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COMMENTS:

Following are the National Right to Work Committee's comments on the Commission's Notice of Proposed Rulemaking ("NPRM") 2004-6, 69 FR 11736. The original printed copy is being mailed to you today.

National Right to Work Committee

A COALITION OF EMPLOYEES AND EMPLOYERS
NATIONAL HEADQUARTERS BUILDING

April 5, 2004

Mai T. Dinh, Acting
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking ("NPRM") 2004-6, 69 FR 11736

Dear Ms. Dinh:

The National Right to Work Committee ("NRTWC") files these comments in response to NPRM 2004-6, which proposes to amend the definitions primarily of nonconnected "political committee" and secondarily of "contributions" and "expenditures" in the Federal Election Commission's regulations, Title 11 of the Code of Federal Regulations ("CFR").

Introduction

NRTWC is a nonprofit organization incorporated under the Virginia Nonstock Corporation Act and exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code ("IRC"). It has been in existence for forty-nine years, having been formed in 1955, initially as an unincorporated association.

NRTWC's purpose is to educate the public on and to advocate voluntary unionism, that is, the principle that "Americans must have the right, but not be compelled, to join labor unions." NRTWC does this through a variety of communications, depending on the circumstances, such as a monthly newsletter, direct mail, press releases, press conferences, actiongrams, advertisements, a web site, phone banks, and direct lobbying of Congress and the Executive Branch. NRTWC is constantly reaching out to its members, the general public, and public figures to promote its cause.

NRTWC sponsors two separate segregated funds, which are treated as IRC § 527 organizations. One is a newly created Federal PAC called The National Right to Work Committee PAC. The other is an exclusively state/local level PAC called State Employee Rights Campaign Committee (SERCC), which is registered in and operates out of Virginia. These PACs are treated as separate organizations pursuant to IRC § 527(e)(1) and (f)(3).

Thus, NRTWC is able to address the concerns of NPRM 2004-6 from the perspective of a Section 501(c)(4) organization that operates separate segregated political funds at both the state and federal levels.

NRTWC believes that its ability to carry out its First Amendment, cause-promotion activities may be adversely affected by the outcome of this rulemaking proceeding. That is, the proposed rules may create too expansive a definition of the terms under consideration and, in the process, unnecessarily and constitutionally impinge upon the work NRTWC and similar organizations do to educate the public on their issues and to convince the public (including public figures, some of whom will from time to time be federal candidates) to support their principles.

The Commission should proceed with caution, leaving generous breathing space for the exercise of First Amendment freedoms by American citizens. Any poorly conceived or expansive regulation will chill speech and associational activities that the Commission is precluded from regulating, especially "issue discussion," as distinguished from "express advocacy" and "electioneering communications." *See, Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, culminating in *McConnell v. FEC*, 540 U.S. ___, 124 S. Ct. 619 (2003).

The Commission should take adequate time to consider the full effect of its proposals, especially as they pertain to 501(c) organizations.[1] A highly charged election year is a difficult time to comply with existing regulations, much less shift to dealing with new ones, especially if an organization may be recharacterized as a result of the new rules. Many 501(c) organizations, in particular, will have corporate contributions in their general treasuries, which may put them in automatic violation of the FECA if they are deemed "political committees" under the new rules.[2]

Any Regulations Should Respect the First Amendment and Structures Provided by Law for Citizens to Organize

In this NPRM, the Commission manifests a great deal of knowledge about the various types of organizations that can be used by citizen activists to promote their causes, and NRTWC encourages the Commission to be sensitive to those options. The various organizational choices

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[1] The Commission has given the public very little time to analyze the proposed rules. The NPRM was published on March 11th, and the public was given just over three weeks to file comments, with hearings scheduled for just a month after publication of the notice. Such time constraints necessarily limit the public's ability to analyze and comment on the proposed rules.

[2] The U.S. District Court for the District of Columbia recently extended the time for compliance with new Department of Labor reporting rules because the rules did not allow adequate time for the regulated entities to alter their accounting and compliance systems. *AFL-CIO v. Chao*, 298 F.Supp.2d 104 (D.D.C., 2004).

available to citizens exist either as constitutional necessities or as statutorily approved ways of organizing and operating, and the final rules should respect that.[3] We will start with a short summary of some of the available options. (There are many different types of 501(c) organizations, but no attempt will be made to address them all here.)

IRC § 501(c)(3) organizations include, *inter alia*, religious, educational and charitable entities. They are precluded from engaging in more than an insubstantial amount of attempts to influence legislation and from engaging in any activities to influence the outcome of elections to public office. They may, however, engage in a certain type of activity customary to PACs under IRC § 527, i.e., attempts to influence appointments to public office. They do not thereby lose their 501(c)(3) status, but unless they establish a separate segregated fund under § 527 to raise funds and pay for the 527 activities, they may incur a tax liability under 527 based on the cost of the § 527 activities. IRS Notice 1988-76, 1988-2 C.B. 392.[4]

IRC § 501(c)(4) organizations are similar to 501(c)(3) organizations, except that they engage in too much legislation-influencing activity and perhaps some incidental attempts to influence elections; thus, they are classified under § 501(c)(4).[5] The tradeoff is that they do not qualify for tax-deductible contributions enjoyed by 501(c)(3)s. If a 501(c)(4) organization engages in "political" activities that come within the definition of "exempt function" under IRC § 527, it also may have to pay tax on the cost of those activities under § 527(f).

Finally, an organization devoted primarily to "exempt function" political activities under IRC § 527 is classified as a political committee under § 527(e)(1). To be exempt from tax, the income must be maintained in a segregated account and used only for "exempt function" political activities under § 527. IRS Regs. § 1.527-1.

When used properly, these organizational structures provided by law allow citizens to exercise their First Amendment right to promote causes of their choice in a variety of ways. These organizational structures then tie into various statutory means by which the entities may operate.

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[3] *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944), held that a union had a First Amendment right to exist as an unincorporated association, rather than as a corporation, and that attempting to force it to incorporate was a violation of free speech and assembly.

[4] We note that the Commission is attempting to recognize and provide an exception for this type of segregated fund under paragraph (iv)(E) of Alternative 2-A.

[5] An organization whose primary activity is "social welfare" qualifies for 501(c)(4) status even though it engages in some political activity, but it may be taxed on the political activity under IRC § 527. Rev. Rul. 81-95, 1981-1 C.B. 332. The dictionary definition of "primary" is "of first rank, importance, or value." *Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Co. Springfield, Mass. 1971.

For example, 2 U.S.C. § 441b(b)(2) allows corporations to communicate with their stockholders and executive or administrative personnel and their families on any subject; to conduct nonpartisan registration and get-out-the-vote campaigns aimed at their stockholders and executive or administrative personnel and their families; and to establish, administer, and solicit contributions to a separate segregated fund to be utilized for political purposes (a § 527 organization). In the case of a membership corporation, the "restricted class" that may be communicated to, and solicited from, includes the organization's members and their families. 2 U.S.C. § 441b(b)(4)(C); 11 CFR § 114.7.

The U.S. Supreme Court has upheld the prohibition of speech with corporate funds in only two areas dealing with elections: (1) expressly advocating the election or defeat of clearly identified candidates for public office, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); and (2) "electioneering communications" as defined in amended FECA § 316(b)(2), 2 U.S.C. § 441b(b)(2), *McConnell v. FEC*, 540 U.S. ___, ___,124 S. Ct. 619, 697 (2003). The McConnell Court described "electioneering communications," so defined, as "the functional equivalent of express advocacy." *Id.* at 696.

Aside from these two prohibitions, the Supreme Court has upheld the right of corporations to engage in other forms of communication that might have an impact on elections, most importantly "issue discussion," which the Court defined in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), and applied to nonprofit corporations in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("We . . . hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.") Today, the Court would say, "We hold that an expenditure must constitute either 'express advocacy' or its functional equivalent, an 'electioneering communication,' in order to be subject to the prohibition of § 441b."

The Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA"), introduced the new concept of "Federal election activity," 2 U.S.C. § 431(20), but notably, the amended statute does not contain any restriction on the right of corporations, for-profit or nonprofit, to spend corporate funds on such activity. Any restriction would have to be derived from another provision of FECA.

This appears to be a recognition by Congress that "Federal election activity," at least the public communication part of it, is inextricably intertwined with "issue discussion" and that it would be difficult, if not impossible, to craft a definition of "Federal election activity" that could be prohibited without running afoul of the vagueness and overbreadth holdings of *Buckley*, 424 U.S. at 44 (with respect to then § 608(e)(1)'s restriction on independent expenditures) and at 80 (with respect to then § 434(e)'s requirement to report independent expenditures). The Buckley Court's reasoning was that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.

Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.*, 424 U.S. at 42 (footnote omitted).

And last, but not least, the First Amendment to the Constitution of the United States, states in a concise forty-five words:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Any rules or regulations adopted by the Commission as a result of this NPRM should be precise and well-tailored to avoid impermissibly infringing on the First amendment right of American citizens to organize and operate for the promotion of causes, and they should respect the various options citizens have to organize their affairs from a structural point of view. Now, we turn to discussion of specific concerns raised by the Commission.

Specific Issues

A. A primary purpose/the major purpose test should be used for determining when a 501(c) organization becomes subject to FEC regulation as a "political committee," and that primary purpose test should mean "more than 50%" of an organization's resources are devoted to political activities subject to FEC regulation.

NRTWC recommends that the Commission adopt a primary purpose/the major purpose test to the definition of "political committee," especially with respect to non-527 organizations.

As noted above, IRS uses a primary purpose and activities standard to determine whether an entity is classified as a 501(c)(4) organization or a 527 political organization. Then, if a (c)(4) engages in 527 activities, it is subject to tax under § 527, and if a 527 organization engages in non-527 activity, it is subject to tax under § 527. In short, IRC § 527 provides a mechanism for reconciling the competing tax and regulatory interests with the need for stability in the form of organizations. So long as their primary purpose and activities do not change, the entities will not be reclassified by IRS; they will simply be taxed on the cross-over activity.

The Commission should take the same approach, especially with respect to activities of 501(c) organizations. Organizational life would be made quite difficult were an entity to be

classified one way by IRS, under a primary purpose/activities test, and another way by the FEC, under a lesser test.

As a hypothetical, assume a 501(c)(4) organization with a $5 million budget that makes "exempt function" political expenditures (as defined in IRC § 527) from its general treasury in the amount of $10,000 to $50,000. And assume that the organization raises significant amounts of corporate funds (enough that it would not qualify as an *MCFL*-type organization). The consequences vis-a-vis IRS would be: (a) reporting on IRS Form 990, line 81; and (b) paying a § 527 tax on the lesser of the political expenditures or the organization's net investment income over a $100 threshold. There would be no change in the organization's 501(c)(4) status. This could be repeated year after year with the same results.

Assume the same facts, but this time the organization spends $2,500,001 on "exempt function" political activity under § 527. Now, the organization is in serious trouble. IRS can and probably will reclassify it – at least for that tax year – as a 527 organization. As a 527 organization, however, it is liable for the 527 tax on amounts spent for its non-527 activities, that is, on the other $2,499,999. And it may get even worse. Its managers probably would not have realized they had an obligation to file Form 8871 to report the organization's 527 status to IRS; thus, it may be taxed as a for-profit corporation under the regular tax rules. But what triggers these adverse consequences vis-a-vis IRS? Allowing the primary purpose or activity to become "exempt function" political activities under IRC § 527.

The Commission should take the same approach, i.e., use a "more than 50% of resources or activities" test. That would alleviate the difficulty of an organization being classified as one type of entity for IRS purposes and another type of entity for FECA purposes.

Thus, unless the Commission clarifies that 501(c) organizations are excluded from the scope of proposed § 100.5, then subparagraph (a)(1)(ii) and paragraph (2) should be rewritten to change "a major purpose" to "the major purpose," and the $10,000/50,000 thresholds should be rewritten to incorporate a "more than 50%" of resources or activities test.[6]

This would also be consistent with *Buckley*'s reasoning that the term "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. . . . [W]hen the maker of the expenditure is not within these categories – when it is . . . a group other than a 'political committee – the relation of the information sought to the purposes of the Act may be too remote. . . ." *Id.* 424 U.S. at 79-80 (footnotes omitted; emphasis added).

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[6] IRC § 527 organizations are already classified as political organizations by IRS, so they will not be faced with the same structural conversion problems as 501(c) organizations if a lesser dollar threshold is applied to them.

Subparagraph (a)(2)(ii) comes closest to adopting the major purposes test based on a "more than 50% of disbursements" test, but it should not incorporate disbursements for "Federal election activities" for reasons discussed below, and we submit that an historical average over the last four years would be a better indicator than "any" of the last four years because developments beyond the organization's control – such as its issue suddenly becoming a hot issue – may compel it to spend more on (A), (B) and (D) type activities in a particular year, while historically it may spend far less than 50% of its resources on § 527 activity. We suggest that the Commission adopt a 4-year average test, such as that used by IRS to determine the "publicly-supported" status of 501(c)(3) organizations under IRC § 170(b)(1)(A)(vi).

Subparagraph (a)(2)(iii) should not be adopted because the $50,000 threshold bears no relationship to the organization's total resources. For a $5,000,000 organization, $50,000 would be a mere one percent of its resources, hardly "the major purpose" or even "a major purpose." (The same defect is in subparagraph (a)(2)(i), although there the organization's self-described goals appear to fall largely within the description of a 527 organization.)

Subparagraph (a)(2)(iii) makes the least sense, practically and constitutionally.

If an organization becomes a political committee, all of its contributions and expenditures become subject to reporting and disclosure, and the organization becomes subject to onerous contribution limits and prohibitions. *See*, 2 U.S.C. §§ 432, 434, and 441a(a), (f) and (h), 441b, and related regulations.[7]

Such compelled disclosure, as well as restrictions on contributions, would represent an incredible infringement of the First Amendment right to associate in private, recognized in *Buckley*, 424 U.S. at 12, n.10, citing *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Bates v. Little Rock*, 361 U.S. 516 (1960), for all the other purposes such organizations exist, including their educational, lobbying, and "issue discussion" activities.

Does the Commission seriously contemplate forcing a $5,000,000 per year social welfare organization, exempt under IRC § 501(c)(4), to disclose its entire donor list year after year, and all of its expenditures, and restricting its sources of donations, just because the organization may have spent $50,000 in one year on activity subject to the Act?

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[7] As the Commission itself notes, "political committee" status continues indefinitely until the committee "terminates" or is "terminated" under 11 CFR § 102.

B. Payments for "Federal election activities," especially the public communication variety, should not be included in determining whether a 501(c) organization is a "political committee."

BCRA added the term "Federal election activities" to FECA. That term includes within its scope "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii).[8]

While certain political parties, committees and candidates are restricted in their financing of "Federal election activities," and parties, federal candidates and officeholders, and their agents, are prohibited from soliciting "funds for any Federal election activity, unless the funds are subject to [the FECA]," FECA § 323, *McConnell* at 670-683, there is no restriction on a 501(c) organization's raising or spending funds for "Federal election activities," especially of the public communication variety.[9] The 501(c) organization simply must do so without the fundraising help of the restricted parties, candidates, officeholders, and agents.

And it does not matter whether the 501(c) organization is incorporated. When Congress enacted BCRA, it added a prohibition on corporations (and unions) spending their general treasury funds on "applicable electioneering communications," but it did not add any such prohibition with respect to public communication "Federal election activities."[10]

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[8] The term "public communication" means "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22). The term "mass mailing" means "a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 2 U.S.C. § 431(23). And the term "telephone bank" means "more than 500 telephone calls of an identical or substantially similar nature within any 30-day period." 2 U.S.C. § 431(24).

[9] Corporations and labor organizations are allowed to conduct "nonpartisan" voter registration and get-out-the vote activities. 11 CFR § 114.4(c) & (d). And we note that the Commission is attempting to address the interrelationship between those activities and the terms "Federal election activities" and "expenditures" in Alternative 1-B. NRTWC will leave to other commentators the adequacy of that attempt.

[10] Public communication "Federal election activities" are more like "issue discussion" than "electioneering communications," which the Supreme Court deemed the "functional equivalent of express advocacy," *McConnell*, 124 S. Ct. at 696, because such "Federal election activities" lack the temporal link to elections that "electioneering communications" have and they are not necessarily disseminated through targeted broadcast media.

Thus, a 501(c) organization's raising and spending funds for public communication "Federal election activities," in the absence of illegal fundraising involvement of the restricted parties, candidates, etc., is of no consequence and of no concern to the Commission. As such, it should not be used in the test for "political committee" status.

Consequently, unless the Commission clarifies that 501(c) organizations are excluded from the scope of proposed § 100.5, then the reference to "Federal election activities," especially the public communication variety, in proposed subparagraphs (a)(1)(iii), (a)(2)(i)(C), (a)(2)(ii)(C) and (a)(2)(iii)(C) should be deleted.

C. The types of entities expressly excluded from "political committee" status should be better clarified.

With respect to proposed § 100.5(a)(2)(iv), Alternative 2-A is preferable to Alternative 2-B because those entities specifically excluded in Alternative 2-A will have the assurances of a black-and-white exclusion.

However, subparagraphs (B) and (D) of Alternative 2-A are too narrowly drawn. Both of those provisions could apply to state/local political committees, but by use of the phrase "to a non-Federal office," in the singular, subparagraph (B) seems to limit the exception to committees focusing on only one non-Federal office, and subparagraph (D) would appear not apply to a committee supporting or opposing state or local candidates in multiple states.

Why? Our state/local level PAC, SERCC, for example, which is based in Virginia and reports to the Virginia Board of Elections, sometimes supports candidates in other states, where permitted by the other state's law, and complies with whatever registration and reporting requirements the other state might impose. But, this is of no concern to the FEC because it has nothing to do with Federal candidates.

In short, subparagraph (B) of Alternative 2-A should be rewritten to exempt organizations that support or oppose state/local candidates running for "one or more non-Federal offices," and subparagraph (D) should be rewritten to exempt organizations that support or oppose state/local candidates in "one or more States."

This does not mean that committees such as SERCC would necessarily be treated as "political committees" under the proposed rule, as currently written, because, in addition to the tests set out in subparagraphs (a)(2)(i) through (iv), they would also have to meet the test of subparagraph (a)(1), relating to "contributions" and "expenditures" in excess of $1,000. But clarity and comprehensiveness in the exceptions would help the regulated community understand their situation.

D. Proposed § 100.116 poses a direct threat to constitutionally protected "issue discussion," which the FEC cannot regulate, and its closely intertwined cousin, "Federal election activity," which Congress itself has not added to the definition of "expenditure," either under 2 U.S.C. § 431(9) or § 441b. Thus, § 100.116 should be deleted.

Proposed § 100.116 poses a direct threat to constitutionally protected "issue discussion" because it adopts, by reference, the definition of "public communication" in 2 U.S.C. § 431(22), coupled with the third category of "Federal election activity" under 2 U.S.C. § 431(20)(A)(iii). Proposed § 100.116 would add "public communications" constituting "Federal election activities" to the general definition of "expenditure," thereby banning a large category of communications not intended by Congress to be prohibited.

As discussed at pages 4 and 8, above, the public communications part of "Federal election activity" is closely intertwined with "issue discussion," which cannot be regulated under the "express advocacy" and "electioneering" holdings of *Buckley* and *McConnell*. Congress itself did not add "Federal election activity" to the definition of "expenditure," either under 2 U.S.C. § 431(9) or § 441b, and the Commission should not take it upon itself to do so.

If the Commission does promulgate § 100.116, as currently written, as a final rule, many groups will find their issue discussion and public communications constituting "Federal election activity" threatened, even though there is no statutory prohibition on either. Simply criticizing or praising an incumbent candidate for his position on a piece of legislation or public issue would make one subject to FEC regulation and reporting. Incorporated 501(c) organizations would be accused of violating the corporate expenditure rules of § 441b.

Such results would not withstand constitutional scrutiny. Such communication is the essence of petitioning our government for redress of grievances under the First Amendment. Thus, § 100.116 should be deleted from the final rule.

E. It would be inconsistent with manifest congressional intent to treat "electioneering communications" as an element of "political committee" status or as an element of the general definitions of "contribution" or "expenditure."

The structure of FECA, as amended by BCRA, does not support the notion that "electioneering communications" should be treated as an element of "political committee" status or as an element of the general definitions of "contribution" or "expenditure."

The requirement to disclose "electioneering communications" applies to "every person" who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year. If paid out of a segregated bank account, the names and addresses of $1,000 and over donors must be disclosed,

and if paid from the general treasury of an unincorporated group, $1,000 and over donors to the group must be disclosed. 2 U.S.C. § 434(f). There are special rules for corporations and labor organizations under 2 U.S.C. § 441b.

These are different standards for reporting, and they do not require registration as a political committee with the Commission. They apply to "every person," whether or not a "political committee." And the reporting requirements are different than for political committees – or for qualifying as a "political committee."

A group becomes a "political committee" by receiving "contributions" or making "expenditures" in excess of $1,000 in a calendar year, and a "political committee" must report the identity of $200 and over donors.

The difference in treatment is so striking that the Commission should recognize that Congress did not intend for "electioneering communications" to trigger "political committee" status, and Congress did not intend for "electioneering communications" to be incorporated in the general definition of "contribution" or "expenditure."

If an entity is not otherwise a "political committee," the "electioneering communication" section is simply a reporting and disclosure requirement, similar to the independent expenditure reporting requirement of 2 U.S.C. § 434(g), which applies both to "political committees" and to persons who are not political committees.

These distinctions must be maintained in any final rules to be faithful to the congressional intent manifest in the structure of the amended FECA.

Conclusion

With this NPRM, the Commission is engaging in an endeavor to clarify which groups are, or are not, "political committees" under the amended FECA, but the Commission is reaching too far inasmuch as it proposes to use tests other than "the major purpose," "primary purpose," "more than 50%" of resources/activities, or uses as elements of the test activities that Congress has not prohibited even to corporations, i.e., public communication "Federal election activities," or that Congress has chosen to regulate simply as a reporting/disclosure matter, i.e., "electioneering communications" (except if done by already registered political committees, or by corporations).

Going beyond manifest congressional intent would threaten the exercise by American citizens of their residual First Amendment rights to associate and petition their government for redress of grievances.

NRTWC requests the opportunity to testify before the Commission on these matters. Our representative at the hearing would be Richard J. Clair, Corporate Counsel.

Respectfully submitted,

Mark A. Mix
President

Richard J. Clair
Corporate Counsel

RJC/emm