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To: politicalcommitteestatus@fec.gov
cc:

Subject: Notice of Proposed Rulemaking on Political Committee Status, 69 Fed., Reg. 11736 (3/11/04)


letter to FEC.doc

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The Women Of Color Policy Network

April 5, 2004

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

via electronic mail: politicalcommitteestatus@fec.gov

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

Dear Ms. Dinh:

The Roundtable of Institutions of People of Color and the Women of Color Policy Network urge the Federal Election Commission (FEC) to exclude 501(c)(3) organizations from the definition of "political committee." This letter outlines the rationale for our recommendation.

The Roundtable is a coalition of non-profit organizations from the Asian, Black, Hispanic and Native American communities. It provides a forum for non-profits from these communities to develop a common agenda; develops and provides research on the economic, social and cultural needs of people of color; and advocates for funding equity from government and philanthropic sources.

The Women of Color Policy Network was established by the **Roundtable** in the Fall of 2000 to create a public sphere for Asian, Black, Hispanic and Native American women to engage in discourse about the nexus of gender and race, to develop research and data which can inform advocacy and policy, and to tailor policies and programs to meet their major needs.

Genuine issue advocacy must be left 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. 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 entities such as the Commission should be wary of making any rules that will discourage citizens and nonprofit organizations from participating in the democratic process.

Advocacy is an essential role of the nonprofit sector. Through advocacy, nonprofits provide a vehicle for civic engagement in the democratic process. We encourage all of our members to get involved in advocacy activities in order to better meet the mission of their organization and better meet the needs of their constituencies. The new rules that the Commission is considering may prevent us from fulfilling our advocacy role.

Existing federal law prohibits 501(c)(3) organizations from engaging in partisan political activity. Title 26 of the United States Code, the Internal Revenue Code, explicitly bars 501(c)(3) organizations from participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. The prohibition is absolute; there is no *de minimis* exception to that rule. Nonprofits are heavily regulated, and rightly so, from engaging in direct partisan political activities. Nonprofit leaders and boards are well aware of this limitation. They are careful not to cross the threshold into non-permitted activities, and we have found them to be overly cautious about kinds and extent of their advocacy efforts.

What is a Political Committee?

As the Commission struggles 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. Activities in which 501(c)(3) organizations engage are more appropriately characterized as lobbying or nonpartisan voter activation. The advocacy activities of 501(c)(3) organizations allow more people to participate and more voices to be heard, which achieves the ultimate purpose of the Bipartisan Campaign Reform Act (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 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.

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 are deemed to be political committees, the result would be that we and most of the 501(c)(3) community could no longer conduct 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 sides of the political spectrum, will be severely hampered in their efforts to conduct worthy efforts.

Meaning of "Expenditures"

The Commission should not redefine "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office. In doing so, the Commission would be creating a new test, one that far exceeds the broadcast limits contained in BCRA. BCRA does not allow the Commission to extend the definition of "expenditures" to include all communication, including print ads, letters to members, fundraising letters, web sites, and messages from door-to-door canvassers. Moreover, in upholding BCRA, the United States Supreme Court stated that interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." McConnell v. FEC, 540 U.S. ___ at ___ [slip op. at 80]. The Commission cannot limit speech that Congress itself refused to limit.

The NCNA network is actively engaged in educating the public and advocating positions on legislative and policy issues related to our charitable missions. In our advocacy work, it is frequently valuable to refer to current elected federal officeholders who support or oppose our positions. 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.

Likewise, 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 to participate in, or intervene in political campaigns on behalf of (or opposition to) candidates for public office. That 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) state association holds a briefing to educate its members about a proposal to cut the Earned Income Tax Credit (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 state association 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? NCNA thinks not, and urges the Commission to protect such speech.

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 for the Commission to change the campaign finance rules in the midst of this 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 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 defers action until 2005, and takes the time to sort through the issues more carefully.

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 Notice of Proposed Rulemaking (NPR) is too complex and confusing to produce a clear, coherent, and constitutional rule that will improve the campaign finance system. The NPR 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 should 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 Bipartisan Campaign Reform Act of 2002 or the Federal Election Campaign Act must be imposed by Congress, and not through an administrative rulemaking.

Again, we urge the Commission not apply the rules to the 501(c)(3) community.

Thank you for this opportunity to practice those freedoms that make our country great – voicing our opposition to a proposed action that will have detrimental and disastrous effects on the practice of democracy in our country.

Sincerely,

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c/o
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