"Brenda Wright (NVRI)" <bw@nvri.org> on 04/09/2004 04:06:25 PM

Please respond to bw@nvri.org

To: politicalcommitteestatus@fec.gov
cc:

Subject: Comments on NPRM 2004-6

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

Dear Ms. Dinh:

Attached is a PDF file with the comments of the National Voting Rights Institute and the Fannie Lou Hamer Project on the FEC's NPRM 2004-6. Please contact me if you should have any difficulty opening the attachment.

Very truly yours,

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nvri-flhp comments nprm 2004-6.pdf

NATIONAL VOTING RIGHTS INSTITUTE

FANNIE LOU HAMER PROJECT

April 9, 2004

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

Re: Comments on Notice of Proposed Rulemaking 2004-6: Political Committee Status

Dear Ms. Dinh:

The National Voting Rights Institute and the Fannie Lou Hamer Project hereby submit these comments in response to the Commission's Notice of Proposed Rulemaking 2004-6, published at 69 Fed. Reg. 11736 (March 11, 2004).

The National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote and to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, the Institute works to promote reform of our campaign finance system to ensure that those who do not have access to wealth are able to participate fully in the political process. The Institute's litigation has addressed some of the constitutional issues raised by the proposed rulemaking. For example, the Institute has defended the constitutionality of campaign-finance regulations encompassing "major purpose" organizations through the filing of *amicus* briefs in cases such as *Minnesota Citizens Concerned for Life,* No. 03-4077 (8th Cir.) (appeal pending), and *Jacobus v. State of Alaska,* 338 F.3d 1095 (9th Cir. 2003). The Institute also is defending the constitutionality of limits on contributions to independent expenditure PACs as counsel for defendant-intervenors in *Landell v. Sorrell,* No. 00-9159 (L) (2nd Cir.) (appeal pending).

The Fannie Lou Hamer Project (FLHP) is a non-profit, national education and advocacy organization dedicated to strengthening our democracy through bringing justice and equity to the campaign finance system. FLHP recognizes that any system of

privately-financed election campaigns, if only because private wealth is so unequally and unjustly distributed, guarantees grossly unequal political opportunity. Committed to building an intergenerational, multicultural constituency, the Project is guided by perspectives and interests of people of color, youth and disenfranchised communities around the world. The Project advocates for an authentically democratic campaign finance system that ensures political power and voice to everyone.

I. Statement of Principles

In assessing the issues before the FEC in this rulemaking, NVRI and FLHP are guided by the "Fannie Lou Hamer standard." The Fannie Lou Hamer standard asks whether a particular campaign reform will promote equal opportunity for everyone to participate in the political process, regardless of race, gender, economic status, or access to wealth. It values one person, one vote, above one dollar, one vote. It asks, "How far does this reform really go in making the system fair for someone like Fannie Lou Hamer – a passionate leader, a person of color, a woman, a person of little means?" The Fannie Lou Hamer standard leads us to support reforms such as full public financing of elections, which allows qualified candidates to run for office without having to be dependent on funds raised from wealthy private interests for their electoral success. It led us to support BCRA's ban on unlimited soft-money donations to political parties, which made a mockery of limits on campaign funding. At the same time, it led us to oppose BCRA's doubling of the hard-money amounts that donors may contribute to candidates, because the increased limits have empowered only the tiny fraction of Americans that can afford to make $2,000 political donations -- a group that is grossly unrepresentative of our country.

II. Analysis of the Issues

BCRA now forbids the large, unlimited "soft money" donations that corporations, unions and wealthy individuals previously made to political parties to help elect or defeat federal candidates. As a result, some of these funds are finding their way into the coffers of so-called "527" organizations. "527s" are tax-exempt organizations established under Section 527 of the Internal Revenue Code. By definition, the primary purpose of a 527 organization is to influence the election of candidates to federal, state or local office. As a result, it is important for the FEC to address the question of whether such unlimited donations may allow an illegal end run around BCRA's soft money ban.

Unfortunately, the proposed rulemaking does not confine itself to examining whether 527 organizations that are organized for the primary purpose of electing or defeating federal candidates must register as political committees and operate subject to the hard-money limits of the Federal Election Campaign Act ("FECA"). Instead, it proposes far broader rules that would curtail the activities of non-profit, non-partisan 501(c) groups that are not primarily engaged in electoral advocacy but may conduct voter registration and education, do grass-roots lobbying on important legislative or executive initiatives, or engage in other issue-oriented activities.

NVRI and FLHP believe such efforts are misguided. 501(c) organizations, by definition, are not established for the major purpose of electing or defeating candidates; in fact, they are prohibited by the Internal Revenue Code from having campaign activity as their primary purpose. Because they are not engaged primarily in electing candidates to office, such organizations should not be subject to the full panoply of federal campaign finance regulations merely because some of their issue-oriented communications may speak favorably or negatively about officeholders or candidates, or because they engage in nonpartisan voter registration and education. For such organizations, the distinction between "express advocacy" and "issue advocacy" – first recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) – should remain the constitutional guidepost for regulation. Thus, their communications and expenditures should not require them to register as political committees or implicate other campaign finance regulations under FECA so long as they do not engage in express advocacy or the specific "electioneering communications" defined in BCRA.[1] To the extent that the proposed rulemaking would hinder the ability of 501(c) organizations to conduct non-partisan voter registration and education activities or establish non-partisan programs to protect citizens' voting rights and assure that votes are counted, it is particularly ill-considered. Further, we believe that Congress, not the FEC, is the appropriate body to consider whether dramatic changes in the treatment of 501(c) organizations under FECA are warranted.

We believe, however, that 527 organizations established for the major purpose of electing or defeating federal candidates should register as political committees and conduct their activities subject to the hard-money limits in FECA. If such organizations may instead operate outside of campaign-finance restrictions, they quickly will become a means of circumventing BCRA's restrictions on unlimited soft-money donations to political parties. Donors who previously made $100,000 contributions to the RNC or DNC in order to purchase access to and influence with elected officials will make the same donations to a 527 organization established to elect or defeat particular candidates. Candidates will understand the source of the largesse and will be grateful for the assistance. Persons able to make such large donations will have far more influence and access than ordinary citizens who cannot afford to participate through their checkbooks. The goal of a truly participatory democracy will be further subverted.

The distinction, for purposes of campaign finance regulation, between organizations whose major purpose is to elect or defeat candidates for office, and those whose major purpose is non-electoral, was first recognized by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). The distinction between issue and

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[1] As the Supreme Court's decision in *McConnell v. FEC*, 124 S.Ct. 619 (2003), makes clear, the protections accorded to issue advocacy do not necessarily depend upon the use of a so-called "magic words" test. For example, "electioneering communications" as defined in BCRA may be regulated consistent with the First Amendment whether or not they use words such as "vote for" or "vote against." *Id.* at 686-694. Whether other definitions of express advocacy more expansive than a "magic words" test will similarly pass First Amendment muster may depend on the precise content of the definition and the nature of the regulation at issue. However, the FEC should not create new rules that would turn many 501(c) organizations into "political committees" under FECA or regulate their "expenditures" as if such organizations constituted political parties or political committees.

express advocacy stemmed from the *Buckley* Court's concern about FECA provisions regulating groups or individuals who might not be principally engaged in electoral advocacy. Section 434(e) of FECA required groups *other than* political committees and candidates to disclose various contributions or expenditures *Id.* at 74. The Court saw no problem with such requirements as applied to political committees, so long as the category of "political committees" was construed to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. Expenditures of such groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.; see also McConnell v. FEC,* 124 S. Ct. at 675 n.64.

However, when the maker of the expenditure is "an individual other than a candidate or a group *other than* a 'political committee,'" the *Buckley* Court saw a risk of overbreadth in FECA's language, and therefore construed the FECA provision at issue to reach only funds used to expressly advocate the election or defeat of a clearly identified candidate. *Buckley,* 424 U.S. at 79-80 (emphasis added). The Court reaffirmed the heightened constitutional protections accorded to non-major-purpose groups in *Massachusetts Citizens for Life v. FEC ("MCFL")*, 479 U.S. 238, 262 (1986), ruling that the FECA's prohibitions on corporate and union expenditures in federal election could not constitutionally apply to expenditures by a 501(c)(4) organization that received no contributions from corporations or unions and did not engage in business activities. The Court expressly noted that the outcome would be different, and MCFL would properly be classified as a political committee, if MCFL's independent spending became so significant that its major purpose consisted of campaign activity. *Id.* at 262.

Because 527 organizations are expressly established for the primary purpose of electing or defeating candidates for office, it is fully appropriate to regulate them and similar 527s as political committees under FECA if their work targets federal candidates. Corporations, unions and wealthy individuals should not be able to pour unlimited donations into these groups. This in no way will prevent like-minded citizens from banding together to fund the activities of a 527 and use it as a vehicle for political association. 527s will still be able to raise funds in amounts of up to $5,000 per individual donor, and there is no limit to the number of individuals who can contribute. It does mean, however, that the wealthiest donors would not be able to dominate the funding of such organizations.

We believe that it is fundamentally misguided to view unlimited donations to 527s as somehow providing a vehicle to attain the goal of political equality for all. Just as raising the hard-money contribution limit to $2,000 has led to an unprecedented increase in hard-money donations by the wealthiest Americans, so too will the creation of a 527 loophole for unlimited donations only exacerbate the advantages of wealth in securing political power and influence. Trying to match one set of wealth advantages in politics by creating a different set of wealth advantages is never going to succeed in lifting up the voices of the poor and disenfranchised in politics. Only more comprehensive and fundamental change in the way we finance elections, including full public financing, can move us toward that goal in a meaningful way.

III. Assessing the Counterarguments

In reaching the conclusion that the FEC should not open a new soft-money loophole for 527s, we have not ignored the arguments that some have made against applying campaign finance limits to 527 organizations. We believe, however, that these arguments are mistaken.

Some argue that contributions to 527 organizations should remain entirely unlimited because the organizations conduct their electioneering activity independently of the candidates they are supporting, and therefore pose no danger that the candidate will feel beholden to the 527's donors. But political parties, too, can engage in independent expenditures on behalf of candidates, yet BCRA – strongly supported by the reform community – limits all contributions to political parties, regardless of the use to which the party puts the money. To argue that candidate Jones will not be grateful to the donors who establish the "Jones for Congress 527", as long as the 527 does not coordinate its activities with the candidate, is highly unrealistic.

Similarly, some argue that if a wealthy donor can personally make independent expenditures from his own funds to support or oppose a candidate, there is no reason to prevent him from donating the same amount to an organization that pools his funds with others for the same purpose. According to this argument, the same amount of money will flow into independent expenditures in either case. This argument, too, misses several important points. First, it seems unlikely that most wealthy individuals would, in fact, personally hire consultants, pollsters and advertising companies to create and air extensive ad campaigns on behalf of candidates. It is much easier for them to pump their wealth into elections by making a donation to an organization established specifically to elect or defeat candidates. Perhaps the rare $10 million donor would establish his own independent election effort, but it is far less likely that $100,000 donors would do so. Thus, limiting donations that wealthy individuals can make to 527s or other independent expenditure PACs does serve the goal of "democratizing the influence that money itself may bring to bear upon the political process," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 401 (2000), even if it may not accomplish this goal perfectly in light of the donor's ability to fund his or her own independent expenditures.[2]

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[2] *Buckley* struck down a $1,000 limit on independent expenditures, and no limits currently apply to such expenditures. Much has changed, however, since *Buckley* first addressed this issue. Although a full discussion of the role of independent expenditures in purchasing undue influence is beyond the scope of these comments, the changed landscape since *Buckley* may merit reconsideration of upper limits on independent expenditures by the wealthiest interests. As a starting point, we believe that the First Amendment permits Congress to place limits on individuals' *contributions* to independent expenditure PACs. Although *McConnell* did not directly rule on this question, its reasoning strongly suggests that such limits are justified to avoid circumvention of limits on direct contributions. 124 S.Ct. at 665 n.48; *see also id.* at 673 (noting that Congress properly restricted donations to state and local political parties based on the "prediction" that soft-money donors would be "scrambling to find another way to purchase influence" in the wake of BCRA's ban on soft-money donations to federal parties"). The same anti-corruption and anti-circumvention rationales that support limits on contributions to independent expenditures PACs logically would apply as well to large-scale independent expenditures by individuals supporting a particular candidate. Moreover, we support a direct revisitation of the compelling interest in political equality as a

Second, as noted above, if the possibility that wealthy individuals might make independent expenditures meant that their donations to 527s should remain unlimited, the same reasoning would suggest that their donations to political parties should remain unlimited. Again, however, the Supreme Court in *McConnell* found no constitutional impediment to limiting such donations to political parties, in view of the clear evidence that limits were necessary to deter influence-peddling and maintain public confidence in elected officials.

A final argument offered to justify unlimited donations to 527s is that there is as yet no extensive record demonstrating that wealthy donors will use such organizations to purchase influence with and access to candidates. We believe this argument blinks at reality. Because the soft-money loophole allowing unlimited contributions to political parties was wide open prior to this presidential election, there was little need for donors to pursue 527 donations as an avenue for access. There can be little doubt that replicating the soft-money loophole to allow unlimited donations to major-purpose organizations such as 527s will give rise to the same problems that prompted the need for BCRA. Avoiding circumvention of existing campaign finance limits is a sufficiently important goal to justify limits on contributions to 527s under existing precedent, including *McConnell*. As Professors Edward B. Foley and Donald Tobin have noted, a group that is expressly organized to achieve, as its primary purpose, the election or defeat of specified candidates, is an obvious target for contributions by people who wish to curry favor with such candidates.[3] We need not wait until the political and electoral system has sustained, all over again, the kind of damage documented in *McConnell* before acting to deter and avoid such harms.

The FEC's proposed rulemaking raises complex issues about how to determine when a particular organization has, as its major purpose, the election or defeat of candidates. NVRI and FLHP believe the FEC must proceed extremely cautiously in determining the appropriate test, so as to avoid trenching on the important educational and advocacy work of 501(c) organizations. However, for 527 organizations that participate in federal elections, the matter is far more straightforward. Again, such organizations, in electing to organize themselves under 527 of the Internal Revenue Code, expressly define themselves as organizations whose primary purpose is to elect or defeat candidates for office. The FEC need not resolve all the complexities involved in determining how to define "major purpose" organizations in order to determine that 527s whose primary purpose is to influence federal elections are properly treated as political committees under FECA.

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basis for campaign finance regulation, which also would permit consideration of such limits. *Compare Buckley*, 424 U.S. at 48-49 (rejecting equality rationale as a basis to uphold FECA's $1,000 limit on independent expenditures), *with Nixon*, 528 U.S. at 400 (Breyer, J., joined by Ginsburg, J., concurring) (noting that "constitutionally protected interests lie on both sides of the legal equation").

[3] Edward B. Foley and Donald Tobin, "The New Loophole?: 527s, Political Committees, and McCain-Feingold," BNA Money & Politics Report, January 7, 2002, at 6.

We appreciate the opportunity to submit these comments.

Respectfully,

/s/
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