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: September 7, 2004

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

Transmitted herewith is an *ex parte* communication regarding the above-captioned matter.

Attachment

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September 3, 2004

Bradley A. Smith, Chairman
Ellen L. 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, N.W.
Washington, DC 20463

Dear Commissioners:

We hereby submit comments to the Commission concerning the Explanation and Justification to be adopted in connection with the regulations approved at the Commission's August 19, 2004 meeting (the "E&J"). Because the new rules are substantially different from the proposed rules, it is critical that organizations including social welfare organizations organized and operating section 501(c) (4) of the Internal Revenue Code understand the impact of these rules on their activity. Without this guidance, these organizations will find it exceedingly difficult if not impossible to reorganize their activities to conform to the law. As the Commission is aware, many groups that have operated consistent with their tax exempt status and the Commission's regulations governing qualified nonprofit corporations were expecting that the new rules would impose no additional obligations on them or on their contributors. Unfortunately the new 11 C.F.R. § 100.57 raises substantial doubt about the accuracy of that expectation.

The proposed Draft Final Rules dated August 12, 2004 (the "DFR") would have defined political committee by, amongst other things, evaluating fundraising solicitations. Proposed § 100.5(a)(2)(iii) provided that an organization would be a political committee if:

> During any twelve-month period, as calculated on a quarterly basis, more than fifty percent [50%] of the total receipts of the committee, club, association or other group is composed of contributions.

For purposes of this section, the DFR defined contributions in § 100.57, which provided:

> (a) Treatment as contributions. Except as provided in 11 CFR § 102.17, a gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

(Emphasis added). At its meeting on August 19, 2004, the Commission rejected the proposed amendment to § 100.5(a)(2)(iii), but adopted proposed § 100.57.

It is uncertain how, standing alone, the adoption of § 100.5 should be interpreted. As it currently stands, § 100.5(a) defines political committee as "any group. . . which receives contributions aggregating in excess of $1,000. . . " And, § 100.57 has redefined contributions based on an organization's solicitations. The inclusion of § 100.5(a)(2)(iii) indicated that the General Counsel did not believe that § 100.57 classified contributions would trigger political committee status at the $1,000 level. Notwithstanding the General Counsel's apparent position, there is an argument that the adoption of § 100.57 alone did just that. Yet, based on Buckley v. Valeo, 424 U.S. 1 (1976) and longstanding Supreme Court precedent, there is no basis to treat organizations as political committees, and regulate them as such, unless the organization's major purpose is political activity that affects federal elections.[1]

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1 Upholding the even the limited disclosure requirements for outside organizations that the FECA imposed, the Supreme Court emphasized that the constitutionality hinged on the organization conducting activities that affected an election: "Unlike 18 U.S.C. 608 (e) (1) (1970 ed., Supp. IV), 434 (e), as construed, bears a sufficient relationship to a substantial governmental interest. As narrowed, 434 (e), like 608 (e) (1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result. This might have been fatal if the only purpose of 434 (e) [424 U.S. 1, 81] were to stem corruption or its appearance by closing a loophole in the general disclosure requirements. But the disclosure provisions, including 434 (e), serve another, informational interest, and even as construed 434 (e) increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By

This scheme leads to many questions regarding the manner in which this new regulation fits into the existing regulatory scheme. Such questions include:

- How, and under what circumstances, would the receipt of $1000 or more of contributions under section § 100.57 transform an organization into a political committee?
- If an organization's major purpose is not influencing elections, what is the consequence of receiving more than $1000 in response to solicitations described in § 100.57?
- If an organization's major purpose is not influencing federal elections, what is the consequence of receiving more than $1000 in response to solicitations described in 100.57?
- Is § 100.57 applicable to solicitations by 501(c) organizations, or is its application limited to 527 organizations? Is it applicable to solicitations by MCFL organizations?
- Can an MCFL organization reference the work it does expressly advocating the election or defeat of candidates in its solicitations without triggering § 100.57?
- If an organization is transformed into a political committee, how would the mechanics operate? Would the organization bifurcate into two organizations: the existing one and a political committee? Is political committee status retroactive? Would such organizations be treated as a nonconnected committee? A SSF? How and under what circumstances could an organization terminate political committee status?
- Do § 100.57 defined contributions count against individuals' aggregate limit?

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the same token, it is not fatal that 434 (e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." Buckley, 424, U.S. at 80.

- Do membership communications that support or oppose a candidate count under this section? That is, if a membership organization solicits for funds to be used solely for partisan membership communications, would the funds received be contributions under the Act?

- Do communications covered by Part 114 trigger § 100.57 under any circumstances?

- Does this section apply to state and local PACs and candidate committees? Would a state candidate trigger § 100.57 if he or she claimed in a solicitation that contributions to the state committee might benefit a federal candidate?

- Can § 100.57 be applied to transform an organization into a political committee based solely on its solicitations, even if the organization does not make expenditures to influence a federal election?

Based on the questions raised by this new regulation, we respectfully submit that the E&J should limit its application in two manners. First, there are organizations and portions of the FECA that should be excluded in their entirety. Second, to the extent that § 100.57 is used to classify organizations as political committees, we suggest its application should be limited in several respects.

I. Suggested Exclusions to the Applicability of § 100.57

MCFL Organizations

MCFL organizations are corporations that are tax exempt pursuant to section 501(c)(4) of the tax code. MCFL organizations have a primary purpose that relates to issue advocacy. As required by both the Internal Revenue Code ("IRC"), political activity is not the primary purpose or activity of an MCFL organization. MCFL organizations do not accepting, directly or indirectly, any contributions from corporations or labor unions. Pursuant to FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), MCFL organizations conduct permissible political activity, including independent expenditures that expressly advocate in connection with elections.

If applied to MCFLs, § 100.57 could have a very serious effect on these organizations' First Amendment rights. Based solely on the nature of an organization's fundraising solicitations, § 100.57 could reclassify MCFL

organizations as political committees and thereby limit contributions, and require disclosure. Indeed, this regulation could reclassify an organization as a political committee even if the organization conducted no electoral activity. Such a rule would clearly violate FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

Political committee status should not depend on whether the organization mentions its political work in its solicitations. Indeed, FEC regulations require an MCFL organization at least to mention its political work in all its solicitations. 11 CFR § 114.10(f) states:

> Whenever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

Thus, MCFL organizations are required to inform donors that their contribution may be used for a political purpose. However, under § 100.57, if the organization goes any further and gives donors any indication of work they may be supporting by identifying candidates whose views the organization supports or opposes, the organization would arguably become a political committee. This result cannot withstand constitutional scrutiny. Accordingly, we respectfully submit that the E&J should exclude MCFL organizations from the application of § 100.57.

Membership Organizations

Similar to MCFL organizations, the law expressly permits membership organizations, corporations and labor unions to communication with their restricted classes. Permissible communications include the ability to expressly advocate with the restricted class. Thus, 2 U.S.C. 441b(b)(2) excludes restricted class communications from the definition of contribution and expenditure. However, section § 100.57 as written, would contradict the express terms of this statute. Accordingly, we respectfully submit that the E&J should limit the application of § 100.57, specifically exempting 11 C.F.R. Part 114 from the definition of contribution included in § 100.57.

Individuals

Bipartisan Campaign Reform Act of 2002 ("BCRA"), imposed a new $95,000, two-year election cycle limit on the amount that an individual may give to all federal

parties, PACs and candidates combined. Of this amount, $37,500 is reserved for contributions to candidates; and $57,500 reserved for contributions to parties and PACs, of which no more than $37,500 may be given to entities other than national political party committees. The limitations in this section were carefully crafted by Congress -- with specific amounts allocated to specific types of committees. The balance would be distorted if new types of organizations were included pursuant to § 100.57.

Moreover, importing § 100.57 into § 110.5 would add substantial uncertainty. How is an individual to know whether a contribution he or she makes will be subject to the limits of § 110.5? Individuals should not be expected to evaluate the content of the solicitations they receive to determine their obligations under § 110.5.

Accordingly, we respectfully submit that the E&J should limit the application of § 100.57, specifically exempting 11 C.F.R. Part 110 from the definition of contribution included in § 100.57

II. Suggested Limitations on the Application of § 100.57 to Classify Organizations as Political Committees

To the extent that § 100.57 operates to classify organizations as political committees under § 100.5, we respectfully suggest that some additional limitations are necessary.

Requirement of Political Activity Directed at Federal Elections

Under § 100.57, an organization could potentially be deemed a political committee based on its solicitations alone – no expenditures under the Act are necessary for § 100.5 to be triggered. Thus, based solely on its receipts, § 100.57 proposes to limit organizations to activities those permissible for federal political committees. This result could occur regardless of whether the organization actually conducts any activity direct to or having an affect on a federal election.

However, the constitutionality of FECA limitations and disclosure requirements depend on the organizations being regulated conducting activities that affect or influence federal elections. In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. at 262, the Supreme Court stated that the organizations political spending had to "become so extensive that the organization's major purpose may be regarded as campaign activity" before an organization could be classified as a political committee

under the Act. McConnell v. FEC, 540 U.S. 93 (2003) also relied on activities affecting an election to uphold BCRA's limitations.[2]

There is no constitutional justification to limit an organization's activities and require disclosure unless it makes expenditures that affect an election. Thus, one could not constitutionally support limiting 501(c)(4) organization's receipts and expenditures if that organization does nothing to influence federal elections. Similarly, it would not be appropriate to classify a state candidate committee or PAC as a federal committee (and subject to those limits) solely because it says in a solicitation that its activities will help elect a federal candidate.

This is particularly true given the reality of fundraising. Organizations routinely puff in their solicitations. Fundraising materials generally promote and even exaggerate organizations' importance and abilities. Accordingly, solicitations do not always represent an accurate indication of the organization's activities.

Accordingly, we respectfully suggest that the E&J limit § 100.57's application to organization's that actually conduct some threshold of political activity. In that regard, we suggest the complete exclusion of 501(c)(4) organizations that act within IRS requirements and do not have political activity as their primary purpose. Similarly, we suggest limiting § 100.57 with respect to 527 organizations to organizations that have some threshold level of activity directed toward federal elections.

Threshold of Receipts

Under § 100.57, an organization could be deemed a political committee based solely on the isolated and unapproved oral solicitations of a junior fundraiser. Organizations should not be subject to a rule that could allow a single person to legally transform an organization. Accordingly, we respectfully suggest two limits on the type of receipts that could result in a classification of an organization as a political committee. First, we suggest that there be some threshold of receipts before political committee status is triggered. Second, we suggest that the solicitations

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2 "Given the overwhelming tendency of public communications, as carefully defined in § 301(20)(a)(iii), to benefit directly federal candidates, we hold that application of § 323(b)'s contribution caps to such communications is closely drawn to the anti-corruption interest it is intended to address." Id.

subject to § 100.57 be limited to written solicitations authorized by organization's management.

Limitation on Political Committee Status and Required Reporting

To the extent that an organization becomes a political committee pursuant to § 100.57, it is not sensible to apply such status to the entire organization including all its activities. Rather, an organization that triggers § 100.5, should only be subject to political committee status vis-à-vis the money received in response to the solicitation that stated that a portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. An organization that sends such a solicitation should not be required to disclose all its donors and expenditures – disclosure should be limited to the particular receipts and the use thereof. Accordingly, we respectfully suggest that the E&J create reporting obligations similar Forms 5 and 7 – reporting required only if and when an organization engages in a particular type of activity.

Respectfully submitted,

Cassandra Lentchner

Cassandra Lentchner

cc: Lawrence Norton, General Counsel