"Ola Douglas, Legal" <odouglas@aft.org> on 04/08/2004 03:12:26 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Sent on Behalf of Edward J. McElroy, American Federation of Teachers

<<EMCELROY_FEC.pdf>>
ATTACHED LETTER SENT ON BEHALF OF EDWARD J. MCELROY

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April 7, 2004

The Honorable Bradley A. Smith
Chairman
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments by the American Federation of Teachers, Federal Election Commission Notice 2004-6, Proposed Rulemaking on Political Committee Status, published on March 11, 2004, at 69 *Fed. Reg.* 11736.

Dear Mr. Chairman:

On behalf of the American Federation of Teachers ("AFT"), I am today submitting these comments in response to the subject notice of proposed rulemaking by the Federal Election Commission ("FEC" or "the Commission").

The AFT is a labor organization as defined in the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. 441b(b)(1), and is an affiliate of the AFL-CIO. Its national membership of over 1.3 million members is comprised of teachers, para-professionals and school-related personnel, higher education faculty and staff, public employees, nurses and other health care professionals. The AFT traces its formation to a teachers meeting in 1916 at Winnetka, Illinois, in which eight locals from around the country decided that they needed a national organization to address common issues, beyond those in their respective school districts, and they requested a charter from the then American Federation of Labor. After those early pioneering years, the AFT launched a drive for collective bargaining for teachers in the 1960's. It is currently one of the fastest growing labor unions in the United States, with membership growing an average of 28,000 per year since 1985.

First and foremost, the AFT expresses its highest level of concern that the FEC would embark on such a significant and extensive rulemaking effort at this midstream point in the 2004 presidential and congressional elections cycle. Some, who may have painstakingly parsed every line of the cited Notice, report that it includes about 160 separate questions or legal issues on which comment is invited. While we cannot confirm this count, it is manifestly obvious the Notice is high volume: 25 pages of small print, three columns per page, in the *Federal Register*. The sheer length and the politically-charged subject matter, to say nothing of the large number of entities that have already communicated via public media with reference to current Federal officeholders (also candidates for re-election), should inform the Commission as to

the utter folly and immense burden of any impulsive regulatory action that even approaches the scope contemplated in the Notice.

We do understand that the Notice seeks comment whether the effective date for any new rules that the FEC may promulgate should be delayed until after the November 2004 general election. At the very least, a later effective date, say January 2005, is imperative for the AFT and almost certainly for many other entities, including but not limited to other labor organizations, that have already engaged in currently lawful election-related activity and will continue to do so as the general election campaign intensifies. If new FEC rules become effective before this November, such activities may be either prohibited outright, or if not prohibited, will subject the AFT to an intrusive compliance burden. This may include an additional, time-consuming legal review of plans that have already been scrutinized for compliance with FEC rules and are ready to launch in the next few weeks and months.

The AFT also respectfully poses a blunt question for the Commission's reflection and review: why the rush?

The subject Notice (page 11737, footnote 3) recalls that in March 2001, the FEC started a rulemaking project that would have addressed the same core issues presented here: revising the definitions of "political committee" and "expenditure." At that time the FEC seemed to recognize the complexity and far-ranging scope of such a rulemaking, since it launched the effort seeking public comments on an Advance Notice of Proposed Rulemaking, which would most likely have been followed by actual proposed rules, with another round of public comments and a public hearing. After receiving public comments on the March 2001 advance notice, the FEC voted on September 27, 2001, over six months later, to hold the rulemaking in abeyance. For all practical purposes this FEC vote closed down the 2001 rulemaking indefinitely. Now three years later on the same highly sensitive, even controversial, subject matter, which has become even more of a legal morass given the Bipartisan Campaign Reform Act of 2002 ("BCRA") and the United States Supreme Court decision in *McConnell v. FEC*, 540 U.S. ---, 124 S. Ct. 619 (2003), the FEC proposes rules with one round of comments, and less than 30 days to submit them (between *Federal Register* publication on March 11 until April 9). Comments submitted at or near the comment due date, would be considered by FEC staff and Commissioners for only about 5-10 days before a scheduled two-day FEC hearing

on April 14 and 15. And then there is the possibility of final, binding rules in place by July 2004, according to published reports.

So our blunt question is fairly posed: why now and why the rush, given the Commission's own recent regulatory history on this very same subject matter?

With respect to the substance of the Notice, the AFT believes it is highly significant and problematic that it ventures into regulatory topics that were not addressed in BCRA—the definition of "political committee" and the scope of a "major purpose" test. Such a test would govern what entities and what types or amounts of disbursements by those entities will cause them to become political committees and thus required to register with the FEC and report their financial activity to the FEC.

The principal focus of the BCRA restrictions on Federal election campaign activity was "soft money" solicited, received, directed and spent by political party committees and elected Federal officials or other persons acting as their authorized agents or in coordination with them. BCRA includes no revisions to the FECA definition of "political committee." Furthermore, it does not even remotely suggest that a labor organization that qualifies as tax exempt under the Internal Revenue Code, 26 U.S.C. 501(c)(5), would ever be subject to coverage as a "political committee" under the FECA or FEC regulations. Indeed, the Internal Revenue Code and the FECA expressly authorize labor organizations like AFT to establish a separate segregated fund for political purposes that is regulated as a "political committee" under the FECA and recognized as a separate [from the labor organization] "political organization" under the Internal Revenue Code. *See*, 2 U.S.C. 431(4)(B), 441b(b)(2)(C) and 26 U.S.C. 527(f)(3).

The AFT does understand that BCRA prohibits labor organizations and nearly all corporations from spending their treasury funds for any covered "electioneering communication" [mass media broadcast ads mentioning a Federal candidate within 60 or 30 days before an election]. 2 U.S.C. 441b(c), 11 CFR 114.2(b)(2)(iii). With this exception, BCRA does not impose new restrictions or limitations on expenditures for public communications by labor organizations in connection with or to influence a Federal election. The Notice, however, would expand the scope of prohibited expenditures to cover a public communication that refers to a clearly identified candidate for Federal office and "promotes or supports, or attacks or

opposes any candidate for Federal office...or promotes or opposes any political party." 11 CFR 100.116 (proposed), 69 *Fed. Reg.* 11757.

The AFT believes that this proposal is vague, overbroad and threatens to curtail or even prohibit its use of general treasury funds for public media messages that express opposition to, or support of, public policy issues and include the name (or photo likeness) of an incumbent Federal officeholder who is identified with that issue and is also a candidate for Federal office. BCRA did not amend the FECA to impose such a content restriction on public communication expenditures by labor organizations or corporations; those entities remain subject to the prohibitions already in place under 2 U.S.C. 441b, as amended by BCRA. Accordingly, AFT strongly disagrees with the substance of the proposal and believes that current FEC regulations should not be muddled or confused in a rushed and ill-advised effort to attempt further regulation of this type of core First Amendment speech.

The Notice also includes one other misguided concept that greatly concerns us: retroactive application of FEC disclosure requirements to entities that would newly qualify as "political committees" under the proposed rules. 11 CFR 102.50--102.56 (proposed), 69 *Fed. Reg.* 11758. It is a well-settled principle of statutory construction that absent explicit statutory language (or a comparable compelling expression of Congressional intent in relevant legislative history), conduct that comes within the strictures of a newly enacted statute is only covered prospectively. Yet in defiance of this principle, the Commission purports to impose by dint of its rulemaking power, a retroactive "covered period," possibly as long as two years, on a new "political committee," and the rule would require full disclosure of the contributions and expenditures received and made by such an entity during that period. Indeed, BCRA itself has a retroactive disclosure obligation, but only with respect to a very confined zone of conduct: an "electioneering communication" that is funded by permissible donors. 2 U.S.C. 434(f). The FEC apparently proposes to distort and misapply that explicit statutory authority to impose a very similar type of disclosure and contribution source regime on entities that it would, by fiat of agency regulation only, determine to be new "political committees." That is clearly bad law, bad policy and bad news for the regulated community and the body politic.

When all is said and done, the AFT is hopeful that on further reflection and review, and after its hearings on April 14--15, the Commission will "do the right thing" and

desist from promulgating a hastily conceived set of complex and intricate new regulations that would purport to regulate First Amendment speech in a pervasive and intrusive manner. Regulations that are not mandated or even contemplated by the 2002 campaign reform legislation.

Respectfully submitted,

Edward J. McElroy
Secretary-Treasurer

EJM:DJS:od