WENDY BURNETTE <dccsn.org@verizon.net> on 04/05/2004 11:05:04 AM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Comment on Possible Threat to Nonprofit Advocacy

Please see attached.

 - Federal Electron Commission.doc

DURHAM COUNCIL FOR CHILDREN WITH SPECIAL NEEDS

115 Market Street, Suite 201, Durham, NC 27701
Telephone (919) 956-5016 * Fax (919) 560-3018 * E-mail: dccsn.org@verizon.net

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 Durham Council for Children with Special Needs urges the Federal Election Commission (Commission) to exclude 501(c)(3) organizations from the definition of "political committee." This letter outlines the reasons for our recommendation.

The Durham Council for Children with Special Needs (DCCSN), formerly known as the Durham Council for Infants and Young Children with Special Needs, is a Local Interagency Coordinating Council (LICC) made up of professionals and parents whose goal is to ensure that children ages birth to five with special needs receive services that enable them to reach their potential. Services for children with special needs are mandated by North Carolina, per PL 99-457 (Individual with Disabilities Education Act). North Carolina was one of the first states in the nation to officially participate in the Infant-Toddler Program (Part C) and the Preschool Program (Part B) of PL 99-457. Each county in North Carolina has an LICC as a strategy for developing, coordinating, and providing a community-based, comprehensive system of services for young children with or at risk for disabilities and their families. Each council is a unique entity in its community and is responsible for its own funding and management. DCCSN was organized in 1988 as the single point of entry for these services in Durham County. In the fall of 1998, DCCSN was incorporated as a nonprofit organization under IRS code 501(c) (3), the first in North Carolina to achieve this status.

The democratic process depends not only on citizens voting, but also on people and nonprofit organizations being actively engaged in 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 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, we should avoid new government rules that would discourage citizens and nonprofit organizations from participating in the democratic process.

The new rules that the Commission is considering may prevent nonprofit organizations from fulfilling our important role in advocacy.

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 clearly prohibited, and rightly so, from engaging in direct partisan political activities. Nonprofit leaders and boards of directors are well aware of this limitation and are careful not to cross the line into impermissible activities.

The Commission's definition of a "political committee" 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. These nonprofit activities allow more people to participate and more voices to be heard, and this helps to achieve 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 make it difficult for charitable organizations seeking to comply with both tax and election laws.

The Commission has already stated, "The purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity." We ask the Commission to remain consistent with its earlier decision.

If 501(c)(3) organizations were deemed to be political committees, most of the 501(c)(3) community could no longer conduct advocacy activities unless we raised and spent funds in accordance with the source and contribution limits of the Federal Election Campaign Act (FECA). FECA prohibits contributions over $5,000 from individuals as well as grants and contributions from corporations and foundations. Yet these are the primary sources 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, would be severely hampered in their efforts to conduct worthy efforts.

If the Commission redefined "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office, it would be creating a new test 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. In upholding BCRA, the U.S. 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 [slip op. at 80]. The Commission cannot limit speech that Congress itself refused to limit.

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 from participating in, or intervening in political campaigns on behalf of (or opposition to) candidates for public office. However, that same law allows for criticism and support of the actions of elected officials.

The scope of activities that may meet this vague test is very broad. For example, they could include:

- A 501(c)(3) community-based organization 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 would 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 be promoting or supporting him.

- A 501(c)(3) educational organization encourages its members to oppose a bill sponsored by state senator B that would cut state funds for child abuse prevention. 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.

We believe that the ability of 501(c)(3) nonprofit organizations to participate in such speech should be protected.

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, such as state or local officials, business leaders, and others, thus affecting advocacy at the state and local levels.

It is inappropriate for the Commission to change the rules in the middle of an election cycle. Simple fairness dictates that no new rules or changes in the definition of basic terms such as "political committee," "expenditure," and "contribution" should be applied in the midst of 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.

The proposed rule would have a strong chilling effect on 501(c)(3) organizations. Stifling voter education and get-out-the-vote activities is not in the best interest of our democracy, which depends on an educated and informed electorate. Any rules should be carefully crafted to avoid discouraging genuine advocacy on important public issues as well as nonpartisan efforts to encourage voting. This can only be done if the Commission defers action until 2005, and takes the time to sort through the issues more carefully. Rules of such significant consequence should not be rushed. This proposed rule would impact organizations that do not even realize they could be subjected to the Commission's regulation. New rules – especially those that would apply to those previously unregulated by the Commission – should not take effect until all those potentially affected 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 protecting the First Amendment right of free speech and association. Where ambiguity in the law exists, regulation or restriction of speech not expressly provided in the Bipartisan Campaign Reform Act of 2002 or in the Federal Election Campaign Act should be considered by Congress, not through administrative rulemaking.

Again, we urge the Commission not to 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 would have detrimental effects on our democracy.

Sincerely,

Wendy M. Burnette
Executive Director

cc: North Carolina's representatives in the U.S. Senate and the U.S. House of Representatives