Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

April 5, 2004

Jan Witold Baran
202.719.7330
jbaran@wrf.com

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Written Comments of the Chamber of Commerce of the United States (Notice 2004-6, Political Committee Status) and Request to Testify

Dear Ms. Dinh:

The Chamber of Commerce of the United States submits the attached comments in response to the Notice of Proposed Rulemaking published at 69 Fed. Reg. 11736, *Political Committee Status* (March 11, 2004). A hard copy will follow via hand delivery.

In addition, Jan Witold Baran and Stephen A. Bokat respectfully request an opportunity to testify on behalf of the Chamber at the public hearings scheduled for April 14 and 15, 2004, on this matter.

Sincerely,

Jan Witold Baran

Stephen A. Bokat
General Counsel
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, DC 20062

BEFORE THE FEDERAL ELECTION COMMISSION

Notice of Proposed Rulemaking	)	
	)	63 Fed. Reg. 11736 (March 11, 2004)
Political Committee Status	)	

COMMENTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

Stephen A. Bokat
General Counsel
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, DC 20062

Jan Witold Baran
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7330

Counsel to the Chamber of Commerce of the United States

April 5, 2004

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

I. ABOUT THE CHAMBER

The Chamber of Commerce of the United States ("Chamber") submits these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") announced in the March 11, 2004 Federal Register, Proposed Rulemaking on Political Committee Status. The Chamber was incorporated in 1916 in the District of Columbia. 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 from every corner of America. On their behalf, the Chamber involves itself in various lobbying, electoral, and litigation activities.

II. COMMENTS

The FEC's NPRM announces the Commission's consideration of sweeping changes to the nation's campaign finance regulatory framework. To address concerns that nonparty groups' advocacy activities may effectively circumvent or undermine the goals of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which amended the Federal Election Campaign Act ("FECA"), the Commission is exploring the application of campaign finance regulation to entities neither expressly governed by the BCRA nor contemplated by Congress.

After reviewing the NPRM and considering the legal and practical implications for its members, the Chamber of Commerce objects to several aspects of the proposals. Fundamentally, the FEC lacks authority to expand campaign finance regulations beyond the intent of Congress and the text of the BCRA. Beyond the NPRM's jurisdictional infirmities, the Chamber is concerned that the proposals violate basic First Amendment protections the Supreme Court has

recognized were retained by interest groups like the Chamber. It is clear from the legislative history of the BCRA and subsequent judicial interpretation that Congress was focused on particular activities that had the tendency to corrupt or that gave the appearance of corruption, of federal officeholders and candidates. Specifically, Congress was concerned about the raising and spending of "soft money" by officeholders and their political parties and the ability of "electioneering communications" – broadcast issue ads funded by corporate and union dollars – to distort or disguise express advocacy on behalf of candidates. Responding to these concerns in a manner calculated to achieve political consensus and pass constitutional scrutiny, Congress sought to carefully regulate certain aspects of the system of campaign finance. In measured terms, Congress defined and regulated the use of soft money for "federal election activity" ("FEA") by party committees and "electioneering communications" by corporations and unions; notably, it did so without rewriting the FECA's bedrock definitions of "expenditure" or "contribution" or "political committee." The proposed regulations go far beyond Congress's conscientious and restrained solution of particular problems confronting the campaign finance system; the NPRM represents a hasty attempt to achieve through regulation what Congress did not do – and likely could not have accomplished – in the BCRA.

III. UNDER WELL SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, THE FEC LACKS AUTHORITY TO ADOPT THE PROPOSED RULES

The FEC would exceed its authority if it adopted the proposed rules. Agencies are not empowered to craft whatever rules they might deem in their considered judgment to be good policy; rather, they are limited by the terms and structure of the statutes they are charged with enforcing. More specifically, agencies can only proceed where there is an ambiguity or gap to be filled, and "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . .." MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229

(1994). In this case, Congress left no gaps for the FEC to fill in the definition of "political committee" or the more general definition of "expenditure" as they pertain to nonparty groups. In the BCRA, Congress spoke with deliberation, clarity and circumspection; it labored to develop a "carefully crafted compromise," 147 Cong. Rec. S3097 (daily ed. Mar. 29, 2001) (statement of Sen. McConnell), that could pass both houses of Congress and survive inevitable court challenges.[1]

The foundation of modern administrative law is the familiar Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which outlines the contours of permissible agency action. Under Chevron, courts and the implementing agency ask first whether Congress has left any ambiguity or gap to fill. If Congress has spoken with clarity to the issue in question, the court or agency should give effect to the expressed intent of Congress; where Congress "explicitly left a gap for the agency to fill," and there is "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" the agency may act. Chevron, 467 U.S. at 843-44. In such circumstances, agencies are empowered to undertake gap-filling rulemakings so long as they are not "arbitrary, capricious, or manifestly contrary to the statute." Id.; see also Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174 (D.C.Cir. 2003). This two step analysis is critical to evaluating an agency's actions. Though the FEC's interpretation of campaign finance laws deserves "considerable deference,"

[1] The original version of the BCRA was introduced in the 104th Congress as S. 1219 on September 7, 1995. This bill was significantly more restrictive than BCRA eventually turned out to be; that bill was defeated and Senators McCain and Feingold thereafter introduced a modified version of that bill in each session of Congress. In some years, the House of Representatives succeeded in passing a version of campaign finance, but Senate sponsors failed to break a filibuster on the Senate version. Finally, in the 107th Congress, the latest McCain-Feingold iteration of the bill survived numerous amendments and passed in the Senate, 59-41 on April 2, 2001. After the House failed to consider versions of the bill pending in committee, House supporters finally succeeded in forcing a floor vote and on February 7, 2002, the House approved H.R. 2356. The Senate approved an identical bill on March 22 to avoid a conference committee, and President Bush signed the bill into law on March 27.

American Federation of Labor & Congress of Industrial Organizations v. FEC, 333 F.3d 168, 175 (D.C. Cir. 2003), under the first step of Chevron, courts "only defer to an agency interpretation if a statute or regulation is unclear." In re Sealed Case, 237 F.3d 657, 669 (D.C. Cir. 2001) (citations omitted).

A. This rulemaking is inconsistent with the BCRA's text, structure and purpose

The proposed regulations do not resolve an ambiguity or fill a "gap" left by Congress in the definition of "political committee" or "expenditure." Congress spoke with remarkable precision in crafting its legislative response to the problems perceived in the system of election financing. The justification offered by the government and accepted by the Supreme Court for almost every provision of the BCRA, was the "sufficiently important governmental interests of avoiding corruption and its appearance." McConnell v. FEC, 124 S. Ct. 619, 675 (2003). In addressing these problems, Congress had before it the full panoply of legislative responses to the perceived inadequacies in the campaign finance regulatory regime, but focused on two specific and related areas: national and state party soft money, and "electioneering communications," a narrowly tailored term of art used to describe a specific class of communications by particular entities.

The principal articulated rationale for BCRA's regulation of national and state party soft money was to stop circumvention of the campaign finance laws. "Title I is Congress' effort to plug the soft-money loophole." Id., at 654. Congress' "conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternate avenue for precisely the same corrupting forces." Id., at 672. The rationale for Title II's regulation of "electioneering communications" was the same: circumvention of the soft

money ban. "As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on 'issue' advocacy." Id., at 652 (citations omitted). The Congressional Record is replete with references to the vital role the BCRA's restrictions on electioneering communications would play in ensuring "real and meaningful campaign finance reform" by preventing circumvention of the law.[2]

Campaign finance reform is an "area in which [Congress] enjoys particular expertise" and over which there were "lengthy deliberations leading to the enactment of BCRA ...." McConnell, 124 S. Ct. at 657. Congress was aware of and debated all manner of regulation aimed at eradicating the pernicious effect it perceived played by soft money before enacting limited reform in the BCRA. Senators debating the regulation of electioneering communications remarked on the BCRA's intentionally narrow scope. To comply with constitutional limitations and achieve consensus, Congress deliberately did not bring all nonparty groups under the watchful eye of the federal campaign finance laws; Congress was "trying to make distinctions between true issue advocacy and election ads. . . . It is carefully crafted to make sure we have a narrow provision identifying the time period of 60 days and 30 days. We ban only union and corporation money. So the entities know which provisions affect them in the election." 147 Cong. Rec. S3035 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe) (emphasis added); see id. at S3033 (statement of Sen. Jeffords) ("We also worked to make our requirements sufficiently

[2] See e.g., 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001) (statement of Sen. McCain); id. at S3041-42 (statement of Sen. Wellstone) ("[W]hat we want to make sure of is when we do the prohibition on soft money to the parties, all of a sudden that money ... doesn't just shift to these sham issue ads where a variety of existing groups and organizations ... will just take advantage of a loophole and just pour all of their soft money into these sham issue ads which are really electioneering."); id., at S3072 (statement of Sen. Feingold) ("Snowe-Jeffords gets at the heart of the issue ad loophole.").

clear and narrow to overcome unconstitutional claims of vagueness and overbreadth.") (emphasis added).

The BCRA's admittedly limited solution was, fundamentally, the product of political compromise.[3] Senator Wellstone aptly summarized the negotiated nature of Congress' regulation of soft money: "It is not the only problem in our campaign finance laws. It is not the only answer. But it is the answer around which a majority of Members here could coalesce." 148 Cong. Rec. S2099 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone) (emphasis added). Discussing proposals that did not make it into the BCRA, he noted, "[no matter how good the idea may be, if you can't muster 51 votes here and a majority in the House, then the idea is only that: it is a good idea, but it lacks the ability to build the necessary majority support for the idea to become law." Id. Senator Daschle agreed that the BCRA "does not address every flaw in our campaign system. . . . it curbs some of the most egregious injustices in that system." 147 Cong. Rec. S3244 (daily ed. Apr. 2, 2001) (statement of Sen. Daschle).

Given the range of legislative solutions available, it is notable what Congress did not do. In combating soft money and sham issue ads, Congress could have regulated in the manner now proposed by the FEC, but Congress did not amend the definitions of "expenditure" or "political committee" to include "electioneering communications," except when coordinated, in which case the spending becomes a "contribution." See 2 U.S.C. § 441a(a)(7)(C). This omission from such a comprehensive bill, debated for so long, supports a "sensible inference" that Congress

[3] "There are people who would not be for this legislation, I dare say, if they thought the Snowe-Jeffords legislation on money being spent on sham ads right before the election were not restricted in this bill." 147 Cong. Rec. S3097 (daily ed. Mar. 29, 2001) (statement of Sen. McConnell). Sen. McConnell stated, "[a]ll of the ingredients are essential to the compromise" which he characterized as "carefully crafted" to resolve the "controversial, complicated, emotional issue of how we handle campaigns in this country." Id. (emphasis added).

deliberately did not act. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002).[4] Indeed, prior to the passage of the BCRA, the FEC had begun to clarify the definition of a political committee. See Definition of Political Committee, 66 Fed. Reg. 13681 (FEC Mar. 7, 2001). "After receiving comments on the ANPR, the Commission voted on September 27, 2001, to hold that rulemaking in abeyance pending changes in legislation, future judicial decisions, or other action." Political Committee Status, 69 Fed. Reg. 11736, 11737 n.3 (FEC Mar. 11, 2004). Subsequently, and presumably well aware that the FEC was considering such amendments, Congress enacted explicit reform legislation that did not alter the concepts the FEC sought, and now seeks, to redefine.

Nonparty groups intentionally were left free to engage in issue advocacy (except express advocacy or electioneering communications) at all times outside the 30 and 60 day blackout periods and even during the blackout periods in other media (e.g. newspapers, direct mail, billboards, etc.). "As long as those are genuine issue ads and it is not electioneering, they have all of the freedom in the world to do that - period." 147 Cong. Rec. S3041 (daily ed. Mar. 28, 2001) (statement of Sen. Wellstone). Senator Hatch reinforced this conclusion, arguing the BCRA would lead to a variety of unintended consequences because soft money would shift to

---

[4] In light of the particularity of Congress's solution, guidance can be taken from the ancient canon of statutory construction: *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another."

> The maxim's force in particular situations depends entirely on context, whether or not the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives. That will turn on whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed "the one thing" would have likely considered the alternatives that are arguably precluded.

Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998) (emphases added).

advocacy groups, "[t]he problem with such a result is that these non-party groups are completely unregulated, as they should be." Id. at S3243 (April 2, 2001) (Statement of Senator Hollings).

Not only is it contrary to congressional intent, the extrapolation of fundamental definitional elements, such as FEA, beyond their designated place violates a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989). For the agency to redefine these fundamental elements of campaign finance law, thereby subjecting previously unregulated nonparty groups to intrusive and unnecessary regulation, is to legislate where Congress did not. Congress not only did not legislate new definitions, it did not indicate that changes were needed through new FEC regulations, as it did in other contexts. BCRA mandated certain new rules and imposed deadlines on the FEC. See BCRA § 214 (c), codified at 2 U.S.C.A. 441a note; BCRA § 402(c)(1)-(2), codified at 2 U.S.C.A. 441a note. None of these mandated rules pertain to the definition of "political committee" or the expansion of FEA to nonparty groups. While some of the FEC rules provoked complaints from congressional sponsors and a lawsuit, Shays v. FEC, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2002), there were no suggestions that the FEC has failed to implement BCRA by excluding regulations of the sort proposed in this rulemaking.

Indeed, after passing the BCRA Congress itself has attempted to address some of the unintended consequences the FEC seeks to address in this rulemaking. Congress passed amendments to Section 527 of the Internal Revenue Code, Pub. L. No. 107-276, 116 Stat 1929 (2002), which complemented the BCRA by taking the limited step of amending the disclosure requirements applicable to nonparty organizations. Congress did not subject nonparty groups to the FECA's definitions of "expenditure" and "political committee" which would have

significantly burdened their operations by exposing them to all of the FECA's regulations and restrictions. To the contrary, Senator Lieberman explained that when enacting the BCRA, Congress anticipated the continued existence of nonparty organizations in their current form:

> [W]hen the Bipartisan Campaign Reform Act—the McCain-Feingold bill—goes into effect ... at least some of the soft money donors who will no longer be able to give to political parties will be looking for other ways to influence our elections. Donations to 527 groups will probably top many of their lists, because these are the only tax-exempt groups that can do as much election work as they want without jeopardizing their tax status.

148 Cong. Rec. S10779 (daily ed. Oct. 17, 2002) (statement of Sen. Lieberman). Fully cognizant of the BCRA and its implications for nonparty organizations, Congress only attempted to regulate them by improving disclosure of their activities and not by altering their ability to operate or redefining fundamental elements of campaign finance law. If this is true of § 527 organizations, it is more so with regard to other types of tax-exempt groups like the Chamber, a § 501(c)(6) organization.

The FEC's proposed rules thus ignore the circumspect and deliberate choices Congress made to address particular problems it perceived in the system of election financing. While the FEC is empowered to regulate in order to give substance to otherwise ambiguous provisions, "[a] regulation, however, may not serve to amend a statute, or to add to the statute something which is not there." Iglesias v. United States, 848 F.2d 362, 366 (2d Cir. 1988) (holding regulation amended statute because it altered the scope of the statute) (citations and quotations omitted). A regulation that does not implement the will of Congress, "but operates to create a rule out of harmony with the statute, is a mere nullity." Id. at 366-67 (quotation omitted); see also Comm'r v. Acker, 361 U.S. 87, 92-94 (1959) (holding regulation invalid when it added restriction for which the law did not provide); City of Tucson v. Comm'r, 820 F.2d 1283, 1290 (D.C. Cir.1987)

(rejecting regulation that "forged, not a reasonable implementation of the legislative mandate, but rather an impermissible enlargement by an unnatural construction of the statutory language").

The FEC's proposed rules are, in light of the text, structure, and legislative history of the BCRA, a substantive addition that is "out of harmony" with the narrowly tailored regime enacted by Congress. See Iglesias, 848 F.3d at 366-67. The BCRA cannot be construed as ambiguous with respect to the principal substantive definitions left intact by Congress; the FEC should not adopt rules fundamentally inconsistent with the compromise forged by Congress. By regulating nonparty groups, the FEC's proposals run afoul of the Supreme Court's admonition: "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (quotation omitted).

B. The McConnell decision provides no independent authority for the FEC's proposed expansion of the reach of campaign finance law

Though the Supreme Court in McConnell appeared to suggest the Court's view that *Congress* could constitutionally broaden the definition of regulated activities, the Supreme Court cannot expand the authority of the FEC to regulate beyond that which Congress has authorized. Even with the purported blessing of the Supreme Court, the FEC is powerless to exceed the scope and reach of the substantive laws that Congress has enacted as part of its careful compromise in addressing this complex and contentious issue. The FEC does not have a mandate to expand the scope of regulation simply because the Supreme Court may have "recognize[d] additional activities that may be constitutionally regulated by Congress ...." See

69 Fed. Reg. at 11738; see generally, Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 170 (D.C. Cir. 2002). The FEC should heed the intent of Congress; no matter how desirable it finds a proposed rule, if it exceeds the scope of its delegated authority and clearly conflicts with the considered judgment of the Congress, it is properly taken up only by Congress.

IV. THE PROPOSED RULES IMPROPERLY AND UNWISELY EXPAND THE DEFINITION OF "EXPENDITURE"

The Commission is considering amendments to its general definition of "expenditure" in subparts D and E, which would import certain aspects of FEA and electioneering communications into the definition of "expenditure." The Commission purports to do this in order, among other things, to "reflect McConnell's conclusion that certain communications and certain voter drives have the purpose or effect of influencing Federal elections." 69 Fed. Reg. at 11739. The Commission acknowledges that its approach would "extend restrictions related to Federal election activities beyond political party committees and Federal candidates to all persons, including a State or local candidate or committee." *Id.* The proposed amendments to the general definition of "expenditure" are unauthorized by Congress, constitutionally infirm, inconsistent with BCRA and constitute bad public policy. As the FEC notes, Congress in BCRA did not amend the general definition of "expenditure" in 2 U.S.C. § 431(9); the FEC should not take upon itself that which Congress itself lacked the will to do. Indeed, BCRA flatly states that "electioneering communications" are not expenditures. See 2 U.S.C. § 434(f)(3)(B)(ii).

A. Proposed § 100.116 improperly expands the definition of expenditure to capture vastly more communication than intended under BCRA

The NPRM proposes to expand the definition of "expenditure" by adding a new provision, 11 C.F.R. § 100.116, which provides:

> A payment, distribution, loan, advance, or deposit of money or anything of value made by, or on behalf of any person for a public communication, as defined in 11 CFR 100.26, is an expenditure if the public communication:
>
> > (a) Refers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office; or
> >
> > (b) Promotes or opposes any political party.

The definition improperly incorporates the "promote, support, attack or oppose" standard from BCRA's provisions on "federal election activity." Limits on FEA were applied in BCRA only to state and local political parties, and in certain circumstances to officeholders soliciting funds. Nowhere in the BCRA or the legislative history is there any evidence that Congress intended to apply the new FEA restrictions, or its definitional elements, to nonparty groups. For the FEC to do so is inconsistent with the text and structure of Congress' deliberately limited legislative solution to party soft money. Furthermore, by expanding the definition of "expenditure" the proposal threatens, like so much else in the NPRM, to bring within the definition of "political committee" nonparty groups who make public communications critical of political parties or candidates, under a standard, "promotes or supports, or attacks or opposes." Congress never intended such a standard to apply to issue advocacy by nonparty groups.

To the contrary, such a standard was adopted in part solely as a back-up provision to the definition of "electioneering communication." See 2 U.S.C. § 434(f)(3)(A)(ii). Moreover, a "promotes or supports, or attacks or opposes" standard was not incorporated into the revised prohibitions on corporate and union expenditures in 2 U.S.C. § 441b. While Congress amended

that statute to prohibit corporate and union "electioneering communications," it did not change (or even proposed to change) the FECA definitions which would have expanded the term "expenditure" and therefore expand, not only the definition of "political committee," but the scope of prohibited corporate and union disbursements.

B. The regulation of voter outreach in proposed § 100.133 is vague and will chill grassroots efforts to encourage voter participation

The NPRM suggests an amendment to 11 C.F.R. § 100.133, an exception to the definition of expenditure, which would further broaden the definition of "expenditure" and possibly subject the Chamber and other nonparty groups to inappropriate regulation. Section 100.133 provides an exception from the definition of "expenditure" for certain GOTV, voter registration activities; the NPRM proposes to narrow that exception. By including more activity in the definition of "expenditure" the FEC will be subjecting important grassroots activity to the prohibitory and regulatory limitations contained in the FECA. The Chamber engages in GOTV and voter registration activities that, under the vague definition in the NPRM, will be unnecessarily chilled.[5]

The proposed amendment subjects outside groups to unpredictable enforcement, as the proposed rule offers little guidance about what standards will govern the interpretation and application of the new restrictions. We have stated earlier the impropriety of using the "promotes or supports, or attacks or opposes" standard which reappears in subsection (a). In

[5] The Chamber of Commerce is an active participant in non-partisan GOTV and voter registration activities. *See* http://www.voteforbusiness.com. Among its many outreach activities, the Chamber assists and encourages absentee voting, an important option for members' employees, who are frequently traveling out of their voting districts on election day. See also MUR 5342 (Mar. 2, 2004) (finding no cause to proceed on complaint against Chamber with respect to certain of its voter outreach efforts, including an online voter guide and voter registration efforts). In addition, the Chamber conducts activities directed at its restricted class, which activity may be partisan and is outside the prohibition of 2 U.S.C. § 441b.

addition, the Chamber is concerned about the addition of subsection (c), which requires that "Information regarding likely party or candidate preference has not been used to determine which individuals encouraged to register to vote or to vote." If such information is used, the voter registration and get-out-the-vote activities become "expenditures" and thus are subject to the reporting, disclosure and funding restrictions noted above.

The current regulation, at 11 C.F.R. § 100.133, entitled "Voter Registration and get-out-the-vote activities" reads as follows:

> Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4(c) and (d). See also 11 CFR 114.3(c)(4).

The Commission's proposed § 100.133, entitled "Nonpartisan voter registration and get-out-the-vote activities" would read:

> Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if:
>
> (a) It does not include a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party;
>
> (b) No effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote; and
>
> (c) Information concerning likely party or candidate preference has not been used to determine which individuals to encourage to register to vote or to vote.
>
> (d) Corporations and labor organizations that engage in such activity shall comply with the additional requirements set forth in 11 CFR 114.4(c) and (d). See also 11 CFR 114.3(c)(4).

69 Fed. Reg. at 11757 (emphasis added).

Unfortunately, this proposed regulation raises more questions than it answers. What sorts of information will be deemed "information concerning likely party or candidate preference"? Under what circumstances will information, demographics, and common sense, possessed by nonparty groups engaging in these activities, be deemed to have "been used to determine which individuals" to target to registration and get-out-the-vote activities?

1. **The regulation's vagueness threatens to chill lawful voter outreach**

The vagueness of this standard offends many of the basic constitutional principles on which the courts rely to require precision in governmental prohibitions on conduct or expression. As the Supreme Court explained in Grayned v. City of Rockford, 408 U.S. 104 (1972),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (emphases added) (citations and quotations omitted).

Subjecting nonparty groups to penalties for the exercise of their expressive and associational rights should be undertaken with the utmost care and precision. Such precision is notably lacking from § 100.133. Under the proposed formulation organizations risk violating law based on their use or possession of demographic, voter registration or other information that

the FEC could interpret as assisting the organization in deciding which individuals to encourage to register to vote or to vote.

> [S]tatutes restrictive of or purporting to place limits to those (First Amendment) freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb * * * and * * * the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation.

Baggett v. Bullitt, 377 U.S. 360, 373 (1964) (quoting United States v. Congress of Indus. Orgs., 335 U.S. 106, 141-42 (1948) (Rutledge, J., concurring).

Will the Chamber or similar nonparty organizations run afoul of proposed § 100.133 by targeting traveling businessmen, particular urban areas, or other categories of people when publicly available demographic or other data show a propensity of those categories of individuals to vote a certain way? Could the Chamber lawfully organize GOTV activities targeted atobusinesspeople in certain "swing" states? Organizations such as the Chamber have limited resources to plan and deploy voter registration and GOTV activity; a national GOTV effort is impractical and decisions must be made about how best to deploy the Chamber's resources for the benefit of its members. However, each of the aforementioned scenarios could run afoul of proposed § 100.133(c)'s requirement that "[i]nformation regarding likely party or candidate preference has not been used to determine which individuals encouraged to register to vote or to vote" thereby transforming nonpartisan voter outreach into "expenditures" under the FEC's rules. This would be so even though there would be no communications referring to a candidate or party and no effort to determine the partisan preferences of individuals.

This uncertainty will likely chill such nonpartisan voter mobilization, leading to the absurd result that the campaign finance laws – intended to reinvigorate democracy – lead to less

voter outreach. Because organizations will not be able to predict what sorts of GOTV and voter registration activities might run afoul of the FEC's vague proscriptions, they will be chilled from engaging in this socially useful activity, particularly in a time when commentators bemoan low levels of voter participation. The possibility of liability for lawful activities, and the chilling effect that such a possibility would have on legitimate nonpartisan voter drives, offends the individual and associational freedoms protected the First Amendment, and threatens to starve the democratic process of important independent voter mobilization activities.

2. The inadequacy of the proposed approach is obvious when contrasted with the precise definition of "electioneering communications"

In the BCRA, Congress took pains to define "electioneering communication" precisely, in order to provide guidance and predictability to the regulated community, and to survive constitutional scrutiny on judicial review. The Supreme Court in McConnell approved of Congress' efforts and concluded that precision of the statute on this matter rendered unnecessary the "express advocacy" narrowing construction applied in Buckley.

> [BCRA's] definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in Buckley. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here.

McConnell, 124 S. Ct. at 689 (citation omitted).

By contrast, the standard set out in the NPRM provides no concrete guidance for organizations to lawfully engage in GOTV and voter registration activities. As such, the

regulated community will not have adequate notice of the standards by which its activities will be governed.

V. THE PROPOSED DEFINITION OF "POLITICAL COMMITTEE" IS UNLAWFUL AND THREATENS TO CHILL LEGITIMATE ISSUE ADVOCACY

The proposed rules redefine "political committee," treating organizations as political committees if they make qualified "expenditures" under an expanded definition of what constitutes an "expenditure," and if their "major purpose" is the nomination or election of federal candidates. Both of these changes to the elements of "political committee" are problematic.

A. The proposed rules improperly and unwisely expand the scope of the "expenditure" prong of the definition of "political committee"

A determination that a group or organization is a "political committee" under 11 C.F.R. § 100.5 would subject that group to certain registration and reporting requirements, as well as limitations and prohibitions on contributions, that do not apply to organizations that are not "political committees." See, e.g., 2 U.S.C. §§ 423, 433, 441a, 441b; 11 C.F.R. part 102.

The approach proposed in Alternative 1-A would define an "expenditure" as the term is used in § 100.5's definition of "political committee," as "payments for Federal election activities described in 11 CFR 100.24(b)(1) through (b)(3) and payments for all or any part of an electioneering communication as defined in 11 CFR 100.29." 69 Fed. Reg. at 11756. Thus, the proposed rules incorporate the definition of FEA, found at 2 U.S.C. § 431(20), and used elsewhere in the statute into its new definition of "political committee." The use of this definition in the new definition of political committees is improper, and threatens to chill grassroots advocacy by subjecting too many organizations to "political committee" status under

the FECA. The proposed rule also proposes to make electioneering communications into expenditures when the Act states the opposite. 2 U.S.C. § 434(f)(3)(B)(ii).

The NPRM seeks to add payments for FEA described in 2 U.S.C. 431(20)(A)(i) through (iii) and payments for electioneering communications to the definition of "expenditure" to form the basis for a determination that an organization is a "political committee" under 11 C.F.R 100.5. See 69 Fed. Reg. at 11738.

FEA includes voter registration within 120 days of a federal election, voter identification, get-out-the-vote or generic activities, as well as public communications referring to a clearly identified candidate that promote, support, oppose or attack a clearly identified federal candidate. The BCRA imposes restrictions and prohibitions related to FEA on national party committees,[6] State, district and local party committees,[7] federal candidates,[8] and state candidates.[9] Thus, by Congressional design, the concept and regulations attendant to FEA are explicitly applicable to the conduct of state, district and local political parties, which must use hard dollars, and in certain circumstances to officeholders soliciting money for groups.

There is no legal authority, nor is there any evidence of Congressional intent to apply the definition of and restrictions attendant to FEA found elsewhere in BCRA to the independent political communication of nonparty groups, including 501(c) organizations. It is not consistent

[6] 2 U.S.C. § 441i(c).

[7] Id., at 441i(b).

[8] Id., at §§ 441i(e)(1)(A), (e)(4)(A)-(B).

[9] Id., at § 441i(f).

with the intent and structure of the BCRA to include Federal election activity within the regulatory definition of "expenditure" where Congress did not do so.

As the Commission acknowledges in its NPRM, in defending the BCRA's regulation of FEA before the Supreme Court, the Government relied on the "close relationship" of federal officeholders and candidates to their political parties to justify the regulation of FEA. See 69 Fed. Reg. at 11739. Indeed, the Supreme Court seems to have considered the inherent circumspection of BCRA's FEA restrictions, applicable only to parties and candidates, in its approval of them. The Court noted, in disposing of plaintiffs' Equal Protection challenge to the restrictions, that, in contrast to party committees, "[i]nterest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." McConnell, 124 S. Ct. at 686. Thus neither electioneering communications nor FEA should be added to the definition of expenditure.

B. The major purpose test is overinclusive and threatens improperly to subject nonparty groups to regulation

In redefining "political committee" the NPRM properly seeks to incorporate the "major purpose" test, but its approach suffers from some fatal flaws. Under the proposed regulations, once an organization has spent $1,000 on this broadened category of activities, it will have met the "expenditure" prong of the definition and will be deemed a "political committee" if the "major purpose" test is satisfied – meaning the organization is one "[f]or which the nomination or election of one or more Federal candidates is a major purpose." See 69 Fed. Reg. at 11756 (proposed 100.5(a)(1)(ii)). While the Chamber does not oppose the incorporation of the "major purpose" test into the regulations defining "political committee" it has some serious reservations

about the legality and practicality of the tests laid out in the NPRM. See 69 Fed. Reg. at 11756-11757 (outlining three tests).

1. The $50,000 threshold in 11 CFR § 100.5(a)(2)(iii) is overinclusive

Alternative 1-B establishes a test for determining whether an organization has the nomination or election of a candidate or candidates as a major purpose. *See* 69 Fed. Reg. at 11756-11757. Under proposed 11 CFR § 100.5(a)(2), an organization has the nomination or election of a candidate as its major purpose if it satisfies the following, summarized, conditions:

> (1) The organizational documents, solicitations, advertising, public pronouncements, or any other communication . . . "demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party;" and the organization makes more than $10,000 total disbursements composed of (A) Contributions; (B) Expenditures (including independent expenditures); (C) Payments for Federal Election Activities, or (D) Electioneering communications;[10] or
>
> (2) More than 50% of the organization's disbursements during any of the previous four calendar years are composed of (A) Contributions; (B) Expenditures (including independent expenditures); (C) Payments for the first three types of FEA, or (D) Electioneering communications;[11] or
>
> (3) The organization made, during any of the previous four calendar years, more than $50,000 in total disbursements composed of (A) Contributions; (B) Expenditures (including independent expenditures); (C) Payments for the first three types of FEA, or (D) Electioneering communications.[12]

Defined thus in the *disjunctive*, the statute threatens to subject many heretofore unregulated groups to the reporting, disclosure and other regulatory burdens attendant to political

---

[10] See proposed 11 CFR § 100.5(a)(2)(i).

[11] See id., at § 100.5(a)(2)(ii).

[12] See id., at § 100.5(a)(2)(iii).

committee status without the logical and constitutionally required finding that the groups' major purpose is to engage in such advocacy.

We have already stated our objections to the improper application of the electioneering communications and FEA concepts, of which this is yet another. In addition, the present formulation of the major purpose test suffers from the same infirmities as the proposal in the FEC's ANPRM on the Definition of Political Committee in 2001. 66 Fed. Reg. 13681 (Mar. 7, 2001). In that proposed rulemaking, the Chamber submitted comments (May 7, 2001) and offered a modification of a proposed "major purpose" test that turned solely on whether an organization met the threshold requirement of $50,000 in disbursements for certain activities. This was objectionable because, without a comparison to the total disbursements of the organization, it is impossible to properly assess whether the major purpose of the organization in fact was to influence political campaigns or election activity. The structuring of proposed 11 CFR § 100.5(a)(2) suffers from the same problems. The Commission's own precedent has been to compare contributions to the organization's total disbursements 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. 1996-3 (holding a trust did not meet the major purpose test despite contributions to federal candidates aggregating to over $1000 and amounting to 10% of total disbursements in one year). A fixed dollar threshold bears no rational relationship to the purpose of an organization; $50,000 for an organization disbursing a total of $75,000 shows the "central organizational purpose," FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 252 n. 6 (1986), of that organization, whereas $50,000 for an organization as large and

diverse as the Chamber would not. Therefore, the test in § 100.5(a)(2) should be limited to organizations that spend over 50% of their disbursements on qualifying expenditures (which should not include electioneering communications or FEA). The Chamber thus respectfully suggests that the provision in 11 C.F.R. § 100.5(a)(2)(iii) be struck, and that 11 C.F.R. § 100.5(a)(2)(ii) be the test for major purpose.

2. 11 CFR § 100.5(a)(2)(i)'s reliance on an organization's statements to determine whether its "major purpose" is to "promote, support, attack or oppose" is overbroad

The test proposed in 11 C.F.R. § 100.5(a)(2)(i) provides a conjunctive test for "major purpose" – namely that an organization make more than $10,000 total disbursements for contributions, expenditures, certain FEA, and that

> [t]he organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communication of the committee, club, association or group of persons demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or candidates for Federal office or the Federal candidates of a clearly identified political party . . . .

69 Fed. Reg. at 11756 (emphasis added).

The NPRM identifies this provision of the three-prong, disjunctive "major purpose" test as "Avowed Purpose and Spending." Id. at 11745. By allowing subjective assessment and providing little definition, these provisions venture far beyond the "express advocacy" or any other narrowly tailored standard for discerning an entity's major purpose, and thus encroach impermissibly on the First Amendment rights of associations or groups of persons who may make "public pronouncements or any other communication" that could be interpreted as demonstrating that its major purpose is to "nominate, elect, defeat, promote, support, attack or oppose" a candidate.

a. This subjective, intent-based standard is impermissibly vague and overbroad and will chill speech

The reliance on "public pronouncement or any other communications," rather than express words of advocacy or organizational documents to discern a group's "avowed purpose" is unconstitutionally vague. This vagueness will chill expression by interest groups fearful their public statements, fundraising, and other advocacy will allow opponents or regulators to impute to them a major purpose to "nominate, elect, defeat, promote, support, attack or oppose" a candidate.

As the Fourth Circuit recently noted, "[d]iscerning the 'intent' of an organization thus can be problematic, even if some in the organization 'admit' their intent in running the ad. Certain groups might be disinclined to engage in political speech, fearful that someone in the group would make a public statement of the group's intent in a particular ad, thus subjecting the group to regulation." Perry v. Bartlett, 231 F.3d 155, 161 (4th Cir. 2000). In Perry, the court found unconstitutionally overbroad a statute allowing regulation of issue advocacy if a speaker manifested intent to advocate the election or defeat of a candidate. Id. The Fourth Circuit had previously concluded that the same state statute, in a different posture, was unconstitutionally overbroad because it defined "political committee" as "a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election." N. C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712 (4th Cir. 1999) (citation omitted). The "statute subjects groups engaged in only issue advocacy to an intrusive set of reporting requirements" and therefore violated the constitution because it was not susceptible to a limiting construction as required by Buckley. Id. at 713. The

same is true of 11 CFR § 100.5(a)(2)(i)'s reliance on an organization's self-defining statements to determine whether its "major purpose" is to "promote, attack, support or oppose" a candidate.

To the extent that the Commission's proposal is really just a place-holder for intent, it is impermissible. It potentially subjects organizations or groups of individuals to political committee status on the basis of statements by a whole host of possible speakers: members, supporters, spokespeople or officers. The lack of clarity in the explanation of what triggers political committee status threatens to chill the speech of groups wary of inadvertently triggering political committee status. "Certain groups might be disinclined to engage in political speech, fearful that someone in the group would make a public statement of the group's intent . . . thus subjecting the group to regulation." Perry, 231 F.3d at 161. The standard, like that in Perry, creates "a legal standard that would be the antithesis of the bright-line express advocacy test developed in Buckley," id., or, one may now add, the bright line test of electioneering communications. See McConnell, 124 S. Ct. at 689.

b. 11 C.F.R. § 100.5(a)(2)(i)'s standard requires an "express advocacy" limitation

The "promote, support, attack or oppose" standard incorporated into 11 C.F.R. § 100.5(a)(2)(i) is inappropriate as well. We have already noted above that this concept was limited in BCRA to state and local party organizations. Separately, a great deal of advocacy by nonparty groups does not come close to the "express advocacy" standard, which can be interpreted as promoting, attacking, supporting or opposing a candidate. BCRA did not abandon the "express advocacy" requirement for regulation of speech by nonparty groups; it merely explained that, when faced with a constitutionally precise and tailored restriction, the "express advocacy" test would not necessarily serve as a limiting construction because the statute would

not need it. See McConnell, 124 S. Ct. at 689 (because the electioneering provisions are "both easily understood and objectively determinable .... the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here."). Thus, the "express advocacy" standard lives on, to be applied where statutes fail to achieve the constitutionally required precision to avoid overbreadth and vagueness concerns. See Anderson v. Spear, 356 F.3d 651, 663-65 (6th Cir. 2004). Here, these regulations are not narrowly tailored and thus should be subject to the "express advocacy" requirements.

3. **The "major purpose" test should be narrowly tailored to avoid unconstitutional burdens on interest groups' freedom of association**

Subjecting new organizations to the definition of "political committee" necessarily entails intrusive regulations - particularly reporting and disclosure obligations - that threaten these groups' associational rights. As the Supreme Court noted, 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." Mass. Citizens for Life, 479 U.S. at 262. The D.C. Circuit has recently explained:

> The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation. See, e.g., Buckley v. Valeo, 424 U.S. 1, 64-68 (1976) (disclosure of campaign contributions); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63, (1958) (disclosure of membership lists). When facing a constitutional challenge to a disclosure requirement, courts therefore balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests.

Am. Fed'n of Labor & Congress of Indus. Orgs. v. FEC, 333 F.3d 168, 175-176, (D.C.Cir. 2003) (some citations omitted).

> Furthermore, even where requiring disclosure of political or speech activities to a government agency may be necessary to facilitate law enforcement functions, we have held that compelled public disclosure

> presents a separate first amendment issue that requires a separate justification.

Id. at 176 (quotation and citation omitted) (original emphases omitted).

In light of the onerous regulatory burden that accompanies "political committee" status, the FEC should be particularly cautious in expanding the groups that meet that classification. The definition should therefore be more narrowly drawn to include only those organizations that truly have as a "major purpose" the election or defeat of a Federal candidate.

VI. IF ENACTED, THESE REGULATIONS SHOULD NOT APPLY TO § 501(C) ORGANIZATIONS

The Commission requested comment on the wisdom and necessity of adopting different standards for 501(c) organizations. See 69 Fed. Reg. 11741 (regarding the propriety of the "promote, support, attack or oppose" standard). The Commission asked whether it should adopt language that tracks the functional distinctions recognized in the Internal Revenue Code's ("IRC") regulations, which recognize "that some organizations engage in 'grassroots lobbying' campaigns primarily designed to effect upcoming legislative or executive actions." *Id.* The IRC adequately regulates the acceptable political activities of 501(c) organizations. The IRS polices and restricts these organizations' ability to engage in the type of overt politicking by charities and corporations that this rulemaking seeks to address. Because they are adequately regulated, the FEC should clarify that any rules adopted as a result of this rulemaking do not apply to 501(c) organizations. As Senator McCain recently observed,

> Section 501(c) groups, for instance, are prohibited by the tax laws from having a primary purpose to influence elections. These groups thus operate under different rules, and appropriately so. Section 501(c) groups can – and should - engage in nonpartisan voter mobilization activities without restriction. And under existing tax laws, Section 501(c) groups – unlike Section 527 groups – cannot have a major purpose to influence federal elections and therefore are not required to register as federal political committees, so long as they comply with their tax law

requirements. Much of the public controversy surrounding the FEC's rulemaking stems from a failure to understand these simple distinctions.

Hearing to Examine the Scope and Operation of Organizations Registered under Section 527 of the Internal Revenue Code: Hearing Before the Senate Comm. on Rules and Administration, 108th Cong. (Mar. 10, 2004) (statement of Senator McCain) (emphasis added).[13]

Senator Feingold echoed this sentiment, warning, "care must be taken not to chill the legitimate activities of 501(c) advocacy organizations that do not have the primary purpose of influencing elections." Id. (statement of Senator Feingold).[14] In light of the recognized special status afforded 501(c) organizations and the restrictions attendant to that status, the FEC should take care in formulating its rules to ensure that its regulation of political activity does not conflict with the regulations placed on 501(c) organizations by the tax code and regulations, or unduly burden the protected speech activities of these groups.

VII. ANY EFFECTIVE DATE SHOULD BE AFTER THIS FEDERAL ELECTION CYCLE

The proposed rules threaten to bring many previously unregulated groups within the ambit of the FEC's regulatory oversight. These groups, like the Chamber, have been independent and free to engage in appropriate political issue advocacy; this long history leaves them poorly positioned to rapidly adjust to any new regime, particular in light of the vagueness of some of the proposals.

[13] Available at http://rules.senate.gov/hearings/2004/031004_mccain.htm.

[14] Available at http://rules.senate.gov/hearings/2004/031004_feingold.htm.

Given the uncertainty engendered by major changes to the substantive law governing electoral activities, and the difficulty many 501(c) organizations will face in ensuring compliance, the current rulemaking, if adopted in its current form, should not be effective until after the 2004 election cycle.

Respectfully submitted,

Jan Witold Baran
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7330
Counsel to the Chamber of Commerce of the United States

Stephen A. Bokat
General Counsel
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, DC 20062