



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 8, 2001

MEMORANDUM

TO: The Commission
Acting General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Rosemary C. Smith *RC*
Assistant General Counsel

SUBJECT Comments on Advance Notice of Proposed Rulemaking Definition of
Political Committee

Attached please find six timely comments submitted in response to the above Advance Notice of Proposed Rulemaking published on March 7, 2001 (66 FR 13681). The comment period ended on May 7, 2001.

Attachments

cc: Associate General Counsel for Policy
Congressional Affairs Officer
Executive Assistants



Republican
National
Committee

Counsel's Office

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Smith:

These comments on the Federal Election Commission's ("the Commission") Advance Notice of Proposed Rulemaking ("ANPR"), 66 Fed. Reg. 13681, regarding the definition of "Political Committee" (to be codified at 11 CFR 100.5), are submitted on behalf of the Republican National Committee ("RNC").

First, the RNC agrees with the comments by Chairman McDonald and Commissioner Thomas at the Commission meeting on Thursday, May 3, 2001, explaining that the Commission should not proceed with rulemakings when Congress is in the midst of considering legislation on the very same issues. It would be inappropriate for the Commission to proceed with a Rulemaking vastly expanding the statutory definition of "political committee" at the very same time Congress is debating many of the same issues.

Accordingly, the RNC respectfully recommends that the Commission take no action at this time on this ANPR. If, after Congress has completed its consideration of campaign finance reform legislation, the Commission believes it is still necessary to attempt to expand its jurisdiction through the re-definition of "political committee," then a re-publishing of the ANPR will allow for thoughtful and informed commentary from the regulated community.

The RNC would also incorporate by reference its statements in previously submitted comments urging the Commission to not issue any regulations that unconstitutionally chill or abridge the First Amendment rights of political parties, or that serve to stifle political participation at the grassroots level.

Respectfully submitted,

Michael Toner
Chief Counsel
Charles R. Spies
Deputy Counsel

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May 7, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
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Fax: 202/219-3923
Email: polcomms@fec.govRe: Comments Concerning Advance Notice of
Proposed Rulemaking Regarding 11 CFR
Part 100, "Definition of Political Commit-
tee," Notice 2001-3

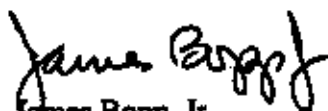
Dear Ms. Smith:

We send with this (by fax, mail, and email) the *Comments on Proposed Rules at 11 CFR Part 100 to Amend the Definition of "Political Committee"* by the James Madison Center for Free Speech (in response to a notice published at 66 Fed. Reg. 13681, March 7, 2001), incorporated herein by reference.

Notice is hereby given that Mr. James Bopp, Jr., General Counsel for the James Madison Center for Free Speech, wishes to testify orally concerning the proposed rulemaking in the event a hearing is scheduled on this matter.

Sincerely,

BOPP, COLESON & BOSTROM


James Bopp, Jr.
Richard E. Coleson

1 Enclosure

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Comments on Proposed Rule at 11 CFR Part 100 to Amend the Definition of "Political Committee"

By the

James Madison Center for Free Speech

To the

Federal Election Commission

Prepared by

James Bopp, Jr. & Richard E. Coleson

May 7, 2001

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The James Madison Center for Free Speech submits the following comments regarding the Federal Election Commission's ("FEC") advanced notice of proposed rulemaking ("Notice") regarding amendments to 11 CFR Part 100 (Notice 2001-3, "Definition of Political Committee") in response to the solicitation of comments published at 66 Fed. Reg. 13681 (March 7, 2001).

The Notice by its title purports to be about redefining "political committee." However, the proposed 'new' definition of "political committee" (66 Fed. Reg. at 13687) simply repeats the statutory definition: "any committee, club, association, or other group of persons that received contributions aggregating in excess of \$1,000 or that makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The Notice goes beyond its title by proposing to redefine "contribution" and "expenditure." As the notice observes, the proposed redefinitions would have broad ramifications, requiring many entities that are not currently registered as political committees to do so and making previously unregulated contributions/expenditures "count against the FECA's contribution limits and, if sufficient amounts are contributed or expended, . . . trigger the FECA's reporting requirements." 66 Fed. Reg. at 13683.

Because most of the proposed amendments would amount to a radical rewriting of the FECA – with multiple and extensive effects, but without constitutional warrant – the James Madison Center for Free Speech opposes them. In general, the proposals fly in the face of the constitutional interpretations developed by the federal judiciary with respect to the "major purpose" test and the "express advocacy" test and reveal an attempt to overturn judicially-imposed constitutional mandates by agency regulation. As such, these efforts are doomed to federal judicial invalidation if enacted.

However, a new definition of "political committee" that would provide important guidance to the public about the existence of the "major purpose" test judicial gloss on the

definition would be salutary if it adheres to the Constitution of the United States as interpreted by the United States Supreme Court and lower federal courts. This First Amendment-mandated gloss is well defined by the courts, and the FEC is not free to deviate from the judicial standard. Unfortunately, the proposed 'new' definition of "political committee" fails to make any effort to incorporate the major purpose test.

These comments articulate the proper standards for the "major purpose" and "express advocacy" tests, concluding with some examples of how various proposals violate these constitutional doctrines that govern all rulemaking in this area.

I. **FEC Regulations Are Governed by the "Major Purpose" Test.**

Any new rules to be enacted pursuant to this Notice are bound by the "major purpose" test.

A. ***The "Major Purpose" Test Is Designed to Protect Issue Advocacy Groups That Only Occasionally or Incidentally Engage in Express Advocacy of a Candidate from Suffering the Burdens Imposed on Political Committees.***

The *major purpose* test is designed to eliminate the burden on First Amendment speech resulting from political committee registration by groups that are only incidentally or occasionally involved in advocating the election or defeat of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). The *express advocacy* test is similarly designed to separate constitutionally-protected advocacy of issues, which may not be restricted, from express advocacy of the election or defeat of clearly identified candidates by explicit words such as "vote for," which may be subjected to limited regulation. *Id.* at 44 n.52.

While the the "major purpose" and "express advocacy" tests serve different functions, they are related. The determination of a group's "major purpose" requires that the court separate the group's activities into two categories, i.e., its non-election related activities and its election related activities. Since (under *Buckley*) issue advocacy (while sometimes election-related in the broadest use of that term) should properly be considered in the non-election-related-activities category in determining a group's "major purpose," the "express advocacy" test is thus used in conjunction with the "major purpose" test for the purpose of properly categorizing a group's activities.

This is clear from one of the most recent pronouncements of a federal court, issued on February 22, 2001, which was not included in the FEC's Notice. To be deemed a political committee, "the Fourth Circuit . . . require[s] that the organization have the 'major purpose [of] engaging in express advocacy in support of a candidate . . . by using words such as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat,' or 'reject,' . . ." *Community Alliance for a Responsible Environment v. Leake*, No. 5:00-CV-554-BO(3), slip op. at 16 (quoting *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999)). "The 'major purpose' test is thus used to determine which organizations may be subject to administrative and disclosure requirements, as 'political committees,' and which may not . . ." *Id.* at 11. "For organizations whose major purpose is election activity, the legislature may require disclosure of substantially all expendi-

tures, regardless of whether they were made for express advocacy;¹ for organizations whose major purpose lies elsewhere, the legislature may require disclosure only of those expenditures used for express advocacy." *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1311 (S.D. Ala. 2000).

In *Buckley*, the Supreme Court tried to protect issue advocacy groups that only occasionally or incidentally engage in express advocacy of a candidate from suffering the many burdens imposed upon political committees. 424 U.S. at 79; see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-53, 262 (1986) ("MCFL"). However, the Court held that such an organization can be constitutionally required to make a minimum independent expenditure report, *Buckley*, 424 U.S. at 74-81, 160, which is "less restrictive than imposing the full panoply of regulations that accompany status as a political committee." *MCFL*, 479 U.S. at 262. It is only proper to go beyond requiring an independent expenditure report and require disclosure of the entire organization when electoral advocacy becomes the organization's major purpose. The major purpose test set forth by the Supreme Court would serve no purpose if an organization that only incidentally or occasionally engages in electoral advocacy could be required to report *all* of its expenditures and *all* of the contributions it receives, even those completely unrelated to electoral advocacy.² Such a consequence would "create a disincentive for such organizations to engage in political speech." *MCFL*, 479 U.S. at 254.

B. Organizations May Not Be Regulated as Political Committees Unless Their Major Purpose Is to Engage in Electoral Advocacy.

In *Buckley*, the Supreme Court held that the First Amendment prohibits organizations from being required to bear the burdens imposed on political committees unless they are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79 (emphasis added). Every case since that has considered the major purpose test has found it to be constitutionally mandated.

Approximately two years after the *Buckley* decision, the court in *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75, 89 (S.D. N.Y. 1978), struck down a political committee definition since it encompassed groups whose major purpose was not to support or oppose a ballot measure. The political committee definition at issue in *Acito* encompassed all organizations that spent any amount of money to support or oppose a referendum. The political committee definition in *Acito* operated so that when an organization was deemed a "political committee"

¹In the words of the Supreme Court in *Buckley*, "[t]o fulfill the purposes of the Act [the words '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. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." 424 U.S. at 79.

²In these comments, the term "electoral advocacy" is used to mean either making contributions to candidates or making independent expenditures, i.e., making communications independent of a candidate that expressly advocate the election or defeat of a candidate through express or explicit words.

that organization was then subject to the various record-keeping and reporting provisions of the state's election law.

The court held, not only that the "political committee" definition was unconstitutional as applied to Plaintiff, but also that it was unconstitutional on its face since the "[political committee' definition] applies to the acts of plaintiff in supporting the [ballot measure]. This [definition] on its face also would apply to every little Audubon Society chapter or Golden Age club or Boy Scout troop which campaigned for or against a particular referendum." *Acito*, 459 F. Supp. at 89. The court further held that:

the governmental interest in disclosure of both the contributors to and expenditures of essentially apolitical organizations such as these is minimal. On the other hand, the First Amendment right of freedom of association would suffer if potential contributors to these organizations declined to make 'public' contributions. The First Amendment right of freedom of speech would suffer if these organizations were discouraged from actively engaging in an election campaign because of the disclosure and reporting requirements of the Act. [*Id.*]

The court also stated that "political committee" requirements, such as disclosure can be constitutionally required only in those limited situations where the potential benefits of disclosure are so great as to outweigh the infringement on First Amendment rights. This court holds that, that standard can be met by applying [political committee requirements] only to those organizations soliciting contributions or making expenditures *the major purpose* of which is to support or oppose any question submitted to vote at a public election. [*Id.* (citing *Buckley*, 424 U.S. at 61) (emphasis added).]

In *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), the D.C. Circuit declined to extend the definition of political committee beyond *Buckley's* holding:

The Supreme Court [in *Buckley*] . . . found . . . that unless a group is 'under the control of a candidate or (its) major purpose . . . is the nomination or election of a candidate,' it cannot constitute a 'political committee' under the Act [and be subject to a panoply of FEC regulations]. . . . The *Buckley* Court felt that a more expansive definition of 'political committee' would have been *constitutionally dangerous*, since once any group of Americans is found to be a 'political committee' it must then submit to an elaborate panoply of FEC regulations [655 F.2d at 391-92.]

The Court in *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982), held likewise.

Ten years after the *Buckley* decision, the Supreme Court reaffirmed the "major purpose" test in *MCFL*, where a plurality noted that "this Court said [in *Buckley*] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n.6. *MCFL* was incorporated as a nonprofit organization whose corporate purpose was "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities." *Id.* at 241. The Court specifically recognized that *MCFL* fits neither of the above requirements to determine whether an entity is subject to regulation as a "political committee": "[i]ts central organizational purpose is

issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.* at 252 n.6. However, to remove all doubts on the application of the "major purpose" test, a majority of the Court observed that "should MCFL's independent spending [on express advocacy] become so extensive that the organization's *major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262 (emphasis added). MCFL clearly establishes that political committee requirements, such as record keeping, registration, organizational and reporting requirements, beyond an independent expenditure report, as applied to organizations whose major purpose is not electoral advocacy, are not narrowly tailored to meet the government's informational interest because less restrictive means through an independent expenditure report will satisfactorily advance that interest. 479 U.S. at 262; see also 479 U.S. at 266 (O'Connor, J. concurring in part and concurring in the judgment) (FECA's organizational requirements "do not further the government's informational interest in campaign disclosure"); *Richey*, 120 F. Supp. 2d at 1316.

Further, in *FEC v. GOPAC*, 917 F. Supp. 851 (D. D.C. 1996), relying on the *major purpose* test, the court held that an organization was not a political committee under the FECA. The court stated that

[t]he 'major purpose' test treats an organization as a 'political committee' if it receives contributions and/or expenditures of \$1,000 or more and its 'major purpose' is the nomination or election of a particular candidate or candidates for federal office. The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.

Id. at 859 (citing *MCFL*, 479 U.S. at 262). Moreover, the court noted that "[c]onfining the definition of 'political committee' to an organization whose *major purpose* is the election of a particular federal candidate or candidates provides an appropriate 'bright-line' rule." *GOPAC*, 917 F. Supp. at 861 (emphasis added).

The Fourth Circuit in *Bartlett*, 168 F.3d 705, struck down a political committee definition because it encompassed organizations that were only incidentally engaged in express advocacy. The *Bartlett* Court said that "the Court [in *Buckley*] defined political committee as including only those entities that have as a *major purpose* engaging in express advocacy in support of a candidate by using such words as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat,' or 'reject.'" 168 F.3d at 712 (citations omitted) (emphasis added). The state in *Bartlett* urged the Court to narrowly construe the challenged definition. *Id.* However, because the "political committee" definition, which included those entities whose primary or incidental purpose was to engage in express advocacy, "expressly sw[ep]t within its ambit those groups that only incidentally engage[d] in express advocacy," the Court refused to narrowly construe the statute, since to do so "would require quite a stretch" by having the court literally "excise the word 'incidental' from the statute." *Id.* Thus, the Fourth Circuit intended to exclude those organizations that only engage in a minor amount of electoral advocacy from the panoply of requirements imposed upon political committees.

The Notice cites *North Carolina Right to Life v. Leake*, 108 F. Supp. 2d 498 (E.D. N.C. 2000), as "uphold[ing] a North Carolina statute revised in light of *Bartlett* that, in contrast to the FECA, defines 'political committee' as, *inter alia*, a group that has 'a major purpose to support

or oppose the nomination or election of one or more candidates.” 66 Fed. Reg. at 13685. The Notice further observes that North Carolina created a “rebuttable presumption” of a group having “a ‘major purpose’ of supporting or opposing one or more candidates if its contributions and expenditures total over \$3,000 during an election cycle,” and seeks comments on whether the FEC should adopt such an approach. *Id.* The Notice fails to note that this was a ruling on a motion for preliminary injunction, making it a temporary ruling. Plaintiffs (represented by present counsel for the James Madison Center) have since moved for summary judgement and fully anticipate that the district court’s erroneous, but preliminary and temporary, decision will be reversed by the district court or on appeal.

In fact, a related later word from the Eastern District of North Carolina itself is already available in the *CARE* case, issued on February 22, 2001 (and not included in the FEC’s Notice), which declares that to be deemed a political committee, “the Fourth Circuit . . . require[s] that the organization have the ‘major purpose [of] engaging in express advocacy in support of a candidate . . . by using words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject,’” *Community Alliance for a Responsible Environment v. Leake*, No. 5:00-CV-554-BO(3), slip op. at 16 (order granting preliminary injunction) (quoting *Bartlett*, 168 F.3d at 712). This reaffirmation of the Fourth Circuit (and U.S. Supreme Court) standard leaves little room for rebuttable presumptions, although the preliminary injunction motion in the *CARE* case was decided on the basis that none of *CARE*’s expenditures were for express advocacy.³

The court in *Volle v. Webster*, 69 F. Supp. 2d 171 (D. Me. 1999), held that requirements imposed on political committees *can only* be justified if the organization’s major purpose is to engage in electoral advocacy since such extensive political committee requirements undoubtedly would operate to deter spending on political speech by organizations whose major purpose is not to engage in electoral advocacy. *Id.* at 175. The court in *Richey* held that Alabama’s “registration, organizational and record keeping requirements [imposed upon political committees] are unconstitutional as applied to organizations whose major purpose is not to engage in election activity, [such as Plaintiff Christian Coalition of Alabama].” *Richey*, 120 F. Supp. 2d at 1318.

³The “rebuttable presumption” found in N.C. Gen. Stat. § 163-278.6(14) is wholly nugatory and is virtually unavailable since there is no standard whatsoever to which an entity can rebut the presumption because the term “major purpose” is not defined under the Act. Moreover, the burden of proving one’s ‘innocence’ by filing briefs and evidentiary materials with an agency (or alternatively by requesting an advisory opinion and being subject to subpoena of all one’s records by an agency permitted to consider all factors) is a burden on free speech rights not permitted by the First Amendment under the rationale of *Buckley* and *MCFL*. Plaintiffs’ summary judgment brief in *Leake* deals with the problems of the rebuttable presumption in detail and is available to the FEC upon request from present counsel.

⁴Consistent with *Buckley* and *MCFL*, the court held that, for organizations whose major purpose lies elsewhere, the legislature may require some minimal disclosure of *only* those contributions and expenditures used for the purpose of express advocacy. *Richey*, 120 F. Supp. 2d at 1311, 1318-19, 1321 n.25. “A statute that requires broader disclosure from one whose major purpose is not the achievement of an election result may therefore run afoul of *Buckley*.”

(continued...)

Recently, the Eleventh Circuit upheld a district court decision to enjoin Florida's political committee definition "because it is unconstitutionally overbroad under the First Amendment." *Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613, at *2 (11th Cir. Jan. 17, 2001), *aff'g Florida Right to Life v. Mortham*, 98-770-CIV-ORL-19A (M.D. Fl. Dec. 15, 1999). The district court agreed with the plaintiffs that the political committee definition was unconstitutional because "it sweeps in groups that engage solely in issue advocacy" and "groups that do not have as their major purpose express advocacy." *Mortham*, 98-770-CIV-ORL-19A, slip op. at 10-1:

One case discussed in the Notice as discussing the major purpose test has been *vacated* by the Supreme Court. *See Atkins v. FEC*, 101 F.3d 731 (D. D.C. 1997), *vacated by* 524 U.S. 11 (1998).⁵ In *vacating* the D.C. Court of Appeals' opinion, the Supreme Court did not rule on the application of the major purpose test because to do so would have been a futile academic exercise. Specifically, the Supreme court firmly believed it was inappropriate to rule on FECA's political committee definition in that case due to "the unusual and complex circumstances in which [the] case aros[e]." *FEC v. Atkins*, 524 U.S. at 26-29. The Court emphasized that it "cannot squarely address that matter" in the context of the case before it. *Id.* at 27 (emphasis added). Thus, in *vacating* the D.C. Court of Appeals' opinion, the Court in no way advocated or even hinted that the Court of Appeals' ruling regarding the major purpose was proper and correct.⁶

Moreover, the question before the D.C. Court of Appeals in *Atkins* was whether the major purpose test applied to an organization that made campaign contributions. The Court held that under the FECA the major purpose test does not apply to groups that make contributions over \$1,000.⁷ In so holding, however, the court held that according to Supreme Court precedent the major purpose test does apply to organizations that only make express advocacy communications; thus, under *Atkins*, an organization cannot be required to suffer the panoply of requirements imposed upon political committees unless its major purpose is to make express advocacy

⁴(...continued)

Id. at 22.

⁵Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-3 (1994) (emphasis added) (citation omitted).

⁶It would seem to be unnecessary to explain the major purpose test to the FEC in light of the Agency's 1996 brief before the United States Supreme Court in *FEC v. Atkins*, 524 U.S. 11, in which it described it quite well in support of its position (although failing to concede the debate over *the* major purpose versus *a* major purpose). Similarly, a quite clear understanding of the major purpose doctrine underlay the First General Counsel's Report in MUR 4940, in which the FEC recently closed an enforcement matter against Campaign for America and its founder, Jerome Kohlberg. However, the current Notice evinces a different approach.

⁷Under FECA, a political committee is defined as "any committee, club, association, or other group of persons" which makes direct contributions to a candidate. 2 U.S.C. § 431(9)(A)(i); *see also Atkins*, 101 F.3d at 734 ("Expenditures have been classified by caselaw and FEC interpretation to include . . . direct contributions to a candidate.").

communications independent of a candidate since “[i]ndependent expenditures are the most protected form of political speech.” *Akins*, 101 F.3d at 742.

Akins also suggests that an organization can make up to the statutory limit on contributions to candidates and make independent expenditures over the statutory amount as long as such disbursements combined do not become that organization’s major purpose. The distinction between contributions and independent expenditures set forth in *Akins* is not pertinent to the application of the major purpose test. As mentioned above, the major purpose test is designed to protect groups primarily engaged in issue advocacy. The protection lies regardless of the type of political activity engaged in. The very idea of the major purpose test is that the heavy reporting, registration, record keeping and disclosure requirements imposed on political committees are too great a burden on the First Amendment rights of organizations whose major purpose is not electoral advocacy.

Thus, the pertinent question is “what is an organization’s major purpose.” The dichotomy set out in *Akins* between contributions and independent expenditures is not a pertinent inquiry as to the application of the major purpose test. In *Buckley*, the Supreme Court overlaid the major purpose test on the definition of “political committee” found in the FECA – the same definition found in *Akins* – which includes organizations that make contributions or expenditures in excess of \$1,000 in a calendar year. See also *MCFL*, 479 U.S. at 253 n.6. Hence, it was the intent of the Supreme Court to protect all groups whose major purpose is not to make contributions to candidates and/or make communications expressly advocating the election or defeat of a candidate from being subjected to the panoply of burdensome requirements imposed upon political committees regardless of the type of political activity the organization chooses to engage in – contributions to candidates or independent expenditures.

C. *Communications Not Expressly Advocating the Election or Defeat of a Candidate Are Not Relevant in Determining an Organization’s Major Purpose.*

Other than contributions made to a candidate, only communications that expressly advocate the election or defeat of a candidate are relevant in the determination of an organization’s major purpose. In its discussion of the reporting requirements found at § 434(e), the *Buckley* Court narrowly construed the definition of “expenditure,” found within the definition of political committee, “to reach only funds used for communications that expressly advocate the election or defeat of a . . . candidate” since if not so construed it “could be interpreted to reach groups engaged purely in issue discussion.” 424 U.S. at 79-80. Further, “[a]s the Fourth Circuit noted in . . . *Bartlett*, for the definition of ‘political committee’ to be constitutionally applied, it must [include] *only* those entities that have as a major purpose engaging in express advocacy in support of a candidate, [i.e.], by using words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *CARE*, Civil No. 5:00-CV-554-BO(3), slip op. at 15 (quoting *Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999) (quoting *Buckley*, 424 U.S. at 44 n.52) (emphasis added)).

Moreover, the Fourth Circuit recently held that “the Supreme Court adopted a bright-line rule” that “requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated” at all. *Perry*, 231 F.3d at 160. The Fourth Circuit recognized that the Supreme Court “refused to adopt a standard allowing regulation of any advertisement that mentions a candidate’s stand on an issue.” *Id.* (citing *Buckley*, 424 U.S. at

42-43). "The Fourth Circuit has steadfastly adhered to the bright-line 'express advocacy' test from *Buckley*." *Id.*; see also *Bartlett*, 168 F.3d at 712-13; *Virginia Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998); *FEC v. Christian Action Network*, 110 F.3d 1049, 1051 (4th Cir. 1997) ["CAN I"]; *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996) ["CAN I"]. These Fourth Circuit decisions are convincing in their logic, correctly applying the constitutional principles articulated by the United States Supreme Court.⁵

Thus, as discussed below, to include communications that do not expressly advocate the election or defeat of a candidate, i.e., issue advocacy communications, to determine whether an organization is deemed a political committee and, therefore subject to political committee requirements, would be an unconstitutional regulation of issue advocacy.

D. The Major Purpose of an Organization Is Determined Either by its Central Organizational Purpose or Relative to the Majority of its Disbursements.

If an entity makes direct contributions to candidates and/or expenditures on express advocacy, it cannot, under the First Amendment, be required to register as a "committee" unless "the major purpose of [the entity] is the nomination or election of a candidate." *Buckley*, 424

⁵"Other courts applying *Buckley* have also required express words of advocacy before allowing government regulation of campaign speech." *Perry*, 231 F.3d at 161. See *Mortham*, 98-770-CIV-ORL-19A, at 11 n.8, 9, *aff'd per curiam*, *Lamar*, 2001 U.S. App. LEXIS 613; *Citizens for Responsible Gov't State PAC v. Davidson*, 2000 U.S. App. LEXIS 33727, *22-26, (10th Cir. Dec. 26, 2000); *Vermont Right to Life Comm. v. Sorrell*, 216 F.3d 264, 275-77 (2d Cir.2000); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969-970 (8th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Maine Right To Life Comm.*, 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) ("[W]e affirm for substantially the reasons set forth in the district court opinion."); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1309 (S.D. Ala. 2000); *Leake*, 108 F. Supp. 2d at 51-11; *South Carolina Citizens for Life v. Davis*, C.A. No. 3:00-124-19 (D.S.C. Feb. 9, 2000); *Virginia Soc'y for Human Life v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000); *FEC v. Freedom's Heritage Forum*, Civil Action No. 3:98 CV-549-S, at 5-8 (W.D. KY Sept. 29, 1999); *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999); *Right to Life of Mich. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998) (same); *Right To Life of Dutchess County, v. FEC*, 6 F. Supp. 2d 248 (S.D. N.Y. 1998); *Clifton v. FEC*, 927 F. Supp. 493, 496 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Survival Educ. Fund*, 1994 WL 9658, at *3 (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *West Virginians For Life v. Smith*, 919 F. Supp. 954, 959 (S.D. W.Va. 1996); *FEC v. NOW*, 713 F. Supp. 428 (1989); *FEC v. AFSCME*, 471 F. Supp. 315, 317 (D. D.C. 1979).

U.S. at 79; *see also* *MCFL*, 479 U.S. at 252 n. 6; *Bartlett*, 168 F.3d at 712. Implicit in this constitutional protection is that the major purpose of an organization is determined either by its central organizational purpose, as evidenced by its public statements of its purpose, *see* *MCFL*, 479 U.S. at 625 n. 6 (*MCFL*'s "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of candidates"); *see also* *GOPAC*, 917 F. Supp. at 859 ("The organization's purpose may be evidenced by its public statements of its purpose.") or relative to the *majority* of its disbursements, i.e., more than 50 percent. *See* *MCFL*, 479 U.S. at 262 ("[S]hould *MCFL*'s independent spending [on express advocacy] become so extensive that the organization's major purpose may be regarded as campaign activity the corporation would be classified as a political committee."). *See also* *GOPAC*, 917 F. Supp. at 858; *Wisconsin Mfrs & Commerce v. Wisconsin Elections Bd.*, 978 F. Supp. 1200, 1206 (W.D. Wisc. 1997).

Since the major purpose test was created by the Supreme Court in *Buckley* to protect issue advocacy groups that only occasionally or incidentally engage in express advocacy of a candidate from suffering the many burdens imposed upon political committees, it is only logical to treat an organization as a political committee when it is its major purpose to engage in electoral advocacy. It is illogical, however, to treat an organization as a political committee when it only occasionally or incidentally engages in electoral advocacy – for this activity, an independent expenditure report can be required. Consistent with this logic, the two tests described are the only appropriate ones for establishing the major purpose of an organization.

II. The FEC May Not Regulate Issue Advocacy, Which Is Protected by the "Express Advocacy" Test.

To protect First Amendment freedom, the Supreme Court has created a bright line between permitted and proscribed regulation of political speech. Government may only regulate a communication that "expressly advocates the election or defeat of a clearly identified candidate" ("express advocacy"), by "explicit words" or "in express terms," such as "vote for," "support," or "defeat." Election-related speech that discusses candidates' views on issues is known by the legal term of art "issue advocacy." Although issue advocacy undoubtedly influences elections, it is absolutely protected from regulation – even if done by corporations, labor unions, or political parties.

The Supreme Court has recognized that the freedom of speech is both an inherent liberty and a necessary instrument for limited representative government.⁹ The Court observed that "[i]n a republic where the people[, not their legislators,] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation."¹⁰ As a result, "it can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."¹¹

⁹*MCFL*, 479 U.S. 238, 257 n.10.

¹⁰*Buckley*, 424 U.S. at 14-15.

¹¹*Id.* at 15 (citation omitted).

The seminal case is the 1976 decision in *Buckley*, where the Supreme Court was faced with constitutional questions regarding the post-Watergate amendments to the Federal Election Campaign Act ("FECA") – which was by far the most comprehensive attempt to regulate election-related communications and spending¹² to date. One of the more nettlesome problems with which the Court struggled was the question of what speech could be constitutionally subject to government regulation. The post-Watergate FECA was written broadly, subjecting any speech to regulation that was made "relative to a clearly identified candidate"¹³ or "for the purpose of . . . influencing" the nomination or election of candidates for public office.¹⁴

In considering this question, the Court recognized that the difference between issue and candidate advocacy often dissipated in the real world:

[T]he distinction between discussion of issues and candidates and advocacy of the 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.¹⁵

Thus, the Court was faced with a dilemma—whether to allow regulation of issue advocacy because it might influence an election or to protect issue advocacy because it is vital to the conduct of our representative democracy, *even though it would influence elections*.

The Court resolved this dilemma decisively in favor of protection of issue advocacy. First, the Court recognized that "a major purpose of [the First Amendment] was to protect the

¹²The fact that laws regulate the spending of money on speech, rather than the speech itself, does not change the constitutional calculus. As the Court explained in *Buckley*,

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 18-19. Thus, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18.

¹³Section 608(e)(1) limited expenditures by individuals and groups "relative to a clearly identified candidate" to \$1,000 per year.

¹⁴Section 431(e) and (f) defined the terms "contribution" and "expenditure" for the purposes of FECA's disclosure requirements in then Section 434(e).

¹⁵*Buckley*, 424 U.S. at 42-3.

free discussion of governmental affairs . . . of course includ[ing] discussions of candidates."¹⁶ Thus, the Court concluded that issue advocacy was constitutionally sacrosanct:

Discussion of *public issues and debate on the qualifications of candidates* are integral to the operation of the system of government established by our Constitution. The First Amendment affords the *broadest protection* to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁷

Second, in order to provide this broad protection to issue advocacy, the Court adopted the bright-line "express advocacy" test which limited government regulation to only those communications which "expressly advocate the election or defeat of a clearly identified candidate," in "explicit words" or by "express terms."¹⁸ In so doing, the Court narrowed the reach of the FECA's disclosure provisions to cover only "express advocacy."¹⁹ A decade later, the Court reaffirmed the express advocacy standard and applied it to the ban on corporate and labor union contributions and expenditures in connection with federal elections.²⁰

Finally, not even the interest in preventing actual or apparent corruption of candidates, which was found sufficiently compelling to justify contribution limits, was deemed adequate to regulate issue advocacy. The Court rejected this interest even though it recognized that issue advocacy could potentially be abused to obtain improper benefits from candidates.²¹

In adopting a test that focused on the words actually spoken by the speaker, the Court expressly rejected the argument that the test should focus on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

[W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-

¹⁶*Id.* (citation omitted).

¹⁷*Id.* at 14 (citation omitted) (emphasis added).

¹⁸*Id.* at 43, 44. To ensure that there was not any confusion about the meaning of "express advocacy," the Court gave examples of such "express terms" – "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44 n.52.

¹⁹*Id.* at 80; see also Bopp & Coleson, *The First Amendment is not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U.W.L.A. LAW REV. 1, 11-15 (1997).

²⁰*MCFL*, 479 U.S. at 249 ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition in § 441b."); see also *id.* ("finding of express advocacy depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (citations omitted).

²¹*Buckley*, 424 U.S. at 45.

cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.²²

Some claim that the Court was not sufficiently farsighted to see the effect that issue advocacy would eventually have in influencing elections and, if we only bring this to their attention, then the Court will allow government regulation of it. However, the Court made clear that it was not so naive:

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.²³

As a result, the Court explicitly endorsed the use of issue advocacy to influence elections:

So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.²⁴

The several lower federal courts and state courts that have been faced with restrictions on issue advocacy have faithfully adhered to the "explicit" or "express" words of advocacy test according to its plain terms.

²²*Id.* at 43 (citation omitted). Some espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, but they ignore the Court's confirmation that the express advocacy limitation was also imposed on the FECA "to avoid problems of overbreadth." *MCFL*, 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80).

²³*Buckley*, 424 U.S. at 43 n.50 (citation omitted).

²⁴*Id.* at 45. Some argue that the "express advocacy" test was ill considered by the Supreme Court. The evidence does not admit this conclusion. The Court reiterated the "express advocacy" test in eight different passages throughout its opinion. *Id.* at 43, 44, 44 n.52, 45 (twice), 80 (thrice). Others, contend that the "express advocacy" test is a "magic words" test – that so long as the words used in *Buckley*'s footnote 52 are avoided, political speakers avoid regulation. Footnote 52 belies this view: "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' . . ." (Emphasis added.) Thus, the Court adopted an "explicit words of advocacy" test, not a "magic words" test.

The weight of authority is indeed heavy; the express advocacy test means exactly what it says. Regulations seeking to regulate more than explicit words of advocacy of the election or defeat of clearly identified candidates are "impermissibly broad"²³ under the First Amendment.

III. Based on These Criteria, Much of What the FEC Proposes Is Unconstitutional.

The Notice, especially the final proposed rule change, evinces an effort to avoid the twin criteria of the "major purpose" and "express advocacy" tests. For example, while comments are elicited as to whether to incorporate the "major purpose" test into the definition of "political committee," there is no effort to do so. And despite the United States Supreme Court's insistence that issue advocacy must be protected by the "express advocacy" test, the final proposed rule change repeatedly refers to "influencing" federal elections, instead of anywhere incorporating "express advocacy" language in the definitions of "contributions" and "expenditures." 66 Fed. Reg. at 13687.

A. *The Supreme Court's Criterion for What Constitutes "the Major Purpose" of an Organization Is Largely Ignored by the Proposals.*

As to the "major purpose" test, it would be useful for the FEC to incorporate a definition as outlined above. However, "Alternative 1: Percentage of Disbursements" is overbroad because it would consider "disbursements . . . for the purpose of *influencing* federal and non-federal elections." *Id.* at 13685. "Alternative 2: Percentage of Time and Disbursements" suffers from the same overbreadth flaw, while "Alternative 3" shows the correct approach by limiting consideration to express advocacy and contribution expenditures as compared to total expenditures. The Notice admits that "[t]his approach is consistent with *MCFL*," which raises the question of why there is any debate over which approach to adopt. *Id.* at 13686.

"Alternative 2" has the further flaw of being overly burdensome in its suggestion that time – and especially volunteer time – be accounted for by an organization to prove that its major purpose is not influencing elections. There can be no expectation that the United States Supreme Court would sustain as a constitutional burden on First Amendments rights the requirement that large national organizations like the Sierra Club or the National Right to Life Committee keep and compile time sheets on myriad volunteers in innumerable locations. An important goal in our democratic Republic is to get people involved in the marketplace of ideas, advocating the things they believe in and making their voices heard in government. This runs counter to that American ideal, in addition to being an impossible task and an unimaginable burden.

While the FEC is proposing the snapshots of a quarter for "assessing major purpose," why not consider a month, a week, or a day – maybe the one before an election? The Notice notes that "once an organization qualifies as a political committee, it retains that status until it terminates." *Id.* When applying for IRS recognition of non-profit status, an organization must submit evidence of its activity over time, not just in little temporal snapshots, because common sense dictates that the purpose of an organization cannot be discovered by a thin sample slice of time. The same principle should apply here, indicating that a year should be the minimal time for

²³*Buckley*, 424 U.S. at 80.

assessing an organization's major purpose on the basis of its expenditures on express advocacy and contributions as a portion of its total budget.

The proposal of "Alternative 4" that an expenditure of \$50,000 (or some other amount) for "election activity" (unconstitutionally overbroad) "or, alternatively, on express advocacy communications," "will automatically be deemed to [be] a major purpose," ignores the judicial precedent cited above. It endeavors to convert a minor purpose into "the major purpose" of an organization. There is no constitutional warrant for this.

B. *The Supreme Court's Criterion for What Constitutes Permissible Regulations of Contributions and Expenditures Is Largely Ignored by the Proposals.*

As to the proposed definitions of "contribution" and "expenditure," this new rule would amount to a complete rewrite of all the regulations ever promulgated in this area, affecting numerous other provisions. The proposals suggested for comment and the proposed new rule refer repeatedly to "anything of value" for "influencing" elections. This is a plain attempt to regulate issue advocacy, which is unconstitutional under the First Amendment and the vagueness doctrine.

The proposals violate the "express advocacy" test. A torrent of litigation has determined this cannot be done, whether by using a name or likeness test or by using vague "influencing" language. Particularly egregious is the inclusion of voter guides (which have been the subject of much litigation and judicial solicitude) in the proposed definitions of "expenditure" that ban choices made on the basis of target audience voting behavior or on the basis of payments to a vendor to create a product "designed to influence one or more federal elections."

The inclusion of the administrative expenses of a political action committee as an expenditure prohibited by 441b where donors are told "that donations will be used to influence a federal election" is likely even ultra vires for being beyond the statutory authority of 2 U.S.C. 441b(2)(C) (providing an exception to the ban on corporate expenditures that are for "the establishment, administration, and solicitation of contributions to a" PAC.

In sum, most of what the FEC proposes in its proposed rule is unconstitutional. The useful and constitutional things proposed in the Notice that it could do the FEC does not do in its proposed rule. It would be useful to the public if the FEC would enact rules that strictly reflect the constitutionally-mandated "major purpose" and "express advocacy" tests.

National Right to Work Committee
8001 Braddock Road
Springfield, VA 22160
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TELECOPIER INFORMATION SHEET

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF LEGAL
COUNSEL

TO : Rosemary C. Smith, Assistant General Counsel

FIRM : Federal Election Commission

CITY/STATE: Washington, D.C.

TELECOPIER: (202) 219-3923

FROM : Mark A. Mix, Sr. V.P.

SENDER'S FAX #: (703) 321-7342

Total Number of Pages (including information sheet): 10

Date Transmitted: May 7, 2001

If there is a problem with this fax, please call back as soon as possible and ask for Sheila Buenaventura on extension 2240.

COMMENTS:

The original of the following comments on Advance Notice of Proposed Rulemaking 2001-3, 66 Fed. Reg. 13681, is being mailed to you today.



National Right to Work Committee

A COALITION OF EMPLOYEES AND EMPLOYERS

HEADQUARTERS AT THE NATION'S CAPITAL

May 7, 2001

Rosemary C. Smith
 Assistant General Counsel
 Federal Election Commission
 999 E Street, N.W.
 Washington, D.C. 20463

RECEIVED
 FEDERAL ELECTION
 COMMISSION
 OFFICE OF GENERAL
 COUNSEL
 MAY 7 1 36 PM '01

Re: Advance Notice of Proposed Rulemaking ("ANPRM") 2001-3, 66 FR 13681

Dear Ms. Smith:

The National Right to Work Committee ("NRTWC") files these comments in response to ANPRM 2001-3, which proposes to amend the definitions primarily of "political organization" and secondarily of "contributions" and "expenditures."

NRTWC is a nonprofit organization incorporated in Virginia and exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code ("IRC"). NRTWC's purpose is to educate the public on and to advocate voluntary unionism, that is, the concept that employees ought to have the right, but not be compelled, to join or support labor organizations.

That purpose may be adversely affected by any rule or regulation that creates too expansive a definition of the terms under consideration, i.e., "political committee," "contributions," and "expenditures." These terms should be kept strictly within their constitutional boundaries under the First Amendment to the Constitution of the United States.

The Commission should proceed with the utmost 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. See, *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny.

As its touchstone, the Commission should keep in mind the simple, absolute language of the First Amendment, which 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

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peaceably to assemble, and to petition the Government for a redress of grievances.

(Emphasis added.) The Commission should emulate our Founding Fathers and respect these citizenship rights of all Americans.

SPECIFIC COMMENTS

A. "Major Purpose" Test

The "major purpose" test should be based on whether an organization devotes more than fifty percent of its resources on activities that can be regulated by the Commission.

This would correspond with the way the Internal Revenue Service ("IRS") distinguishes between social welfare organizations, such as ours, and political committees under § 527 of the Internal Revenue Code ("IRC"). IRS uses a "primary purpose" test:

In order to qualify for exemption under section 501(c)(4) of the Code, an organization must be primarily engaged in activities that promote social welfare. Although the promotion of social welfare within the meaning of section 1.501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.

Rev. Rul. 81-95, 1981-1 C.B. 332 (emphasis added).

"Primary" has an easily understood, common meaning, i.e., "something that stands first in rank, importance, or value." *Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Co. Springfield, Mass. 1971.

The Commission's proposal to use an "at least 50%" test, by definition, would not identify a "primary" purpose because, if an organization had only two purposes, with a 50/50 split, neither would be "primary."

Using a "primary," i.e., "more-than-50%" test would alleviate the difficulty of an organization being classified as one type of entity for IRS purposes and another type of entity for purposes of the Federal Election Campaign Act ("FECA" or the "Act").

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B. "Time for the Computation or Assessment."

In determining the "primary" purpose of an organization, the Commission should consider an organization's activities from an historical perspective, such as is done for the "public support" and "excessive lobbying" tests applicable to IRC § 501(c)(3) organizations, which are based on a four-year averaging test in recognition of the fact that events and issues in certain years may propel organizations to apply more of their resources to one activity or another in particular years, but they average out over a period of time. See, e.g., the attached pages 3 and 5 from IRS Form 990, Schedule A (2000). This approach would be consistent with *Buckley v. Valeo's* recognition that:

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.⁵⁰

⁵⁰ In connection with another provision . . . , the Court of Appeals concluded: "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

Buckley v. Valeo, 424 U.S. 1, 42 & n. 50 (1976) (citation omitted).

C. Alternative 3: Percentage of Disbursements Spent on Communications Containing Express Advocacy.

A "primary" purpose test, discussed under "A" above, should be combined with Alternative 3.

Under *Buckley*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("MCFL"), and their progeny discussed under the Alternative 3 proposal, the Commission cannot constitutionally regulate any communications that do not constitute "express advocacy." Therefore, the Commission cannot constitutionally use any other communications as a pretext to scoop issue discussion groups into the Commission's definition of "political committee," with all of its ramifications.

The only disbursements or activities the Commission can constitutionally use to regulate organizations under the *Buckley* and *MCFL* line of cases are: (1) contributions to federal candidates, political committees, and political parties, including in-kind contributions; (2) express

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advocacy communications to the general public, otherwise known as independent expenditures; and (3) partisan registration and get-out-the-vote activities. Corporations (for-profit and non-profit) and labor organizations, of course, are prohibited from making such disbursements. 2 U.S.C. § 441b.

It makes no logical sense to use disbursements for activities the Commission is constitutionally barred from regulating as part of the pool of disbursements used to classify the organization as a "political committee" under the Act. That is a contradiction in terms.

D. Dollar Threshold - Alternative 4.

Under Alternative 4, the Commission proposes to subject organizations to "political committee" status merely if a dollar threshold of disbursements, say \$50,000, is made, irrespective of the organization's total expenditures.

This proposal makes no sense, practically or 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), and related regulations.¹

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 "issue discussion."

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?

E. Proposed "Political Committee" definition.

The Commission proposes to give several examples of "contributions" and "expenditures" that would be used to satisfy the \$1,000 statutory threshold to regulate groups as "political

¹ As the Commission itself notes, "political committee" status continues indefinitely until the committee "terminates" or is "terminated" under 11 C.F.R. § 102.

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committees." The Commission's proposals are flawed for a number of reasons.

1. Contributions.

The first contribution proposal, "[m]oney . . . received as the result of a solicitation, the express purpose of which was to raise money to influence federal elections" (emphasis added), flouts *Buckley's* admonition that "issue discussion" can "influence" federal elections, but that does not make it constitutionally subject to regulation under the Act. Only "express advocacy" communications are subject to the Act. *Buckley*, at 42-44.

Many Americans simply exercising their presumed citizenship rights to speak out, associate, and attempt to influence public policy debates, raising and spending money in the process, will have to watch their words carefully - in George Orwellian style - or they may easily be caught by this regulation.

How many average Americans will even know that the FEC has made the phrase "influence federal elections," taboo in fund-raising copy? How many fund-raisers will know that they must excise this phrase from their writing?

Novice fund-raising writers had better beware, the FEC will become the thought-police agency of the country!

To cure this constitutional vagueness, the explanation for this change, at 66 FR 13683, should be incorporated in the actual regulation.

The second, "[m]oney . . . received from a political committee . . . , except money . . . received by an organization qualifying for tax exempt status pursuant to 26 U.S.C. 501(c)(3)" ignores the fact that political committees, as IRC § 527 organizations, are not prohibited from using their funds for purposes other than federal electioneering. The only consequence of doing so is that the political committee will have to report the expenditure and pay a § 527 tax on the lesser of the expenditure or the committee's net investment income.

If the political committee donor is not prohibited from spending its funds on non-electioneering activity, and if the recipient is an independent organization retaining its own control over its activities and expenditures, there is no logical reason to treat the donee organization as a political committee. This would be substantial overreaching by the Commission.

Section 501(c)(3) organizations are not political committees, but that does not mean that § 501(c)(4) organizations and others should be presumed to be political committees just because they receive contributions from political committees.

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Organizations are not typically alter egos of their donors. The only types of organizations which may be alter egos of their donors, and thus of concern to the Commission, are organizations controlled by candidates, political parties, and political committees.

Any other type of organization should be of no concern to the Commission under this regulation.

The Commission's explanation for this provision, at 66 FR 13683, reveals the Commission's unconstitutional goal, i.e., to treat donee organizations as "political committees" without any inquiry into the donee organization's activities or use of the funds.

But, if the donee organization never engages in activities subject to the Commission's jurisdiction, the Commission will never succeed in regulating the donee.

The third, "[m]oney . . . received by an organization that is expressly authorized by its charter, . . . or other organizational document to engage in activities for the purpose of influencing federal elections," begs the question.

As *Buckley* pointed out many years ago, issue discussion activities can "influence" federal elections. Thus, an organization could be organized, wholly or partially, "to influence federal elections" and do so exclusively through "issue discussion" activities. This would not give the Commission any jurisdiction over the organization.

The fifth, "[m]oney . . . received by [a § 527 organization that] does not restrict its activities to influencing . . . elections to state or local public office . . .," ignores the fact that such an organization may engage exclusively in issue discussion activities and never engage in activity subject to FEC jurisdiction under the "express advocacy/issue discussion" dichotomy.

2. Expenditures.

The first expenditure proposal is a parallel to the first contribution proposal and suffers from the same defect.

The third, "[p]ayments or costs associated with any general public political communication that refers to a candidate for federal office, where the intended audience has been selected based on its voting behavior," and the fourth, which is similar, ignore the fact that the subject communications would not amount to "express advocacy." At most, they would be issue discussion, which does not support Commission jurisdiction. These proposals should encompass only express advocacy communications.

Federal Election Commission
May 7, 2001
Page 7

The fifth, "[p]ayments made to a commercial vendor for a service or product, with the express understanding that the service or product be designed to influence one or more federal elections," continues to invoke the long-since discredited, constitutionally vague, "election influencing" language, which led the *Buckley* Court to fashion the "express advocacy/issue discussion" dichotomy.

Issue discussion can and does influence federal elections! The Commission needs to accept that. The Commission also need to accept the fact that it cannot regulate issue discussion, no matter how much issue discussion may influence elections. *See Buckley and MCFL!*

CONCLUSION

With this ANPRM, the Commission, once again, manifests a desire to exceed the constitutional limits on its jurisdiction and, once again, threatens the exercise by Americans of their First Amendment rights to associate and petition their government for redress of grievances, and freedom of speech.

The Commission should either abandon this project or substantially revise its proposal to conform with the "express advocacy/issue discussion" dichotomy enunciated by the U.S. Supreme Court in *Buckley* and *MCFL*, and adopt a "more than 50% of disbursements or activities" major purpose test, measured on an average over, say, a four-year period.

Respectfully submitted,



Mark A. Mix
Sr. Vice President

MAM/emm
Enclosures, A/S

Support Schedule (Complete only if you checked a box on line 10, 11, or 12.) *(Use cash method of accounting. Note: You may use the worksheet in the instructions for converting from the accrual to the cash method of accounting.)*

Calendar year (or fiscal year beginning in)	(a) 1999	(b) 1998	(c) 1997	(d) 1996	(e) Total
15 Gifts, grants, and contributions received. (Do not include unusual grants. See line 28.)					
16 Membership fees received					
17 Gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is not a business unrelated to the organization's charitable, etc., purpose					
18 Gross income from interest, dividends, amounts received from payments on securities loans (section 512(a)(5)), rents, royalties, and unrelated business taxable income (less section 511 losses) from businesses acquired by the organization after June 30, 1975					
19 Net income from unrelated business activities not included in line 18					
20 Tax revenues (levied for the organization's benefit and either paid to it or expended on its behalf)					
21 The value of services or facilities furnished to the organization by a governmental unit without charge. Do not include the value of services or facilities generally furnished to the public without charge					
22 Other income. Attach a schedule. Do not include gain or (loss) from sale of capital assets.					
23 Total of lines 15 through 22					
24 Line 23 minus line 17					
25 Enter 1% of line 23					

26 Organizations described on lines 10 or 11: a Enter 2% of amount in column (e), line 24	26a
b Attach a list (which is not open to public inspection) showing the name of and amount contributed by each person (other than a governmental unit or publicly supported organization) whose total gifts for 1996 through 1999 exceeded the amount shown in line 26a. Enter the sum of all these excess amounts	26b
c Total support for section 509(a)(1) test: Enter line 24, column (e)	26c
d Add: Amounts from column (e) for lines: 18 _____ 19 _____ 22 _____ 26b _____	26d
e Public support (line 26c minus line 26d total)	26e
f Public support percentage (line 26e (numerator) divided by line 26c (denominator))	26f %

27 Organizations described on line 12: a For amounts included in lines 15, 16, and 17 that were received from a "disqualified person," attach a list (which is not open to public inspection) to show the name of, and total amounts received in each year from, each "disqualified person." Enter the sum of such amounts for each year:
 (1999) _____ (1998) _____ (1997) _____ (1996) _____

b For any amount included in line 17 that was received from a nondisqualified person, attach a list to show the name of, and amount received for each year, that was more than the larger of (1) the amount on line 25 for the year or (2) \$5,000. (Include in the list organizations described in lines 5 through 11, as well as individuals.) After computing the difference between the amount received and the larger amount described in (1) or (2), enter the sum of these differences (the excess amounts) for each year:
 (1999) _____ (1998) _____ (1997) _____ (1996) _____

c Add: Amounts from column (e) for lines: 15 _____ 16 _____ 17 _____ 20 _____ 21 _____	27c
d Add: Line 27a total _____ and line 27b total _____	27d
e Public support (line 27c total minus line 27d total)	27e
f Total support for section 509(a)(2) test: Enter amount on line 23, column (e)	27f
g Public support percentage (line 27e (numerator) divided by line 27f (denominator))	27g %
h Investment income percentage (line 18, column (e) (numerator) divided by line 27f (denominator))	27h %

28 Unusual Grants: For an organization described in line 10, 11, or 12 that received any unusual grants during 1996 through 1999, attach a list (which is not open to public inspection) for each year showing the name of the contributor, the date and amount of the grant, and a brief description of the nature of the grant. Do not include these grants in line 15. (See page 5 of the instructions.)

Lobbying Expenditures by Electing Public Charities (See page 7 of the instructions.)
(To be completed ONLY by an eligible organization that filed Form 5768)

- Check here a if the organization belongs to an affiliated group.
- Check here b if you checked "a" above and "limited control" provisions apply.

Limits on Lobbying Expenditures (The term "expenditures" means amounts paid or incurred.)		(a) Affiliated group totals	(b) To be completed for ALL electing organizations
36	Total lobbying expenditures to influence public opinion (grassroots lobbying)	36	
37	Total lobbying expenditures to influence a legislative body (direct lobbying)	37	
38	Total lobbying expenditures (add lines 36 and 37)	38	
39	Other exempt purpose expenditures	39	
40	Total exempt purpose expenditures (add lines 38 and 39)	40	
41	Lobbying nontaxable amount. Enter the amount from the following table -- If the amount on line 40 is -- The lobbying nontaxable amount is --		
	Not over \$500,000 20% of the amount on line 40		
	Over \$500,000 but not over \$1,000,000 \$100,000 plus 15% of the excess over \$500,000		
	Over \$1,000,000 but not over \$1,500,000 \$175,000 plus 10% of the excess over \$1,000,000	41	
	Over \$1,500,000 but not over \$7,000,000 \$225,000 plus 5% of the excess over \$1,500,000		
	Over \$7,000,000 \$1,000,000		
42	Grassroots nontaxable amount (enter 25% of line 41)	42	
43	Subtract line 42 from line 38. Enter -0- if line 42 is more than line 38	43	
44	Subtract line 41 from line 38. Enter -0- if line 41 is more than line 38	44	

Caution: If there is an amount on either line 43 or line 44, you must file Form 4720.

4-Year Averaging Period Under Section 501(h)

(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 45 through 50 on page 8 of the instructions.)

Calendar year (or fiscal year beginning in) ▶	Lobbying Expenditures During 4-Year Averaging Period				
	(a) 2000	(b) 1999	(c) 1998	(d) 1997	(e) Total
45	Lobbying nontaxable amount				
46	Lobbying ceiling amount (150% of line 45(a))				
47	Total lobbying expenditures				
48	Grassroots nontaxable amount				
49	Grassroots ceiling amount (150% of line 48(a))				
50	Grassroots lobbying expenditures				

Lobbying Activity by Nontelecting Public Charities
(For reporting only by organizations that did not complete Part VI-A) (See page 9 of the instructions.)

During the year, did the organization attempt to influence national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of:	Yes	No	Amount
a Volunteers			
b Paid staff or management (include compensation in expenses reported on lines c through h)			
c Media advertisements			
d Mailings to members, legislators, or the public			
e Publications, or published or broadcast statements			
f Grants to other organizations for lobbying purposes			
g Direct contact with legislators, their staffs, government officials, or a legislative body			
h Rallies, demonstrations, seminars, conventions, speeches, lectures, or any other means			
i Total lobbying expenditures (add lines c through h)			

If "Yes" to any of the above, also attach a statement giving a detailed description of the lobbying activities.



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Christopher A. Conte

May 7, 2001

Rosemary C. Smith
Assistant General Counsel
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COMMISSION
OFFICE OF LEGISLATIVE
COUNSEL
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Re: Advance Notice of Proposed Rulemaking

Dear Ms. Smith:

I am writing on behalf of the National Rifle Association of America to comment on the Commission's Advance Notice of Proposed Rulemaking published in the Federal Register on March 7, 2001, which proposes possible amendments to 11 CFR 100.5. In particular, NRA is concerned with the proposed new description to the definition of "contribution" numbered (1) and the proposed new descriptions to the definition of "expenditure" numbered (1), (3), (4), and (5). NRA also believes that, concerning the concept of "major purpose," the Commission should consider adoption of Alternative 3.

Contribution definition (1): "Money, services or any other thing of value received as the result of a solicitation, the express purpose of which was to raise money to influence federal elections."

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court made clear that the phrase "for the purpose of . . . influencing" federal elections encompasses issue advocacy as well as express advocacy. 424 U.S. at 79. Thus, this proposed new description would encompass money received which was solicited for issue advocacy. To bring this proposed new description within constitutional bounds, it should be amended as follows:

Money, services or any other thing of value received as the result of a solicitation, the express purpose of which was to raise money ~~to influence~~ expressly to advocate the election or defeat of candidates in federal elections.

Expenditure definition (1): "Payments or costs associated with the organization's solicitation of money or any other thing of value, where the solicitation appeals to donors by stating that donations will be used to influence a federal election."

As with Contribution definition (1), this proposed new description would encompass money received which was solicited for issue advocacy. Indeed, in FEC v. MCFL, 479 U.S. 238 (1986), the Supreme Court has already held that the "term 'expenditure' encompassed 'only funds used for communications that expressly advocated the election or defeat of a clearly identified candidate.'" 479 U.S. at 248-49. To bring this proposed new description within constitutional bounds, it should be amended as follows:

Payments or costs associated with the organization's solicitation of money or any other thing of value, where the solicitation appeals to donors by stating that donations will be used expressly to advocate the election or defeat of candidates in to influence a federal elections.

Expenditure definition (3): "Payments or costs associated with any general public political communication that refers to a candidate for federal office and has been tested to determine its probable impact on the candidate preference of voters."

This proposed new description encompasses general public political communications which, after testing, have been found not to have had an impact on candidate preference. Plainly, if an "issue ad" has been tested and found not to have an impact on candidate preference, it is likely in fact an "issue ad," not express advocacy. As issue advocacy, not express advocacy, it is protected speech under Buckley v. Valeo and FEC v. MCFL. Thus, the proposed new description should be amended as follows:

Payments or costs associated with any general public political communication that refers to a candidate for federal office, and has been tested to determine its probable impact on the candidate preference of voters, and found to have a substantial impact on the candidate preference of voters.

Expenditure definition (4): "Payments or costs associated with any general public political communication that refers to a candidate for federal office, where the intended audience has been selected based on its voting behavior."

This proposed new description appears to assume that selecting an audience based on its voting behavior converts a communication from issue advocacy to express advocacy. This assumption not only does not logically follow, but is contrary to Buckley v. Valeo and FEC v. MCFL, in which the Court concluded that it was the nature of advocacy that made a communication either express advocacy or issue advocacy. In particular, the Court looked to whether the communication included "the use of language such as 'vote for,' 'elect,' 'support,' etc., Buckley, . . . , at 44, n. 52 .

...” FEC v. MCFL at 249. See also FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997)(explicit words of advocacy necessary for express advocacy).

Moreover, the contours of the criteria for what constitutes the “audience” are vague to the point of meaninglessness. The example of “those residing in a specific area” is a good example. How large must an area be to be “specific”? Is a state a “specific area” (particularly in a Senate election)? A congressional district? A county? A city? A precinct?

In light of these flaws, this proposed new description should be deleted in its entirety.

Expenditure definition (5): “Payments made to a commercial vendor for a service or product, with the express understanding that the service or product be designed to influence one or more federal elections.”

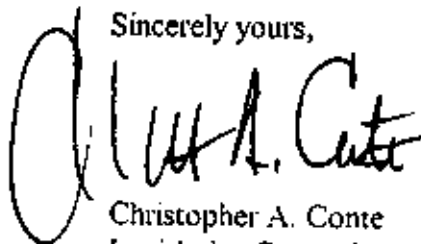
This proposed new description again broadly relates to influencing federal elections, which encompasses issue advocacy as well as express advocacy. It should thus be amended as follows:

Payments made to a commercial vendor for a service or product, with the express understanding that the service or product be designed expressly to advocate the election or defeat of candidates in ~~to influence one or more~~ federal elections.

Major purpose: The Commission should not amend the definition of “political committee” at 11 CFR 100.5 to contain a rebuttable presumption that groups that have a major purpose of supporting or opposing one or more federal candidates are presumed to be political committees for purposes of these rules. A rebuttable presumption is a means of shifting the burden of proof from the Commission to a group the Commission believes is a political committee. If a group has as a major purpose supporting or opposing one or more federal candidates and the group has not registered and filed reports, the Commission should not be able to avoid the burden of proving that the group is a political committee.

In addition, because Alternative 3 adheres most closely to the Supreme Court’s First Amendment jurisprudence, the Commission, should it adopt a regulation at all, should focus on Alternative 3.

Sincerely yours,



Christopher A. Conte
Legislative Counsel
NRA/ILA

American Medical Association

Physicians dedicated to the health of America

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COUNSEL



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May 7, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
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Re: Advanced Notice of Proposed Rulemaking Definition of Political Committee

Dear Ms. Smith:

I am writing on behalf of the American Medical Association ("AMA") to comment on the Commission's Advanced Notice of Proposed Rulemaking regarding the Definition of Political Committee, Notice 2001-3, 66 Fed. Reg. 13,681 (March 7, 2001) (the "Notice").

The AMA is a membership organization that was established in 1847 and incorporated under Illinois law in 1897. It is exempt from federal income tax pursuant to §501(c)(6) of the Internal Revenue Code. Its membership consists of approximately 291,000 physicians and medical students. The AMA is the connected organization of the American Medical Association Political Action Committee ("AMPAC"), a separate segregated fund which is registered as a multi-candidate committee pursuant to the Federal Election Campaign Act ("FECA"). During 2000, AMPAC received contributions from approximately 54,272 individuals who are members or executive or administrative personnel of the AMA or affiliated state or county medical societies or medical association alliances.¹

The AMA believes that much of what the Commission is proposing has merit. Several courts, including the Supreme Court, have stated that the definition of political committee under §301(4)(a) of FECA is limited to organizations whose "major purpose" is campaign activity. It therefore makes sense to incorporate this concept into the Commission's regulations. And several of the proposed examples of "contributions" and "expenditures" are useful clarifications. Other proposed examples, however, present serious practical and legal problem and should not be adopted.

Proposed Examples of Contributions

Proposed examples (i) and (vi) appear to be useful clarifications of the definition of contribution.

¹ The alliances are membership organizations whose members are spouses of medical society members. In Advisory Opinion 1981-55, the Commission held that the AMA Alliance (then called the AMA Auxiliary) is an affiliate of the AMA.

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Proposed examples (iii), (iv) and (v) provide that, "Money, services or anything of value received by," respectively, "an organization that is expressly authorized by its charter, constitution, bylaws, articles of incorporation or other organizational document to engage in activities for the purpose of influencing federal elections," "an organization that is controlled by a federal candidate, his or her principal campaign committee, or any other [authorized] committee," or "an organization that claims tax exempt status pursuant to 26 U.S.C. 527 and does not restrict its activities to influencing or attempting to influence elections to state or local public office or office in a political organization" constitutes contributions. The AMA does not wish to comment in detail on these proposals since it does not have sufficient information regarding the nature and operations of such organizations. It does seem, however, that these proposed examples are overbroad and should at least exclude funds solicited and spent for non-political purposes.

Proposed example (ii) provides that the term "contribution" would include "[m]oney, services or anything of value received from a political committee...except money, services or anything of value received by an organization qualifying for tax exempt status pursuant to 26 U.S.C. 501(c)(3)." This could cause many entities to be treated as political committees for engaging in activities that are explicitly authorized by Commission regulations and advisory opinions.

The AMA is particularly sensitive to this problem because one of these advisory opinions was issued to the AMA and AMPAC. AO 1984-37 held that AMPAC could donate the services of AMA employees as in-kind contributions to candidates if AMPAC paid the AMA the usual and normal charge for such services prior to the time the services were performed or the employees compensated for the time involved by the AMA. Payments to the AMA by AMPAC for such services would be treated as contributions to the AMA under this proposal.

A similar problem arises under §§114.2(f)(2)(i) and 114.9 of the Commission's regulations. Section 114.2(f)(2)(i) allows corporations and labor organizations to have employees work on fundraisers for candidates, use a "list of customers, clients, vendors or others...to solicit contributions or distribute invitations to the fundraiser," or provide catering services for a fundraiser if they receive advance payment of the fair market value of such services. Sections 114.2(f)(2)(i)(C) and 114.9 allow the use of corporate and labor organization facilities for political purposes if the corporation or labor organization is reimbursed "the usual and normal charge" for the use of such facilities within "a commercially reasonable time." To the extent that such payments are made by a political committee they would be considered contributions under the proposal.

A corporation or labor organization could easily receive payments exceeding the \$1,000 threshold in §301(4)(a) of FECA and be required to register as a political committee by engaging in relatively limited activities of this sort. For example, a contribution of two days of an employee's time pursuant to AO 1984-37 could exceed this threshold. The AMA does not believe that this result is appropriate.

According to the Notice, the proposed example is intended to, "for example, prevent national party committees from funneling money into groups that may not report their disbursements and receipts. Again, an examination of how the money was ultimately spent would be unnecessary to determine political committee status." The AMA is in favor of full disclosure and is not opposed to requiring organizations that receive funds from political committees that may subsequently be spent to influence federal elections from being required to register. But treating the kinds of payments authorized by AO 1984-37 and §§114.2(f)(2)(i) and 114.9 as contributions does not further this purpose. Such payments are fully reported by the political committee that makes them. The corporations and labor organizations receiving such payments are precluded by FECA from using such funds to make contributions or expenditures in connection with a federal election. In this respect they are analogous to organizations which are exempt under §501(c)(3) of the Internal Revenue Code, which are excluded from this proposal for this reason.

The Notice suggests adding a "savings clause" which would provide that, "[n]otwithstanding any other provision of this section, a business entity organized for profit that provides goods or services to others at the usual and normal charge for such goods or services shall not be considered a political committee."

This would narrow the scope of the proposed example somewhat. But membership organizations, such as the AMA, trade associations and labor organizations are not business entities organized for profit. Thus the savings clause does not solve this problem for such entities. The AMA therefore believes that either the proposed examples should be modified to exclude payments authorized by AO 1984-37 and §§114.2(f)(2)(i) and 114.9, or the savings clause should be modified to make it clear that an organization shall not be deemed to be a political committee because it receives such payments.

It is possible that incorporation of a major purpose test into the definition of political committee might alleviate this problem somewhat. This would depend in part on which of the proposed alternatives for the major purpose test suggested by the Notice is adopted. If the Commission adopts Alternative 4 and establishes a dollar threshold, it is possible that larger organizations would receive sufficient payments for activities to exceed the threshold. If "major purpose" is defined in terms of a "percentage of disbursements" or "percentage of time and disbursements," a small organization could easily exceed the threshold during an election year with only a small amount of activity. The AMA therefore believes that modifying either the proposed example or the savings clause as suggested above is preferable to relying on a major purpose test to solve this problem.

Proposed Examples of Expenditures

The Notice proposes to add the following five examples of "expenditure" to the Commission's regulations:

- (i) Payments or costs associated with the organization's solicitation of money or any other thing of value, where the solicitation appeals to donors by stating that donations will be used to influence a federal election;

(ii) Payments or costs deemed to be coordinated expenditures for general public political communications, pursuant to 11 CFR 100.23;

(iii) Payments or costs associated with any general public political communication that refers to a candidate for federal office and has been tested to determine its probable impact on the candidate preference of voters;

(iv) Payments or costs associated with any general public political communication that refers to a candidate for federal office, where the intended audience has been selected based on its voting behavior; or

(v) Payments made to a commercial vendor for a service or product, with the express understanding that the service or product be designed to influence one or more federal elections.

The AMA believes that the first two proposed examples of expenditures would be reasonable clarifications of the Commission's regulations. The last three proposed examples, however, would treat as expenditures the type of issue advocacy communications that the courts have consistently held are not expenditures under FECA. And proposed examples (iii) and (iv) would cover communications that are not even intended to influence federal elections.

In the leading case on FECA, *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976), the Supreme Court held that in order to be constitutional the restrictions on expenditures in FECA "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." To meet this test, the communication must "include explicit words of advocacy of election or defeat of a specific candidate." This limitation was reaffirmed by the Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and has consistently been applied by the lower courts.

These three examples try to get around this limitation by establishing objective criteria to identify communications that are intended to influence elections but don't contain the "explicit words of advocacy" required by Buckley. This approach is not constitutionally permissible. The Supreme Court limited FECA to communications containing express advocacy in order to avoid restricting constitutionally protected discussion of issues. As one court put it, "FEC restriction of election activities was not to be permitted to intrude in any way upon the discussion of issues. What the Supreme Court did was to draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues." *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8, 14 (D. Me.), *aff'd*, 93 F.3d 1 (1st Cir. 1996). Therefore, "questions of intent...are to be excluded from the analysis." *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999). A communication which does not contain express advocacy cannot be treated as an expenditure under election law even if the person making the communication admits that it is intended to influence the outcome of an election. *Perry v. Bartlett*, 231 F.3d 155, 161 (4th Cir. 2000)(North Carolina law).

Furthermore, proposed examples (iii) and (iv) do not, as the Notice claims, "provide an objective basis for determining if an otherwise independent 'issue ad' was in reality undertaken for the purpose of influencing voters' preferences with respect to one or more federal candidates."

Proposed example (iii) assumes that a communication "that has been tested to determine its probable impact on the candidate preference of voters" is intended to influence an election. However, an organization that is testing a communication for other purposes might also test its impact on candidate preference to learn more about how to influence elections, even if that is not the purpose of the communication. For example, an organization that is testing a proposed grass roots lobbying communication to determine whether recipients would be likely to ask their representative or senator to support or oppose legislation might also test its effect on candidate preference, even though its sole purpose in sending this specific communication is to generate support for its legislative position. The proposed example would treat this communication as an expenditure in connection with an election even if the test showed that it would have no impact on candidate preference.

Proposed example (iv) assumes that any communication that refers to a candidate is an expenditure if "the intended audience has been selected based on its voting behavior." The Notice indicates that this would include communications targeted to people "residing in a specific area." Thus a communication asking the recipients to contact Representative X to support or oppose legislation would be deemed to be an expenditure if it is targeted to persons living in Representative X's district.

This proposed example ignores the fact that there are numerous reasons why an organization may target an issue advocacy communication to recipients based on their voting behavior. An organization that wants to influence a particular representative or senator will naturally target the communication to the constituents of that representative or senator. An organization that wants, for example, to generate mail asking a senator to support President Bush's proposed tax cut could logically target a communication to persons believed to be Republicans or to have voted for President Bush because they are more likely to do what is being requested. To assume, as the proposed example does, that such targeting is necessarily evidence of intent to influence an election is simply wrong.

For the above reasons proposed examples (iii), (iv) and (v) should not be adopted.

Structure of Regulations

The Notice asks for comments on how the proposed examples should be incorporated into the Commission's regulations. Three alternative approaches are suggested: adding the examples to the definition of political committee and adding a cross reference to the general definitions of contribution and expenditure; adding the examples to the general definitions of contribution and expenditure; and having the new examples apply only to the definition of political committee and leaving the current definitions of contribution and expenditure unchanged for other purposes.

The AMA believes that the third approach should not be adopted because it is inconsistent with FECA. FECA contains general definitions of contribution and expenditure that are applicable for all purposes. The Commission's regulations should use the same approach.

Either of the other suggested approaches would be legally acceptable. The AMA would prefer that any examples be added to the general definitions of contribution and expenditure because this would be less confusing and make it clear that the examples are part of the definitions for all purposes.

Major Purpose Test

As mentioned above, the AMA believes that it would be appropriate to add a major purpose test to the definition of political committee.

The Notice suggests four alternatives for adding such a test. The AMA believes that the fourth alternative, setting a dollar amount of campaign activity, is not appropriate. Any such threshold would have to be substantially higher than the \$50,000 threshold suggested in the Notice before campaign activity could be considered a major purpose of a large organization such as the AMA or a national labor organization. A threshold that is high enough to be realistic in such cases would be too high to have any practical effect.

It is extremely unlikely that political activities would be considered a major purpose of the AMA under any of the other suggested approaches. And the major purpose test would not be applicable to separate segregated funds, such as AMPAC. Thus the AMA does not have an opinion as to which of these approaches would be preferable.

Section 527 Organizations

The Notice asks for comments on how the Commission should address organizations that are exempt under §527 of the Internal Revenue Code and "organizations that are not organized under" §527.

Last summer Congress amended §527 to require all organizations that are exempt under that section and are not political committees to file reports with the Commission to file reports with the IRS. Since Congress has determined how the problem of nondisclosure by §527 organizations should be solved, the Commission need not do anything.

The Commission has jurisdiction over organizations that are not organized under §527 only if they are political committees as defined in FECA or violate specific provisions of FECA. The Commission has no authority to require disclosure by any organization that is not a political committee. Therefore all the Commission can do is develop an appropriate definition of political committee and enforce the requirements that political committees register and file reports with the Commission, whether or not they are exempt under §527.

I hope that these comments are useful. If you have any questions please contact Mr. Leslie J. Miller of the AMA's Corporate Law Division at (312) 464-4608 or by e-mail at leslie_miller@ama-assn.org.

Sincerely,

A handwritten signature in cursive script, appearing to read "E. Ratcliffe Anderson, Jr., MD".

E. Ratcliffe Anderson, Jr., MD

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BEFORE THE FEDERAL ELECTION COMMISSION

Advanced Notice of Proposed Rulemaking)
)
Definition of Political Committee)

66 Fed. Reg. 13681 (Mar. 7, 2001)

**COMMENTS OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES**

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Counsel to the Chamber of Commerce of the
United States

May 7, 2001

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COUNSEL
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COMMENTS

The Chamber of Commerce of the United States ("Chamber") submits these comments in response to the Federal Election Commission's Advance Notice of Proposed Rulemaking ("ANPRM") announced in the March 7, 2001, Federal Register.

About the Chamber

The Chamber was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation exempt from taxation under I.R.C. § 501(c)(6). It is the world's largest not-for-profit business federation, representing three million businesses, 3,000 state and local chambers, 830 business associations, and 87 American Chambers of Commerce abroad. The Chamber's members include businesses of all sizes and industries and from every corner of America. On their behalf, the Chamber involves itself in various lobbying, electoral, and litigation activities.

Summary of Comments

Although the Federal Election Commission ("FEC" or "Commission") correctly proposes to include the major purpose test in its definition of "political committee" under the Federal Election Campaign Act ("FECA" or "Act"), none of its proposed alternatives is acceptable as stated in the ANPRM. The proposed tests would improperly involve the FEC in the regulation of issue advocacy. Not only is such regulation of issue advocacy beyond the jurisdiction of the Commission, such regulation is unconstitutional.

One proposed major purpose test, Alternative 3, could be made acceptable if the Commission limits its application in two ways. First, the Commission must circumscribe the application of the major purpose test to include only contributions (narrowly defined) and expenditures expressly

advocating the election or defeat of a particular candidate. The FEC must also define the threshold which triggers the major purpose test to capture only those groups whose disbursements for contributions and express advocacy aggregate to 50% or more of their total disbursements.

In addition, the Commission's proposed definitions for "contribution" and "expenditure" are too expansive. In short, they also impermissibly regulate issue advocacy. The "objective" tests and solicitation additions proposed by the FEC improperly consider criteria beyond the words of a group's advocacy. Finally, other proposals of the Commission are either redundant in relation to other regulations or conflict internally with statements in the ANPRM.

I. THE COMMISSION IS CORRECT TO INCLUDE THE MAJOR PURPOSE TEST IN THE DEFINITION OF POLITICAL COMMITTEE

A. The Regulation of Issue Advocacy Is Beyond the Commission's Jurisdiction and Is Unconstitutional

The FEC would be correct to finally include in its regulatory definition of "political committee" the major purpose test. The inclusion of the major purpose test is constitutionally mandated in order to avoid overbreadth in the general definition of "political committee" found at 2 U.S.C. § 431(4)(A). In Buckley v. Valeo, 424 U.S. 1, 79 (1976), the Supreme Court narrowed the definition of political committee to those "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." The Court reiterated its view in FEC v. Massachusetts Citizens for Life, Inc. ("MCEL"), 479 U.S. 238, 262 (1986), where it would consider the nonprofit corporation at issue a political committee only if its "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity." The Commission, although mistaken in its definition, has acknowledged this

constitutional requirement in both its Advisory Opinions and its Matters Under Review (“MURs”). See, e.g., FEC Advisory Opinion 1996-13 (“when determining if an entity should be treated as a political committee . . . , the standard used is whether the organization’s major purpose is campaign activity . . .”); First General Counsel’s Report at 21 approved in MUR 4940 (quoting above language). Lower courts have also read Buckley and MCEL to require the major purpose test when considering political committees under FECA, see, e.g., FEC v. GOPAC, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (citing Buckley), and when considering a state’s regulation of political committees, see, e.g., Florida Right to Life, Inc. v. Morham, 1999 WL 33204523 (M.D. Fla. 1999), aff’d sub nom Florida Right to Life, Inc. v. Lamar, 238 F.3d 1288 (11th Cir. 2001).

In defining its major purpose test, it is imperative that the Commission limit the test to consider only the express advocacy conducted and contributions (properly defined) given by the organization in question. The Commission must so delimit the major purpose test because (i) any inclusion of issue advocacy is beyond the statutory jurisdiction of the Commission and (ii) any inclusion of issue advocacy would be unconstitutional.

To begin, the text and history of FECA does not give the Commission jurisdiction to include issue advocacy within the parameters of the major purpose test. The statutory definition of “political committee” limits such committees to those groups which make more than \$1,000 in expenditures or contributions during a calendar year. 2 U.S.C. § 431(4). “Contribution,” in turn, is defined to include, inter alia, “any gift, subscription, loan, advance, or deposit of money or anything of value made by a person for the purpose of influencing any election for Federal office.” Id. § 431(8)(A)(i). The term “expenditure” includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” Id. § 431(9)(A)(i). As the D.C. Circuit Court of Appeals noted in Akins v. FEC, the

Buckley court only considered a narrow definition of "contribution," relating as it did to "direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the cooperation or consent of a candidate." 101 F.3d 731, 741 (D.C. Cir. 1997) (en banc), decision vacated, 524 U.S. 11 (1998). The Court in Buckley, on the other hand, determined that the term "expenditure" was susceptible to too broad a meaning and, therefore, gave it a narrowing definition, "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. The Court's later addition of the major purpose test did not expand the activities covered by the definitions embedded in the meaning of political committee, but rather the test narrowed those activities to the ones placed under the definitions of contribution and expenditure, the latter of which was limited to express advocacy. As the Fourth Circuit stated, "the FEC is fully aware that the Supreme Court has required explicit words of advocacy as a condition to the Commission's exercise of power." FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1062 (4th Cir. 1997).

In Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), the First Circuit struck down a Commission regulation prohibiting issue advocacy by corporations. The Court of Appeals agreed with the district court that the regulation, focusing as it did on issue advocacy, was "beyond the power of the FEC." Id. at 469 (quoting 743 F. Supp. 64 (D. Me. 1990)). The court struck down the regulation as "having overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court." Id. at 472. In focusing on issue advocacy, the FEC impermissibly "sought to restrain that very same activity which the Court in Buckley sought to protect." Id. at 471. The First Circuit rested its analysis on Supreme Court jurisprudence. "We therefore hold that our expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." MCFL, 479 U.S. at 249 (cited in Faucher, 928 F.2d at 470).

Three members of this Commission built upon similar holdings and found that the Commission may never act when issue advocacy is involved. Then-Chairman Wold and Commissioners Mason and Smith acknowledged that “the holdings in Buckley and [MCFL] preclude the application of the Act to uncoordinated communications which do not contain express advocacy, and therefore establish a constitutionally mandated safe harbor for much political speech.” FEC Advisory Opinion No. 2000-16 (Aug. 28, 2000) (concurrence of Chairman Wold and Commissioners Mason and Smith) (internal footnote excluded).

The recent debate in Congress on the McCain-Feingold campaign finance bill also confirms the Commission’s current lack of jurisdiction. A major provision of the bill expands (albeit unconstitutionally) FECA to prohibit “soft money” and issue advertising by parties and private groups. For example, section 203 of the McCain-Feingold bill, S. 27 as passed by the Senate, amends FECA to prohibit unions and corporations from engaging in any “applicable electioneering communication.” “Electioneering communication” is then defined as follows:

any broadcast, cable, or satellite communication which -

- (I) refers to a clearly identified candidate for Federal office;
- (II) is made within -
 - (aa) 60 days before a general, special, or runoff election for such Federal office; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate for such election, conventions, or caucus; and
- (III) is made to an audience that includes members of the electorate for such election, convention, or caucus.

S. 21, 107th Cong. § 201 (2001). Additionally, Senator Wellstone’s amendment eliminated from this prohibition an exception for 501(c)(4) organizations and 527 political organizations, which conduct electioneering communications “whose audience consists primarily of residents of the state for which the clearly identified candidate is seeking office.” Id., § 204. If the Commission could simply

regulate issue advocacy by redefining, through the major purpose test or otherwise, the definition of political committee to include issue advocacy by private groups, then a major part of the McCain-Feingold Bill and the Senate debate thereof would have been unnecessary. To the contrary, the Senate debated and voted on such proposed statutory provisions because they are absent from FECA.

In addition to the Commission's lack of jurisdiction, inclusion of issue advocacy in any major purpose test would be unconstitutional. Both Supreme Court and lower court precedent point to the unconstitutionality of including issue advocacy within the ambit of the Commission's power.

First, the Supreme Court in Buckley limited expenditures to include only express advocacy and limited the definition of political committee to include the major purpose test. 424 U.S. at 43, 79; see also MCFE, 479 U.S. at 248-49, 262. The Court warned that a broad definition of political committee had "the potential for encompassing both issue discussion and advocacy of a political result." 424 U.S. at 79; see also GOPAC, 917 F. Supp. at 858-59 (citing same). The Court's purpose was to draw a bright line and protect issue advocacy from incursion and regulation by the state. See Christian Action Network, 110 F.3d at 1052 (analyzing MCFE as holding that "the divide between discussion of issues and candidates and election advocacy is so obscure as to require a prophylactic definition in order to give the widest berth to First Amendment freedoms."). If the federal government cannot regulate the issue advocacy directly as expenditures, see, e.g., MCFE, 479 U.S. at 248-49, then it cannot regulate organizations that primarily engage in issue advocacy on the basis of the organizations' issue advocacy. If it did so, the Commission would be doing indirectly what it could not do directly.

In the lower courts, this point has been brought to the fore. In GOPAC, the District Court for the District of Columbia rejected the Commission's and Common Cause's arguments that the major purpose need only refer to "partisan politics," "electoral activity," or "electioneering." 917 F. Supp.

at 859-60. The Court considered the terms too vague and thought their use would impinge on issue advocacy groups. *Id.* at 861. Several other courts have found it unconstitutional for definitions of political committees to include issue advocacy. See, e.g., Citizens for Responsible Gov't State Political Action Comm. v. Davidson ("Citizens"), 236 F.3d 1174, 1193-94 (10th Cir. 2000) (finding the extension of Colorado's election law to reach "'advocacy with respect to public issues'" as unconstitutional) (quoting Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 387 (2nd Cir. 2000)); N.C. Right to Life, Inc. v. Bartlett ("N.C. Right to Life"), 168 F.3d 705 (4th Cir. 1999) (declaring a North Carolina law that covered groups engaging in issue advocacy as "unconstitutionally vague and over broad" because "the statute subjects groups engaged in only issue advocacy to an intrusive set of reporting requirements"); Fla. Right to Life, 1999 WL 33204523 at *4 (affirming preliminary finding that Florida election law was overbroad because it swept in groups that only engage in issue advocacy).

In sum, federal court precedent, including Supreme Court precedent, shows that the regulation of issue advocacy is beyond the jurisdiction of the FEC and, in any event, is unconstitutional.

B. The Commission Should Choose Alternative 3

Based on the two conditions above, Alternative 3 proposed in the Commission's ANPRM comes closest to a proper exposition of the major purpose test. Alternatives 1 and 2 are misguided, for they seek to expand political committees to include issue advocacy groups, and Alternative 4 improperly uses a dollar threshold. Nevertheless, Alternative 3 contains several discrepancies that must be corrected before the Commission adopts any new regulations.

Alternative 3 “would compare [an organization’s] total disbursements to only the amount [the organization] spends on general public political communications that expressly advocate the election or defeat of clearly identified candidates (i.e., ‘independent expenditures,’ 2 U.S.C. § 431(17)) and any contributions, 2 U.S.C. § 431(8).” 66 Fed. Reg. 13681, 13686 (proposed Mar. 7, 2001, to be codified at 11 C.F.R. pt. 100). This alternative avoids the jurisdictional and constitutional problems described previously as well as the flaws of the other three alternatives.

In contrast, Alternative 1 unconstitutionally includes in the major purpose test disbursements “for the purpose of influencing federal and non-federal elections.” *Id.* at 13685 (emphasis added). Encompassing disbursements for non-federal elections within its major purpose test, Alternative 1 proposes to regulate activities not within the Commission’s jurisdiction. *See GOPAC*, 917 F. Supp. at 856, 862 (holding that a group, which “focused on recruiting, training and funding strong local and state candidates” was not a political committee) (internal quotations omitted). The statutory definition of political committee refers to contributions and expenditures, 2 U.S.C. § 431(4)(A), both of which are defined only to include payments “for the purpose of influencing any election for Federal office.” 2 U.S.C. §§ 431(8) and (9) (emphasis added). It follows that the major purpose test, because it construes terms involving only federal elections, cannot take into account non-federal elections.

Alternative 2, on the other hand, includes the same impermissibly broad approach and compounds the problems by taking into account volunteer activity. As noted in the ANPRM, FECA’s definition of “contribution” specifically exempts volunteer activity. *Id.* § 431(8)(B)(i). The inclusion of volunteer activity in the major purpose test would turn such volunteer activity into a de facto contribution. Volunteer activity would not be subject to limitations, but it would subject the groups benefiting from such activity to registration and reporting requirements and contribution

caps. See, e.g., *id.* § 433 (requiring political committees to file a statement of registration).

Functionally, in many ways, volunteer activity would be treated like a contribution, but, since there is no basis for finding volunteer activity to be a “symbolic expression of support,” *Buckley*, 424 U.S. at 21, such categorization would shatter the First Amendment freedoms of the volunteers involved. Contributions and expenditures are the objects of the letter and intent of FECA, not the uncompensated activities of volunteers.

Alternative 4, on the other hand, creates an absolute dollar amount, initially set at \$50,000 of electoral activity or express advocacy, as a threshold for political committee status. This approach is inadequate. *Buckley* emphasized that “the major purpose,” 424 U.S. at 79 (emphasis added), not “a” major purpose, was required.¹ For a large, national organization, \$50,000 might not represent a significant percentage of disbursements. As a result, the organization could not be claimed to be pervasively engaged in electoral activity or express advocacy. (See discussion *infra*.)

¹ In *North Carolina Right to Life, Inc. v. Leake* (“NCRL”), the District Court for the Eastern District of North Carolina rejected the argument distinguishing “the” from “a.” 108 F. Supp. 2d 498, 508 (E.D.N.C. 2000). The court asserted that the Fourth Circuit used the articles interchangeably. *Id.* Nevertheless, the court still instituted a high standard -- “[w]hatever article the state employs, the gist of the major purpose test must be whether a group may fairly be called ‘campaign-related.’” *Id.* (emphasis added). The court also noted that campaign-related activities of a group must be extremely extensive for the groups to qualify as a political committee. “Certainly a group with a ‘central, organizing purpose’ of electioneering is one which would be transformed into a very different group if it ceased its campaign-related activity.” *Id.* (quoting *MCFL*, 179 U.S. at 253 n.6).

Regardless of the Fourth Circuit’s inconsistent application of the articles, the Supreme Court has referred only to “the” major purpose test or its equivalent. *FEC v. Akins*, 524 U.S. 11, 26-29 (1998); *MCFL*, 479 U.S. at 253 n.6, 262; *Buckley*, 424 U.S. at 79.

C. The Commission Needs to Modify Alternative No. 3

Despite the advantages of Alternative 3 over its counterparts, it still requires further refinements before it should be adopted by the Commission. Those requirements are two-fold: a limitation to express words like those proffered in Buckley and the use of a 50% threshold.

In Buckley, the Supreme Court limited the definition of express advocacy "to communications containing express words of advocacy of election or defeat." Buckley, 424 U.S. at 44 n.52. See also id. at 43 (limiting application of provision in question to "communications that include explicit words of advocacy of election or defeat of a candidate"). According to the Court, only communications containing words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" would be subject to regulation as express advocacy. Id. at 44 n.52. The Court made the inclusion of such words constitutionally required in MCEL. 479 U.S. at 249 ("We therefore concluded in [Buckley] that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc."). The reasons for the Court's stance are clear:

[T]he 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 issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

The need for the use of express words of advocacy when deciding what constitutes express advocacy for the major purpose test and for the definition of political committee in general has been the subject of several lower court rulings, as noted in the ANPRM. In Citizens, for example, the

Tenth Circuit declared a Colorado campaign finance law unconstitutional as applied to an issue advocacy group because the definition of “independent expenditure” and “political message” embedded in the definition of “political committee” omitted the limitation to express advocacy. See 236 F.3d at 1194-95 (proposing and rejecting a narrowing construction of such an overbroad provision). The Tenth Circuit found that, in MCEL, the Supreme Court “clarified that express words of advocacy were not simply a helpful way to identify express advocacy,” but that the inclusion of such words was constitutionally required. Id. at 1187 (citing MCEL, 479 U.S. at 249).

The District Court for the Middle District of Florida required the inclusion of express words of advocacy in the major purpose test. Fla. Right to Life, 1999 WL 33204523. In a footnote, the court declared that “[e]xpress advocacy” does not include communication that leaves an ‘unmistakable impression’ of supporting or opposing a specific, identifiable candidate.” Id. at *4 n.8 (voluminous citations omitted). Rather, the court found the Supreme Court to have held “express advocacy” only to be present “when there are ‘explicit words of advocacy of election or defeat of a candidate.’” Id. (quoting Buckley, 424 U.S. at 41 n.48, 43). See also N.C. Right to Life, 168 F.3d at 712 (reading Buckley as narrowing the allowable definition of political committee to “only those entities that have as a major purpose engaging in express advocacy in support of a candidate by using words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject.’”) (citations omitted); Iowa Right to Life, Inc. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999) (finding the focus of the Supreme Court to be on “whether the communication contains ‘express’ or ‘explicit’ words of advocacy for the election or defeat of a candidate.”) (citing Buckley, 424 U.S. at 43-44).

The constitutional definition of express advocacy, therefore, only includes advocacy that involves express words advocating the election or defeat of a particular candidate. Five federal courts of appeals have declared that the express words are necessary to define express advocacy with

clarity and precision.² The Commission, using terms from the Ninth Circuit decision in Furgatch, has been enjoined on two separate occasions from using a definition for “expressly advocating,” in 11 C.F.R. § 100.22, which is used in the definition of “independent expenditure,” id. § 100.16. Va. Soc’y for Human Life, Inc. v. FEC, 83 F. Supp. 2d 68 (E.D. Va. 2000) (nationwide injunction); Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248 (S. D.N.Y. 1998). In order to give proper guidance to the activities of groups engaging in issue advocacy, the definition of political committee must be limited to exclude “communications that do not contain express words advocating election or defeat of a particular candidate . . . which the First Amendment shields from regulation.” Citizens, 236 F.3d at 1187.³

² Citizens, 236 F.3d 1174 (10th Cir. 2000); Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000); Iowa Right to Life, 187 F.3d 963 (8th Cir. 1999); Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997); Maine Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8 (D. Me.), aff’d per curiam, 98 F.3d 1 (1st Cir. 1996), cert. denied, 522 U.S. 810 (1997); Faucher, 743 F. Supp. 64 (D. Me. 1990), aff’d, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991).

³ The Commission in its ANPRM notes that the district court in NCRL declared “that the express advocacy component was not constitutionally required of North Carolina’s ‘political committee’ definition.” 66 Fed. Reg. at 13685 n.5. This is indeed the holding of NCRL, but several contrary factors about the case should be noted. First, the district court purports to be following the D.C. Circuit in Akins in declaring “that it is ‘the major purpose test,’ and not the ‘express advocacy test,’ that assures the regulation of political committees will not be so broad as to chill protected issue advocacy.” 108 F. Supp. 2d at 507. Akins, instead, holds (albeit wrongly) that there is no constitutional requirement with applying the major purpose test to contributions. 101 F.3d at 742. Instead, the D.C. Circuit placed the focus of the major purpose test on independent expenditures. Id. Nowhere did the D.C. Circuit state, and the district court cites none, that, because the major purpose test applies to independent expenditures, the express advocacy test does not. The district court’s misreading of Akins is highlighted by the D.C. Circuit’s invocation of MCFL, where the first question addressed by the Supreme Court related to independent expenditures, and required the express words of advocacy. 479 U.S. at 248. It was this “independent spending” that might become “so extensive” as to trigger the major purpose test. Id. at 262 (quoted in Akins, 101 F.3d at 742). Second, the district court in NCRL, although stating that its decision was in accord with the Fourth Circuit’s decision in N.C. Right to Life, 108 F. Supp. 2d at 508 n.12, seems to be in disagreement with the Fourth Circuit, which held the Court’s narrowing of political committee to include “only those entities that have as a major purpose engaging in express advocacy in support of a candidate by
(Continued . . .)

In addition to the necessary express advocacy clarification, the way in which the Commission determines the major purpose of a given organization in its new regulations will be critical. Only groups whose aggregate disbursements on independent expenditures and contributions equal 50% or more of their total disbursements should be determined to be political committees.

The reasons for this exacting threshold requirement are numerous. First, the intent of the major purpose test is to identify and regulate from the universe of groups who make independent expenditures or contributions only those groups whose focus is the making of such expenditures. Such activities must be pervasive. The Supreme Court, in MCEL, analyzed the "central organizational purpose" of the non-profit corporation in question and did not find it to be a political committee although "it occasionally engage[d] in activities on behalf of political candidates." 479 U.S. at 252 n.6. Furthermore, the Court found the political committee "obligations and restrictions" "to apply to those groups whose primary objective is to influence political campaigns." *Id.* at 262. The Supreme Court in Buckley also referred to "the major purpose," and included the major purpose requirement in addition to contributions or expenditures in excess of \$1,000. Buckley, 424 U.S. at 79; *see also* GOPAC, 917 F. Supp. at 859.

The Commission's own precedent has been to compare contributions to the total disbursements of the organization to see if the organization meets the major purpose standard. *See, e.g.,* First General Counsel's Report at 26, adopted in MUR 4940 (holding that Campaign for America's expenditure of \$205,000 on a purportedly express advertisement, 7.6% of yearly disbursements, did not cause it to "cross [] the 'major purpose' line"); FEC Advisory Opinion No.

(...Continued)
using words such as 'vote for'" 168 F.3d 712 (citations omitted).

1996-3 (holding a trust not to meet the major purpose test despite contributions to federal candidates aggregating over \$1,000 and amounting to 10% of total disbursements in some years).

Furthermore, using a certain monetary threshold as a presumption of fulfilling the major purpose test, even if rebuttable, is inappropriate. Again, the focus or "primary objective" of the organization is key, not its sideline activities. MCEL, 479 U.S. at 262. A presumptive dollar threshold would force organizations that are focusing on lobbying, education, issue advertising, or the like, to engage in a protracted struggle with the Commission every time they hit the dollar limit even though the percentage of their activity remained minimal. Such interaction would not only be costly but would also inject the Commission into the affairs of these non-regulable groups more often.⁴ In sum, \$50,000 for an organization disbursing a total of \$75,000 shows the "central organizational purpose," MCEL, 479 U.S. at 252 n.6, of that organization, whereas \$50,000 for an organization as large and diverse as one like the Campaign for America would not.

In Akins, the D.C. Circuit voiced fears about the effect of allowing large contributors to go unregulated as non-political committees. The Court's fears are unfounded. The participation of such groups is still severely circumscribed. First, the groups' contributions are limited to \$1,000 per

⁴ The Commission cites NCRL, where the district court approved the inclusion in the North Carolina definition of political committee a rebuttable presumption of major purpose at \$3,000. The two reasons the court gives for approving the presumption are notice and a shift in the burden of production. 108 F. Supp. 2d at 509-10. Under the correct application of a 50% threshold, *see supra*, there is no relevance in giving notice at a certain monetary threshold. As long as the major purpose test is clearly defined only to take into account express advocacy and contributions, then the groups involved in issue advocacy will have notice. For example, the Fourth Circuit considers the express advocacy test of Buckley involving express words as a sufficient bright-line test. *See, e.g., N.C. Right to Life*, 168 F.3d at 712; Christian Action Network, 110 F.3d at 1051. As for a shift in the burden of production, this may be necessary (if constitutionally permitted) for a small, state government entity with limited resources. For the Commission, with its resources and manpower, such a shift is unnecessary to ensure proper oversight.

candidate per election, for the groups are considered "persons" under the law. 2 U.S.C. §§ 431(11), 441a(a)(1). The organizations, as non-political committees, cannot even avail themselves of the increased \$5,000 per candidate per election contributions allowed by multi-candidate political committees. *Id.* § 441a(2). As a result, the direct impact of these organizations on candidates is limited. This effect already exists with respect to partnerships which are "persons" under the Act and therefore contribute. Moreover, any coordinated political advertising is deemed a contribution and regulated accordingly under the Act. 11 C.F.R. § 100.23(b). Any independent express advertising continues to be subject to disclosure requirements. 2 U.S.C. § 434(c). All contributions are reported by the applicable candidates. 11 C.F.R. § 104.8. Additionally, under the new and related provisions of section 527 of the Internal Revenue Code these groups mostly qualify as political organizations and accordingly, submit to the reporting requirements therein. See 26 U.S.C. § 527, amended by Pub. L. No. 106-230 (July 1, 2000).

In *MCFEL*, the FEC maintained an even greater fear that the inapplicability of the corporate contribution prohibition to independent expenditures by *MCFEL* "would open the door to massive undisclosed political spending by similar entries, and to their use as conduits for undisclosed spending by business corporations and unions," 479 U.S. at 262. The Court, however, dismissed these fears, for other statutory requirements, like 2 U.S.C. § 434(c), would provide for disclosure. "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id.*

In short, these non-major purpose organizations are treated as individuals. They report their income to the IRS, make only \$1,000 contributions, report independent expenditures, and spend unlimited amounts on issue advocacy (as can political committees). These groups are treated differently than political committees because they are different. Their "central organizational

purpose" is not making contributions or engaging in express advocacy but elsewhere. If the *Akins* court's fears were heeded, then the Commission would be able to interpose in all aspects of a relatively uninvolved group's activities, for the reporting requirements are broad and exacting. This "invasion of privacy of belief," *Buckley*, 424 U.S. at 66, is precisely what the Court in *Buckley* tried to prevent. "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The Court assumed that expenditures of candidates and major purpose political committees "fall within the core area sought to be addressed by Congress," *id.* at 79, but the Court could only be as sure in this assumption about a "political committee" if at least 50% of a group's disbursements were for contributions or independent expenditures.

II. THE COMMISSION'S PROPOSED DEFINITIONS OF CONTRIBUTION AND EXPENDITURE ARE TOO EXPANSIVE

A number of the proposed additions to the definitions of "contribution" and "expenditure" in the first part of the ANPRM suffer from the same defects as most of the proposed major purpose tests. In short, several proposed definitions improperly subject issue advocacy to the Commission's oversight. As stated above, this is both beyond the Commission's jurisdiction and unconstitutional. Second, the "objective" tests and solicitation additions proposed by the Commission improperly consider events beyond the words of the group's advocacy. Finally, other proposals are either redundant or conflict internally with other statements in the ANPRM.

A. The Proposed Definitions Impermissibly Subject Issue Advocacy to Commission Oversight

The Commission, in its proposals, intends to develop more objective criteria, "even bright line rules," in developing new examples for contribution and expenditure. Bright line rules are

necessary to prevent a chilling of protected political speech, see, e.g., Christian Action Network, 110 F.3d at 1051 (“absent the bright line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled”), but, unfortunately, the Commission’s proposals would objectively, but impermissibly, include issue advocacy within its rubric.

As stated in the previous section, the Commission lacks statutory jurisdiction to regulate issue advocacy. Furthermore, its regulation of such issue advocacy would be unconstitutional. Defining, money received from an Separate Segregated Fund (“SSF”), a local committee of a political party, or an individual candidate’s committee as a contribution, as the Commission proposes in 66 Fed. Reg. 13681 (to be codified at 11 C.F.R. § 100.5(a)(1)(ii)), would impermissibly involve the Commission in regulating issue advocacy. As “contributions,” these amounts would be included in the \$1,000 threshold under the statutory definition of political committed in 11 C.F.R. § 100.5(a). Additionally, under all of the proposals for the major purpose test, the purported “contributions” would be part of the analysis. The Commission, in effect, would be regulating issue advocacy by the parties, PACs, and candidates, for the proposed definitions would only take into account the source and not the way in which the money is spent. The proposal, of course, would also capture express advocacy by these entities, but express advocacy is already regulated by the existing definition of “expenditures,” *id.* § 100.8 (“for the purpose of influencing any election for Federal office”). The only reason to expand this definition is to regulate issue advocacy. This fatal flaw is also present in proposed 11 C.F.R. § 100.5(a)(1)(iv), which categorizes as a contribution money received by an entity controlled by a federal candidate. A backhanded attempt to regulate the issue advocacy of the included groups is inappropriate given that these groups have the right to engage in such advocacy

through the vehicle of their choosing. "An examination of how the money [is] spent," 66 Fed. Reg. at 13683, is necessary to determine political committee status.

Furthermore, money and other things of value provided by an SSF, a local political party committee, and a candidate's committee have already been fully disclosed. If the groups receiving the funds use the money for contributions, then they will be limited to \$1,000 and may qualify as political committees in their own right if they meet the major purpose test. If these groups exercise their issue advocacy rights, then they should be free from such constraints. The Commission fears the funneling of money by the parties and other groups to entities not having to report. This concern is unfounded, for the earmarking provision, 11 C.F.R. § 110.6, exists to prevent any such funneling. See also 2 U.S.C. § 441f (prohibiting contributions in the name of another).

B. Several Definitions Consider Criteria Beyond the Words of the Advocacy

In other proposed elements of the definition of "contribution" or "expenditure," the Commission inappropriately suggests criteria other than the words used in the advocacy. The Commission proposes to consider whether an ad "has been tested to determine its probable impact on the candidate preference of voters," 66 Fed. Reg. 13681 (to be codified at 11 C.F.R. § 100.5(a)(2)(iii)); whether "the intended audience has been selected based on its voting behavior," *id.* § 100.5(a)(2)(iv); whether there was an "express understanding" with a vendor "that the service or product be designed to influence one or more federal elections," *id.* § 100.5(a)(2)(v); whether there existed a solicitation, "the express purpose of which was to raise money to influence federal elections," *id.* §§ 100.5(a)(1)(i) and 100.5(a)(2)(i); whether the by-laws of the organization authorize it "to engage in activities for the purpose of influencing federal elections," *id.* § 110.5(a)(1)(iii); and whether a group is "controlled by" a federal candidate, his committee, or related persons, *id.*

§ 100.5(a)(1)(iv). The proposal also would consider whether the funds were received from an SSF, a local committee for a political party, or a candidate committee. *Id.* § 100.5(a)(1)(ii).

The use of these criteria is impermissible. First, to the extent that the outside tests are used to show intent, *see, e.g. id.* § 100.5(a)(1)(i) (focusing on the “express purpose” of the solicitations), the courts have declared intent not to be applicable. In *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1229 (Mar. 5, 2001), for example, the Fourth Circuit declared a disclosure requirement of North Carolina law overbroad even where it excepted material “not intended to advocate the election or defeat of a candidate.” Instead, relying on *Buckley* and its progeny, the Court declined to allow North Carolina to regulate political expression “which on its face is issue advocacy, when the speaker acknowledges an intent to influence the out-come of an election.” *Id.* at 161. To the extent that the Commission’s proposals are place-holders for intent, they are prohibited.

Many courts have held that the only activity that may be taken into account when regulating advocacy are the words used. Other means of evaluating “intent” are too subjective to be constitutional. *See Buckley*, 424 U.S. at 42-43 (citing *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Accordingly, criteria may not include imagery, rhetoric, and symbols. *Christian Action Network*, 110 F.3d at 1064. “[T]he emphasis must always be on the literal words of the communication, with little if any weight accorded external contextual factors.” *Id.* at 1053. Indeed, in *Christian Action Network*, the Fourth Circuit pointed out that even the Ninth Circuit, in *Furgatch*, focused on the speech of the advocacy. *Id.* at 1053-54. *See, e.g., FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (“[S]peech may only be termed ‘advocacy’ if it presents a clear plea for action and thus speech that is merely informative is not covered by the Act.”). *See also FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999) (holding that under the express advocacy test, the

communication "must in effect contain an explicit directive," the effect of which "is determined first and foremost by the words used").

The proposed definitions of contribution and expenditure are not benign provisions but rather are vehicles for the regulation of unregulable entities. The proposed definitions use outside tests like the intent of the actors, the testing of the advertising, the person who controls the group, and the source of the money in determining what to regulate and attempt to circumvent the express advocacy mandate. Based on the case law above, this is improper, for regulation should only apply to groups making contributions (narrowed to influencing federal elections) and independent expenditures of more than \$1,000 and whose major purpose is making such contributions and independent expenditures. In considering whether certain types of advocacy qualify as an independent expenditures, nothing outside the words of the advocacy may be taken into account. Redefining contribution and expenditure to include issue advocacy is the same as direct regulation and is prohibited. Examination of the words of the ads tested or brought about by the funds solicited is the appropriate mode of analysis.

C. Several Definitions Are Internally Inconsistent or Redundant

As for proposed 11 C.F.R. § 100.5(a)(1)(v) and money received by a 527 organization that does not restrict its activities to influencing or attempting to influence elections to state or local public office or office in a political organization, the ANPRM seems to be internally inconsistent. Where the Commission proposes this addition to the definition of contribution, the ANPRM states that a 527 organization that goes beyond the above activities "acknowledge[es] that it is influencing or attempting to influence the selection ... of any individual to any Federal office." 66 Fed. Reg. at 13683. Later, however, the Commission discusses 527 organizations specifically and states that the

IRS has issued a series of private letter rulings holding issue advocacy activities to fall within the exempt function definition. *Id.* at 13687. Accordingly, although the IRS may be wrong in its analysis, if a 527 organization does not restrict its activities to state, local, or intra-party elections, it may be exercising its constitutional right to engage in issue advocacy. It does not necessarily follow that it is influencing a federal election through an "expenditure" or a "contribution."

Finally, the Commission proposes to include as both expenditures and contributions those payments and costs associated with coordinated expenditures for general public political communications. Proposed 11 C.F.R. §§ 100.5(a)(1)(vi), 100.5(a)(2)(ii). Recently promulgated 11 C.F.R. § 100.23(b), however, already considers such coordinated expenditures to be expenditures and contributions under the regulations as they now stand. 65 Fed. Reg. 76138, 76146 (Dec. 6, 2000). The inclusion of these examples imposed in the ANPRM would, therefore, be redundant.

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