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Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
Washington, D.C.

By Electronic Mail:

Re: Comments on Proposed Rulemaking Notice 2004-5 and Request to Testify

Dear Ms. Dinh:

The following are comments in response to the Federal Election Commission's notice of proposed rulemaking. I request the opportunity to testify before the Commission with regard to these comments.

My comments here are an outgrowth of academic work I have done on the treatment of section 527, including an article co-authored with my colleague Edward Foley, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 70 U.S.L.W. 2403 (January 20, 2004), as well as an article entitled *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611 (2003). My work in this area is purely academic, and the views expressed here are solely my own. They do not necessarily reflect the views of the Moritz College of Law or The Ohio State University. I do not represent any parties that have any interest in this issue. During my previous employment, however, I was an attorney at the Department of Justice and was part of a team of attorneys involved in crafting the Government's position in *National Federation of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273 (S.D. Ala. 2001), a case attacking the constitutionality of section 527's disclosure provisions.

These comments address three questions raised by your proposed rulemaking -- first, whether the FEC should amend its definition of "political committee" applicable to nonconnected committees; second, whether section 501 tax-exempt organizations should be excluded from these regulations; and finally, the proper timing of the regulations.

As explained in more detail in these comments, I believe many nonconnected committees, especially those organized under section 527 of the Internal Revenue Code who have as their primary purpose influencing Federal elections, meet the statutory definition of

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political committee and should be regulated as such. With regard to whether nonprofit organizations should be exempt from these regulations, the Federal Election Commission, not the Internal Revenue Service, is charged with implementing campaign finance laws. The Commission should not let a designation by the IRS control an organization's status under campaign finance laws. Finally, due to the breadth of these regulations, 527 organizations' reliance on previous decisions by the Commission, and the late date during the election cycle that any rule would be finalized, any rule should be prospective only and have an effective date after this election cycle is finished.

1. *Nonconnected committees are often political committees and should be subject to regulation under FECA*

Even prior to the passage of BCRA and the Supreme Court's decision in *McConnell v. FEC,* there was growing concern regarding activities of so-called 527 organizations. During the 2000 presidential campaign, 527 organizations were very active in attempting to influence the Presidential election. In fact, one 527 organization, Republicans for Clean Air, gained national attention for the negative ads it ran against Senator John McCain, a then presidential candidate.

The ultimate question facing the Commission is whether 527 organizations should be able to engage in advocacy designed to influence federal elections without being subject to campaign restrictions contained in FECA and BCRA. These organizations generally claim that their election activity is not express advocacy and therefore it cannot be regulated. This ignores the fact that in *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court did not rely on express advocacy to limit FECA's definition of expenditure as it applied to political committees.

FECA defines a political committee as a group that receives contributions or makes expenditures in excess of $1,000. 2 U.S.C. § 431(4)(A). Because FECA in turn defines "contribution" or "expenditure" to apply whenever any gift or payment is made "for the purpose of influencing any election for Federal Office," a literal reading of FECA would require that any group that spent $1,000 on almost any federal advocacy be a political committee. In *Buckley*, the Supreme Court limited the definition of political committee to candidate committees or organizations that have as their major purpose the influencing of federal elections. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

Some argue that an organization's major purpose must be determined solely by the amount it spends on express advocacy. Under this analysis, an organization would only be subject to political committee status if a major part of its advocacy were express advocacy. Since it is easy to avoid the express advocacy label, it is not surprising that nonconnected organizations avoid express advocacy and claim they are not political committees. This gloss on the major purpose test, however, is an overly restrictive one not necessitated by *Buckley.*

In *Buckley*, the Court discussed the major purpose test as an alternative to the express advocacy test. The Court discussed both the definition of political committee and the express advocacy test in its discussion of FECA's disclosure requirements. With respect to non-PAC

groups, the Court determined that the term "for the purpose of influencing a federal election" was too vague, and therefore limited the disclosure provisions to express advocacy. *Id.* at 79. But the Court did not similarly limit the definition for PACs. The Court determined that as long as the category of "political committee" is limited to those groups whose "major purpose" is to influence federal elections then expenditures "can be assumed to fall within the core area sought to be addressed by Congress." *Id.* They are, the Court recognized, "by definition, campaign related." *Id.*

Since a political committee's spending is subject to regulation under FECA whether or not it engages in express advocacy, it makes little sense to conclude that the only way to measure an organization's major purpose is through the amount of its express advocacy. Instead, the question must be whether the major purpose of the organization, in light of all its activities, is to influence a federal election.

On a simple level, the definition of political committee seems to encompass most section 527 organizations since section 527 status is only available to organizations that state that their primary purpose is to influence a federal, state, or local election. I.R.C. § 527(e)(1), (e)(2). A 527 organization may, however, be engaged in both federal and state advocacy. In other words, its primary purpose may be to influence elections, but its primary purpose may not be to influence a federal election. Section 527 status alone, therefore, cannot be the trigger for determining whether an organization is a political committee.

In a recent article, Edward Foley and I suggest two methods for determining whether an organization's major purpose is influencing elections. First, we argue that a group's "declaration" of its purpose may be enough to trigger political committee status. Although there may be some question regarding how clear an organization's declaration must be, it is clear that an organization can choose to be a political committee by its own declaration that it intends to influence federal elections (it simply needs to file as a political committee with the Commission). In addition, in some instances organizations may publicly state their primary purpose through a board resolution, corporate charter, or even an official fundraising appeal. If an organization states through an official document that its primary purpose is to influence a federal election, then it seems reasonable to hold the organization accountable for that statement. I recognize that it will be easy for an organization to avoid a public declaration of its primary purpose, and that this test alone has little value. But if an organization chooses to publicly declare that its primary purpose is to elect a specific candidate, it should not get the benefit of being able to make that declaration without the consequence that naturally follows from it. In my view, however, this test should only apply to organizations that make clear "declarations" regarding their purpose. The FEC should not attempt to infer an organization's stated purpose. If the declaration is not explicit, the Commission should examine what the organization actually does to determine its major purpose.

In this regard, Edward Foley and I proposed a 50% standard (this is similar to the standard set out in 11 CFR 100.5(a)(2)(ii)). We argue that an organization that spends more than 50% of its funds on influencing a federal election should be classified as a political committee.

There are several standards that could be used for determining what spending constitutes "for the purpose of influencing federal election." One such standard would be the "electioneering communications standard" and another would be the "federal election activity" standard, both of which were in BCRA and upheld by the Supreme Court in *McConnell*. In light of the Supreme Court's decision upholding the narrowly focused "electioneering communication" standard, at the very least, electioneering communication should be counted towards determining an organization's major purpose. It is important to recognize that absent political committee status, an unincorporated section 527 organization can engage in "electioneering communication" (subject to the disclosure provision of BCRA).

While in my view the Commission's previous enforcement of the major purpose test has been insufficient, two of the tests proposed in the rulemaking are overbroad. The $50,000 disbursement threshold is seriously overbroad as a test and runs the risk of ensnaring thousands of organizations that never intended to be political committees. It raises the same vagueness concerns that troubled the Court in *Buckley*. It is both constitutionally suspect and substantively flawed.

Similarly, basing the definition of political committee on an organization's tax status raises serious concern. First, why should the IRS's determination regarding an organization's tax status control its treatment for federal election law purposes? The FEC, not the IRS, is the expert agency regarding campaign finance law, and an organization's activities, not its status with the IRS should control. Moreover, under the proposed rule, a 527 organization that engages in both state and federal advocacy would be considered a political committee. A 527 organization that mainly supported local candidates, but also spent a small proportion of its money on federal candidates, would be deemed a political committee. Such an organization, however, would not have as its major purpose the influencing of federal elections.

The Commission should be sensitive to the fact that it is not promulgating these new rules due to statutory changes with regard to political committees. Instead, BCRA and *McConnell v. FEC* shed new light on the Commission's already difficult task of defining political committee for purposes of FECA. The express/issue advocacy distinction no longer need be the centerpiece of our discussion. Instead, the Commission should seek a definition of political committee that is consistent with the major purpose standards enunciated in *Buckley*. In my view, proposed tests 3 and 4 would bring within the definition of political committee thousands of organizations that do not have influencing elections as their major purpose, and would raise the same constitutional concerns that caused the Supreme Court to limit the definition of influencing an election in the first place.

2. *Section 501 organizations should not be exempt from the regulations*

The Commission also seeks guidance whether certain 501(c) organizations should be exempt from these regulations. I recognize that many 501(c) organizations are fearful that under the proposed regulations their advocacy will render them political committees. Exempting them from these regulations, however, is not the answer. If the regulations subject 501(c)

organizations to political committee status without warrant, then the regulations themselves need to be re-examined. If 501(c) organizations, however, have as their primary purpose influencing federal elections, then they should not be exempt from political status merely because of the IRS's conclusion that they are a 501(c) organization.

Presumably, the main argument for exempting 501(c) organizations from the proposed rule is that 501(c) organizations are prohibited by definition from having influencing federal elections as their major purpose. There are two major problems, however, with allowing 501(c) status to control whether an organization is subject to federal election law. First, the Commission should not allow itself to be bound by an IRS determination of an organization's status. Why should the IRS's decision regarding an organization's nonprofit status exempt an organization from federal election law? The IRS makes its decision regarding an organization's 501(c) status with far too little information to judge the amount of an organization's election-related advocacy. Moreover, the IRS often takes a long time to "pull" an organization's 501(c) status, and it is questionable whether anyone but the IRS has standing to contest an organization's status. Thus, if a 501(c) organization was exempt, it might remain exempt even if it engaged in significant election-related activity.

The second problem with allowing exempt status to control whether an organization is subject to election law is that organizations play games with regard to their stated purpose. In a thorough article on tax-exempt organizations and election law, Daniel Simmons analyzes how 501(c) organizations are used as conduits for campaign activities. *See Daniel Simmons*, An Essay on Federal Income Taxation and Campaign Finance Reform, 54 Fla. L. Rev. 1, 81 (2002). To the extent that a 501(c) acts as too much of a conduit, such that its major purpose is influencing elections, it should be regulated as a political committee regardless of its tax status.

Once the disclosure provisions in section 527 were enacted, organizations started filing as 501(c)(4) organizations. They claimed that education or social welfare was their primary purpose, but these organizations often engage in a significant amount of political advocacy. It is very difficult for the public to determine whether these organizations are acting consistent with their exempt status and the IRS simply does not have the resources to audit exempt organizations on a regular basis.

Assume the following scenario:

ZZZ files with the IRS as a 501(c)(4) organization. The charter for ZZZ indicates that ZZZ will educate the public about energy efficiency and the high cost of gasoline. The IRS approves ZZZ's application, and ZZZ is a 501(c)(4) organization. ZZZ organization then determines that gas prices are too high and it is President X's fault. It decides to engage in an advertising campaign telling people that high gas prices are President X's fault. ZZZ decides that all its efforts should be spent on defeating President X in the next election.

It often takes several years for the IRS to successfully pull an exempt organization's status, but even if the IRS revokes an organization's tax-exempt status, the only consequence is that the organization may have to pay tax on its income. But since that event will likely happen after X's election, any sanctions the IRS might impose on ZZZ would be relatively unimportant to the organization. Even if the IRS imposes financial sanctions, if the organization spent all its funds on campaign advocacy, the IRS would have no remedy to collect the sanctions. In other words, there would be almost no penalty to a 501(c) organization that primarily engaged in influencing federal elections despite the prohibition on such conduct. A savvy and unethical organization might specifically seek 501(c) status, engage in political advocacy, and not worry about the consequences since they would not come until after the election. If 501(c) organizations are exempt from this regulation, the Commission will be powerless to intervene in such a situation.

Similarly, the Commission's Request for Comment asks the extent to which the Commission should take into account certain T.A.M.s and other documents from the IRS. T.A.M.s. are merely technical advice from one IRS official to another, they should have no impact on the Commission's deliberation at all.

3. *Any new regulations should not be effective until 2005*

I have argued here and elsewhere that section 527s are not an end run around McCain-Feingold, and these organizations should not become a vehicle for subverting the intent of Congress with regard to campaign finance issues. In my view, interpreting the major purpose test as I propose is consistent with Congressional intent when it passed FECA. Congress clearly intended FECA to cover campaign activity as broadly as possible. The Court in *Buckley* limited the broad scope of FECA and nullified at least part of the Congressional intent of the statute. This Commission issued rulings and regulations consistent with what it thought the Supreme Court required. In light of *McConnell v. FEC*,it is clear that some of those interpretations were over-cautious. To the extent that this rulemaking clarifies the major purpose test and closes a loophole that has been open for too long, the rulemaking will serve an important purpose.

But the question still remains whether section 527 organizations now engaged in old style advocacy are in violation of the law. In that regard, I think 527 organizations are acting consistently with the previous understanding of how election law works. I believe my interpretation that would subject some of them to political committee status is consistent with FECA, and could be implemented by this Commission through adjudication. The Commission, however, has declined to do so. Organizations like Republicans for Clean Air, who engage in advocacy that has been held to be slightly below express, have routinely escaped political committee designation. Based on prior actions or inactions of this Commission, I understand why 527s believe that their current activities are not subject to federal election law. They do not engage in classic express advocacy (although the Commission's decisions in this area may be too lenient as well) and they are not associated with any candidate or party. In addition, there is still an open question regarding what activities should be considered for determining an organization's major purpose. Since it is not altogether clear what activities would subject an

organization to political committee status, I believe any changes in this area should be prospective only. In addition, due to the timing of these regulations, and the lateness of this election cycle, the regulations should be effective starting in 2005.

Respectfully submitted,

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