NORMAN CHACHKIN <NCHACHKIN@NAACPLDF.ORG> on 04/05/2004 04:52:16 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Comments of NAACP Legal Defense & Educational Fund, Inc.

Please see the attached.

 - FEC reg comments.pdf

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

National Office
99 Hudson Street, Suite 1600
New York, NY 10013-2897
212.965.2200 Fax 212.226.7592
www.naacpldf.org

April 5, 2004

Via E-Mail

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 "E" Street, N.W.
Washington, D.C. 20643

Re: Comments on Proposed Rulemaking
Political Committee Status
69 Fed. Reg. 11736

Dear Ms. Dinh:

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a signatory to the comments on this proposed Rulemaking by the Commission that are being submitted today by the Alliance for Justice, the Leadership Conference on Civil Rights, People for the American Way, and many other organizations. We are also submitting these brief separate comments focusing on the impact of the proposed regulations upon § 501(c)(3) organizations such as ours. (We do not wish to testify separately.)

LDF was chartered by the Appellate Division of the Supreme Court of New York State in 1939 as a legal aid society and throughout its existence has qualified as a tax-exempt charitable organization under § 501(c)(3) of the Internal Revenue Code. LDF provides legal assistance to individuals with claims of racial or other invidious discrimination who are unable to afford counsel, operates a scholarship program, and engages in public education

and advocacy to secure equal rights and promote diversity. LDF has made the election provided for in Section 501(h) of the Internal Revenue Code and engages in legislative advocacy within the limits provided by that provision of law, reporting annually on such activities to the Internal Revenue Service on its Form 990 return. LDF also submits semi-annual reports to the U.S. Senate and the U.S. House of Representatives pursuant to the Lobbying Disclosure Act of 1995.

However, LDF strictly adheres to the Internal Revenue Code's prohibition upon partisan political activities by § 501(c)(3) organizations. It has not established any separate § 501(c)(4) or § 527 subsidiary or affiliated organizations. Moreover, throughout its history LDF has rarely purchased print or broadcast media advertising to disseminate its views on civil rights or other issues. Finally, LDF recognizes that BCRA, as authoritatively construed by the Supreme Court in *McConnell v. FEC*, 124 S. Ct. 619, 72 U.S.L.W. 4015 (Dec. 10, 2003), restricts its ability to expend "general treasury" funds to make specified types of broadcast communications that "refer[] to a clearly identified candidate for Federal office" within specified time periods prior to elections for such Federal offices. *See McConnell*, 72 U.S.L.W. at 4042.

Notwithstanding this history, LDF — an organization that has never before been required to delve into the complexities of the Commission's regulations, with a small staff and heavy ongoing responsibilities in pending litigation — has concluded, in the short period of time that the Commission has allowed for public comment, that it faces potential regulation or classification as a "political committee" under the extraordinarily broad and standardless language contained in the NPRM. We do not believe this is what Congress intended. We urge the Commission to withdraw the NPRM and, at a minimum, to republish it in the future with much greater specificity and guidance about how the definitions and standards that it proposes will be administered.

We understand that various provisions of BCRA were prompted, in part, by the Congress' conclusion that there were opportunities under pre-existing law for political parties to evade the contribution and expenditure limitations of FECA by channeling advertising and public communications through nominally independent tax-exempt organizations. Nevertheless, in acting to avoid allowing political parties to "rais[e] large sums of soft money to launder through tax-exempt organizations engaging in federal election activities," *McConnell*, 72 U.S.L.W. at 4039, Congress carefully limited the extent to which the operation of tax-exempt charitable organizations would be restricted or subject to regulation under the Act. In so doing, Congress recognized

> the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. [citation omitted.] Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences.

Id. at 4042. The balance struck by the Congress limits solicitations for and donations or contributions to certain charitable organizations by political parties, or by candidates for federal office to charitable organizations "whose principal purpose is to conduct [federal election activities]," *see id.* at 4087 (quoting §§ 323(d), 323(e)(4)(A) of FECA, as amended by § 101(a) of BCRA), and subjects charitable organizations to regulation under FECA if they expend their general treasury funds to make specified "electioneering communications," as we recognized above at p. 2, quoting *id.* Apart from these limitations, "[i]nterest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." *Id.*[1]

The NPRM fails to respect the balance struck by the Congress when it proposes to subject charitable organizations, including § 501(c)(3) organizations such as LDF, to disclosure obligations and regulation, either directly[2] or by classification as "political committees" if they engage in activities that the Supreme Court has specifically indicated they are permitted to undertake.

---

[1]This language from the majority opinion in *McConnell* upholding Titles I and II of BCRA is not *dictum*, because the Court necessarily had to construe the differences in treatment between political parties and interest groups under BCRA that it sustained against the equal protection attack mounted in *McConnell*.

[2]*See, e.g.*, 69 Fed. Reg. 11736, 11741 ("Proposed section 100.116 would . . . treat public communications that promote or oppose ["a clearly identified Federal candidate" or] political parties [as expenditures] in a similar fashion, and it would apply to communications made by all persons, not just political committees."

One of the ways that it does so is by expanding the definition of "political committee" to include an organization that makes expenditures above the minimum threshhold not only for "electioneering communications" — broadcast communications that "refer[] to a clearly identified candidate for federal office" — but also for non-broadcast communications that (apparently in the Commission's unconstrained judgment, because the terms are nowhere defined in the existing or proposed regulations) "promote[], or support[], or attack[] or oppose[] any candidate for Federal office; or [p]romote[] or oppose[] any political party." *See* proposed § 100.116 [Alternative 1-B], incorporating 11 C.F.R. § 100.26.[3]

A second way in which the NPRM exceeds the scope of BCRA's impact upon interest groups, including charitable organizations, is by similarly defining as expenditures that will

---

[3]While a § 501(c)(3) organization could be classified as a "political committee" if the Commission concluded that "a major purpose" of the group was "the nomination or election of one or more Federal candidates," *see* proposed § 100.5(a)(1)(iii) (as to which determination we comment further below), *and* it exceeded certain expenditure minimums, *see id.* § 100.5(a)(2)(i), the proposed regulations also provide for such classification of the organization if more than 50 per cent of its total disbursements within a five-year period were "expenditures," without limiting qualifying expenditures to "electioneering communications." *Id.* §§ 100.5(a)(2)(ii), (iii).

Further, the proposed regulations contain no adequate principles or standards to constrain the Commission's administration of the "major purpose" determination embodied in § 100.5(a)(1). The preamble discusses the possibility of "rely[ing] on an organization's written characterization of its own activities" as evidenced in its "organizational documents, such as its charter, constitution, by-laws, etc.," 69 Fed. Reg. at 11745, but the language of the proposed regulation is substantially broader, referring — in addition to "organizational documents," a group's "solicitations, advertising, other similar written materials, public pronouncements, or any other communication . . . ." *See* proposed § 100.5(a)(2)(i). This opens the door to extraordinarily burdensome scrutiny of charitable organizations' speech by the Commission, the mere specter of which would have a severe chilling effect on that speech.

The extremely convoluted and complex nature of the proposed regulations, especially as they would apply to Section 501(c)(3) organizations that have not previously been subject to the Commission's purview, and the interrelationship between the "expenditure" definitions and the "major purpose" conclusions, are still imperfectly understood by LDF. What is clear is that the terms used are extraordinarily broad and thus their application cannot be predicted with any degree of precision. The preamble asks, "is there a need to develop a more focused content analysis for the major purpose test [with respect to 501(c) organizations]?" 69 Fed. Reg. at 11746. The answer to this question is a resounding affirmative!

trigger classification as a "political committee" the organizations' disbursements for voter registration, GOTV, and mailings and other non-broadcast communications. *See* proposed § 100.5(iii) [Alternative 1-A], incorporating 11 C.F.R. §§ 100.24(b)(1) through (b)(3) [which necessarily also again incorporates 11 C.F.R. § 100.26].

A third problem with the proposed regulations is the direct limitation on corporations' [including, obviously, non-profit corporations'] voter registration and GOTV activities. *See* proposed §§ 114.4(c)(2) and (c)(3), incorporating proposed §§ 100.133(b) and (c). As the comments of the Alliance for Justice, Leadership Conference on Civil Rights, *et al.*, which LDF has signed, describe, these sections make targeted voter registration and GOTV messages suspect even when they are aimed at voters or potential voters from population subgroups historically subjected to discriminatory vote denial and dilution; and they fail to include [either in the regulatory language or in the preamble discussion] any indication of the standards that the Commission might apply in determining whether to infer that such targeting was based on consideration of "likely party or candidate preference," *see* proposed § 100.133(c).[4] This is a particular problem for civil rights organizations such as LDF, because the history of racial discrimination in the United States and current conditions have created situations in voters from racial minority groups may perceive that candidates of a particular political party will best serve their policy interests.[5]

But the difficulty extends to a much wider variety of charitable organizations that focus on public policy issues. For it confronts these groups with the problem that the more a particular issue becomes the focus of public attention — and especially if there appear to be differences between candidates or partisan political organizations on such issues, so that there is a greater need for the expression of the electorate's viewpoint to guide resolution of those differences — the more likely it is that (for all that appears in the NPRM) the Commission may conclude that interest groups' actions are intended to have partisan effects.

---

[4]See footnote 37 of comments of Alliance for Justice, Leadership Conference on Civil Rights, *et al.*, discussing IRS Private Letter Ruling 9925051 (March 29, 1999).

[5]In *Easley v. Cromartie*, 532 U.S. 234, 245 (2001), the Supreme Court recognized that "[a] legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior [and h]ence . . . may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." Similarly, registration or GOTV activities directed at African-American voters by civil rights organizations might, in similar circumstances, reach more actual or potential voters of one political party than another, but that should not trigger regulation under FECA.

These provisions of the proposed regulations are utterly inconsistent with the Supreme Court's construction of the BCRA's impact upon "interest groups," as opposed to political parties, quoted above. In the BCRA, Congress struck the appropriate balance among all of the considerations discussed above by limiting, for these groups, only "electioneering communications" that explicitly refer to clearly identified candidates for office. The Commission has no authority to recalibrate the balance.

While we appreciate the fact that the Commission is considering exempting § 501(c)(3) organizations entirely from the reach of these proposed rules, *see* 69 Fed. Reg. at 11749, and while we believe that for the reasons set forth above that § 501(c)(3) organizations were not intended by Congress in enacting the BCRA to be regulated by the Commission, we also agree with the deficiencies of the Commission's proposed approach to other charitable organizations, including Section 527 groups, that are detailed in the comments of the Alliance for Justice, Leadership Conference on Civil Rights, *et al.*, which we have joined. We therefore urge the Commission to go further than merely to exempt § 501(c)(3) organizations — although it should do that at a minimum, preferably by withdrawing the entire NPRM for further study.

The lack of meaningful standards for interpreting and applying the new tests contained in the NPRM is of particular concern to LDF. Not only does the NPRM fail to offer guidance that will permit charitable organizations to conform their future conduct to the requirements of BCRA and FECA (to the extent they apply to such organizations), but it also provides little protection against arbitrary — because standardless — application of its provisions. Indeed, the questions framed in the preamble are often so general that they convey no sense of the direction that the final regulations are likely to take on a wide variety of subjects. In such circumstances, at a minimum (and following measured consideration and analysis of the public comments submitted in response to this draft), the regulations should be republished for further comment (with substantially more time allowed for study and analysis) before they are adopted and applied. This necessarily would mean that they could not apply to the upcoming national elections, but to do so in any event would raise very serious concerns in light of the short time remaining and the advance planning and commitments that have already been undertaken by charitable organizations with respect both to issue advocacy and voter registration or GOTV activities in 2004.

Conclusion

We urge the Commission to take no action on the proposed NPRM during 2004 but to re-study and re-think these proposals in light of the comments above as well as those of other organizations and individuals that it will undoubtedly receive.

Respectfully submitted,

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

Norman J. Chachkin

By: Norman J. Chachkin
Director of Litigation

/c