same hard money restrictions? Plainly, Congress did not have so intended.

Also, what is a labor union to make of the term "other communications"? Would this term include a union's communications to its members urging them to defeat a candidate for President? Section 441b(b)(A) expressly protects the union's right to make such communications without running the risk of becoming a political committee. But the NPRM provides no such assurance.[5]

Using a union's internal membership communications or member voter registration and GOTV activities to make it into a federal political committee also flies in the face of clear statutory language in 2 U.S.C. § 441b expressly permitting unions to spend dues money for such communications and activity, as well as the underlying Supreme Court decisions in United States v. CIO, *supra*, and United States v. UAW, 352 U.S. 567 (1957) which were the geneses of those statutory provisions. If a union's use of dues for membership communications that urge the election or defeat of, or that support or oppose, federal candidates could transform the

[5] Indeed, a complaint filed by the Republican National Committee and Bush-Cheney campaign last week alleges that a 501(c)(4) membership organization should be treated as a federal political committee on the basis of its internal membership communications.

organization into a federal political committee that can only raise and spend voluntary contributions, the guarantee of union free speech would be eliminated.

Finally, the use of organizational documents and union communications to evaluate a union's "purpose" simply invites the Commission and union opponents to intrude into the union's private affairs. Such intrusion is not constitutionally permissible. *See* AFL-CIO v. FEC, 333 F.3d 168 (D.C.Cir. 2003).

2. Misuse Of The "Federal Election Activity" Standard

The Commission's proposal to import the "Federal election activity" standard into the test for a "political committee" is deeply flawed as well. As discussed above, Congress introduced this concept principally to ensure that political party committees paid for certain party activities out of funds raised in accordance with FECA's restrictions on the amounts and sources of contributions. Congress's use of the term *presupposes* that activities or communications *by parties* are being conducted for an election-influencing purpose, and it was in that context *alone* that the term passed constitutional muster in McConnell, 124 S. Ct. at 675.

What survived judicial scrutiny in that limited context, however, would certainly be unlikely to produce a similar result when applied to a labor union. Indeed, when the plaintiffs in McConnell contended that Title I violated the equal protection rights of political parties by subjecting them to different treatment from that accorded to "special interest groups," the Supreme Court emphatically rejected their argument, noting the fundamental differences between political parties and private groups in the political process. *See* McConnell, 124 S. Ct. at 686.

Extension of the "Federal election activity" test to labor unions is also inconsistent with BCRA's legislative history. Congress considered at length how it wanted to regulate corporate and union speech, and decided on the precise and limited "electioneering communications" provision.[6] Indeed, when the Senate considered an amendment by Senator Bingaman that would have required candidates to receive free broadcast time to respond to ads by *non-candidates* that "*attack or oppose*" them, BCRA chief sponsor Senator McCain objected:

> How do you stop these attack ads without infringing on freedom of speech and not being so vague that it is very difficult to stand (sic) constitutional muster? The difference between Snowe-Jeffords and this amendment is that Snowe-Jeffords draws a very bright line and it says: 'Show the likeness or mention the name of a candidate.' This is a very bright line . . . [but] this amendment is very vague.

[6] *See, e.g.*, 147 CONG. REC. S3035 (Mar. 28, 2001) (statement of Sen. Snowe) ("That is what the Supreme Court said -- that it not result in an overly broad or vague provision to ultimately have a chilling effect on the constitutional right of freedom of speech. That is why this provision was so narrowly and carefully drawn, with constitutional experts examining each and every provision.").

147 CONG. REC. S3116 (Mar. 29, 2001). It was the precision and limited scope of the electioneering provision that led the Supreme Court to uphold its constitutionality. *See* McConnell, 124 S. Ct. at 689.

Inasmuch as the NPRM would flout BCRA and extend the "Federal election activity" concept beyond the limited application carefully constructed by Congress, it is no wonder that its application to labor unions contains serious flaws. For example, the term, as defined in 11 C.F.R. § 100.24 includes all voter registration activity conducted within 120 calendar days before the date of a regularly scheduled election, as well as voter identification and GOTV activity conducted throughout most of a federal election year. There is no exception for voter registration and GOTV activity aimed solely at a labor union's members and their families. This leads to the anomalous result that a union that makes dues money payments for voter registration and GOTV activity to its members – payments that are expressly exempted from the definition of "expenditure" under Section 441b(b)(2)(B) -- would become a federal political committee on the basis of those payments.[7]

"Federal election activity" also includes a public communication that refers to a clearly identified candidate for Federal office and "promotes or supports, or attacks or opposes any candidate for Federal office," regardless of whether the communication contains express advocacy. As noted above, the "promotes, supports, attacks, opposes" test passed constitutional muster in McConnell only in the context of political party committees that, by their very nature, were understood to make communications in connection with elections. One cannot make the same assumption with regard to labor unions. The primary function of a union is not the election of a candidate to public office, but the representation of its members regarding compensation, the terms and conditions of their employment, and other matters affecting their economic and social welfare. Frequently unions participate in legislative and public policy debates when it is in the best interests of their members. *See, e.g.*, Abood v. Detroit Board of Education, 431 U.S. 209, 228-29, 231 (1978). Such participation may involve publicly praising or attacking elected officials. Yet that fact does not change the nature of the communication from legislative to election-related.

Moreover, national and international labor unions often request their state and local affiliated organizations to engage in grassroots campaigns with respect to federal legislative or public policy matters, and those campaigns frequently contain public communications naming an elected federal officeholder. Those organizations spend their own funds on such communications, the costs of which might well exceed $10,000 during a calendar year. Were the Commission to adopt the "promote, support, attack, or oppose" standard, it could well result in thousands of local unions and hundreds of state labor bodies becoming political committees under FECA.

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[7] The NPRM disclaims interference with "certain" membership-directed voter registration and GOTV activities, *see* 69 Fed. Reg. at 11743, but that is inconsistent with the importation of a "Federal election activity" standard.

3. The Four-Year "Look-Back" Provision

The proposed four-year "look-back" provision is manifestly unfair and totally arbitrary. We find nothing in the NPRM, or in FECA, as amended by BCRA, that would justify such a rule. Moreover, the provision is capable of profound abuse when applied to labor unions. For example, if a labor union spent more than $10,000 during a particular calendar year on a grassroots lobbying campaign that contained advertisements urging citizens to contact certain Congressmen and tell them to reverse their public positions on federal legislation dealing with immigration, such activity might qualify as Federal election activity. Even if prior to that year and during the subsequent two years, the union spent *nothing* on public communications dealing with federal issues, let alone ones that would mention the name of a federal officeholder/candidate, the expenditures during the one year in question would cause the union to become a political committee -- regardless of the fact that the remainder of the organization's activities were strictly local or state in their orientation.

Moreover, once the four-year "look-back" provision captures a union, it is effectively trapped. Unlike a typical political committee, a labor union cannot simply terminate its status as such, because it is a large organization with contracts, leases, and many employees who are covered by collective bargaining agreements.[8] By becoming a "political committee," it would be obligated to refund its membership dues and raise voluntary contributions in accordance with FECA requirements. Moreover, even if the union were otherwise able to terminate and reformulate with a new name and structure, that could raise questions regarding the status of collective bargaining agreements it had negotiated on behalf of its members.

Faced with these absurd scenarios, a union might well refrain from any public speech on national legislative issues -- even though they might be of great importance to the economic and social well-being of their members -- in order to avoid the risk of losing their dues money pursuant to the conversion provisions of the NPRM.[9]

4. The 50% Test Is Unfair, Especially To Smaller Labor Unions

The NPRM's second test for determining whether a major purpose of an organization is the nomination or election of a candidate or candidates would capture an organization that spent

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[8] Of course, the same would hold true for corporations and other membership organizations.

[9] Moreover, if the union did become a federal political committee, there is a significant risk that it could lose its nonprofit tax status under Section 501(c)(5). A strong argument can be made that a labor union that is deemed to be a federal political committee and which thereby would qualify for tax-exempt status under I.R.C. § 527 would no longer qualify for exemption under Section 501(c)(5) of the Code, on the grounds that its primary purpose is political rather than "labor-oriented." *See* Rev. Rul. 77-5. There is considerable uncertainty regarding the scope of the IRS's application of its primary purpose test. If a union became a federal political committee, would it have to disgorge all its dues money and cease further collection of dues from members, as the proposed rules suggest, because as a federal committee it would be barred from raising or spending dues money in connection with federal elections? Such results fly in the face of other federal statutes that regulate labor unions, such as the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act, and state laws providing collective bargaining rights for public-sector employees.

more than 50% of its total annual disbursements during this or any of the previous four calendar years on contributions, expenditures, Federal election activities, or payments for electioneering activities, as those terms are defined under FECA. Application of this test could prove misleading and unfair to small labor unions that engage in communications that could qualify as Federal election activity during a particular calendar year. For example, a union with less than 100 members would have a fairly small treasury account. If the members were faced with an outsourcing crisis, and the union wanted to take out advertisements in local newspapers criticizing the Bush Administration for its failure to keep jobs from being transferred overseas, it would not be surprising if the amount spend on such a media buy exceeded 50% of the organization's treasury account. And once the 50% threshold was met as a result of this single project, because of the look-back provision discussed *supra*, the union would continue to be a political committee for purposes of FECA, even though in each of the following three years, it spent all its funds on collective bargaining and contract administration or enforcement. Accordingly, the 50% test would not be an appropriate indicator of a union's major purpose, and probably would cause many unions to refrain from making many kinds of public communications on issues of legislative concern.

5. The $50,000 Test Is Unfair

Under the NPRM's third test for determining an organization's major purpose, the Commission would treat an organization as a political committee if it spent more than $50,000 during this or any of the four previous calendar years on contributions, expenditures, Federal election activities, or electioneering communications as those terms are defined under FECA. The Commission has offered no reasoned explanation for choosing $50,000 as the threshold for political committee status; the fact that that amount is the threshold for requiring a political committee to file its reports electronically is completely irrelevant when discussing a test for determining whether an organization must become a political committee and thereby comply with the many requirements that FECA imposes on such entities. In essence, applying the proposed $50,000 test either would turn hundreds or thousands of larger labor unions into political committees, since it would apply the impermissibly vague "Federal election activity" standard to their public communications at an unreasonably low monetary threshold, or it would chill those organizations' otherwise protected speech.

B. Expanded Definition of "Contribution"

The NPRM suggests expanding the statutory definition of "contribution" to include a gift of money or anything of value made by any person in response to a communication that includes material expressly advocating a clearly identified federal candidate. *See* proposed 11 C.F.R. § 100.57. Such a payment or in-kind gift would be deemed a contribution to the person making the communication. The proposal contains no exemption for membership communications that contain express advocacy, and consequently it is plainly at odds with the First Amendment and Section 441b.

As noted *supra*, long-standing Supreme Court precedent protects the right of a labor union to communicate with its members on any subject. This protection also is embodied in Section 441b, which expressly excludes membership communications on any subject from the definition of "contribution or expenditure." Under Section 441b, a labor union may solicit voluntary contributions from members for its federal PAC, and may even use dues money to pay for such solicitations.

Under the proposed modification to the definition of "contribution," however, a labor union could become a political committee for purposes of FECA if it spends dues money on soliciting member contributions for its Federal PAC and those solicitations contain express advocacy of a clearly identified candidate. Since the union would be the entity making the solicitation, the proposal could be read as treating the contributions received in response to the solicitation as contributions to the union itself, not just to its PAC. Once those contributions exceeded $1,000, the union would qualify as a political committee for purposes of FECA. *See* 2 U.S.C. § 431(4)(A).[10]

In sum, the difficulties with the Commission's proposal regarding the modification of the definition of "political committee" bring to mind the ancient fable of the blind men and the elephant.[11] If one focuses solely on a single part of a complex entity, one can draw a conclusion about its true nature that completely belies reality. Suggesting that a labor union could become a "political committee" for purposes of FECA simply on the basis of a selection of the organization's public or internal statements that voice support or opposition to an officeholder/candidate would grossly mischaracterize and mistreat organizations vital to the well being of millions of workers.[12]

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[10] Similarly, the proposed redefinition of "contribution" could prevent a labor union from soliciting contributions for a federal candidate or party committee, even though such activity is protected under existing FEC regulations so long as the union simply makes the communication and does not facilitate the making of such contributions. *See* 11 C.F.R. § 114.2(f).

[11] In that fable, six blind men wanted to understand what an elephant was. Each blind man touched a different part of the elephant and drew different conclusions about the physical characteristics and nature of the animal. Their conclusions ranged from a snake (from touching the trunk), to a spear (from touching the tip of the tusk), to a tree (from touching a leg), to a wall (from touching the side of the body), to a fan (from touching an ear), to a rope (from touching the tail). The wise rajah settled their confusion by telling the blind men that they must put all the parts of the body together to discover what an elephant is really like.

[12] *See* State of Washington ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n, 111 Wash.App. 586, 49 P.3d 894, 903 (Wash. Ct. App. 2002), *review denied*, 148 Wash.2d 1020, 66 P.3d 639 (Wash. 2003) (in rejecting the argument that a labor union representing education employees was a political committee under the state's campaign finance law, the court observed, "if electoral political activity is merely one means the organization uses to achieve its legitimate broad nonpolitical goals, electoral political activity cannot be said to be one of the organization's primary purposes").

Conclusion

We have highlighted only some of the extreme and wrong-headed aspects of the NPRM. In our considered view, the NPRM should be withdrawn in its entirety.

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