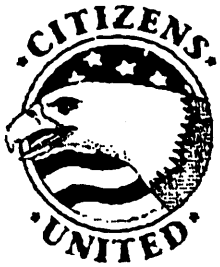

FAX

COVER SHEET

DATE: 4/5/2004 @ 3:10pmEDT

TO: Federal Election Commission

ATTN: Ms Mai T. Dinh Acting Ass't General Counsel

FAX: 202-219-3923

RE: Comments & Testimony Request/Notice 2004-6

PAGES: 28 (Including Cover)

FROM: Michael Boos

1006 Pennsylvania Ave, SE
Washington, DC 20003
202-547-5420
Fax: 202-547-5421

Via E-Mail, Facsimile
& First Class Mail

April 5, 2004

Ms. Mai T. Dihn
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments of Citizens United Regarding Proposed Changes to the Definitions of "Expenditure," "Contribution" and "Political Committee"

Dear Ms. Dihn:

Pursuant to the requirements of Federal Election Commission Notice 2004-6, please find enclosed (attached) the Comments of Citizens United Regarding Proposed Changes to the Definitions of "Expenditure," Contribution" and "Political Committee." Citizens United requests that its President, David N. Bossie, be allowed to testify on the organization's behalf during the April 14 and 15, 2004 hearings.

The enclosed (attached) comments are being submitted electronically in Microsoft Word (.doc) format. They are also being sent via facsimile and first class mail. The full name, electronic mail address and postal service address of the commenter are as follows:

Citizens United
c/o Michael Boos, Vice President & General Counsel
michaelboos@citizensunited.org
1006 Pennsylvania Avenue, SE
Washington, DC 20003

Again, the individual who will testify on behalf of Citizens United is David N. Bossie, the organization's president. Mr. Bossie may be contacted at the electronic and postal address listed herein.

If you have any questions or need additional information, I can be reached at the addresses listed above, or by telephone at 202-547-5420. Thank you.

Sincerely,

Michael Boos
Vice President & General Counsel

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:	:	
	:	
	:	
POLITICAL COMMITTEE STATUS	:	NOTICE 2004-6
	:	

COMMENTS OF CITIZENS UNITED

REGARDING PROPOSED CHANGES TO THE DEFINITIONS OF "EXPENDITURE," "CONTRIBUTION" AND "POLITICAL COMMITTEE"

SUBMITTED BY MICHAEL BOOS
VICE PRESIDENT & GENERAL COUNSEL
CITIZENS UNITED
1006 PENNSYLVANIA AVE., SE
WASHINGTON, DC 20003
TEL. 202-547-5420
FAX. 202-547-5421
E-MAIL: MICHAELBOOS@CITIZENSUNITED.ORG
APRIL 5, 2004

INTRODUCTION

Citizens United submits the following comments in response to the Federal Election Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM"), which seeks input from the public on whether the Commission should (1) amend its regulations defining "expenditure" to include certain disbursements that do not expressly advocate the election or defeat of a Federal candidate, (2) amend the definition of "contribution" to correspond to any changes in the definition of expenditure, and/or (e) amend the definition of "political committee" by adding a "major purpose" test. See Notice of Proposed Rulemaking, 69 Fed. Reg. 11,736 – 11,760 (March 11, 2004).

Citizens United is a non-profit membership organization that is exempt from taxation under Section 501(c)(4) of the Internal Revenue Code. The organization is dedicated primarily to principles of limited government, national sovereignty and rights secured under the United States Constitution. Citizens United uses a variety of formats to present its views and the views of its members on legislative and public policy issues to federal, state and local government officials, and the general public.

Citizens United also maintains a separate segregated fund named Citizens United Political Victory Fund (CU-PVF), which receives "contributions" and makes "expenditures" under the Commission's existing rules. CU-PVF is registered with the Commission as a multi-candidate political action committee. Citizens United and CU-PVF were plaintiffs in the recent constitutional challenge to the so-called Bipartisan Campaign Reform Act ("BCRA"), which culminated with the Supreme Court's decision last December in McConnell v. FEC, 540 U.S. ___, 124 S. Ct. 619 (2003).

Since its founding in 1988, Citizens United has employed a variety of channels to communicate its views to its members, government officials and the public at large. Modes of communication have included, but are not necessarily limited to, direct mail, handbills, internet, television, radio, print publications, court briefs and public forums. With the exception of communications paid for by CU-PVF, the organization does not expressly advocate the election or defeat of candidates for elective office in its contacts with the public. Nevertheless, Citizens United's communications frequently mention the names of public officials and candidates for elective office, including Federal candidates. For example, in the spring of 2003 Citizens United helped finance the production and broadcasting of two television commercials featuring former U.S. Senator Fred Thompson. The commercials, which mentioned President Bush, encouraged Americans to rally in support of American troops and the prosecution of the War on Terror. More recently, Citizens United paid for a television ad spoofing Senator John Kerry's claim to be a "man of the people." This ad, however, did not expressly advocate the election or defeat of Mr. Kerry, nor did it qualify as an electioneering communication under the Commission's rules.

Although Citizens United's annual revenues and expenditures vary from year to year, for each of the past five years, the organization estimates that it has spent in excess of $750,000 on communications that mention the names of Federal candidates in the context of discussing controversial issues. For example, one of the organization's ongoing projects is entitled "Citizens United for the Bush Agenda," which promotes enactment of various legislative and policy initiatives backed by the Bush Administration. In 2003, this project raised and spent in excess of $2,000,000. In

contrast, the expenditures of CU-PVF, which include express advocacy for the election or defeat of Federal candidates, have not reached $50,000 in any calendar year.

Citizens United has deep-seated interests in the matters addressed in the NPRM. As a strong advocate for free and robust debate on public policy matters, the organization is quite concerned that the proposed amendments to the Commission's rules would stifle free speech by subjecting Citizens United and scores of other advocacy organizations to the fund-raising restrictions and burdensome reporting requirements of the Federal Election Campaign Act ("FECA"). Citizens United believes that laws inhibiting peaceful free speech, especially those restricting political speech, should be construed narrowly in order to minimize their encroachment on the exercise of constitutional rights.

SUMMARY OF COMMENTS

Citizens United strongly opposes any changes to the Commission's rules that would broaden the definitions of "expenditure" and/or "political committee" to encompass activities that fall short of the express advocacy of the election or defeat of clearly identified Federal candidates. We also strongly oppose any changes to the existing rules that would incorporate the "major" purposes test proposed in the NPRM.

1. We believe the proposed rules would have the undesirable effect of classifying Citizens United and scores, if not hundreds or perhaps thousands, of advocacy organizations as political committees. Effective issue advocacy necessarily includes the association of policy issues with the political personalities who support or oppose the issues of importance to the organization. Citizens United and a diverse array of national advocacy organizations will easily surpass the $10,000 and $50,000 annual disbursement thresholds that will classify them as political committees even though there expenditures

on these activities would be fully consistent with IRS regulations governing their tax-exempt status. In addition, the Supreme Court in McConnell expressly recognized that BCRA's bar on the use of soft money by political party organizations for "Federal election activities" does not apply to advocacy groups.

II. Subjecting advocacy organizations to FECA's contribution limits and comprehensive disclosure scheme will impose huge compliance costs on "small entities." Contrary to the Commission's conclusions, we believe the proposed rule changes for effect numerous 501(c) organizations in addition to Section 527 organizations. Moreover, the classification of Citizens United and similarly situated groups as political committees will divert limited resources from programs to compliance and other administrative costs. Citizens United estimates that the rule changes will require it to increase its annual administrative budget by at least 40%. Other groups will be similarly affected.

In addition, FECA's limitations on the amounts and sources of contributions will have a serious adverse affect to the funding of advocacy organizations that are currently not subject to the FECA restrictions.

III. Because the proposed rule changes radically depart from the long-standing interpretations of the terms "expenditure" and "political committee," and Congress passed BCRA in reliance on the prior understanding of the definitions, the Commission lacks authority to broaden the definitions as proposed. Similar to the Food & Drug Administration's attempt to regulate tobacco, see FDA v. Brown & Williamson, 529 U.S. 120 (2000), the proposed rules create internal inconsistency in FECA as amended by BCRA.

If the rules are adopted as proposed they would render BRCA's disclosure requirements for electioneering communications a virtual nullity. Defining "expenditure" and "political committee" with reference to "Federal election communications," would be contrary to the Supreme Court's interpretation of BCRA in McConnell, where the Court specifically determined that the restrictions on the use of soft money for those type activities do not apply to advocacy organizations. And the proposed "major purpose" test is so restrictive that the newsletter published by Massachusetts Citizens for Life in 1977 would result in it being classified as a political committee under the test if it were to publish the same newsletter today.

IV. While Citizens United would welcome the exemption of Section 501(c) organizations from the definition of political committee, we believe that the Commission nevertheless lacks the authority to expand the definition to include certain Section 527 organizations that do not qualify as political committees under the existing rules. In November 2002, Congress passed a separate law requiring Section527 organizations that are not subject to FECA to file detailed periodic reports with the Internal Revenue Service, which are subject to public disclosure. In light of Congress having passed an alternative comprehensive regulatory scheme for Section 527 organizations, we believe it would be inappropriate for the Commission to require those groups to file redundant reports under FECA.

V. If contrary to Citizens United's position, the Commission amends its rules as proposed we urge the Commission to delay the effective date until at least January 1, 2005. Any earlier effective date will open a proverbial "can of worms" that will cause a

regulatory and enforcement nightmare for the Commission, the courts and the regulated community.

DISCUSSION & ANALYSIS

For the reasons set forth below, Citizens United strongly opposes any changes to the Commission's rules that would broaden the definition of "expenditure" to include the use of funds for purposes other than express advocacy.[1] Citizens United also strongly opposes any rule change that would expand the definition of "political committee" to include entities whose principal purpose is not the election or defeat of Federal candidates.

I. THE PROPOSED CHANGES TO THE DEFINITIONS OF "EXPENDITURE" AND "POLITICAL COMMITTEE," INCLUDING THE "MAJOR PURPOSE" TEST, WILL LIKELY RESULT IN CITIZENS UNITED AND SCORES OF OTHER ADVOCACY ORGANIZATIONS BEING CATEGORIZED AS POLITICAL COMMITTEES.

In recent testimony before the Senate Committee on Rules, Senator John McCain, one of the primary sponsors of BCRA, stated his belief that Section 501(c) organizations should not be required to register with the Commission as political committees because their primary purpose is not to influence elections. In distinguishing Section 527 political organizations from other non-profit groups, Senator McCain stated:

> But many other organizations, although politically active, do not have partisan politics as their primary purpose. Section 501(c) groups, for instance, are prohibited by the tax laws from having a primary purpose to influence elections. These groups thus operate under different rules, and appropriately so.

---

[1] With the exception of the proposal related to "independent expenditures," changes to the definition of "contribution" are being proposed to correspond to changes made in the definitions of "expenditure" or "political committee." Because Citizens United opposes any changes to the definitions of the latter terms we see no need for the Commission to tinker with the definition of "contribution."

> Section 501(c) groups can – and should - engage in nonpartisan voter mobilization activities without restriction. And under existing tax laws, Section 501(c) groups – unlike section 527 groups -- cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as long as they comply with their tax law requirements. Much of the public controversy surrounding the FEC's rulemaking stems from a failure to understand these simple distinctions.

See Statement of Senator John McCain, Senate Committee on Rules (Mar. 10, 2004) available at http://rules.senate.gov/hearings/2004/031004_hearing.htm.

Although Citizens United often disagrees with Senator McCain on issues related to the First Amendment and campaign finance laws, see, e.g., McConnell v. FEC, 540 U.S. ___, 124 S.Ct. 619 (2003), we find ourselves in partial agreement with the above-quoted statement. As a Section 501(c)(4) organization, Citizens United may lawfully engage in unlimited public policy advocacy, but the organization is restricted with respect to its level of partisan political activity. Recently, the IRS issued a Revenue Ruling providing guidance to groups such as Citizens United on the level of political activity that is permitted under Section 501(c). See IRS Rev. Rul. 2004-6.

But under the proposed changes to the Commission's rules many 501(c) organizations, including Citizens United, will be at risk of being categorized as political organizations even though they are in compliance with IRS rules governing their tax-exempt status. The reason is quite simple: Effective issue advocacy necessarily includes the association of policy issues with the political personalities who support or oppose the issues of importance to an organization. As the IRS revenue ruling recently noted, "public policy advocacy may involve discussion of the positions of public officials who are also candidates for public office." Id. The principal problem under the proposals is that any expenditures that associate a candidate with the public policy issues that he or

she supports or opposes will constitute an expenditure for "Federal elections activities," which, in turn, will result in the organization being categorized as a political committee if the organization makes more than $10,000 in "expenditures" in a single year and meets one of the four "major purpose" test definitions.

As noted in the introduction to these comments, Citizens United has an ongoing project entitled "Citizens United for the Bush Agenda." Among other things, the project has promoted the president's tax cut initiatives, supported his efforts to strengthen America's national defense and prosecute the War on Terror, and pushed for Senate confirmation of his judicial and executive branch appointees. In 2003, Citizens United spent in excess of $2,000,000 on its Citizens United for the Bush Agenda project. While none of the project's expenditures expressly advocated President Bush's re-election, hundreds of thousands of dollars were spent on communications that spoke favorably about President Bush and his policy initiatives. Examples include:

- television advertisements in the spring, which encouraged Americans to support the President's efforts to prosecute the War on Terror,
- direct mail communications that included upbeat photos of the President and encouraged recipients to sign petitions in support of various policy initiatives or legislation, and
- publication and distribution a 2004 calendar that featured numerous images of Mr. Bush and highlights various achievements of his life and presidency.

In reliance on the existing Commission rules, Citizens United is planning to spend a comparable amount on similar activities in 2004. Several direct mail appeals in support of the President's policy initiatives have been mailed and many more are in production. One television ad has already been aired and others are under consideration. None of the

organization's 2003 or 2004 expenditures qualify as an independent expenditure because none of them expressly advocate the election or defeat of President Bush or any other candidate for Federal office. See 11 CFR § 100.16(a). In addition, the TV ads do not meet the criteria for an electioneering communication because they have not, and will not, be "publicly distributed" in any state within 30 days of the state's presidential primary, caucus or nominating convention, nor will they be broadcast in any state within 60 days of the general election. See 100 CFR §§ 100.29(a)(2) and 100.29(b)(3)(ii). Thus, under the Commission's existing rules, none of Citizens United's existing or contemplated activities for 2004 are subject to regulation under FECA.[2]

But if the Commission were to adopt the rule changes proposed in the NPRM, Citizens United would almost certainly be categorized as a political committee unless it dramatically alters its advocacy programs. Many of the activities already underway would likely fit the definition of "Federal election activities" under 11 CFR § 100.24(b)(3), because President Bush is running for re-election and the organization's statements in support of his policies will be construed as promoting or supporting him. In a similar vein, any statements by Citizens United that mention Senator John Kerry and are critical of the policy or legislative positions he has taken will also be construed as "Federal election activities." Since Citizens United expenditures are likely to easily exceed the proposed rule's $10,000 and $50,000 thresholds, Citizens United will be required to register as a political committee, and, as such, be subject to FECA's

[2] The exception, of course, would be any expenditure by CU-PVF. Through March 31 of this year, however, CU-PVF has made only $1,000.00 in expenditures, which was a contribution to a congressional candidate.

restrictions on the receipt of contributions, and be required to comply with the Act's comprehensive and burdensome public disclosure provisions.

But Citizens United will not be the only advocacy organization transformed into a political committee. Scores of advocacy groups, if not hundreds or perhaps thousands, will be similarly affected. Groups as diverse as the American Association of Retired Persons, American Bar Association, American Civil Liberties Union, American Conservative Union, Americans for Democratic Action, American Medical Association, Americans for Tax Reform, Citizens for a Sound Economy, Eagle Forum, Fraternal Order of Police, Greenpeace, Handgun Control, Inc., National Abortion Rights Action League, National Rifle Association, National Organization for Women, National Resources Defense Council, National Right to Life Committee, Public Citizen and Sierra Club will each be at risk of being labeled a political committee unless they vastly overhaul their public policy advocacy campaigns to eliminate any and all mention of candidates for Federal political office during an election year.

In addition to the devastating impact that the proposed rule changes will have on public policy organizations, Citizens United believes the proposals are clearly inconsistent with congressional intent. In upholding BCRA's ban on the use of soft money by political parties for Federal election activities, the Supreme Court clearly recognized and upheld Congress' decision not to impose similar restrictions on advocacy organizations. To that end, the Court stated:

> Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications). We conclude that this disparate treatment does not offend the Constitution.

* * * *

national advocacy organizations that exist in America today will be similarly categorized as political committees unless they dramatically alter their advocacy activities. Thus, a huge number of 501(c) organizations, in addition to Section 527 organizations, will be adversely affected if these particular proposals are adopted.

We also firmly dispute the Commission's conclusion that FECA's disclosure requirements and restrictions on contributions will have only a negligible effect on small entities. The hundreds of court cases, matters under review and advisory opinions that have arisen under FECA since it was first enacted conclusively demonstrate that the Act's regulatory scheme is far from simple or easy to understand. Legitimate disputes

> Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation in the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences.

McConnell, 124 S.Ct. at 686. In our opinion, this pronouncement makes clear that Congress has not authorized the Commission to categorize non-party organizations as political committees based on their disbursements for so-call "Federal election activities."[3]

II. SUBJECTING ORGANIZATIONS SUCH AS CITIZENS UNITED TO FECA'S CONTRIBUTION LIMITS AND COMPREHENSIVE DISCLOSURE SCHEME WILL IMPOSE HUGE COMPLIANCE COSTS ON "SMALL ENTITIES."

In its "initial regulatory flexibility analysis," prepared pursuant to the Regulatory Flexibility Act, the Commission certifies that it does not believe that the proposed rule changes will have a significant economic impact on a substantial number of small entities. See NPRM, 69 Fed. Reg. at 11,755-11,756. While the Commission acknowledges that it has no hard data on the number of organizations that may be affected by the rule proposals, it surmises that "most of the organizations that would be affected by the proposed rule are 'political organizations' organized under section 527 of

[3] Although Citizens United does not engage in any significant level of voter registration or get-out-the-vote activities, we are concerned that the proposed rules changes would inhibit the voter registration and get-out-the-vote activities of advocacy organizations that are active in that area. In light of the above-quoted language in McConnell, we believe it is quite clear that BCRA does not authorize the Commission to classify non-party entities as political committees based on their voter registration and get-out-the-vote activities, irrespective of whether those activities are deemed to be "partisan."

often take years to resolve and cost the taxpayers and regulated community untold millions of dollars. The fact that the Commission is still seeking to promulgate rules defining FECA's most basic terms demonstrates that the Act is not yet fully comprehended be even the most learned professional in the field of federal election law.

From the standpoint of the regulated community, FECA's reporting requirements and other compliance-related obligations are extremely burdensome to small organizations.[4] As mentioned in the introduction to these comments, CU-PVF is Citizens United's separate segregated fund under FECA. Although CU-PVF has never raised or spent more than $42,000 in any one year, Citizens United showed in its constitutional challenge to BCRA that it routinely incurs between $5,000 and $12,000 per year in administrative costs in keeping CU-PVF in compliance with FECA. See "Declaration of Michael Boos," Congressman Ron Paul v. Federal Election Commission, (DDC No. 02-CV-781). If Citizens United were classified as a political committee, we estimate the organization's annual administrative costs for FECA-related compliance would increase to between $100,000 and $250,000. Other similarly situated advocacy organizations could expect comparative increases in their annual administrative costs. These added costs are quite significant. Based on 2002 figures,[5] FECA compliance costs would increase Citizens United's overall annual administrative expenses of at least 40%.

---

[4] The Commission's contention to the contrary appears to be somewhat disingenuous in light of its request for an 11.5% budget increase following enactment of BCRA. According to the Commission's April 25, 2002 news release, the supplemental funding request reflected the added costs of implementing BCRA during the 2003 fiscal year. See FEC News Release, April 25, 2002. If, as the Commission contends in the pending rule-making, compliance with the new regulatory scheme is neither complicated nor expensive, there should have been no need for the Commission to seek a $5,366,200 appropriation increase.

[5] 2002 is the most recent fiscal year for which the organization has completed audited financial statements.

And for every dollar the organization incurs in increased administrative costs, it must cut programs by an equal amount.

But increased administrative costs are far from the only financial burdens the organization will forced to bear. Since Citizens United is not a political committee under the Commission's existing rules, it is not subject to FECA's $5,000 per year cap on contributions from individuals, nor is Citizens United subject to FECA's bar on corporate gifts. Over its history, Citizens United has received a number of generous contributions from individuals in excess of $5,000 per year, and it sometimes receives gifts from corporate entities. These receipts will be prohibited if Citizens United is classified as a political committee. Thus, besides increasing the organization's administrative costs by at least 40%, the proposed rule changes will further burden the organization by decreasing its annual revenues. Other like organizations will be similarly affected.

III. THE COMMISSION LACKS THE AUTHORITY TO BROADEN THE DEFINITIONS OF "EXPENDITURE" AND "POLITICAL COMMITTEE" AS PROPOSED IN THE NPRM.

Although a regulatory agency enjoys significant leeway in construing the terms of a statute it administers, see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000), agency rules are required to comport with congressional intent. See Chevron, U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-843 (1984). And rules that depart radically from an agency's traditional interpretation of a statute's breath are looked upon with deep suspicion, especially where Congress has enacted legislation in reliance on the agency's long-standing prior interpretation and the rule changes would create anomalies in the law. Brown & Williamson, 529 U.S. at 143-159.

Citizens United believes the proposed changes to the definitions of "expenditure," and "political committee" as set forth in the NPRM are inconsistent with clear congressional intent. Similar to the FDA's attempt to regulate tobacco, see Brown & Williamson, 529 U.S. at 143-159, the proposed rules depart radically from the long-standing interpretations of the terms at issue and create internal inconsistencies in FECA as recently amended by BCRA.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court definitively construed the terms "expenditure," and "political committee" as defined by FECA. The Supreme Court read the term "expenditure" to include "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 79-80. The term "political committee" was interpreted to "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." Id. at 79 (emphasis added). As noted in the NPRM, 69 Fed. Reg. 11,737, the Buckley definition of "political committee" was reaffirmed ten years later in FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 262 (1986). Thus, for nearly thirty years, Congress, the Commission, the courts and the regulated community have clearly understood these terms "expenditure" and "political committee" to mean precisely what the Court in Buckley said they mean.[6]

[6] On those occasions when the Commission has sought to depart from the Supreme Court's long-standing interpretations of these terms, it has paid a significant price. For example, in FEC v. Christian Action Network, the Fourth Circuit U.S. Court of Appeals required the Commission to pay the Christian Action Network's attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, because the Commission's position with respect to the definition of "expenditure" was "contrary to clear, well-established Supreme Court caselaw." FEC v. Christian Action Network, 100 F.3d 1049, 1050-1051 (4th Cir. 1997).

When Congress passed BCRA in 2002, it acted with a full and complete understanding of the definitions of "expenditure" and "political committee," and relied on those definitions. If Congress had wanted to change either or both definitions it could have easily done so. Instead, the legislative body left the definitions largely in tact, opting instead to make changes elsewhere in the law by creating new terms and categories of regulated activities. As pointed out below, if the Commission amends the definitions of "expenditure" or "political committee" a proposed in Alternative 1-A and "major purposes" test, it will create serious anomalies in the law.

A. Electioneering Communications

BCRA created a new category of regulated activity called "electioneering communications." See 2 U.S.C. §434(f). In general terms, BCRA defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified Federal candidate, and is publicly distributed for a fee within 60 days before a general election or 30 days before a primary election or convention, and is targeted to the relevant electorate. See 2 U.S.C. § 434(f)(3)(A)(i). As pointed out in the NPRM, "BCRA establishes disclosure requirements for persons who make electioneering communications," 69 Fed. Reg. 11,738. Specifically, BCRA requires persons making electioneering communications in excess of $10,000 in a calendar year to disclose the expenditures to the Commission within twenty-four hours. 2 U.S.C. § 434(f)(1).

If the Commission were to adopt rules that (1) include "electioneering communications" within the definition of "expenditure" at 2 U.S.C. § 431(9), as proposed in Alternative 1-A, and (2) redefine a "political committee," to include "a

major purpose" as proposed in the "major purpose" test, it would effectively cancel out BCRA's provisions relating to the reporting of "electioneering communications."

Under the proposed rule changes any group that would make disbursements in a year in excess of $10,000 on electioneering communications, or a combination of electioneering communications and certain other election-related disbursements, would ipso facto be designated a political committee. But as a political committee, the group would be exempt from BCRA's electioneering communications disclosure requirements, because it is subject to the much broader contribution restrictions and disclosure requirements that apply to political committees. As the Commission explained in a recent advisory opinion:

> The Act and Commission regulations set forth four exceptions to the definition of "electioneering communication." 2 U.S.C. 434(f)(3)(B); 11 CFR 100.29(c). One of these statutory exceptions covers communications that are expenditures or independent expenditures under the Act. 2 U.S.C. 434(f)(3)(B)(ii). The Commission determined that communications that would otherwise meet the definition of electioneering communications are, in fact, expenditures when made by a political committee and must be reported as such. "Electioneering Communications; Final Rules," 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002); see also "Bipartisan Campaign Reform Act of 2002; Reporting; Notice of Proposed Rulemaking," 67 Fed. Reg. 64,555, 64,561 (October 21, 2002). Accordingly, Federal political committees, by operation of the expenditure and independent expenditure exemption in 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), are not subject to BCRA's electioneering communication provisions.

FEC AO 2003-37 (Feb. 19, 2004).

Thus, under Alternative 1-A and the "major purposes" test, anytime a group becomes subject to BCRA's disclosure requirements for electioneering communications, it simultaneously becomes exempt from those reporting requirements because it is transformed into a political committee, which, in turn, is subject to much more stringent restrictions and reporting requirements.

If Congress had wanted a group to be categorized as a political committee by spending in excess of $10,000 on electioneering communications in a given year, it would not have enacted BCRA's separate disclosure provisions relating to electioneering communications. Instead it would have broadened the definition of "expenditure" in 2 U.S.C. § 431(9) to include any disbursements for electioneering communications in excess of $10.000 in a year.

Citizens United does not believe that Congress created separate and less burdensome disclosure requirements for entities making electioneering communications disbursements with the intent of having the Commission nullify those requirements by imposing the more stringent rules that are applicable to political committees.

B. Federal Election Activities

The proposed definitions of "expenditure" and "political committee" pose similar problems with respect to "Federal election activities." As explained in the NPRM, BCRA created a new category of regulated activity called "Federal election activities," which restricts the funds that can be used by state and local party committees for activities that fall within the definition. See NPRM, 69 Fed. Reg. at 11,737. More specifically, BCRA requires state and local party committees to use hard money to fund their Federal election activities, see 2 U.S.C. § 441i(b)(1), but, as the Supreme Court explained in McConnell, Congress did not impose similar restrictions on other entities, such as special interest groups, that might engage in voter registration, get-out-the-vote, or other Federal election activities.[7] See McConnell, 124 S.Ct. at 685-686.

[7] In McConnell, the Supreme Court upheld BCRA against a facial constitutional challenge. If the Commission adopts a "major purposes" test that defines a group as a political committee based on its expenditures for so-called "Federal election activities" it

In light of the Supreme Court's specific interpretation of BCRA, which is discussed more fully above, it is clear that any attempt by the Commission to redefine "expenditure" and "political committee" to encompass activities falling within the definition of Federal election activity would be clearly inconsistent with congressional intent. If Congress had intended to impose restrictions applicable to state and local party organizations on advocacy organizations, it would have written the law to do so by amending the statutory definitions of "expenditure" at 2 U.S.C. § 431(9) and "political committee" at 2 U.S.C. § 431(4) to include the expenditure of funds for "Federal election activities." As the Supreme Court recognized in McConnell, Congress chose not to do this; thus, the Commission lacks the authority to impose such any such restrictions via its rulemaking process.[8]

C. Major Purposes Test.

---

risks hundreds if not thousands of "as applied" constitutional challenges to the rule for the very reason the Supreme Court imposed the narrowing construction on the term in Buckley. In short, the proposed rule will incorporate within the definition of "political committee" those groups having issue advocacy as their overarching purpose.

[8] The adoption of a rule that labels a group as a political committee based on its Federal election activity disbursements also creates an internal inconsistency in 26 U.S.C. § 441i(e). Sub-section 441i(e)(1)(A) prohibits Federal candidates and Federal public officials from soliciting soft-money contributions for Federal election activities, but sub-section 441i(e)(4) allows them to make general solicitations on behalf of "any organization that is described in section 501(c) of the Internal revenue Code of 1986 and exempt from taxation under section 501(a)," except if the entity's "principal purpose" is to engage in certain voter registration activities and get-out-the-vote activities. If Alternative 1-A and the "major purpose" test are adopted, Federal candidates will be effectively barred from soliciting soft-money contributions to advocacy organizations that comment favorably or negatively on public officials and candidates, because those entities will be categorized as political committees and thus prohibited from soliciting or accepting soft money contributions. In Citizens United's view, if Congress had intended such a result it would have included 26 U.S.C. § 431(20)(A)(iii) among the prohibitions on solicitations for 501(c) organizations by Federal candidates and public officials.

The proposed "major purpose" test does not comport with the major purpose requirement imposed by the Supreme Court in Buckley, and is clearly inconsistent with Congressional intent. As mentioned above, in Buckley, the Supreme Court narrowed the statutory language defining a "political organization" to include only those entities that "are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Buckley, 424 U.S. at 79 (emphasis added). This definition was reaffirmed in FEC v. Massachusetts Citizens for Life ("MCFL"), where the Court stated:

> should MCFL'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.

MCLF, 479 U.S. at 262 (citations omitted). Thus, prior to the enactment of BCRA it was understood by Congress, the Commission, the courts and the public that a group could spend significant funds on election-related activities, including express advocacy, without becoming a political committee, so long as the organization's political expenditures did not become so extensive as to change the organization's principal purpose. In other words, the major purpose test was universally understood to include the definite article "the" to modify "major purpose," not the indefinite article "a" as proposed.

As acknowledged in the NPRM, use of the modifier "a" significantly alters the meaning of the major purpose test. The NPRM states:

> The consequence would be that the major purpose element of the definition of 'political committee' may be satisfied if the nomination or election of a candidate or candidates is one of two or more major purposes of an organization, even if it is not its primary purpose.

NPRM, 69 Fed. Reg. 11,744. Nevertheless, the NPRM does not cite any statutory language in BCRA to justify the proposed altering of the major purpose test, nor does it contend that the Supreme Court's decision in McConnell v. FEC overruled or altered

Buckley's construction of the term "political committee." Instead, the NPRM suggests the Buckley Court's "apparent intention" was to:

> limit the applicability of the definition of political committee so that it would not cover organizations involved 'purely in issue discussion,' but that nevertheless engage in some incidental activity that might otherwise satisfy the Act's $1,000 expenditure or contribution political committee thresholds.

NPRM, 69 Fed. Reg. at 11,744.

In Citizens United's view, there is no doubt that the Supreme Court meant what it said in Buckley, when it stated that an organization that is not controlled by a candidate will only be classified as a political committee if "the major purpose" of the group is the election of candidates to political office. Buckley, 434 U.S. at 79 (emphasis added.) This limitation on the definition of a political committee was specifically re-affirmed in MCLF, where the Court noted that the organization would be re-classified as a political committee if its independent expenditures became so extensive as to alter "the organization's major purpose." MCLF, 479 U.S. at 262. In light of two separate Supreme Court cases, decided ten years apart, which applied the same "major purpose" test in construing the definition of a political committee under FECA, there can be no real doubt that the Court meant precisely what it said in Buckley in using the definite article "the" to modify "major purpose," as opposed the indefinite article "a", as proposed in the NPRM.

If, however, any Commission member has any lingering doubt as to what the Court meant, we urge him or her to apply the facts of MCFL to the proposed rule change. As the Supreme Court noted in its opinion, MCFL spent $9,812.76 in 1977 dollars to publish and circulate more than 50,000 copies of the special edition of its newsletter,

which expressly advocated the election and/or defeat of various candidates for Federal elective office. See MCFL, 479 U.S. at 243-249. Due to the impact of inflation, we estimate the group would need to spend well in excess of $25,000 today to publish and distribute the same newsletter. Such an amount far exceeds the $10,000 annual threshold for independent expenditures that would qualify the group as a political committee under the "major purpose" test. Thus, it is clear that the proposed 'major purpose" test is wholly inconsistent with the Supreme Court's decision in MCFL.

* * * *

From Citizens United's perspective, the proposed changes to the terms "expenditure" and "political committee" depart radically from the long-term interpretations of those terms. Since Congress recently amended FECA in reliance on the traditional understanding of those terms, the Commission lacks authority to adopt rules that define the terms in a manner that is inconsistent with the BCRA amendments.

IV. EXEMPTING 501(C) ORGANIZATIONS WOULD ALLEVAITE SOME PROBLEMS, BUT THE RULE CHANGES WOULD NEVERTHELESS REMAIN INCONSISTENT WITH CONGRESSIONAL INTENT.

Citizens United would certainly welcome any change to the proposed rules that would exempt Section 501(c) organizations from the definition of political committee. As explained above, we believe the proposed rules go too far and would be extremely burdensome on advocacy organizations.[9]

---

[9] We take strong exception to the suggestion that "the various thresholds in the major purpose tests are set high enough that certain 501(c) organization may continue to conduct incidental or low levels of election activities without satisfying any of the major purpose test and triggering political committee status." See NPRM, 69 Fed. Reg. at 11,756. As shown above, MCFL would be classified as a political committee if it were to publish the newsletter at issue in the case during the current election cycle. While a 50% threshold that evaluates election-related activity over several years would likely meet the

On the other hand, we do not believe that FECA, as amended by BCRA, allows the Commission to re-define the definition of political committee to encompass Section 527 organizations that are not currently required to register with the Commission. In particular, we note that on November 2, 2002, Public Law 107-276 was enacted, which requires Section 527 groups to file periodic reports with the Internal Revenue Service. Similar to the reports filed with the Commission by political committees, the reports filed with the IRS by Section 527 organizations include detailed information about the group's contributions and expenditures, and are open to public inspection. In light of Congress having passed an alternative comprehensive regulatory scheme for Section 527 groups that do not qualify as political committees under the Commission existing regulatory scheme, we believe it would be inappropriate for the Commission to require these groups to file redundant reports under FECA.

If Congress had intended to impose FECA's contribution restrictions on Section 527 organizations that do not meet the existing criteria for political committee status under FECA, it seems likely that it would have done so explicitly in either BCRA or Public Law 107-276. After all, Congress was keenly aware that the Commission was not requiring these groups to file under FECA. In light of Congress having passed an alternative regulatory scheme for Section 527 organizations that do not qualify as political committees under the Commission's existing criteria, we believe the Commission would be exceeding its regulatory authority if it were to re-define the

---

major purpose tests of Buckley and MCFL, any test that measures an entities "major purpose" in set dollar amounts inherently discriminates against an organization with a large membership or sizable public communications budget.

definitions of political committee and expenditure in order to subject them to FECA's registration, contribution limitations and public disclosure requirements.

V. IF, CONTRARY TO CITIZENS UNITED POSITION, THE COMMISSION DECIDES TO AMEND THE DEFINITIONS OF "EXPENDITURE" AND "POLITICAL COMMITTEE," WE URGE THE COMMISSION TO DELAY THE EFFECTIVE DATE OF ITS AMENDMENTS UNTIL AT LEAST JANUARY 1, 2005.

For the most part, the proposed changes to the Commission rules define "expenditure" and "political committee" with reference to the amount of annual disbursements made by an organization. Even under the most accelerated process, the proposed rule changes could not go into effect prior to late spring. By the earliest possible effective date many organizations, including Citizens United, will have already made disbursements, or be contractually obligated to make disbursements, for amounts far in excess of the annual thresholds proposed in the rule-making notice. Thus, from a practical standpoint, it will be difficult, if not impossible, to determine when or if a particular expenditure triggers the application of one or more of the proposed new rules.

For example, if prior to the effective date of the new rules a group has made $9,000 in 2004 disbursement for what is characterized as "Federal election activities," would this amount be counted toward the $10,000 and $50,000 thresholds on the new definitions of "expenditure" and/or "political committee"? If so, how will the rules be applied with respect to a group that exceeds the annual thresholds prior to the effective date of the new rules?

Some groups may have already entered into binding contracts for certain activities that will occur after the effective date of the new rules, how will disbursements pursuant to a pre-existing contract be handled?

In Citizens United's view, January 1, 2005 is the earliest possible effective date that the Commission should consider. Any earlier date will open a proverbial "can of worms" that will cause a regulatory and enforcement nightmare for the Commission, the courts and the regulated community. Thus, we believe the most suited effective date for any rule that imposes annual disbursement thresholds would be on the first day of a calendar year following adoption of the rule.[10]

[10] The Commission's prior rule-making practices provide ample precedent for delaying the effective date on any new rules until January 1, 2005 or some later date. See, e.g., Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064 (July 29, 2003)(delaying effective date of 11 CFR § 106.7(a) until January 1, 2003).