RHolmen@realtors.org on 04/09/2004 03:17:51 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Notice of Proposed Rulemaking Concerning Political Committee Status

Attached please find comments submitted on behalf of the National Association of Realtors, 430 N. Michigan Ave., Chicago, IL.

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- FEC Expenditure ANPR comment 4-9-04.DOC

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April 9, 2004

Via Email to politicalcommitteestatus@fec.gov

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

RE: Notice of Proposed Rulemaking Concerning Political Committee Status

Dear Ms. Dinh:

This letter is submitted on behalf of the National Association of Realtors® ("NAR") in response to the Notice of Proposed Rulemaking ("NPR") regarding "Political Committee Status," published by the Federal Election Commission ("Commission") in the Federal Register on March 11, 2004. 69 Fed. Reg. 11736 (2004).

NAR is an Illinois not-for-profit corporation exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code. NAR engages in a variety of federal legislative and political activities intended to advance the interests of its members by improving the legal climate in which the members conduct their businesses.[1] NAR has carefully reviewed the NPR, and, in particular, the manner by which it proposes to expand the definitions of "expenditure," "contribution," and "political committee" to apply to NAR, and to like organizations that are not political committees, when engaging in activities not previously not subject to regulation under the Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA.") For the reasons set forth below, NAR believes that the Commission should not and may not adopt such rules because only Congress, and not the Commission acting pursuant to Congress's delegated authority, may extend the scope of the entities and activities subject to regulation under FECA and BCRA.

[1] NAR has established and operates the Realtors® Political Action Committee ("RPAC"), a separate segregated fund registered with and filing monthly reports to the Commission. The Commission's proposed regulations do not raise significant concerns related to the activities of RPAC, and for that reason this letter focuses on the potential application of the proposed rules to NAR.

The NPR discusses and proposes certain amendments to the Commission's regulations. Most fundamentally, however, the NPR requests comment on whether the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. ___ , 124 S. Ct. 619, 675 (2003) permits, or requires, the Commission to amend its rules defining "expenditure," "contribution," and "political committee." This issue is raised by the Court's discussion and resolution of the *McConnell* plaintiffs' challenge to the constitutionality of the provisions of BCRA defining and regulating "electioneering communications," 2 U.S.C. 434(f)(3)(A)(i), 11 C.F.R. 110.29. The basis for that challenge, as described by the Court, was plaintiffs' claim that "Congress cannot constitutionally require disclosure of, or regulate expenditures for, 'electioneering communications' without making an exception for those 'communications' that do not meet *Buckley's* definition of express advocacy." *McConnell*, at 687. As the Commission notes in regard to that challenge, "*McConnell* upheld regulation of electioneering communications against a facial challenge, explaining that the definition of 'electioneering communication' serves 'to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*,' which, for nonpolitical groups, was the express advocacy construction. *McConnell*, 124 S. Ct. at 686 and 695."

The NPR explicitly 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 "contribution' and 'expenditure.' " The former proposition – that *McConnell* holds that Congress may constitutionally regulate corporate expenditures for communications that do not include express advocacy – is indisputably correct. In upholding the definition of "electioneering communication" the Court noted that both *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986) ("*MCFL*") were specific to and only addressed the statutory provisions before the Court, and did not "draw a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *McConnell* at 688. With respect to the latter proposition – whether the Commission may expand the regulatory definitions of "contribution" and "expenditure," or whether it is solely the province of Congress to do so, NAR asserts that only Congress may expand the scope of the FECA and BCRA in the way the Commission seeks to do in the NPR. Accordingly, NAR urges the Commission not to adopt these new regulations governing contributions, expenditures and political committees. NAR also believes that adoption of the proposed rules is imprudent for the practical reasons that the expedited rulemaking contemplated by the Commission is likely to introduce unintended and unanticipated consequences in its regulation of the affected activities, and may unfairly and adversely affect parties that have acted in reliance on existing law in preparing for the ongoing primary and quickly upcoming general elections.

1. Section 316(b) of FECA is one of the operative provisions at the core of the amendments suggested by the NPR, making it unlawful for "any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any (federal) election . . . ." 2 U.S.C. 441b(a). Prior to BCRA, section 316(b)(2) defined "contribution or expenditure" in a manner that the Supreme Court had construed to be limited to apply *only* to communications containing express advocacy:

> Since our decision in Buckley, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. . . .
>
> Section 203 of BCRA amends FECA 316(b)(2) to extend this rule, ***which previously applied only to express advocacy***, to all "electioneering communications" covered by the definition of that term in amended FECA 304(f)(3), discussed above. 2 U.S.C.A. 441b(b)(2) (Supp.2003). . . .

McConnell, 540 U.S.,____, 124 S.Ct. at 694-695. (emphasis added). See also *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Me. Right to Life Comm., Inc. v. FEC*, 914 F.Supp. 8 (D.Me.), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996).

Thus, prior to BCRA, corporations were prohibited from making communications related to federal elections only if the message included express advocacy. In adopting BCRA Congress narrowly and surgically modified that rule only to add the definition of and restrictions applicable to electioneering communications. To the extent that other restrictions are to be applied to corporate expenditures for federal election-related communications, therefore, such additional modifications must and should likewise be prescribed by Congress.

Moreover, the foregoing holds true despite the fact that "[T]he Supreme Court found that public communications that promote, support, attack, or oppose a clearly identified Federal candidate 'undoubtedly have a dramatic effect on Federal elections.' " *McConnell v. FEC*, 540 U.S. ___ , 124 S.Ct. 619, 675 (2003). A careful reading of the text in which that quote appears in *McConnell* reveals that it refers to public communications by political party committees, since it appears in the discussion of the definition of "Federal election activity," 2 U.S.C. 434(20)(A)(iii), a definition that has significance *only* to party committees. *McConnell* held that the words "promote," "support," "attack," and "oppose" are not unconstitutionally vague as incorporated in the definition of "Federal election activity," *McConnell*, at 675, n.64, that conclusion by definition applies on with respect to activity by party committees. Thus, that conclusion does not necessarily apply to avoid vagueness concerns when considering activities of other entities that are not political committees, formed for the very purpose of affecting federal elections.

The Commission should further recognize that Congress incorporated the words "promote, support, attack or oppose" in its regulation of Federal election activity by party committees, but chose not to append that language to other provisions of the FECA applicable to other entities. In particular, Congress amended 2 U.S.C. 441b(2)(a) by adding the electioneering communication provisions, but did not amend that section further by, for example, also broadening the scope of that section to include expenditures that "promote, support, attack, or oppose a clearly identified Federal candidate." Nor did Congress amend the definition of "expenditure" in 2 U.S.C. 431(9) to include those words. Thus, Congress' adoption of highly specific amendments to "expenditure" in certain contexts but not others, coupled with its incorporation of the language "promote, support, attack or oppose" in only with respect to the definition of "Federal election activity, " which is relevant only to party committee activity but not elsewhere, powerfully and persuasively reveals an intent that this statutory design of

Congress be carefully applied and not administratively enlarged by the Commission, as now proposed.

2. The very existence of the electioneering communications provisions themselves also illustrates that it is appropriate only for Congress, and not the Commission, to further amend or expand of the scope of the definition of "expenditure." As noted above, pre-BCRA law was well-understood to prohibit using non-federal funds to make express advocacy communications only. BCRA amended prior law with respect to such communications only to add a new category, "electioneering communications," of regulated (and, for corporations and labor organizations, prohibited) communications. The regulations now proposed in the NPR threaten to alter Congress' carefully considered and prescribed statutory formulation of permitted and prohibited communications. This would occur because the regulations in the NPR would prohibit corporations and other non-political committee organizations from using non-Federal funds to make public communications that "promote, support, attack, or oppose a clearly identified Federal candidate," even though many such communications would otherwise be permitted as outside the scope of the detailed statutory definition of proscribed "electioneering communications." As the Commission noted in its brief to the Supreme Court in McConnell, "[I]n defining the "electioneering communications" subject to BCRA's source limitation, Congress thus established a bright-line, readily administrable test...." Brief for Defendant Federal Election Commission, *McConnell v. FEC*, 124 S.Ct. 619 (2003). The regulations proposed by the Commission would move, if not indeed eviscerate, that bright-line drawn by Congress, something only Congress itself may do.

3. Finally, in its brief to the Court in *McConnell* the FEC itself recognized that Congress enacted a limited response to the perceived abuses occurring as a result of the narrow scope of existing law, which prohibited communications by corporations and labor organizations that mention federal candidates and other entities only if the communication included express advocacy:

> [P]rior to BCRA, federal law (2 U.S.C. 441b) prohibited corporations and unions from using their general treasury funds to pay for electioneering advertisements that contained express advocacy, but left them free to spend their treasuries on electioneering advertisements that are considered by candidates and political consultants to be if anything more effective in influencing elections because they do not contain express advocacy. As discussed above, corporations and unions not only have taken note of that loophole, but they have in each of the past few federal election cycles funneled increasing amounts of their general treasury funds into federal elections through that loophole. (p.83)
>
> Congress responded to (the) phenomena (of corporations and unions making the above-described advertisements) by enacting Title II of BCRA. As discussed above, Title II adjusted the longstanding prohibition on the use of corporate and union general treasury funds in connection with a federal election to cover "electioneering communications," as defined in BCRA § 201, that in all likelihood, based on the presence of certain objective factors, will affect the outcome of federal elections, even if they do not contain particular words of express advocacy. (p. 84) (citations omitted).

> In light of the hundreds of millions of dollars spent by corporations and unions on advertisements virtually indistinguishable from electioneering advertisements funded by candidates themselves, ... Congress clearly needed to update the limits on corporate and union expenditures to prevent the evasion of the longstanding policy embodied in Section 441b. (p.90)
>
> [A]ny entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district. (p. 92)

Brief for Defendant Federal Election Commission, *McConnell v. FEC*, 124 S.Ct. 619 (2003) (emphasis added).

To the extent that that it is necessary to prevent more effectively or more comprehensively "the evasion of the longstanding policy embodied in Section 441b," therefore, it is up to Congress, rather than the Commission, to consider whether and how to amend the law to do so. Adoption of regulations that would more restrictively limit communications by corporations and labor organizations reaches beyond the authority delegated to the Commission, and is inappropriate and unlawful.

Very truly yours,

s/s

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