FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: August 19, 2004

SUBJECT: *Ex Parte* COMMUNICATION
Re: Final Rules for Political Committee Status

Transmitted herewith is an *ex parte* communication from Gail Harmon and John Pomeranz on behalf of Harmon, Curran, Spielberg & Eisenberg, LLP, regarding the above-captioned matter.

Proposed final regulations are on the agenda for Thursday, August 19, 2004.

Attachment

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August 18, 2004

Bradley A. Smith, Chairman
Ellen Weintraub, Vice Chair
David M. Mason, Commissioner
Danny L. McDonald, Commissioner
Scott E. Thomas, Commissioner
Michael E. Toner, Commissioner
Federal Election Commission
999 E Street, NW
Washington, DC 20463
BY HAND

Re: Draft Final Rules for Political Committee Status (Agenda Document No. 04-75)

Dear Chairman Smith, Vice Chair Weintraub, and Commissioners Mason, MacDonald, Thomas, and Toner:

As one of the many who presented comments and testimony in response to the March 11 Notice of Proposed Rulemaking on Political Committee Status (NPRM 2004-6), our firm writes to you today in response to the recent Draft Final Rules recently released by the Commission's General Counsel.

Let us not proceed further without acknowledging our appreciation of the staff's hard work in crafting this clear and thoughtful document and our gratitude at their efforts to respond to many of the serious concerns about the NPRM that were raised by advocates on all sides of this debate.

Of course, our praise for the proposed rules should certainly not be read as unalloyed support for the proposal. Unfortunately, the time between the release of these proposed final regulations and the Commission's consideration of them has been far too short to provide you with a comprehensive critique. In fear that the Commission may act in haste and adopt some form of these regulations tomorrow, we write to you today to identify only the two most serious problems with the proposal. In hopes that the Commission will act with more prudence, we also write today to request that the Commission take some additional time before promulgating the final regulations to seek additional public comment to highlight, improve, and clarify points of concern.

The 12-Month Look-Back Provisions

One major concern with the draft regulations is that they would treat certain organizations as political committees based on activities that took place before these rules would take effect – indeed, before they were even proposed. Proposed Section 100.5(a)(2)(ii) would treat as a political committee any organization that made more than half of its disbursements in the preceding four quarters (excluding administrative and overhead expenses) for certain purposes: contributions,[1] soliciting contributions, independent expenditures, and electioneering communications. Likewise, proposed Section 100.5(a)(3) expands the list of triggering disbursements for 527 organizations.

Thus, if these rules were to take effect on January 1, 2005, an organization that had made more than half of its 2004 disbursements (excluding administrative and overhead expenses) for these activities and that had made expenditures or received contributions in excess of $1000 would become a political committee. The organization would be required to register as a political committee with the Commission, comply with all reporting requirements, and endure the substantial size and source limits on its funding – all on the basis of activities that took place prior to the release of this proposal, let alone its adoption.

We suggest that if it adopts some form of this proposal, the Commission should also adopt a phase-in for the regulations that would calculate a "major purpose" to influence federal elections by measuring disbursements or contributions for the *lesser* of the preceding twelve months or the period after the date the regulations take effect.

The Treatment of Fundraising Solicitations

Our second major concern is that the draft regulations misapprehend the uses and purposes of fundraising solicitations and, in so doing, inappropriately insert such solicitations into the regulatory process in a way that does violence to the constitutional rights of the regulated organizations.

The draft final rules raise the issue of fundraising solicitations in several ways. First, the proposal would find that an organization had a "major purpose" to influence federal elections if its fundraising solicitations contained statements that indicated that major purpose. (Proposed Section 100.5(a)(2)(i).) In addition, the proposal would redefine "contribution" to include any funds received in response to a solicitation that "indicates that any portion of the funds received would be used to support or oppose the election of a clearly identified Federal candidate." (Proposed Section 100.57(a).) Under the proposal these "contributions" could be used to show that an organization had a "major purpose" to influence federal elections because the cost of soliciting them (combined with other listed disbursements) exceeded 50% of the organization's overall disbursements. (Proposed Section 100.5(a)(2)(ii)(B).) Or the organization could show

[1] The inclusion of "contributions" in this list is itself problematic. Is there some organization than could make any contributions under the either the current or proposed definitions and still avoid treatment as a political committee?

such a major purpose because more than half of the funds it received in a year were contributions, as redefined. (Proposed Section 100.5(a)(2)(iii).) The proposal would also permit these newly defined "contributions" to be used to show that the organization had made more than $1000 in contributions and thus met the first prong of the test for a political committee. (Proposed Section 100.5(a)(1)(i).)

It is essential for the Commission to understand that the purpose of these fundraising appeals is (unsurprisingly) to raise funds for the organization and to build its membership. These communications are not written, designed, or targeted in a way one would expect if they were intended to be attempts at political persuasion. The organization's support for or opposition to a candidate or the candidate's policies is used in an effort to define the organization and demonstrate the importance of its programmatic efforts at a time when the public's attention is focused on an upcoming election. The evidence demonstrating an non-political purpose is ample and manifest. For example in sending a fundraising appeal indicating its opposition to a candidate, an organization is far more likely to send the appeal to a state that is solidly opposed to that candidate than it is to send the appeal to a battleground state.

Thus to find a "major purpose" where the preponderance of the evidence points to an entirely different purpose is absurd.

Furthermore, the use of fundraising solicitations in these ways raised serious constitutional concerns. The threat of political committee status would deter an organization from discussing its opposition to candidates in its solicitations for donations and new members, effectively preventing some organizations from communicating central aspects of their missions. Even if the costs of such solicitations or the receipts resulting from them did not rise to the 50% level to trigger the major purpose under proposed Section 100.5(a)(2)(ii) or (iii), a single comment for or against a candidate could doom the organization under 100.5(a)(2)(i). It is hard to imagine that such restrictions on First Amendment rights of speech and association would survive the strict scrutiny of the courts.

The problem is even more obvious in the context of fundraising solicitations to existing members. The regulations would directly violate congressional instructions that communications to members of an organization are not contributions or expenditures. (2 U.S.C. 441b(b)(2)(A).) Indeed, the statute explicitly permits organizations with connected political committees to pay the costs of SSF fundraising solicitations to the organization's restricted class. (2 U.S.C. 441b(b)(2)(C).)

We urge the Commission to fundamentally change or strip out all regulatory reliance on fundraising communications if it adopts a final version of these rules.

The Need to Solicit Further Comments

The days since the release of these draft final rules have not provided the regulated community with sufficient time to analyze them, and no process has been provided to allow

affected organizations to weigh in with their concerns. Beyond the major concerns raised above, we believe that there are several places where the regulations are flawed or should be made clearer, and we urge the Commission to engage in a full comment and hearing process to identify these problems before promulgating final regulations.

For example, the provision that would find a "major purpose" to influence federal elections in the statements and documents of an organization (proposed Section 100.5(a)(2)(i)) suggests that statements on a website would qualify, yet many organizations maintain websites that present content not controlled by the organization – blogs, chatrooms, news tickers, etc. There are similar points that need clarification throughout this section.

Likewise, the staff comments (at 10) and the language of the proposed draft (at proposed Section 100.5(a)(2)(ii)) suggest that an organization should not be found to have a "major purpose" to influence federal elections based solely on expenditures for electioneering communications. Yet this seems inconsistent with the proposed regulation that would declare that an independent 527 organization that made expenditures only for electioneering communications would have a "major purpose" to influence federal elections because it had made "payments for communications that clearly identify one or more candidates for federal office" (proposed Section 100.5(a)(3)(iv)).

We could list a dozen more points in the proposal where minor changes would improve the final regulations, but we do not do so here in light of our desire to get these comments to the Commission in time for its consideration of this proposal tomorrow. Others, no doubt, could find additional points to fine tune these regulations if they were but given the time.

In light of the fact that these regulations will not take effect until after the November elections, it seems that – for a change – the Commission has the luxury of time to improve the final product. We urge the Commission to seek comments on this excellent first draft and hold hearings to further examine ways to improve the final regulations.

Once again, thanks to all involved for their work on this proposal. We hope to have further opportunity to work with you to produce final regulations that all may support.

Sincerely,

Gail Harmon

John Pomeranz

CC: Mr. Lawrence H. Norton, General Counsel