BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

May 11, 2001

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

Re: Notice of Proposed Rulemaking on Definition of Political Committee

Dear Ms. Smith:

Please accept this letter as commentary from the Brennan Center for Justice at NYU School of Law on the Notice of Proposed Rulemaking concerning the Definition of Political Committee published in the Federal Register on March 7, 2001.

The Brennan Center supports the Commission's effort to clarify the definition of "political committee." The Commission's goal should be to adopt a definition of "political committee" that differentiates between, on the one hand, organizations that are purposefully attempting to influence federal elections and spending more than *de minimus* sums on those activities, and on the other hand, organizations that are concerned primarily with legislation or issue advocacy and are only incidentally influencing federal elections. While this is not an easy task, many of the suggestions contained in the Commission's proposed rulemaking are helpful steps towards that goal.

Contributions and Expenditures

We support the suggestion to revise paragraph 100.5(a) by adding the six new general types of descriptions to the definition of "contribution," as outlined in the notice of proposed rulemaking, with one minor comment. In regard to the third description, which involves organizations that are authorized by their bylaws or charters to engage in activities for the purpose of influencing federal elections, the Commission should consider broadening this description. The description should be extended to include organizations that are authorized to engage in activities for the purpose of influencing *any* election, as long as the organization does not restrict its activities to state and local elections. This refinement is consistent with the approach suggested for section 527 organizations, and it is more likely to capture the appropriate organizations. We suspect that few organizations that attempt to influence both state and federal elections state in their bylaws or charters anything more than a general intent to influence elections, and a statement of that type would not satisfy the proposed requirement of a specific statement of an intent to influence *federal* elections.

We also support the suggestion in the notice of proposed rulemaking to revise paragraph 100.5(a) by adding five new elements to the definition of "expenditure." The five new elements provide fair and objective criteria for determining when expenditures are for the purpose of influencing federal elections, and thus, they provide ample guidance to the public of when their actions will subject them to regulatory oversight. When, for example, a speaker is poll-testing his or her advertisements in the relevant media markets of a specifically named-candidate, there can be little doubt that the speaker is engaged in activity intended to influence the election of the named candidate. The new criteria for the definition of "expenditure" properly attempt to capture this type of conduct.

We also agree with the suggestion to clarify that the provision of goods or services at their usual and customary charge is not an "expenditure" under section 100.5. Political consultants and commercial vendors should not become "political committees" simply by virtue of their engaging in their normal for-profit business activity.

The proposed new definitions of "contributions" and "expenditures" should ideally be located in 11 CFR 100.7 and 100.8, respectively, rather than solely in Section 100.5. There is no reason in logic or common sense to conclude, for example, that paying for an advertisement that has been poll-tested is an "expenditure" when done by an organization, but is not an "expenditure" when done by an individual. Similarly, if the words contained in a fundraising appeal sent by an organization would require that the resulting cash received be deemed "contributions," then the same result should obtain if the same letter is sent out by the individual who heads that organization, even if the organization is not mentioned. The Commission should strive to have important terms, such as "contribution" and "expenditure," have a single meaning throughout all of the FECA.

The "Major Purpose" Test

It is clear from the Supreme Court's pronouncements in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 328 (1986) ("*MCFL*"), that the Court intended its narrowing construction of the term "expenditures" to apply only to groups that were not in the business of influencing the outcome of federal elections. Thus, any definition of "political committee" devised by the FEC should attempt to distinguish between groups like Massachusetts Citizens for Life, Inc., a small non-profit group interested primarily in advancing an issue, and groups for whom electoral advocacy is an important part of their agenda. As the Court suggested in *Buckley* and *MCFL*, the "major purpose" test can serve that purpose.

We believe the Commission would be most faithful to Congressional intent and the language of the FECA if it adopted a rule under which organizations would be presumed to be political committees if they make contributions or expenditures (as those terms will be newly defined through this rulemaking) in excess of $1,000. In order to take into account the "major purpose" test, organizations should be permitted to rebut the presumption upon a showing that the organization's contributions or expenditures were not a "major purpose" of the organization

during the election cycle. The "major purpose" component of the test could be rebutted by meeting the following three criteria:

> (i) less than 50 percent of the organization's disbursements are made for the purpose of influencing federal and non-federal elections;
>
> (ii) less than 50 percent of the time spent by the organization's staff is utilized for the purpose of influencing federal and non-federal elections; and
>
> (iii) the organization received less than $50,000 in federal contributions and disbursed less than $50,000 in federal expenditures.

Satisfying all three of these criteria would rebut the presumption that the organization is a "political committee." The final criteria, with a suitably large dollar threshold, is needed to ensure that organizations with large budgets (like the American Israel Public Affairs Committee) cannot be utilized as conduits for significant political contributions or expenditures solely by virtue of their size. Additionally, we believe it would be appropriate to allow organizations to receive contributions or make expenditures in excess of $1,000 through a separate segregated fund, in which case only the separate segregated fund would become a "political committee," subject to source restrictions and donor disclosure.

In Alternative Three of the notice of proposed rulemaking, there is a suggestion that the "major purpose" test take into account only disbursements that "expressly advocate" the election or defeat of clearly identified candidates. This suggestion is manifestly contrary to Congressional intent and the teachings of the Supreme Court. In *Buckley* and *MCFL*, the Court made it abundantly clear that political committees were not entitled to the narrowing construction that defined "expenditures" in terms of "express advocacy."

In *Buckley*, the Supreme Court reviewed the disclosure requirements of section 434(e) of FECA, which required disclosure from persons making expenditures of at least $100 "for the purpose of . . . influencing" the nomination or election of candidates for federal office. The Court was concerned that the "for the purpose of . . . influencing" language was potentially vague and overbroad, *i.e.*, that it could encompass not only political advocacy, but also pure issue advocacy. The Court began its analysis, however, by noting that expenditures of candidates and political committees "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. According to the Court, it was only "when the maker of the expenditure is not within these categories -- when it is an individual other than a candidate or a group other than a 'political committee,'" that FECA's disclosure requirements were to be construed to reach only funds "used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. *Buckley's* adoption of the "express advocacy" standard was explicitly limited to expenditures made by groups *other than* political candidates and political committees. Alternative three would completely eviscerate this explicit conclusion of the Court.

The Court came to the same conclusion in *MCFL*. There the Court held that, as applied to certain types of issue advocacy organizations, the prohibition on expenditures in Section 441b of FECA had to be narrowly construed using the "express advocacy" standard. However, the Court was again clear, as it was in *Buckley*, that this narrowing "express advocacy" construction did not apply to an organization that was engaged in extensive electioneering activity. *See* 479 U.S. at 262 ("should [the organization's] independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.").

In sum, an organization is not entitled to the benefit of the "express advocacy" test if it is a political committee by virtue of its extensive political activity. To then define whether an organization is a political committee or engaged in extensive political activity through the use of the "express advocacy" standard, would be to bootstrap the conclusion on to the test.

Section 527 Organizations

Finally, the FEC should make it clear that all Section 527 organizations are "political committees" unless either: (i) they are engaged solely in non-federal political activity, or (ii) their spending on or fund-raising for activities that further their federal political goals amounts to less than $1,000. An organization is not entitled to section 527 status under the tax laws unless the organization declares that its purpose is to accept contributions or make expenditures for the purpose of influencing the selection, nomination, election, or appointment of individuals to Federal, State, or local public office. Because section 527 organizations admit that their purpose is to influence elections, they are not entitled to the benefit of the "express advocacy" narrowing construction on their activities. *See Buckley*, 424 U.S. at 79-80; *MCFL*, 479 U.S. at 262. Thus, there should be no need to quibble about, for example, whether a particular advertisement run by a section 527 organization is an "expenditure" or whether a particular "receipt" is a contribution. Section 527 organizations exist for the very purpose of influencing elections, and unless they engage only in *de minimus* federal political activities, they are "political committees" under the FECA.

Very truly yours,

Glenn J. Moramarco