Walter Olson <walterolson@mindspring.com> on 04/05/2004 04:54:50 PM

To: pcstestify@fec.gov
cc:

Subject: Notice 2004-6

Dear Ms. Mai T. Dinh:

The attached comments are in response to the FEC's request for comments published in the *Federal Register* on March 11, 2004, at 11736-60, regarding the Notice of Proposed Rulemaking, "Political Committee Status."

These comments are being filed by Free Speech Coalition, Inc., a group of ideologically diverse nonprofit organizations as well as for-profit organizations that help them raise funds and implement programs, which helps protect the rights of nonprofits as against excessive government regulation.

I would ask for the opportunity to testify on these matters on behalf of FSC before the FEC during its hearing on April 14-15, 2004.

Sincerely yours,

Walter J. Olson

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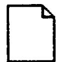 - FSC Comments FEC NPRM Political Committee.pdf

BEFORE THE
FEDERAL ELECTION COMMISSION

In re:	)	
Notice of Proposed Rulemaking	)	Notice 2004-6
Definition of Political Committee	)	
(Federal Register March 11, 2004)	)	

Comments of
Walter J. Olson

on behalf of
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on the

FEC USURPATION OF LEGISLATIVE AUTHORITY THROUGH PROPOSED REDEFINITION OF "POLITICAL COMMITTEE"

INTRODUCTION

The **Free Speech Coalition, Inc**. (hereinafter "FSC") submits these Comments to the Federal Election Commission ("FEC" or "Commission") in response to the FEC's **Notice of Proposed Rulemaking** ("NPRM") that was published in the Federal Register (Vol. 69, No. 48) on March 11, 2004. *See* 69 Fed. Reg. 11736-11760 (March 11, 2004). That NPRM announced the FEC's consideration of various proposed amendments to the FEC regulations concerning important definitional matters, including, but not limited to, the standards for determining whether an entity is a nonconnected "**political committee**" and what constitutes an "**expenditure**" for purposes of this determination.

FREE SPEECH COALITION

The Free Speech Coalition, Inc., founded in 1993, is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC's purpose is to help protect First Amendment rights through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights. FSC has previously commented and testified on FEC-proposed regulations.

OVERVIEW

The NPRM proposes significant changes to the longstanding, important regulatory definitions, including, but not limited to, the definitions of "**political committee**" and "**expenditure**" applicable to nonconnected committees. These are two critical definitions that determine which organizations must register with the FEC, and they are obviously of great moment in determining the reach of the FEC's jurisdiction. The FEC NPRM, if adopted, would greatly expand the Commission's own regulatory reach and assert jurisdiction over many organizations which — under current law as well as all prior versions of the law — have never been required to register or file reports with the FEC.

According to the introduction to the NPRM, the issue to be explored in this proceeding is "whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee and what constitutes an 'expenditure' under [current FEC regulations]." 69 Fed. Reg. at 11736 (footnote omitted). Further, the NPRM states that "the Commission is seeking comment on whether to amend its regulations, to incorporate "**the major purpose**" test into the regulatory definition of 'political committee.'" 69 Fed. Reg. at 11736-37. In truth, however, the Commission appears to be headed toward a radical change in the existing definition of "political committee," substituting "**a major purpose**" test for "**the major purpose**" test.

Such redefinition is designed to produce a regulatory framework that would bring almost any advocacy organization within its grasp, including organizations exempt from taxation under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code which, by their very nature, should not be considered political committees. The NPRM proposed rule would constitute a substantial — and unnecessary — impingement on the free speech, free press, and associational rights of advocacy organizations.

FSC is well aware of the movement by some in the Congress and the FEC to regulate fully virtually all speech and press activities of advocacy organizations involved in the American political process. The current FEC proposals are merely the latest moves designed to limit the ways in which citizens may participate in their government. On such a course, in short order, the only persons who may lawfully speak the name of a candidate or an elected official are the establishment press, a FEC-registered committee, and the elected official themselves.

The Supreme Court's recent narrow, five to four decision in McConnell v. FEC, 124 S.Ct. 619 (December 10, 2003), upholding most of the provisions of the Bipartisan Campaign Reform Act of 2002, Public Law No. 107-155, 116 Stat. 81 ("BCRA"), has emboldened those who seek to regulate the expenditure of every dollar spent to mention of the name of an incumbent or a candidate. But this does not, and cannot, mean that there are no constitutional or statutory standards or boundaries with respect to such regulatory measures, or that

longstanding principles will be forsaken, with respect to so-called lawful restriction of political free speech.

The effect, even if not the intent, of the NPRM would be to make Section 527 and other nonprofit organizations so burdened that they choose to cease engaging in regulated activities. Although the NPRM makes light of the burden of compliance, the Commission should take note that the registration/reporting requirements and restrictions imposed upon those who are subject to the FEC's jurisdiction, including contributions subject to federal limits, are no small matter. (And, if those who framed the NPRM really believe that compliance with federal election law imposes no significant burdens, as it could be concluded from the NPRM, the Commission should consider holding a hearing on that subject alone.)

Under the proposed rule, Section 527 and other nonprofit organizations that do not register with the FEC as "political committees" would be prohibited from carrying out any activities related to: (i) **voter registration** activity during the 120 days preceding a regularly scheduled Federal election; (ii) **voter identification** and **get-out-the-vote** activities; and (iii) **public communication** that refers to a clearly identified Federal candidate and that promotes, supports, attacks, or opposes a candidate for that office. These activities represent three of the four "Federal election activities" that were articulated in BCRA in the context of the restrictions that were being imposed on **political parties**, and should not be applied to nonconnected committees.

FSC submits that, if this NPRM is implemented, the Commission would be exceeding its powers and misinterpreting the law.

COMMENTS

1. Introduction

This NPRM is an unprecedented attempt by the Federal Election Commission to **usurp legislative function through its rulemaking authority** to assert its jurisdiction over both so-called **"527" organizations** (groups organized under Internal Revenue Code ("IRC") Section 527 (26 U.S.C. § 527)), as well as groups organized under **IRC Sections 501(c)(3) and 501(c)(4)**.

This effort to sweep an entire sector of the economy under FEC jurisdiction, including FEC registration and reporting regulations, contribution limitations and prohibitions, and restrictions on expenditures, would have profound consequences. This change is proposed not because federal law has changed to apply the burdensome FEC restrictions to such organizations, but precisely because federal law currently does **not** so restrict such organizations, and some at the FEC apparently wish that it did and think that it should.

The thought of any Americans exercising their freedom of speech and the press to participate in the American political process rattles the cages of politically powerful incumbents, and presumably this action is proposed because of political pressure on the FEC by these Congressmen and Senators, fearful of unregulated political activity which could operate to their personal disadvantage.

2. Definition of Political Committee

The FEC's **current definition** of "political committee" (*i.e.*, "any committee, club, association, or other group of persons which receives contributions in excess of $1,000 in a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year ...") (11 CFR 100.5(a)) tracks the statutory language (2 U.S.C. § 434(4)(A)) and has served the FEC well in carrying out the Federal Election Campaign Act of 1971, as amended ("FECA") throughout the years.

Rather than base its proposed new regulation on any law, the FEC would radically change the existing definition use sleight-of-hand, by simultaneously:

(i) modifying a key term contained in the 1976 decision of the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), and

(ii) misusing a provision in Section 101, "Soft Money of Political Parties," of BCRA that defines "Federal election activity."

Regarding the **first change** to the definition of "political committee," the NPRM has taken the phrase, "the major purpose," which uses the definite "the," in the Buckley decision and revised it to read, "a major purpose," replacing "the" with the indefinite "a," and has devised four arbitrary tests to determine whether an organization meets this new "major purpose" requirement. If the "major purpose" phrase belongs in the definition of "political committees," it is unclear why the Commission has taken over 25 years since the Buckley decision to effectuate this change. Clearly, it does not belong in the definition of "political committee." It is a poor rationale to sweep thousands of organizations under the purview of the FEC regulations.

Regarding the **second change** to the definition of "political committee," the NPRM has chosen to pull the definition of "**Federal election activity**" within the section on "**Soft Money of Political Parties**" in BCRA and to revise this definition in order to make it apply to expenditures by Section 527 organizations, and possibly other tax-exempt organizations. The definition of "Federal election activity" appears in Title I of BCRA, which addresses the receipt and expenditure of "soft money" by the national party committees. Title I of BCRA was expressly directed at political parties, and not at the groups which the proposed rule seeks to regulate. The Commission has no authority to apply this section to organizations other than political parties. Any effort to apply this term to nonparty committees is only another weak excuse for the FEC to broaden its own authority.

3. Definition of Expenditure

One of the ways the NPRM would expand the definition of "**political committee**" would be to broaden the definition of "**expenditure**" in the current definition of a "political committee" (*i.e.*, "any committee, club, association, or other group of persons which receives contributions in excess of $1,000 in a calendar year or which makes **expenditures** aggregating in excess of $1,000 during a calendar year....") (11 CFR 100.5(a), emphasis added.)

At the present time, "expenditure" is defined in 11 CFR part 100, subpart D. As discussed above, for purposes of defining "political committee," the NPRM would expand the definition of "expenditure" to include payments for the first three of the four activities listed in the definition of "Federal election activity" in Section 101, "Soft Money of Political Parties," of BCRA. The NPRM further would expand the definition of "expenditure" in **Alternative 1-A** by including "payments for all or part of an electioneering communication as defined in 11 CFR 100.29." (69 Fed. Reg. 11756.) **Alternative 1-B** of the NPRM does not include such payments for electioneering communications in the definition of "expenditures."

4. Exemption for Tax Exempt Organizations

In section "d. Other potential approaches" (69 Fed. Reg. 11742), the NPRM states that "[t]he Commission also seeks comments on **other potential approaches** to amending the definition of 'expenditure' ..." (emphasis added), although it is unclear whether such other potential approaches would be in addition to or in lieu of the changes discussed above. Within this section, the NPRM poses a number of questions relating to Section 501(c)(3) and Section 501(c)(4) organizations.[1]

Also, within the NPRM's explanation of the proposed **four tests** that would be used to determine whether an organization falls within the definition of "political committees" as expanded by the proposed "major purpose" addition, section "5. Other Tax-Exempt Organizations" (69 Fed. Reg. 11749) poses **additional questions** relating to Section 501(c)(3) and Section 501(c)(4) organizations.[2]

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[1] "For example, should payments by a tax-exempt charitable organization operating under 26 U.S.C. 501(c)(3) be exempt from the definition of 'expenditure?' ...

"Should the Commission consider an organization's status under section 501(c) or 527 of the Internal Revenue Code in determining whether a payment is an expenditure? Should some activities be expenditures if made by a section 527 organization, regardless of whether it is a Federal political committee? Should the same rules or different rules apply to organizations operating under section 501(c)(3), (4), or (6)?" (69 Fed. Reg. 11742.)

[2] "Should the final rule state that certain tax-exempt organizations, such as those organized under 501(c)(3) or (c)(4) of the Internal Revenue Code, will not meet any of the

The Free Speech Coalition strongly believes that **Section 501(c)(3) and Section 501(c)(4) organizations should be excluded** from the amended definition of "political committee" as described in the NPRM for the following reasons:

a. A Section 501(c)(3) organization cannot participate to any degree in political campaigns, including federal, state, or local election campaigns, without losing its tax-exempt status. (*See* 26 U.S.C. § 501(c)(3) and 26 CFR § 1.501(c)(3)-1(c)(3)(iii).)

b. If the primary purpose of a Section 501(c)(4) organization were to influence elections (*i.e.*, federal, state, or local), it would lose its tax-exempt status. (*See* 26 CFR § 1.501(c)(4)-1(a)(2)(ii).)

c. Section 501(c)(4) organizations of any size usually are incorporated. FECA prohibits corporations from using their treasury funds to make contributions or expenditures in connection with federal elections. (2 U.S.C. § 441b(a).)

d. A Section 501(c)(3) or Section 501(c)(4) organization whose annual gross receipts is normally more than $25,000 is required to file an annual detailed Form 990 (Return of Organization Exempt From Income Tax) with the Internal Revenue Service. As certain states permit corporate expenditures in connection with state and local elections, if an incorporated Section 501(c)(4) organization makes such expenditures, it is required to disclose these political expenditures in its annual Form 990 (Part VI, line 81a).

e. Under current FEC regulations, incorporated Section 501(c)(3) and Section 501(c)(4) organizations, as corporations, already are prohibited from making or financing electioneering communications to those outside their restricted class. (11 CFR 114.2(b)(2)(iii).)

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major purpose tests because of the nature of their tax-exempt status, and exempt them from the definition of political committee? Or should the final rule not provide an exemption for 501(c) organizations, recognizing that the various thresholds in the major purpose tests are set high enough that certain 501(c) organizations may continue to conduct incidental or low levels of election activities without satisfying any of the major purpose tests and triggering political committee status? ...

"Would it be more appropriate to discard '*a* major purpose' analysis and use instead '*the* major purpose' analysis for these type of organizations? [Emphasis original.] In this regard, should the Commission fashion a test whereby it would recognize three broad categories of activity for 501(c) organizations — 'election influencing activity,' 'legislative or executive lobbying activity,' and 'educational, research, or other activity.' Under this approach, if the organization put more resources, either financially or otherwise, into 'election influencing activity' than it put into either of the other two activities, the major purpose test would be met." (69 Fed. Reg. 11749.)

f. Although unincorporated Section 501(c)(4) organizations may make electioneering communications subject to the prohibition against corporate and labor funds, such electioneering communications which cost more than $10,000 must be disclosed to the FEC.

g. The NPRM states (69 Fed. Reg. 11755), "[t]he reporting requirements [under FECA] are not complicated and would not be costly to complete." This statement is totally incorrect. We submit that nearly any political committee which receives or expends more than a few thousand dollars in one year, including separate segregated funds ("SSFs") organized under Section 501(c)(4) organizations, will attest that FEC reporting can be very complicated and is costly to complete.

5. Later Consideration

April of a federal election year is no time to begin consideration of major regulatory changes. After the hearings on April 14-15, 2004, this NPRM should be withdrawn. After consideration of the comments received in connection with the current NPRM and hearings, the matter could always be restudied at the FEC and reconsidered after the November 2, 2004 general election.

6. Conclusion

For all of these reasons, the Free Speech Coalition urges that no regulations be issued at this time pursuant to the NPRM with respect to the redefinition of "political committee." The NPRM should be withdrawn, and the matter should be restudied.

FSC intends to file technical comments by the Friday, April 9, 2004 deadline, setting out its detailed views regarding specific proposals in the NPRM.