Sean Delany <sdelany@lany.org> on 04/08/2004 05:13:34 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: FW: Notice of Proposed Rulemaking (2004-6): Comments

To: Ms. Mai T. Dinh, Acting General Counsel
Federal Election Commission

Attached please find comments submitted by Lawyers Alliance for New York regarding Notice of Proposed Rulemaking 2004-6.

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- Comments on NPRM 4-04 (final).doc

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Lawyers Alliance for New York

April 8, 2004

Providing legal assistance to nonprofit and community organizations since 1969

Via Electronic Mail

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

Re: Comments Concerning Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dihn:

Lawyers Alliance for New York ("Lawyers Alliance") respectfully submits these comments in opposition to the rules proposed in the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission ("FEC") on March 11, 2004 (hereinafter "NPRM").

Lawyers Alliance is the leading provider of business legal services to community-based nonprofits that are working to improve the quality of life in low-income communities in New York City. Our clients are creating affordable housing, stimulating economic development, providing child care, and delivering social services in their neighborhoods. Many of our clients conduct educational and outreach programs, including nonpartisan voter registration and get-out-the vote ("GOTV") drives, to increase civic participation and raise awareness within disenfranchised populations. Lawyers Alliance and its volunteers counsel numerous nonprofit clients each year on federal, state, and local laws regulating lobbying and political activity. Lawyers Alliance also conducts workshops and other educational programs designed to inform managers of neighborhood nonprofits about these subjects.

We strongly urge that the NPRM be withdrawn in its entirety because of the devastating effect the proposals would have on the ability of the nonprofits to pursue their missions. Nonprofits' activities in the area of issue advocacy and voter participation activity bring lasting benefits to millions of Americans. The NPRM proposes expanding the number of groups that would be subject to registration and reporting obligations and fundraising restrictions under FEC regulations. This would cause nonprofits to severely curtail valuable advocacy work, voter participation programs and other innocent nonpartisan activity to avoid even the possibility of being subject to such onerous regulations. Groups that are exempt under Section 501(c)(3), 501(c)(4) and other subsections of 501(c) of the Internal Revenue Code ("IRC") are already subject to extensive regulation through the IRC and regulations promulgated thereunder. Additional regulation would deter a great many groups from conducting activities permitted under the current regulatory scheme. The proposals in the NPRM would have

a dramatic chilling effect on nonprofits' activities and therefore, ultimately, work against the interests of the very public whose interests the FEC is seeking to protect.

We raise the following specific objections and recommendations:

1. The Proposed Amendments of the Definition of "Nonpartisan" Voter Participation Activity Would Severely Restrict the Ability of a Nonprofit to Conduct Such Activities

Voter education and registration activities are crucial to ensuring that citizens participate in the democratic process in an educated and meaningful way. For decades, nonprofits have been integral to this process and have consequently succeeded in mobilizing our most disenfranchised and poorest citizens. Their activities in this area are expressly authorized in the IRC.[1] Voter registration and GOTV activities are nonpartisan and permissible under current FEC rules if, among other things, they do not expressly advocate for the election or defeat of a federal candidate.[2] The NPRM proposes to add two overbroad and vague requirements that would make it far more difficult to qualify a voter participation program as nonpartisan and would therefore ban any expenditures by nonprofits for most such activities.

If a nonprofit issues a communication that "promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party" in connection with voter participation activity, such activity would be deemed partisan. The PNRM does not define this standard, nor does the language require that a candidate be named for the standard to be deemed met. If a 501(c)(3) organization conducts otherwise nonpartisan voter registration, but encourages individuals when casting their votes to consider U.S. involvement in Iraq, the best policies for strengthening America's economy, or any other issue on which candidates have differing positions, it could be construed as promoting or opposing a federal candidate.

An equally disturbing aspect of the proposal is its vague provision stating that a nonprofit conducting nonpartisan voter participation activity cannot rely on "information concerning likely party or candidate preference has not been used to determine which individuals to encourage to register to vote or to vote." This prohibition appears to go far beyond indicators such as party registration or declared candidate preferences, and would encompass factors that are not inherently partisan. For example, this concept would apparently include voter registration targeted at particular ethnic groups, even those that have been traditionally disenfranchised and wanting for political engagement, for fear that "information" such as historical voting patterns could link those groups with a party or candidate preference. For many of our clients, the proposal would mean they could not target their own constituents for a voter participation project. Similarly, nonprofits would not be able to target their voter participation based on other demographics, such as age, gender, place of residence or interest in specific issues.

Nonprofits are creatures of limited resources, whose budgets are tied up almost entirely in implementing programs. Most nonprofits would opt to terminate such programs rather than risk an investigation in which they would be forced to demonstrate

[1] IRC § 4945(f).
[2] 11 CFR 114.4(d)(1).

that no "information" exists to link targets of a voter participation project with a voting preference. Given the limitations on fundraising activity that are triggered by designation as a "political committee," many nonpartisan nonprofit groups will likely fail to pursue their missions as a result.

If the NPRM is not withdrawn in its entirety, we strongly encourage the FEC to retain the current definition of nonpartisan voter participation activity, which is both clearer and narrower than the proposals.

2. Expanding the Definition of "Expenditure" to Include an Overly Broad Definition of "Public Communications" Will Unjustly Curtail Issue Advocacy by Nonprofits

The nonprofit sector plays an essential role in the public policy process and has a responsibility to be to be heard publicly on the issues that are vital to their missions. Equally important, nonprofits bring valuable information to underserved segments of our population and are central to grass roots lobbying efforts that mobilize their constituents on issues important to their communities. They offer much needed representation for those whose views and concerns would not otherwise be heard or addressed. Congress authorized such conduct by 501(c)(3) and 501(c)(4) organizations expressly in the tax code.[3]

Broadening the definition of "expenditure" to include public communications that "refer to a political activity or a clearly identified Federal candidate and promote or support, or attack or oppose any political party or any Federal candidate" will drastically curtail issue advocacy and other lobbying efforts by 501(c)(3) and 501(c)(4) organizations. The NPRM does not define this standard. Under the proposed rule, a nonprofit senior citizens center would refrain from sending an e-mail to its constituents urging them to contact their representative and voice their opposition to a bill sponsored by the President to decrease Medicare and Medicaid benefits inasmuch as that communication "refer(s) to ... a federal candidate." In this respect, the NPRM goes further than the tax code does in limiting communications by 501(c)(3)s and 501(c)(4)s; both categories of tax-exempt organizations are authorized to engage in legislative lobbying and other policy advocacy.

We strongly urge you to clarify that this proposed rule does not limit any exempt organization's right to engage in issue advocacy or lobbying activity (direct or grass roots) that is otherwise permissible under the IRC. We also recommend that you use a clearer standard for assessing when a communication "attacks or opposes" a political party or Federal candidate. The proposed vague language will have a chilling effect on legitimate speech and activities of the nonprofit sector and is likely to invite constitutional challenge.

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[3] Organizations exempt under Section 501(c)(3) of the IRC may engage in activity intended to influence legislation so long as it does not constitute a substantial part of their activities. IRC § 501(c)(3). Organizations exempt under Section 501(c)(4) may make it their primary activity influence legislation relating to their exempt purpose and may even engage in partisan campaign activity, so long as it does not constitute their primary activity. IRC § 501(c)(4).

3. The Proposed Definition of Political Committee Will Effectively Silence Important Advocacy and Shut Down Voter Participation Activity

The proposed expanded the definition of political committee would significantly increase the number of organizations that would be subject to the FEC's registration and reporting requirements and its fundraising restrictions. Most of these would be exempt organizations already governed by the IRC's rules and regulations.

The proposed amendments to the "major purpose" test are highly problematic. Under the first test, an organization exempt under Section 501(c)(4) could be deemed a political committee if "a" major purpose is to elect a Federal candidate." An organization exempt under Section 501(c)(4) may engage in political campaign activity, such as purchasing an advertisement in the New York Times supporting George Bush for President, so long as such activity is not its primary activity.[4] However, such an organization is required, under the IRS regulatory scheme, to pay a tax on this "exempt purpose" expenditure.[5] Under the "a" major purpose test and based on current advertisement rates, this 501(c)(4) organization could be deemed a political committee. The effect of another regulatory scheme is duplicitous and unduly burdensome on the nonprofit being regulated. Further, the determination regarding "major purpose" is based on the organization's public communications and not just on its organizational documents. A 501(c)(3) organization, if the FEC deems its communications to satisfy the test, could fall within the reach of the rule if it spends more than $10,000 on registering its constituents to vote within 120 days of the November 2004 election.

Just as troubling are the two other proposed tests that the FEC would use to assess whether an organization is a political committee. Under these tests, a 501(c)(3) or 501(c)(4) organization that spent more than 50% of its budget or more than $50,000 *in any one* of the previous four years on GOTV activity or on communications that the FEC deems to "promote, support, oppose or attack a federal candidate" would be deemed to be a political party (emphasis added). This means that a nonprofit that spent its entire budget encouraging Latino voters in Central Los Angeles to vote in the last Congressional election would be treated as a political committee now and into the future, with no ability to cure the situation.

We strongly oppose the amendment of the definition of political committee as it would double and perhaps triple the number of organizations subject to the FEC's regulations. The fear of falling within the FEC's regulations would cause groups to curtail nonpartisan and innocent activity consistent with their exempt purpose. For the nonprofits that would qualify as political committees under the new standards, the restrictions on receiving soft money will severely impede their ability to sustain themselves.

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[4] IRC § 501(c)(4).

[5] IRC § 527(f)(1).

4. If the Rules Proposed in the NPRM Are to Be Adopted in Any Form, The Effective Date Must Be Postponed Until Well After the November 2004 Election.

If the NPRM is not withdrawn, the effective date of the rules must be postponed until after the upcoming Presidential election. To give effect to the proposals in the NPRM in the middle of an election season would be a travesty. It would disrupt ongoing programs of nonprofits that are currently not subject to the FEC's regulations. To issue the rules as they are currently written would likely cause widespread confusion as nonprofits struggle to understand the vague standards and broad language contained in the NPRM. In addition, by the time the rules are issued, organizations will have already committed their program funds to activities that may be covered by these rules. Nonprofits will be torn between following through on their program goals and plans and terminating activities that they fear run afoul of regulations that currently exist only in proposed form.

We recommend that any amendment of the rules discussed in the NPRM be accompanied by an amnesty period lasting at least eighteen months during which organizations are not penalized for failures to comply with the new rules. The FEC would be well advised to accompany any amendment with educational materials aimed at explaining the new rules with illustrative examples to target audiences, such as 501(c)(3) and 501(c)(4) organizations.

5. Conclusion.

We strongly urge you to withdraw the NPRM or, at the very least, incorporate our comments into any rules that you promulgate. The NPRM contains proposals that would drastically restrict issue advocacy and voter participation activities of nonprofit organizations. These activities are crucial to ensuring an educated and engaged citizenry. As such, these activities are permissible under existing statutory and regulatory schemes. Restricting this permissible activity will cause irreparable harm to nonprofits' most valuable function, which is to serve the communities they represent.

Respectfully submitted,

LAWYERS ALLIANCE FOR NEW YORK

By: /s/ Sean Delany
Sean Delany
Executive Director