Catherine Carabetta <Catherine@donorsforum.org> on 04/06/2004 06:03:35 PM

To: "'politicalcommitteestatus@fec.gov'" <politicalcommitteestatus@fec.gov>
cc: Catherine Carabetta <Catherine@donorsforum.org>

Subject: Comment on Proposed Rule Regarding Political Committee Status

To Whom it May Concern,

Attached is a document containing comments from the Donors Forum of Chicago on the proposed rule regarding political committee status. Thank you for your consideration.

Catherine Carabetta

Director of Public Policy

Donors Forum of Chicago

208 S. LaSalle, Suite740

Chicago, IL60604

ph: 312-327-8941

fax: 312-578-0103

catherine@donorsforum.org

 - FEC Rulemaking--DFC draft comments.April2004.doc

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 Donors Forum of Chicago urges the Federal Election Commission (Commission) to exclude 501(c)(3) organizations from the definition of "political committee." This letter outlines the rationale for our recommendation.

The Donors Forum of Chicago is the region's premier resource for leadership, education, research, and action on behalf of philanthropy and nonprofits. The Donors Forum enables the philanthropic and nonprofit sector to address community concerns with comprehensive information, skilled leadership, and the resources necessary to build institutions and affect change. We are committed to promoting active relationships between grantmakers, nonprofits and the community at large. The Donors Forum believes that advocacy, within certain constraints, is legal for nonprofit organizations and conducive to an informed, healthy and strong democratic society. We support the advocacy rights of nonprofits and believe that nonprofits can and should participate in public policy dialogue that affects their organizations, communities and the people they serve.

The Donors Forum represents more than 200 grantmaking Members and 1,100 nonprofit Partners. The majority of our Members and Partners are 501(c)(3) organizations under the federal income taxation code. As such as have expertise and interest in the impact of your pending action.

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 501(c)(3) organizations to get involved in advocacy activities. 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 unpermitted 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 many 501(c)(3)s could no longer conduct advocacy activities unless they raised and spent 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. The Commission cannot limit speech that Congress itself refused to limit.

The Donors Forum of Chicago 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.

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 affect 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.

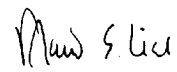
This rulemaking raises legal issues about whether the Commission has the authority to regulate constitutionally protected speech.

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 submit these comments.

Sincerely,



Valerie Lies
President & CEO
Donors Forum of Chicago
208 S. LaSalle, Suite 740
Chicago, IL 60604
Valerie@donorsforum.org
(312) 578-0090