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To: pcstestify@fec.gov  
cc:

Subject: Comments / Request to Testify

Please find attached my comments and request to testify at the hearing on April 14-15, 2004.

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April 5, 2004

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Ms. Mai T. Dinh  
 Acting Assistant General Counsel  
 Federal Election Commission  
 999 E Street, NW  
 Washington, D.C. 20548

Re: Comments in Response to Notice of Proposed Rulemaking  
 2004 - 6

Dear Ms. Dinh:

These comments are submitted in response to the Notice of Proposed Rulemaking 2004-6, ("NPRM").

The Commission has proposed a complex and burdensome set of proposed regulations in the NPRM. The threshold question before the Commission prior to proceeding to this rulemaking is:

**Does the Bipartisan Campaign Reform Act of 2002 ("BCRA") confer statutory authority on the Commission to enact *any* of the proposed alternatives?**

From the point of view of a practitioner in this field, it is my view that the Commission must first answer that question before further action.

If the answer by the Commission is "yes", BCRA *does* confer authority to promulgate additional regulations for purposes of implementing BCRA, then it would seem that the Commission should review its enforcement procedures and immediately proceed to expedite its procedures to enforce existing law. There has been no intervening legal authority conferred on the Commission since the Commission completed its rulemaking under BCRA in 2003 to suggest the Commission now has authority to regulate entities and activities that the Commission failed last year to include within the sweep of the regulations adopted. The Commission engaged in a grueling and extensive rulemaking process in order for regulated entities to know as soon as possible in advance of the 2004 elections which political speech and activities would be subject to regulation and which political speech and activities would be permitted and beyond the reach of the Commission and government regulation.

The Supreme Court in *McConnell v Federal Election Commission* (citation omitted) ("*McConnell*") upheld the statutory and regulatory framework in place before it during the litigation.

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There have been no additional judicial or statutory authorities or requirements imposed on the Commission since the enactment of BCRA other than the two minor provisions of BCRA which were stricken by the Court, neither of which are at issue in the NPRM.

In sum, nothing has changed since that rulemaking was completed *other* than a number of news reports regarding planned activities by various entities with respect to the 2004 elections based on their interpretation of BCRA, the Commission's regulations, and the *McConnell* decision.

Thus, if the Commission has determined that it has the statutory authority to enact any of the proposed alternatives in the NPRM, rather than proceeding to yet another rulemaking, the Commission should, instead, review and revise its enforcement procedures relative to this election cycle and immediately proceed to the appropriate enforcement of existing regulations and the statute as upheld by the Supreme Court in *McConnell*.

If the Commission has the authority it needs to enact the NPRM what is called for is *enforcement*, not additional regulation(s). Or, if the Commission is uncertain as to whether BCRA and the existing regulations extend to the activities and entities which are the subject of the NPRM, the Commission should *not* proceed further in the regulatory arena absent additional grants of statutory authority by Congress or some judicial determination that specifically authorizes or directs the Commission to promulgate additional regulations under BCRA.

The Commission has ample authority and responsibility to take the necessary steps to enforce the law as enacted by Congress, implemented by the regulations currently in existence and upheld by the Supreme Court in *McConnell*. If current enforcement mechanisms are insufficient for the purposes necessary to protect and enforce the law during the current election cycle, the Commission should direct its attention to that issue rather than spending countless hours, days, weeks and months enacting new and additional regulations – all the while failing to enforce BCRA during this election cycle.

Either the Commission has the legal authority to enforce the mandates of BCRA, in which case that is what the Commission should direct its attention to doing this year – or it does not, which requires new regulations that can and should *only* be enacted upon the further action of Congress and/of the Courts.

Enforce the laws and regulations already in place. Give the rulemaking process a break. Forget this NPRM. If the Commission didn't have the authority to promulgate these rules – any of the alternatives – last year, the Commission doesn't have such authority today. And if the Commission *does* under existing law have the authority to promulgate these rules, the Commission doesn't need more rules – it needs the will and the commitment to enforce the law during this election cycle.

The Commission should consider that one of the greatest criticisms of the Commission is its inability and its failure to enforce the law during the election cycle in which alleged violations occur. Solve that problem. Don't spend time writing a new complex set of regulations that were only

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conceived after newspaper reports of activities that the Commission failed to consider when adopting the BCRA implementing regulations last year.

Many of the issues raised by the NPRM are appropriate topics for review. By Congress. Resolution of conflicting rules and determinations by the Internal Revenue Service and the Commission have long been and remain a subject that Congress should review and resolve. However, those are not determinations that the Commission alone should make.

The Commission should take the necessary steps to enforce existing law rather than dissolving into an endless rulemaking process that continues to confuse and confound those who seek to become involved in the political process.

And it goes without saying that if the Commission does *not* have the statutory authority under BCRA to proceed with the NPRM, the Commission must immediately cease further efforts to promulgate any of the alternatives set forth in the NPRM.

I would request the opportunity to testify at the public hearing scheduled on the NPRM on April 14-15, 2004.

Sincerely,

*/s/ Cleta Mitchell*

Cleta Mitchell, Esq.  
Attorney at Law