Chris Sullivan <chris@mncn.org> on 04/08/2004 05:20:36 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Re: Proposed Rules Regarding Political Committee Status

April 5, 2004
Ms. Mai T Dinh, Acting Assistant General Counsel
Federal Election Commissions
999 E Street NW
Washington, DC 20463

Submitted via electronic mail to: politicalcommitteestatus@fec.gov

Re: Proposed Rules Regarding Political Committee Status

Dear Ms. Dinh:

The Minnesota Council of Nonprofits (MCN) submits these comments in response to the Notice of Proposed Rulemaking on Political Committee Status (NPRM) issued by the Federal Election Commission on March 11, 2004. MCN is a statewide association of 1,400 members. MCN and the majority of its members are nonprofit organizations tax-exempt under Internal Revenue Code Section 501(c)(3). MCN submits these comments regarding political committee status on behalf of our members. In such a capacity and as discussed in detail below, we ask that the Federal Election Commission exclude organizations granted tax-exempt status under I.R.C. § 501(c)(3) from the amended definition of "political committee."

The NPRM seeks input regarding organizations that qualify under expenditure and "major purpose" amendments of the political committee regulations. As proposed, the new rules would apply to a wide variety of organizations, including organizations exempt from taxation under I.R.C. § 501(c). In particular, the definitions would apply to organizations created for charitable, educational, or religious purposes under I.R.C. § 501(c)(3). MCN strongly believes that 501(c)(3) organizations are beyond the scope of organizations these proposed rules were designed to regulate. MCN also believes that 501(c)(3) organizations have a unique nature and purpose that is at odds with the proposed regulations. As a result, the propose rules, as applied to 501(c)(3) organizations would be confusing, burdensome, and may chill the issue advocacy vital to the nonprofit sector. These comments outline the current IRS and FEC regulatory requirements for 501(c)(3) organizations and why those existing requirements should exempt them from NPRM.

The granting of tax-exempt status under I.R.C. § 501(c)(3) carries with it restrictions that are relevant to this discussion. First, the IRS can deny exempt status to any organization that does not meet the definition. Specifically, the IRS grants 501(c)(3) status only to those organizations where "no substantial part of the activities of which is carrying on propaganda . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." I.R.C. § 501(c)(3) (2004) (emphasis added). Cases have shown that the IRS may deny initial tax-exempt status or later revoke such status if the organization is found to not comply with this requirement. See, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983); Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

As a result, other than the exception provided by I.R.C. § 501(h) (discussed below), these organizations are not currently within the scope of the proposed regulations.

In addition to the potential revocation of tax-exempt status for an organization participating in partisan election activity, the Supreme Court has held that should a nonprofit organization's independent expenditures "become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986). Remedies already exist that would penalize or regulate the activity of a non-compliant 501(c)(3) organization, making additional restrictions excessive, unnecessary, and confusing.

As proposed, the vast majority of 501(c)(3) organizations would not meet the thresholds of any of proposed "major purpose" tests. The Commission acknowledges as much in the proposed rulemaking. See 69 Fed. Reg. 11749 (March 11, 2004). As a result, any of the proposed tests would have minimal enforcement impact on 501(c)(3) organizations. And yet the confusion that would follow the inclusion of 501(c)(3) organizations in this proposed rule would be harmful to ongoing attempts to educate nonprofit organizations about the permissible extent of lobbying activity. Nonprofits and their boards of directors currently require training, education, and encouragement in order to understand and exercise their existing rights to lobby. If 501(c)(3) organizations were included under these proposed rulings, there would be significant confusion regarding permitted activities under IRS and FEC rules. Such confusion may discourage some charities from exercising their right to lobby or take positions on public policies at all.

501(c)(3) organizations gain tax-exempt status by essentially giving up their right to speak on a specific class of issues. In exchange for the dual benefits of tax-exempt status and tax-deductible donations, 501(c)(3) corporations agree to restrict their speech on partisan election activities. This bargain also limits the percentage of funds that can be used to influence legislation but still leaves 501(c)(3) nonprofits to speak on a wide variety of issues. Indeed, the Minnesota Council of Nonprofits has been a leader in the area of nonprofit lobbying and advocacy by encouraging and training a wide variety of organizations to legally engage in legislative and administrative decision-making. Advocacy on these issues by 501(c)(3) groups has never been considered election activity, nor should it be. I.R.C. § 501(h) makes a distinction between direct and grassroots lobbying. While direct lobbying allows a tax-exempt organization to directly communicate its position on legislative proposals to legislators, grassroots lobbying permits calls for public support that would influence legislative activity. See I.R.C. § 501(h)(2)(A), (B) (2004). Yet, both kinds of lobbying are not meant to avoid the requirement that "no substantial part" requirement of I.R.C. § 501(c)(3). I.R.C. § 501(c)(3) (2004); I.R.C. § 501(h)(7)(B) (2004). The ability of 501(c) organizations to lobby and advocate on behalf of their mission without additional restrictions is a key facet of the success of the mission of these organizations.

The mere inclusion of federal candidates in a communication advocating on an issue should not be sufficient to subject the contents of the organization's speech to FEC regulation as a political committee. Because the IRS restricts the electioneering and advocacy activities of 501(c)(3) organizations, lobbying efforts that are permissible under I.R.C. § 501(h) may mention current federal officeholders or candidates. The Supreme Court addressed the notion of "intertwined" speech involving charities in a series of cases in the 1980's that established the rights of nonprofit organizations to solicit funds without being subject to fundraising percentage restrictions. The Court said that when "the

component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 796 (1988). Furthermore, the Court warned that if the regulations of charitable solicitation became too burdensome, the advocacy and educational components of the organization's speech might be chilled as well. Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 632 (1980) ("[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."). The analogy to the current situation is apt: the permissible advocacy of a 501(c)(3) organization should not be treated as less protected speech simply because it includes mentions or references to current political candidates.

Finally, the FEC appears to understand the unique characteristics and status of 501(c)(3) organizations, because these organizations are currently exempt from the definition of "electioneering communication" as defined under 11 C.F.R. § 100.29(a). Section 100.29(c)(6) specifically states that "Electioneering communication does not include any communication that . . . [i]s paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986." 11 C.F.R. § 100.29(c)(6) (2004). By making such a broad exclusion, the Commission recognizes that communications by 501(c)(3) organizations differ from those by all other organizations even when such communications "refer to clearly identified candidates for federal office," "is publicly distributed within 60 days before a general election sought by the candidate," and "is targeted to the relevant electorate." Id. at § 100(a)(1)-(3). Furthermore, it is clear that the Commission recognizes the established role of the IRS in these matters and properly defers to them. Id. at § 100(c)(6) (stating "[n]othing in this section shall be deemed to supercede the requirements of the Internal Revenue Code for securing and maintaining 501(c)(3) status."). Such deference reinforces the IRS's role of gatekeeper to tax-exempt status, as well as the remedial measure that the IRS may take if an organization violates such status.

None of the oversight powers of the IRS is meant to detract from the ability of the FEC to seek remedial measures against individual 501(c)(3) organizations that violate either the electioneering or "no substantial part" prohibitions of I.R.C. § 501. As we make clear above, MCN believes that advocacy by 501(c)(3) organizations plays an important role in our democratic process. We feel that an exemption for 501(c)(3) organizations by the FEC under the proposed rulemaking is the best solution.

We would like to thank the Commission for the opportunity to submit these comments. No representative of the Minnesota Council of Nonprofits is available to testify in person before the committee, however if you have any question or require further information regarding our position, please call us at 651-642-1904.

Respectfully submitted,

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