"Gregory L. Colvin" <colving@silklaw.com> on 04/05/2004 08:08:49 PM

To: pcstestify@fec.gov
cc: Joseph Sandler <sandler@sandlerreiff.com>

Subject: Comments on Political Committee Status NPRM from MoveOn.org Voter Fund

Please receive the attached document as timely filed on April 5, 2004. <<FECcomsMOVF4504.doc>>

Gregory L. Colvin
Silk, Adler & Colvin
235 Montgomery Street, Suite 1220
San Francisco, CA 94104
415/421-7555 (phone)
415/421-0712 (fax)
colving@silklaw.com

---

The information in this e-mail message and any attachments may be privileged, confidential, and protected from disclosure. If you are not the intended recipient, any use, dissemination, distribution, or copying of this transmission is strictly prohibited. If you think that you have received this e-mail message in error, please e-mail the sender at colving@silklaw.com, and delete all copies of this message and its attachments, if any. Thank you.

- FECcomsMOVF4504.doc

April 5, 2004

*Via electronic mail: pcstestify@fec.gov*

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

**Re: MoveOn.org Voter Fund Comments and Request to Testify re: Notice of Proposed Rulemaking on Political Committee Status**

Dear Ms. Dinh:

On behalf of MoveOn.org Voter Fund, we are pleased to submit these comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission on March 11, 2004 ("the FEC Proposal") and we request the opportunity to testify at the hearing scheduled for April 14-15, 2004.

While we are concerned about the potentially devastating impact of the FEC Proposal on all tax-exempt nonprofit organizations that engage in public policy advocacy and/or voter participation programs, we will confine our remarks here to the situation of organizations falling within the broad category of political organizations defined in Section 527 of the Internal Revenue Code ("IRC").

It may or may not be good public policy to change the definition of "political committee" under the Federal Election Campaign Act ("FECA"). The prerogative to decide that belongs to Congress, not the FEC; and in no event should the FEC make such a fundamental change in its rules on short notice in the middle of an election season. The question of whether such a basic statutory definition is to be radically amended should be taken up, if at all, by the Congress, and only after the very recent changes wrought by the Bipartisan Campaign Reform Act of 2002 ("BCRA") have been given a chance to work through the 2004 election cycle. The next Congress can give the matter full study and amend FECA if necessary, allowing time for the FEC to develop implementing regulations and for appellate court review before the 2006 campaign season begins. To do otherwise would be to succumb to partisan forces seeking to upset the existing rules for short-term tactical advantage. If Congress decides to change the rules in a constitutional fashion, MoveOn.org Voter Fund will be the first to adapt and comply.

## I. The Broad Classification of IRC 527 Political Organizations Is Part of a Carefully Structured Statutory and Regulatory Scheme, Is Healthy for American Democracy, and Does Not Require Greater FEC Regulation

From reading the popular press, one would think that 527 organizations are some kind of disreputable alternative to political committees registered with the FEC. That impression reflects a fundamental misunderstanding of the law. IRC 527 has not been developed by the Congress or Internal Revenue Service ("IRS") to provide a "soft money" end run around federal campaign finance regulation. Rather, 527 is part of a carefully structured statutory and regulatory scheme, developed with deliberation and care by the Congress and IRS, and serving important public policy objectives.

### A. Varieties of IRC 527 Organizations

IRC 527 is a broad, generic tax classification covering political organizations of all shapes and forms, and even some entities that have nothing to do with electoral politics.

If we were talking about motor vehicles, 527 would just be a generic description of "a car" of which there are many makes and models. We shall return to the automotive metaphor later.

All that 527 status means is that the organization is exempt from federal income tax to the extent it spends political income on political activities. IRC 527 groups pay federal income tax at maximum corporate rates on net revenues unrelated to politics, such as investment income, and contributions to 527 organizations are not tax-deductible.

All federal political committees registered with the FEC are 527 organizations. So are the Republican National Committee and the Democratic National Committee. So are John Kerry for President, Inc. and Bush-Cheney '04, Inc. So is every candidate's campaign committee right down to school board and dogcatcher.

Under the IRC, all 527 organizations having over $100 in investment income in a year, from the RNC to the Mayberry Good Government Committee, must file Form 1120-POL with the IRS and pay federal income tax.

IRC 527 organizations include all federal, state, and local candidate campaign committees and party entities, including minor parties. They include federal, state, and local political action committees (PACs) whether or not affiliated with a parent corporation, union, or association, and whether or not registered with a campaign finance agency. They include caucuses or associations of state or local public officials.[1]

IRC 527 organizations include newsletter funds[2] operated by public officials already elected to a federal, state, or local office; in fact, any fund set up to pay the ordinary business expenses of a public officeholder[3] qualifies under 527. Those persons running for or occupying an office in a political party can have 527 funds. And efforts to

influence the appointment of judicial and executive branch officials, commonly regarded as a form of lobbying, come under 527 as well.[4]

Many 527 organizations pursue a blend of federal, state, and local political activities related to certain public interest causes or private commercial interests. For instance, a 527 state league of conservation voters might be mainly devoted to state legislative candidate races, but have a secondary program related to the state's Congressional delegation, occasional involvement in local city and county contests, and a voice in the governor's agency appointments. The IRS has recognized that many ballot measure campaigns may also have a nexus to the candidate selection process and qualify under 527.[5]

To be a 527, the IRS does not require a lengthy application or a corporate structure. Using a simple on-line form (Form 8871), a 527 instantly acquires tax-exempt status and appears on the public IRS listing. There is no barrier to entry to anyone.

To correct another misunderstanding that persists on talk radio and in other popular media, there are no more secret donors or "stealth PACs" under IRC 527. Since July, 2000, all 527 political organizations must disclose donations and expenditures under a regime administered by the IRS that is virtually equivalent to the FEC disclosure system, unless they already disclose through the FEC or a comparable state agency.[6]

The fact that the 527 classification system embraces such a wide variety of entities is a testament to the vitality and diversity of American political life, not a sign of "circumvention" or "evasion" of federal campaign finance regulation.

### B. Varieties of IRC 527 Activities

Before undertaking any greater regulation of 527 organizations, the FEC should consider precisely why it is that the IRS permits an enormously expansive definition of "exempt function" under IRC 527(e)(2).

IRC 527 is interpreted very broadly for tax purposes in order to capture the entire circle of candidate election-related activity at the federal, state, and local levels, from the most explicit express advocacy to elect or defeat candidates at the center to a whole host of marginally partisan voter education activities at the periphery.

The definition of 527 political activity is so expansive because it mirrors the political intervention prohibition imposed by the IRC on Section 501(c)(3) charities, for reasons grounded in tax policy that are very different from the policies underlying campaign finance laws. The 501(c)(3) prohibition on intervention is justified because (c)(3) charities are subsidized by tax-deductible donations, and Congress has decided to condition that subsidy on an absolute prohibition on (c)(3) political intervention. *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997 (1983); *Branch Ministries v. Rossotti*, 211 F.3d 137 (DC Cir. 2000). That standard, which narrowly

confines charities to strictly nonpartisan activities, is the same boundary in tax law that causes 527 organizations to occupy a very broadly defined partisan field of activity.[7]

Those activities, treated by the IRS as potentially too biased to be charitable, and therefore within 527 instead, include many important grass roots public interest programs that may touch upon federal, as well as state and local, elections.[8] Examples:

a. Voter guides evaluating and comparing candidates on policies of interest to the organization.[9]
b. Legislative scorecards grading incumbents on their voting records, timed for distribution during election campaigns.[10]
c. Requests to candidates to pledge or endorse a nonprofit organization's code of fair campaign practices or some other policy position, since release of information as to who signed the pledge and who didn't could favor the candidates who did.[11]
d. Candidate debates or sequential appearances at public forums that fall short of strict nonpartisan guidelines due to content of questions or ground rules.[12]
e. Sponsorship of citizen juries, where a "focus group" of citizens selects and studies issues, interviews candidates, and rates their responses on the issues.[13]
f. Educational campaign schools that may, due to their history, funding, content, selection of students or placement of graduates, be seen as benefiting one political party over another.[14]
g. Grass roots lobbying of candidates running for office in close races, where those candidates are seen as more likely to change their legislative positions.[15]
h. Editorial endorsements or editorial statements favoring or disfavoring candidates appearing in nonprofit newspapers, magazines, or other publications.[16]
i. Mass media advertisements and other efforts of nonprofit organizations to inject their issues into election campaigns, or to defend themselves when attacked by candidates.[17]
j. Voter registration and GOTV activities conducted with some degree of bias because the groups targeted were not selected using completely neutral demographic criteria.[18]
k. Renting or selling mailing lists to political entities for fair market value, but without making them available to all contestants.[19]

In summary, the reach of IRC 527 is very broad in two dimensions—the type of entities and the kind of activities covered.

The IRS polices these 527 organizations and activities and prevents 501(c)(3) charities from supporting such politically-biased programs. There is no reason for the FEC to police them, require that they register as federal political committees, and curtail their sources of funding.

These nonprofit 527 voter education activities should be allowed to continue to thrive under IRS supervision, with disclosure of large donors and expenditures, but not with the source prohibition and contribution limits that FEC "political committee" status would impose.

### C. Public Policies Served by Diverse IRC 527 Organizations

Under the big tent of IRC 527, one finds an eclectic array of political groups--some subject to prohibitions on their sources of income and contribution limits and some not. This is actually good for our robust, free, and open political system, because it provides a variety of electoral vehicles, each with different advantages and disadvantages. Consider just a few of the main options under the combination of FEC and IRS rules that presently exist:

- For those individuals who want personal access to and contact with candidates, they can give to candidate committees and parties in small amounts and recruit others to do so.

- For those individuals who want to band together with others who have similar private or public interests, they can form nonconnected federal committees, give small amounts to the committee, and use the committee to send large "bundles" of small donations to selected candidates. Such a committee can engage in express advocacy, but is subject to FECA's limitations on political committee contributions to candidates, unless the committee makes independent expenditures, with no access to, coordination or cooperation with the candidates or party committees (e.g. MoveOn PAC).

- For those who want to use corporate, union, and large individual donations for issue ads that mention candidates but contain no express advocacy, they can form independent unregistered funds, but they get no access to candidates and they must avoid running ads at the times and in the places "blacked out" by the rule on electioneering communications, i.e. for at least two months before the November general election.

- For those who are willing to forego corporate and union donations, and rely only on individual gifts, they may form independent unincorporated associations and run issue ads mentioning candidates without express advocacy at any time and in any place, promptly reporting expenditures for such ads to the FEC, but with no access to, cooperation with or coordination with candidates or party committees (e.g. MoveOn.org Voter Fund).

We firmly believe that all varieties of 527 political organizations, even those funded without limit by large and small donors, play a valuable free speech role in our democracy.

### D. Limits on FEC's Regulatory Authority

BCRA did not authorize the FEC to go beyond express advocacy and take jurisdiction over all the marginally political citizen-based activities embraced by IRC 527. The only new area in which BCRA gave the FEC increased regulatory jurisdiction over private and public interest groups was "electioneering communications"—those paid advertisements broadcast in locations where primary elections, conventions, or caucuses are occurring, within a 30-day blackout period, and those broadcast within 60 days of the general election, if they mention a federal candidate. 2 U.S.C. §§434(f), 441b(a)(2), (c). The Supreme Court approved that bright-line extension of FEC jurisdiction into the 527 realm in order to capture the expensive issue ads most likely to be timed and targeted to influence federal elections. *McConnell v. FEC*, 540 U.S. __, 124 S. Ct. 619, 695-97 (2003),

Nothing in BCRA in any way authorizes the Commission to go any further in regulating 527 organizations. An organization is a federal political committee if and only if it spends more than $1,000 in a year "for the purpose of influencing a federal election." 2 U.S.C. §431(9)(A). BCRA left this statutory definition intact. And for more than 25 years, it has been the law that this definition of "expenditure" is confined to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976).

Nothing in BCRA changes that test. To the contrary, the U.S. Supreme Court, in its recent decision upholding the new law, *McConnell,* 124 S. Ct. at 687-88, explicitly *affirmed* the *Buckley* test. The *McConnell* Court further characterized its earlier opinion in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248 (1986) as reaffirming this construction of "expenditure". The *McConnell* Court indeed confirmed that, "Since our decision in Buckley, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements *expressly advocating* the election or defeat of candidates has been firmly embedded in our law." 124 S. Ct. at 694 (emphasis added)..

If the FEC attempts to take jurisdiction over everything that 527 political groups do, and prevent them from operating with corporate (even nonprofit corporate) donations, union donations, and contributions from individuals who want to donate more than $5,000 per year, it will likely have the following policy results:

- It will further polarize debate in our democratic society, by de-funding moderate grass roots voices more interested in policy issues than in who wins the election.

- It will obscure information about sources of support for the most hard-hitting campaign programs by combining them with funding for these more tangential activities.

- It will drastically reduce access to public discourse during election periods by all speakers except the most partisan (candidates, parties, and PACs) and the wealthiest (individuals who can pay for their own mass media advertisements).

- It will no doubt plunge the FEC and the 527 community of groups into another protracted series of court battles, this time over the constitutionality of transmuting a tax standard, which does not prohibit taxpayers from funding political speech but merely determines the tax burdens and benefits associated with the speech, into a law enforcement scheme derived from principles of criminal corruption.

## II. The FEC Proposal is Overbroad and Unwarranted

### A. Misuse of IRC 527

Turning to the specifics of the "purpose" test in the FEC Proposal, section 100.5(a)(2)(iv) would treat all 527 organizations as federal political committees, with five exceptions under Alternative 2-A and no exceptions under Alternative 2-B. This is the wrong approach, because the range of organizations within 527 is so big and the five exclusions are so narrowly drawn that the proposal would force federal political committee status on many activities not within FECA or BCRA and many organizations that have little or nothing to do with federal elections.

By excluding only those 527 entities solely devoted to non-federal candidates and non-federal elections, those solely devoted to one state, and those solely devoted to appointive or political party offices, the FEC ignores the fact that many 527 organizations operate in more than one state, get involved with ballot measures as well as candidate elections, and cannot effectively participate in state or local elections if they must avoid elections where a federal candidate appears on the ballot. Many of these 527 groups do not engage in express advocacy or run television ads, but do publish voter guides, grade incumbents on their performance, engage in grass roots lobbying, criticize elected leaders and try to hold them accountable, and mobilize voters based on common interests.

For over 25 years, the only ones in the big 527 tent required to register as federal political committees have been those spending more than $1,000 to expressly advocate the election or defeat of a federal candidate. Now the FEC wants to take over the whole tent, and let out only those that fit certain "pure" models.

It's as if General Motors wanted to monopolize the car industry, and so declared that henceforth all automobiles will be Chevrolets, except for Fords, Jeeps, and BMWs. By

ignoring the existence of many other makes and models (including hybrids), the FEC is clearly overreaching its authority.

Apart from trying to capture the 527 tax classification, the FEC Proposal tries in other invasive and inappropriate ways to enlarge the definition of federal political committee.

The FEC's analysis starts on the wrong foot by suggesting that having "a major" purpose, rather than "the primary" purpose, to nominate or elect one or more federal candidates should be enough to trigger political committee status. By aiming to vastly expand the types of public messages and election activities regulated, and simultaneously apply very low dollar thresholds, the FEC has jumped the boundaries of its authority as defined by Congress and the Supreme Court. The inflated definition in the FEC Proposal will draw in far too many tax-exempt nonprofit groups, not only those within the 527 category but thousands of others described in various subsections of IRC Section 501(c) as well.

### B. Statements of Purpose or Intent

Under proposed section 100.5(a)(2)(i), a single statement of major purpose to promote, support, attack, or oppose someone who happens to be a federal candidate, or a party, at any time during a five-year period, together with $10,000 in vaguely-defined "disbursements," could result in federal political committee status. This appears to include oral statements, external and internal communications, short-term objectives, mistaken expressions, hyperbole, bragging, and perhaps even uncontradicted quotations in the press.

Federal elected officials serve for two, four, and six-year terms, and may be candidates for re-election during most of those terms. It is absurd to suggest that a nonprofit organization's statement of opposition or support for the official's war, tax, environmental, or health policies should cause the group to register as a political committee.[20] It is also wrong to suggest that intending to criticize or evaluate an incumbent's record, behavior, character, or truthfulness should automatically trigger political committee status. Those purposes, if pursued through criticism in the media, candidate grading systems, election-year legislative scorecards, asking candidates to sign pledges on issues, and certain forms of grassroots lobbying, may cause the IRS to classify the activity as "political" under 527, even though the organization is careful to avoid express advocacy. Having the objective to improve or diminish public opinion of a candidate is a 527 purpose, but it is far from the express advocacy standard that is the current test for political committee status.

It is enormously difficult to administer a standard that turns upon statements of intent in the political realm. In the 1990's, a protracted inquiry that began with the House Ethics Committee and continued with the IRS looked into the question whether former Speaker Newt Gingrich had improperly used tax-exempt organizations for the purpose of electing a Republican majority to the House in 1994. The Committee found against the Speaker, but the IRS (without full access to the Committee's records) cleared the tax-exempt Progress and Freedom Foundation ("PFF") after a lengthy examination of statements

attributed to Gingrich and various PFF officials, the extent to which they were agents of PFF, reams of correspondence, and other facts and circumstances.[21] This set off a flurry of legal articles on the role of intent in IRS determinations of political intervention, with no clear resolution.[22]

Aside from legal statements of purpose in an organization's governing documents, evidence of intent is a slippery matter indeed. Advocacy groups may well exaggerate their impact and claim undue credit for electing or defeating candidates. Press reports commonly attribute the intent to influence elections to groups that cannot legally participate in campaigns. Nonprofit officials make public statements and endorsements related to candidates, citing their organizational affiliation "for identification purposes only." Groups that have never publicly announced the intent to help defeat or elect a candidate no doubt have internal memos plotting exactly such a strategy. If this part of the FEC Proposal were adopted, blow-hard groups with ineffective political programs would be registered political committees, while others could avoid federal political committee status simply by never expressing or admitting an explicit purpose to elect or defeat a federal candidate.

Bright-line tests that objectively measure expenditures and contributions are clearly superior to and constitutionally more defensible than subjective purpose tests.

It is essential for the FEC to understand that many interest groups, defined by the IRS as 527s, press their agendas upon political candidates not ultimately to elect or defeat them, but to get one, or both, or ideally all candidates to support their issues. To get the candidates' attention, they have to show them polls, threaten them, praise them, expose them, bird-dog them, grade them, invite them to come to meetings and adopt their positions, remind them of their promises in the last election, and use their vulnerability in the campaign to lobby them on legislation they would otherwise ignore. This kind of carrot-and-stick issue advocacy will of course involve promoting and attacking candidates from time to time, but 527 groups that never expressly advocate the candidate's election or defeat should not be federal political committees.

### C. The 50%+ Disbursements Test

Under proposed section 100.5(a)(2)(ii), if more than 50% of a group's annual expenditures are within the newly-expanded range of "disbursements" that includes payments for public communications that promote, support, attack, or oppose federal candidates or parties, and other activities that go far beyond express advocacy, during any one of the previous four years, it meets the purpose test for federal political committee status.

On the face of it, a 50%+ expenditure test does not seem to be unreasonable. It comes closest to measurements of "primary purpose" made by practitioners in the tax-exempt field,[23] and has been recently advanced by legal academics in the FEC political committee context.[24] However, the FEC proposal has two serious flaws: the vast range of

activities counted within the 50%+ test, and the continuation of political committee status during up to three years after the group no longer meets the test.

Many other commentators have commented on the overbreadth and vagueness of the "promote, support, attack, or oppose" standard if applied to nonprofits groups generally, beyond the narrow political party context in which that phrase was used in BCRA. Others have also pointed out the very harmful effects of counting payments for all voter registration activity within 120 days before an election and other nonpartisan GOTV activities toward the purpose and expenditure tests in the FEC Proposal. Likewise, the "electioneering communications" category, which includes even neutral references to federal candidates in broadcast ads and which may be paid for with funds from individuals without dollar limits under BCRA, should not be counted in the mix of disbursements that could cause a 527 or other nonprofit group to exceed the 50%+ test.

The four-year "look-back" rule in this test and other parts of the FEC Proposal raises serious due process questions. A 527 organization that qualifies as a federal political committee in one year, even under the existing standard of $1,000+ expenditures for express advocacy, should not be saddled with that status for subsequent years when it is not involved in federal elections at all. Indeed, FECA is absolutely unambiguous in requiring the FEC to determine political committee status in any one year based on an organization's "expenditures" in *that year alone*: a political committee is defined as a group "..which makes expenditures aggregating in excess of $1,000 *during a calendar year....*" 2 U.S.C. §431(4)(A)(emphasis added).

As written, the FEC Proposal could cause a nonprofit group that criticized or praised the policies of Bush, Cheney, McCain, or Gore in 2000, or any Congressional incumbent candidate in 2000 or 2002, to be classified as a political committee now, even though the group has not done so since then and is not planning to this year.

### D. The $50,000 Disbursements Threshold

Under proposed section 100.5(a)(2)(iii), a mere $50,000 in disbursements for the newly-expanded range of expenditures, in the current year or any of the previous four years, could trigger political committee status. This test is subject to all the objections mentioned above—the overbreadth and vagueness of the expenditure definition and the due process defects of the look-back rule, plus the threshold is absurdly low. By abandoning any sense of proportionality, the $50,000 dollar threshold defines neither a "primary" purpose nor a "major" purpose. For a $1 million organization, $50,000 is only 5%, a level commonly regarded as "insubstantial" under interpretations of tax law applied to 501(c)(3) charitable organizations that engage in lobbying and to 527 groups as well.[25]

The FEC Proposal runs at cross-purposes to federal tax law, and would cause much confusion and jeopardy to 527 and 501(c) organizations if adopted. The FEC should not, in a few weeks, tear up the fabric of tax-exempt law that has existed for decades and

under which thousands of nonprofit groups have structured their public policy activities and their governance.

## III. The FEC Proposal Is an Extreme Reaction to the Current Appearance of Television Ads Paid for by Independent Organizations Not Registered as Political Committees

From press reports surrounding this rulemaking, it appears that the main controversy involves the millions of dollars that have been spent early this year on television advertisements critical of President Bush, Senator Kerry, and other federal candidates by 527 groups that are not federal political committees and that have received large individual contributions.[26] However, the FEC Proposal is not a limited response to that phenomenon, but a massive enlargement of the definition of a political committee that goes (1) beyond broadcast ads to reach mailings, phone banks, print ads, and other forms of public communication, (2) beyond this year to reach activities that may have occurred in the 2000 and 2002 election seasons, (3) beyond candidate and party entities to reach any type of "committee, club, association, or other group," and (4) beyond commentaries on candidates to reach a wide variety of nonpartisan voter registration and voter engagement efforts.

For those who worry about the attack ads now appearing on television, funded by contributions not subject to the limitations and prohibitions of FECA, there are a number of responses that are more appropriate than this over-wrought FEC Proposal. For example:

- In BCRA, Congress recognized this problem and fashioned a narrowly-tailored remedy. It created a definition of "electioneering communications" limited to broadcast ads occurring at certain times and in certain places, and it prohibited corporations and unions from paying for such ads. Congress did not prohibit the use of unlimited individual donations for ads broadcast outside of those times and places; it only required disclosure of who paid for them within 48 hours.

- The Supreme Court explicitly recognized in *McConnell* that, under BCRA, "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications.)" 124 S. Ct. at 686. The FEC has no authority to curtail what Congress and the courts have left unfettered.

- It is still quite early in the federal election campaign season. Who knew that in the first Presidential election after passage of BCRA there would be a presumptive Democratic nominee eight months before the November election, with advertising of all kinds referencing the presidential candidates at that early stage? Let the BCRA reforms take effect; if BCRA works as intended, in August, September, and October, any

independent "attack" ads funded by corporate or union treasury contributions will diminish as the BCRA restrictions on electioneering communications apply nationwide 30 days before the party conventions and 60 days before the general election.

- Under the 527 disclosure rules and the BCRA requirements for immediate disclosure of those paying for broadcast electioneering communications, there are no more television ads paid for by anonymous donors. Let the free marketplace of political debate determine whether those ads should be believed by the American public, given their sources of funding.

- Finally, it is imperative to remember that even if the FEC Proposal were adopted by Congress as an amendment to FECA and upheld by the Supreme Court, it **would not prevent wealthy individuals from spending unlimited amounts on television ads attacking or promoting federal candidates**. They would simply pay for the ads personally rather than donating to independent 527 political groups running such ads.

## IV. MoveOn.org Voter Fund Strongly Opposes the FEC Proposal

MoveOn.org Voter Fund is an independent 527 political group that has never engaged in express advocacy of the election or defeat of any candidate, federal, state, or local. It has carefully adhered to the existing rules set down by the FEC and the IRS. Indeed, the Voter Fund was one of the first organizations to file the new "electioneering communications" reports required under BCRA and the FEC's regulations.

The Voter Fund does not coordinate its activities with any candidate or party entity; in fact, it surprises them constantly. It is an unincorporated association affiliated with the rapidly-growing two million member on-line citizen engagement organization known as MoveOn.org. The list of donors it filed on January 31, 2004, was so long it crashed the IRS server.

The Voter Fund's average donation is $60. It has had only a handful of large donors, and the largest of those, George Soros and Peter Lewis, agreed to provide matching funds to induce more enthusiastic giving by small donors to the Voter Fund.

MoveOn.org Voter Fund is proud to be a 527 political organization generating a unique blend of donations from those of substantial means and modest means, driven by a citizen movement for "democracy in action" that has brought millions of people out of alienation and into the American democratic process in search of progressive change.

If the FEC or Congress wants to change the rules for federal political committees so that groups like the Voter Fund can have no donors giving more than $5,000/year, and the Supreme Court finds such a change to be constitutional, something very important to our democracy will be lost.

Rich people will still be able to buy their own political advertising, but they will not be permitted to join forces with middle-class citizens in independent 527 political movements challenging entrenched and powerful federal elected officials. In modern times, since the 1968 anti-war candidacy of Senator Eugene McCarthy took on President Lyndon Johnson,[27] brash, young, insurgent political forces have had their angels.

If unique 527 groups like the Voter Fund are outlawed and their voices stilled, only the extremely wealthy and the most partisan players will be left on the American political stage. That is why the Commission has heard such a popular outcry against this FEC Proposal.

For all the reasons stated above, the FEC should set aside this proposed rulemaking, let the current election season run its course under the BCRA reforms, and let Congress take up the matter of whether further revisions to the nation's campaign finance laws are warranted, in 2005 or later.

Very truly yours,

<signed>

Gregory L. Colvin
Silk, Adler & Colvin
235 Montgomery Street, Suite 1220
San Francisco, CA 94104
Telephone: (415) 421-7555

<signed>

Joseph E. Sandler
Sandler Reiff & Young PC
50 E Street, S.E. # 300
Washington, DC 20003
Telephone: (202) 479-1111

Counsel for MoveOn.org Voter Fund

---

[1] IRC 6033(g)(3)(B).

[2] IRC 527(g).

[3] IRC 527(e)(2), second sentence.

[4] IRS Announcement 88-114, 1988-37 IRB 26; General Counsel Memorandum (GCM) 39694 (Jan. 21, 1988).

[5] IRS Private Letter Ruling (PLR) 199925051.

[6] IRC 527(j) and (k), as amended.

[7] While the IRC 501(c)(3) political intervention standard is generally congruent with the exempt function definition in IRC 527(e)(2), there are some inconsistencies, the most notable of which is the treatment of efforts to influence appointments to public offices such as judgeships. Lobbying on confirmation of executive branch appointments is permitted for both 527 and 501(c)(3) organizations, *see* note 4 *supra*. The issue of congruity between the two standards is thoroughly explored in the draft report of the American Bar Association, Tax Section, Exempt Organizations Committee, Task Force on Section 501(c)(4) and Politics, dated January 29, 2004, available via Professor Miriam Galston at mgalston@law.gwu.edu (ABA Task Force 1/29/04 draft).

[8] The IRS recently issued Rev. Rul. 2004-6, providing flexible guidance to 501(c) and 527 organizations on how to recognize when public policy advocacy communications cross the line into 527 political territory during election campaigns. Various combinations of facts and circumstances, not involving express advocacy, could result in 527 classification, using multiple factors rather than bright-line standards. While this may be appropriate for tax law, where the tax subsidy of exemption is a matter of legislative grace (and the FEC should take care not to contradict these well-designed tax rules), the Commission is obliged to fashion much more narrow, precise standards for the regulation of expenditures under FECA and BCRA. Early concerns that Rev. Rul. 2004-6 might treat, as nonpartisan, communications targeted to influence the outcome in swing states or close races have been allayed by subsequent IRS public statements, *see* Fred Stokeld, "EO Issue Ads Targeted at Elections Would Be Political Activity, IRS Official Says," *Tax Notes Today*, Jan. 29, 2004.

[9] Rev. Rul. 78-248, 1978-1 Cum. Bull. 154; *see* PLR 9652026 and IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, pp. 10-11.

[10] Rev. Rul. 80-282, 1980-2 Cum. Bull. 178, *see* PLR 9652026.

[11] Rev. Rul. 76-456, 1976-2 Cum. Bull. 151.

[12] Rev. Rul. 86-95, 1986-2 Cum. Bull. 73.

[13] IRS Technical Advice Memorandum (TAM) 9619596.

[14] *American Campaign Academy*, 92 Tax Ct. 1053 (1989).

[15] PLR 9725036.

[16] Judith E. Kindell and John Francis Reilly, "Election Year Issues," *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2002* (2002 CPE Handbook), pp. 369-70.

[17] 2002 CPE Handbook, pp. 344-46. *See also* TAM 8936002 (Sept. 8, 1989), which is somewhat deceptively represented in the Notice accompanying the FEC Proposal. The FEC states that the IRS "permitted a 501(c)(3) organization to make advertisements that 'support or oppose a candidate in an election campaign,' without losing its 501(c)(3) status for intervening..." In fact, this was a classic "close call" where the IRS reviewed a television ad that did not name any candidate for federal office, but attempted to inject the organization's views on peace and defense policy into the Presidential campaign during the 1984 Reagan-Mondale debates. The IRS gave the charity the benefit of the doubt.

[18] 2002 CPE Handbook, pp. 378-79, citing Milton Cerny, "Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions," *New York University's Nineteenth Conference on Tax Planning for 501(c)(3) Organizations* 5 (1991).

[19] 2002 CPE Text pp. 383-84; TAM 200044038; *see also* Almeras, "CPB Issues Report on Mailing List Swapping," 26 *Exempt Organizations Tax Review* 9 (Oct. 1999).

[20] Examples of such policy-based statements that a 527 or other nonprofit group may have made in the current or prior four years (going back to 2000) include: "stop the Bush administration assault on a woman's right to choose," "halt the appointment of conservative judges nominated by Bush (or break the Democratic filibuster),"" "halt the Clinton/Gore plan to lock up public lands for wilderness in Utah," "support Senator McCain's campaign finance legislation," and "expose the truth behind the President's Medicare drug plan."

[21] Unnumbered TAM issued on February 3, 1999, to Progress and Freedom Foundation, available via mail@pff.org. *See* Gregory Colvin, "Looking for the Lessons of the Gingrich Affair," 11 *Journal of Taxation of Exempt Organizations* (JTEO) 82 (Sept./Oct. 1999).

[22] Frances Hill, "The Role of Intent in Distinguishing Between Education and Politics," 9 JTEO 9 (July/Aug. 1997); Jeffrey Yablon & Edward Coleman, "Intent Is Not Relevant in Distinguishing Between Education and Politics," 9 JTEO 156 (Jan./Feb. 1998); 2002 CPE Handbook, pp. 350-52; *see* IRS bulletin IR-2000-47.

[23] Rev. Rul. 81-95, 1981-1 Cum. Bull. 332, indicates that so long as social welfare activities are primary, a 501(c)(4) organization can have a secondary level of political campaign activities. IRS Field Service Advice 2000037040, on the other hand, indicates that a 501(c)(4) organization that allows its political intervention to become primary will be treated as a 527 organization. *See* extensive discussion of the primary purpose test in ABA Task Force 1/29/04 draft report, note 7 *supra.*

[24] Edward Foley & Donald Tobin, "Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold," *BNA Money & Politics* (January 7, 2004).

[25] *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955); for the 527 context, *see* 2002 CPE Handbook, p. 411.

[26] *See, e.g.,* Glen Justice & Jim Rutenberg, "Political Groups Taking on Bush in Ad Campaign," *New York Times*, March 10, 2004, p. 1.

[27] John R. Lott, Jr., "Caps on Campaign Spending Firmly Entrench Incumbents," *The Investors' Business Daily*, November 4, 2003, p. A15.

M:\CLIENTS\M\MOVEONVF\FECCOMSMOVF4504.DOC