"Jane L. Wilton" <janewilton@nyct-cfi.org> on 04/08/2004 01:35:51 PM

To: "'politicalcommitteestatus@fec.gov'" <politicalcommitteestatus@fec.gov>
cc:

Subject: proposed new rules concerning the definition of "political commit tee"

Attached is a letter from The New York Community Trust concerning proposed new rules in connection with the definition of a political committee.

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The New York Community Trust
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April 8, 2004

via electronic mail: politicalcommitteestatus@fec.gov

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

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

Dear Ms. Dinh:

The New York Community Trust urges the Federal Election Commission (the "Commission") to withdraw the Notice of Proposed Rulemaking on Political Committee Status issued by the Commission on March 11, 2004 (the "NPRM"). Organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code ("501(c)(3) organizations") should be excluded from the definition of "political committee."

The New York Community Trust ("The Trust") is the community foundation serving the New York City area. Our mission is to improve the lives of New Yorkers through grants for a broad range of charitable purposes including the arts and education, homelessness and hunger, environmental concerns, and health care. The Trust is the country's largest community foundation.

Genuine issue advocacy must remain free of Commission regulation.

The democratic process depends not only on citizens voting, but on people and nongovernmental organizations being actively engaged and informed about the issues of the day, including pending legislation and acts by public officials. The charitable sector has a long and distinguished history of promoting active citizen engagement through advocacy, public education and nonpartisan election activities. The Constitution protects such advocacy from being burdened by laws and regulations unless a compelling state

interest justifies it. At a time in our history with the lowest level of voter participation and citizen activism, government bodies such as the Commission should be wary of making any rules that will discourage citizens and nonprofit organizations from participating in the democratic process.

Section 501(c)(3) of the Internal Revenue Code provides that an otherwise charitable organization is eligible for federal tax exemption so long as it does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. Therefore, 501(c)(3) organizations are prohibited from engaging in partisan political activity. The prohibition is absolute; there is no de minimis exception to that rule. Nonprofits are heavily regulated from engaging in direct partisan political activities. We are well aware of this limitation and are careful not to cross the threshold into impermissible activities.

Section 501(c)(3) organizations are not political committees.

Although we recognize that the Commission may be struggling to more clearly define a "political committee" and the appropriate activities of such a committee, the definition should not be expanded to incorporate or encroach on the legitimate, nonpartisan activities of 501(c)(3) organizations. The advocacy activities of 501(c)(3) organizations lobbying and nonpartisan voter registration allow more people to participate and more voices to be heard, which achieves the ultimate purpose of the Bipartisan Campaign Reform Act (the "BCRA").

As described above and as the Commission recognized in its earlier BCRA rulemaking when it exempted the communications of 501(c)(3) organizations from the definition of "electioneering communication," federal tax law requires that 501(c)(3) organizations avoid even the slightest hint of support for or opposition to candidates for public office. Thus, any Commission rule or suggestion that legitimate 501(c)(3) activities might also be an expenditure under BCRA would create inevitable complications for charitable organizations seeking to comply with both tax and election laws. The Commission has already stated that "the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity," and we encourage the Commission to remain consistent with its earlier decision.

For example, the proposed rules could deem the following organizations as political committees:

- A 501(c)(3) organization that spends its entire budget registering college students to vote.

- A 501(c)(3) anti-poverty organization that spends $50,000 in ads this election season criticizing the Administration and Congress for failing to provide adequate funding for the neediest Americans.

If 501(c)(3) organizations including private foundations, public charities and religious organizations are deemed to be political committees, the result would be that we and most of the 501(c)(3) community could no longer conduct or support permitted advocacy activities unless we raise and spend funds in accordance with the source and contribution limits of the Federal Election Campaign Act ("FECA"). FECA prohibits contributions over $5000 from individuals and grants and contributions from corporations and foundations, the primary source of funding for most 501(c)(3) organizations. Consequently, 501(c)(3) organizations, often the only voice for the voiceless on all points of the political spectrum, will be severely hampered in their efforts to conduct their legitimate and worthy efforts.

The definition of "expenditures" should not be expanded.

Likewise, the Commission should not redefine "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office. When educating the public and advocating positions on legislative and policy issues related to a charitable mission, it is frequently necessary and legal under the Internal Revenue Code for a 501(c)(3) organization to refer to current elected federal officeholders who support or oppose the organization's positions. It is not clear how such identification of federal officeholders should be characterized under the proposed rules, but any rule must define clearly what speech and activities fall within the ambit of "promotes, supports, attacks, or opposes" a candidate for federal office. The Commission itself has recognized that it is difficult to make such definitions.

Furthermore, any rule must distinguish between speech that "promotes, supports, attacks, or opposes" a policy position of an elected official acting in her official capacity and speech that praises or criticizes a candidate for public office, even if already an elected official. Of course, federal law, through the tax code, already prohibits 501(c)(3) organizations from participating or intervening in political campaigns on behalf of (or opposition to) candidates for public office. That very same law allows for criticism and support of actions of elected officials.

As can be imagined, the scope of activities that may meet this vague test is very broad. For example, they could include:

- A 501(c)(3) organization holds a briefing to educate its members about a proposal to cut the Earned Income Tax Credit (the "EITC") and the significant negative impact such cuts will have on millions of low-income working people. Congressman A, a strong proponent of the EITC who is also up for reelection this year, will speak about his views on the proposal. An invitation was sent to his

opponent to offer his views, but the invitation was declined. By having Congressman A speak at the briefing, the organization may be considered to promote or support him.

- A 501(c)(3) educational organization encourages its members to oppose a bill sponsored by state senator B that will cut funding for all-day kindergarten in the state. State senator B is a candidate for the U.S. Congress. Such advocacy efforts, even though targeted at a state-level legislative issue, may be seen as opposing or attacking state senator B, a candidate for federal office.

Are these examples of the corruption of the political process that must be stopped? We think not, and we urge the Commission not to attempt to limit such speech.

As the examples show, the restrictions would not apply just to commentary on incumbents in Congress or the White House but also to others who are running for federal office. Those running might include state or local officials, business leaders, and others, thus affecting advocacy at the state or local level.

It is inappropriate to change the campaign finance rules in the midst of an election cycle.

Changing the definition of basic terms such as "political committee," "expenditure," and "contribution" in the middle of an election year would cause undue disruption to the regulated community. Simple fairness dictates that no new rules should be applied during this election season, nor applied retroactively.

An organization cannot and should not be held to standards before they are presented and adopted. Nonprofits and the public need clarity and reasonable notice on all rules. The Commission recognized this when it urged the District Court to grant a stay in McConnell v. Federal Election Commission while the case was on appeal to the Supreme Court in order to avoid creating confusion during an election cycle.

This proposed rulemaking has already created great confusion in the nonprofit community, causing nonpartisan organizations to question the types of advocacy activities in which they can safely engage. Due to the vast confusion and severe (criminal) consequences of being found in violation of federal campaign finance laws, the proposed rule will have a strong chilling effect on 501(c)(3) organizations. Such stifling of voter education and get out the vote activities is not in the best interest of our country to promote an educated and informed electorate. All rules must be carefully crafted to avoid a chilling effect on genuine issue advocacy and nonpartisan voter mobilization activity. This can only be done if the Commission takes the time necessary to sort through the issues more carefully, and defers any proposed action until 2005 at the earliest.

The proposed rule is so long, confusing, and full of alternatives that the public has no clear notice of what is actually being proposed, making meaningful comment impossible.

The NPRM is too complex and confusing to produce a clear, coherent, and constitutional rule that will improve the campaign finance system. The NPRM seeks to drastically reshape the landscape of activities regulated by the Commission. A rulemaking of such significant consequence should not be rushed. This rulemaking will impact entities and organizations that do not even realize they could be subjected to Commission regulation.

Many organizations may suddenly and unexpectedly find themselves regulated by the Commission. New rules—especially those that would apply to those previously unregulated by the Commission—should not take effect until such time that all 501(c)(3) organizations have an opportunity to be fully informed and educated about them.

This rulemaking raises legal issues about whether the Commission has the authority to regulate Constitutionally protected speech.

Deference must be given to protection of the First Amendment's right of free speech and association. Where ambiguity in the law exists, regulation or restriction of speech not expressly provided for by the BCRA or FECA must be imposed by Congress, and not through an administrative rulemaking. This is a fundamental Constitutional principle.

For all these reasons, we urge the Commission to withdraw the NPRM; to reflect and analyze all the comments it will be receiving about the NPRM; and to determine after this election cycle how the Commission regulations ought to be modified consistent with the law and recent Supreme Court decisions.

Sincerely,

The New York Community Trust

Lorie A. Slutsky
President