

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2004 MAY 11 A 11: 57

May 11, 2004

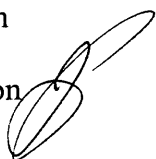
MEMORANDUM


**AGENDA ITEM**

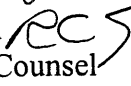
For Meeting of: 05-13-04


**SUBMITTED LATE**

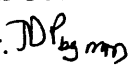
**TO:** The Commission


**THROUGH:** James A. Pehrkon   
Staff Director

**FROM:** Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Mai T. Dinh   
Assistant General Counsel

J. Duane Pugh Jr.   
Senior Attorney

Anthony T. Buckley   
Attorney

**SUBJECT:** Political Committee Status Rulemaking

**I. BACKGROUND**

On March 11, 2004, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) to consider whether new regulations are necessary to define when organizations should be considered nonconnected “political committees,” subject to the contribution limitations, source prohibitions, and reporting requirements of the Federal Election Campaign Act (“FECA”) (also referred to as “the Act).” 69 Fed. Reg. 11,736.<sup>1</sup>

<sup>1</sup> The NPRM does not propose to change the definition of “political committee” applicable to party committees, Federal candidates’ authorized committees, or separate segregated funds.

The Act defines a “political committee” as any committee, club, association, or other group of persons which receives “contributions” or makes “expenditures” aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. §431(4)(A). For purposes of the Act, the term “person” is defined as including “an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons ....” 2 U.S.C. §431(11). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, in order to avoid overbreadth, construed the Act’s references to “political committee” so as to prevent their “reach [to] groups engaged purely in issue discussion.” 424 U.S. at 79. The Court concluded that “[t]o fulfill the purpose of the Act [the designation ‘political committee’] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”<sup>2</sup> *Id.*

The NPRM presents a number of alternative proposals. Generally speaking, the proposals would change the definitions of three foundational terms -- “political committee,” “expenditure,” and “contribution” – with some proposals applying the new definitions of “expenditure” and “contribution” only to the determination of political committee status, and other proposals applying these two new definitions whenever the terms appear in the Commission’s regulations. The NPRM also proposes to codify *Buckley’s* “major purpose” test, and presents a number of alternative meanings for that test. The specific amendments in the NPRM are substantially interrelated -- a Commission

---

<sup>2</sup> In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), the Supreme Court noted that the “central organizational purpose” of *MCFL*, a non-profit advocacy corporation, was issue advocacy, and therefore it did not meet the *Buckley* definition of a political committee, *i.e.*, it was not controlled by a candidate and did not have as its major purpose the nomination or election of a candidate. 479 U.S. at 252, n.6. The *MCFL* Court also noted, however, that should the organization’s “independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.” 479 U.S. at 262.

decision with respect to one rule will affect the scope and operation of the other rules, as well as other current regulations implementing the Act. Additionally, the NPRM proposes various alternatives for changing the allocation regime applicable to nonconnected committees and separate segregated funds.

The NPRM was prompted by the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. \_\_\_, 124 S. Ct. 619 (2003). Prior to *McConnell*, many held the view that “[*Buckley*] drew a constitutionally mandated line between express advocacy and so-called issue advocacy” such that only communications that contained express advocacy could be considered “expenditures” that had to be paid for with funds subject to the amount limitations and source prohibitions of the Act. *McConnell*, 124 S.Ct. at 687. Under this reading, if a group simply avoids making any contributions, and avoids communications using so-called “magic words” such as “Elect John Smith” or “Vote Against Jane Doe,” which *Buckley* presented as examples of “express advocacy,” 424 U.S. at 44, n. 52, it will not meet the threshold test for a “political committee” because it will not make \$1,000 in “expenditures.” Hence, regardless of how irrefutably such a group demonstrates that its major purpose is to influence the election of Federal candidates, under this reading of the Act it would not have to register as a political committee, and would therefore not be subject to the contribution limitations, source prohibitions, and reporting requirements of the Act.

In *McConnell*, the Supreme Court held that that this view was incorrect. The Court clarified that the express advocacy test is not a constitutional barrier establishing whether communications are “for the purpose of influencing any Federal election,” *id.* at 688-689, and characterized the express advocacy test as “functionally meaningless.” *Id.* at 689. The *McConnell* decision, then, presents the Commission with an important choice: apply the

express advocacy test even in circumstances where the Act does not require it, and even though the Court has said this test has no constitutional or functional utility, or apply a different test that withstands constitutional overbreadth and vagueness concerns.

The *McConnell* Court also found that certain activities (in addition to communications containing express advocacy) influence federal elections. For example, the Court concluded that public communications that promote, support, attack, or oppose a clearly identified Federal candidate “undoubtedly have a dramatic effect on Federal elections,” *id.* at 675, and that this test, which the Bipartisan Campaign Reform Act (“BCRA”) applies to officeholders and party committees, satisfies constitutional vagueness concerns. *Id.* at 675, n. 64. The Court also found “that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives.” *Id.* at 678, n. 68. *McConnell* thus presents the question: if such tax-exempt organizations devote a majority of their total spending to partisan activity of this kind, do law and common sense dictate that they be considered political committees?

The Commission established a highly accelerated schedule for this important and far-reaching rulemaking, targeting approval of final rules just two months after publication of the NPRM.<sup>3</sup> The scheduling responded to concerns about the activities of some organizations that, according to press accounts, are raising and spending (or planning to raise and spend) millions of dollars in corporate and union funds and unlimited donations

---

<sup>3</sup> In comparison, the Federal Trade Commission’s final rules amending the Telemarketing Sales Rule and establishing a national “do not call” registry, were published in the Federal Register one year after publication of the NPRM. Even before issuing the NPRM, the FTC conducted two roundtable discussions with participation from various business and consumer interests. Those roundtables occurred approximately two years and eighteen months, respectively, before issuance of the NPRM.

from individuals for the purpose of influencing the 2004 Presidential election. Critics of these organizations argue that they are serving as “shadow” party committees, effectively circumventing BCRA’s ban on party committees from raising and spending funds not subject to the limits, prohibitions, and reporting requirements of the Act, *i.e.*, non-Federal funds, and that the Commission’s failure to respond through new regulations will lead to a proliferation of such groups.

## II. RECOMMENDATION

For a number of reasons, we recommend that the Commission continue work on this rulemaking, but take additional time before issuing final regulations. As discussed below, the NPRM (and in particular, the accelerated schedule) rests in part on an assumption about the Commission’s ability to enforce the law without the benefit of new regulations. That assumption merits closer consideration. Additional time would also help the Commission ensure that any regulations it promulgates are not unacceptably over- or under-inclusive as applied to the organizations they will affect. Here, new rules would potentially affect thousands of organizations, including many registered political committees (who would become subject to new allocation rules), 527 groups that are currently not registered with the Commission, and 501(c)(4) groups that would be likely to shoulder at least some portion of the activity now conducted through 527s.<sup>4</sup> Careful line-drawing is difficult to do at this pace. Finally, some of the legal questions raised by the rulemaking would benefit from further examination. Even some of the more conservative

---

<sup>4</sup> A 527 group, as defined by the Internal Revenue Code, is “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures or both, for an exempt function.” 26 U.S.C. §527(e)(a). An exempt function is defined as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors.” 26 U.S.C. §527(e)(2).

approaches raise issues that need to be thought through in a manner that the current schedule makes difficult.

One assumption that seems to underlie this unusually expedited schedule is that existing law is inadequate to address the conduct that provides the impetus for the rulemaking. In fact, the same witnesses who strongly advocate that the Commission adopt regulations to compel section 527 organizations to register as political committees also take the view that such regulations are unnecessary. April 5, 2004 Comments by Democracy 21, Campaign Legal Center, and Center for Responsive Politics at 1-3 and March 16, 2004 Comments at 1-2. They make a valid point. Take, for example, a group whose avowed purpose is influencing federal elections, that solicits over \$1,000 in funds expressly for that purpose or expressly advocates the election or defeat of federal candidates in an ad campaign, and that spends millions of dollars on ads or other partisan voter drive activity in furtherance of that purpose. Even before reaching the question of how applicable law may have been clarified by *McConnell*, it would seem that the law as understood by many *prior* to *McConnell* would provide a basis for concluding that such a group should be registered as a political committee. No current regulation would foreclose such a result.

It has also been understood for some time that an organization can satisfy Buckley's "major purpose" test through sufficient spending on campaign activity, *see MCFL*, 479 U.S. at 262-264 (political committee status would be conferred on MCFL, a 501(c)(4) organization, if its independent spending were to become so extensive that the group's major purpose may be regarded as campaign activity), and through an organization's public statements of purpose, *see, e.g., FEC v. Malenick*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 626174, \*3 (D.D.C. March 30, 2004) (court found organization evidenced

“major purpose” through its own materials which stated the organization’s goal of supporting the election of Republican Party candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates) and *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996) (“organization’s [major] purpose may be evidenced by its public statements of its purpose or by other means....”).

Moreover, as a matter of fundamental jurisprudence, there is nothing inappropriate in the Commission applying the principles of *McConnell* as specific enforcement matters or Advisory Opinion requests present themselves. In fact, that is the Commission’s obligation. The Supreme Court announces its conclusions concerning federal law “as though [it] were finding it – discerning what the law is, rather than decreeing what it is ... changed to, or what it will tomorrow be.” *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, with Marshall and Blackmun, concurring). “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). This is precisely what the Commission did in Advisory Opinion 2003-37 (ABC PAC), where the Commission concluded that *McConnell* supported a substantial reinterpretation of the “allocation” rules (*ie.*, the mix of Federal and non-Federal funds) that may be used by a registered political committee in funding its various activities.

While the Commission can and should address specific issues and circumstances in this area of law as they arise in the enforcement process (or through Advisory Opinion requests), it is also appropriate for the Commission to attempt to craft general rules of application to give as much additional clarification of the law as possible. Taking some

additional time -- we suggest 90 days -- would benefit this undertaking. For one thing, the pace of the rulemaking has strained the Commission's ability to consider substantive comments submitted in response to the NPRM. The Commission received over 100,000 comments, far exceeding the number of comments received in connection with any of the rulemakings to implement BCRA. Comments came from an unprecedented number of members of Congress, citizens across the country, representatives of public interest groups, attorneys experienced in campaign finance law, and others. Thirty-one witnesses also testified in two days of hearings that were conducted just one month ago. These commenters and witnesses expressed a wide range of views on a number of issues. Although Commission staff reviewed every comment received, it is not unreasonable for the Commission to take some additional time to give these comments further consideration.

The various proposals also raise complex legal issues, as illustrated by the proposal from Commissioners Toner and Thomas (the "Toner/Thomas proposal"). Their proposal treats 527 groups as meeting the major purpose test, with limited exceptions. It also identifies the type of "expenditure" that will trigger political committee status pursuant to the statutory \$1,000 threshold. Counting as an "expenditure" are public communications that "promote, support, attack, or oppose" a clearly identified federal candidate or that "promote or oppose" a political party. Voter identification and partisan voter registration and get-out-the-vote activity also count as "expenditures."

The Toner/Thomas proposal has the virtue of taking an incremental approach to the issue, conferring political committee status on organizations that have made a statement of avowed purpose through the formal act of seeking 527 status under the Internal Revenue



Code.<sup>5</sup> Also, there appears to be substantial congruence between, on the one hand, organizations that under section 527 are “organized and operated primarily for the purpose of” influencing nominations or elections to any Federal, State, or local office, and on the other hand, groups “the major purpose of which is the nomination or election of a candidate.” *Buckley*, 424 U.S. at 79. The exceptions in the Toner/Thomas proposal are crafted to exclude such 527 organizations as those focused on purely state-level activity or the election or selection of judges or other non-elected officials. The proposal seeks to defer some of the more controversial proposals in the NPRM, and is intended to leave organizations other than 527 groups in no different position than they are today under applicable law.

While this proposal clarifies some areas of the law, it also raises important questions that deserve appropriate study. For example, if regulations specifically provide that a 527 group makes “expenditures” when it makes communications that promote, support, attack, or oppose a clearly identified candidate and when it engages in partisan voter mobilization, should groups *not* organized under section 527 infer that different rules apply to them? In an enforcement matter, would it be appropriate for the Commission to apply the same “expenditure” test to non-527 groups, even though the rule specifically applies only to organizations organized under section 527? Or, could the Commission conclude in an enforcement matter that a for-profit corporation, or a 501(c)(4) group, notwithstanding its tax status, has a major purpose of nominating or electing Federal candidates, but that the test for determining if such a group has made \$1,000 in “expenditures” is express advocacy? If it did so, what would be the basis for concluding

---

<sup>5</sup> “Section 527 ‘political organizations’ are, unlike §501(c) groups, organized for the express purpose of engaging in partisan political activity.” *McConnell*, 124 S.Ct. at 678, n. 67.

that groups that evidence their major purpose by applying for 527 tax status are subject to one test for determining whether they have made \$1,000 in contributions or expenditures, while organizations that evidence their major purpose through other public statements, fundraising appeals, or other means, are subject to a different test?

Also, while the Toner/Thomas proposal would codify *Buckley's* "major purpose" test for all groups, and clarify that it can only be satisfied when influencing elections is "the" major purpose, not "a" major purpose, what does that mean in practical application? If a group spends more of its funds on activity aimed at electing candidates than on any other single activity, but such spending is less than 50% of the total spending by that organization, has it satisfied the "major purpose" test or not? When a 501(c)(4) organization makes communications that "promote, support, attack, or oppose" a clearly identified candidate or engages in partisan voter mobilization activity, will that activity be considered in establishing the group's major purpose?

Finally, some commenters in the rulemaking argue that Congress, not the Commission, should determine whether it is appropriate to determine whether more independent groups (or as they are often referred to, "interest groups") must register as political committees. These commenters argue that in addressing concerns about 527 organizations that operated as so-called "stealth PACS," Congress chose through legislation passed in 2000 and 2002 to require them to file reports and make disclosures to the IRS, not the Commission. Similarly, these commenters argue that, in BCRA, Congress re-drew campaign finance rules without attempting to subject more organizations to political committee status. While it is plain that neither BCRA nor the 2000 and 2002 amendments to the tax code rule out regulation in this area -- in fact, the IRS reporting requirements explicitly apply only to those 527 organizations that are not required to report

to the Commission as political committees under FECA -- it is not inappropriate to seek some guidance from Congress before adopting a broad rule. In any event, these issues and concerns further underscore the need to avoid hasty action.

In sum, we recommend that the Commission continue its work on this rulemaking, building on the substantial progress that has been made so far. It is just as important not to drop the issue as it is to get it right. Accordingly, we recommend that within 90 days, the Commission should either issue final rules, issue a second NPRM that would offer commenters a more focused proposal, or decide -- at least for now -- to defer the issuance of new rules and instead look for guidance from Congress. For the same reason, we intend to move forward to address specific questions as they arise in enforcement matters and advisory opinions, even while work on the rulemaking continues.

