Craig Holman <cholman@citizen.org> on 04/05/2004 05:02:03 PM

To: pcstestify@fec.gov
cc:

Subject: Public comments

Public Citizen submits the attached comments on NPRM 2004-06.

Attachments.

Craig Holman, Ph.D.
Legislative Representative
Public Citizen
215 Pennsylvania Avenue SE
Washington DC 20003
TEL: 202-454-5182
FAX: 202- 547-7392
Holman@aol.com

- FEC draft final2.doc

- AJS_Gore_Are_You_Taxed_Enough_Already.PDF

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

April 5, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
pcstestify@fec.gov

Dear Ms. Dinh:

Public Citizen is pleased to submit the attached comments on the Notice of Proposed Rulemaking on political committee status (NPRM 2004-06). Please permit Craig Holman to testify before the Commission on the matter.

Respectfully Submitted,

Joan Claybrook
President
Public Citizen

Frank Clemente
Director
Public Citizen's Congress Watch

Scott Nelson
Attorney
Public Citizen Litigation Group

Craig Holman
Legislative Representative
Public Citizen's Congress Watch

Comments of Public Citizen, "Political committee status" [NPRM 2004-06]

A. Introduction and Summary

The Federal Election Commission has requested public comments on Notice of Proposed Rule Making 2004-06 addressing a wide array of regulatory issues, ranging from who shall be subject to regulation under the Federal Election Campaign Act (FECA), to what types of political activity shall be subject to FECA, to how these political entities and activities shall be regulated. In our view, the proper focus of the proposed regulations should be limited to the subject that has given rise to these proceedings: Should Section 527 organizations be included within the regulatory framework to which campaign source and contribution limits apply? It is on this more narrow – and essential – issue that Public Citizen submits these comments supporting expanded FEC jurisdiction over the activities of 527 organizations.[1]

To the extent the FEC has proposed broader regulatory changes, which would sweep all communications critical or supportive of federal candidates within the definition of "expenditures" and would greatly expand the definition of "political committee" to include groups engaged in legitimate issue advocacy that involves such communications, Public Citizen opposes those proposals. In Public Citizen's view, it is critical that the FEC not further burden the activities of 501(c) groups that are engaged in legitimate issue advocacy and whose major purpose is not engaging in electioneering activity.

However, Public Citizen wholly supports the FEC's proposed expansion of the class of entities defined as political committees subject to regulation to include Section 527 groups whose major purpose is the election or defeat of federal candidates. Public Citizen further supports expanding the definition of expenditures – exclusively for political committees as so defined – to include all activities designed to support, attack, promote or oppose federal candidates, as well as to register or mobilize voters or to otherwise influence federal elections.

Entities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities – express advocacy and electioneering communications – explicitly established by current federal election law, as amended by the Bipartisan Campaign Reform Act (BCRA).

---

[1] Public Citizen is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when corporate money influences elections. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in administrative proceedings and litigation raising campaign finance issues. Public Citizen has worked to strengthen campaign finance regulations in general, and the passage and defense of the Bipartisan Campaign Reform Act in particular. In addition, Public Citizen has reported extensively on the increasing involvement of 527 groups and other non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues addressed by this NPRM.

Consequently, two distinct definitions of "expenditure" are appropriate in FEC regulations: a broader definition consisting of any activity promoting or attacking federal candidates or otherwise affecting federal elections, applicable to political committees; and a narrower definition consisting of express advocacy and electioneering communications, applicable to entities that do not have as their major purpose the election or defeat of federal candidates.

The key elements of NPRM 2004-06 that should be addressed are: (i) the definitions of "expenditure" and "contribution" that serve to distinguish activities of political committees subject to regulation from those of other groups that fall outside federal election law; (ii) the determination of which entities achieve "political committee" status subject to FECA's source and contribution limits and disclosure requirements; and (iii) the unusual contrivance of an "allocation ratio" by the FEC, which allows entities to evade the definitions of "political committee" and "expenditure" to varying degrees, and which was singled out in the *McConnell* decision as a "circumvention of FECA's limits." 124 S. Ct. at 661.

In sum, Public Citizen offers the following comments:

- "Expenditure" should be construed differently based on the entity making the expenditure: it should have one application for political committees under FECA, and another for organizations that generally fall outside federal election law. Indeed, FECA itself was construed in *Buckley v. Valeo* as encompassing two standards for determining what expenditures are subject to regulation – one applicable to candidates and political committees, and another (the express advocacy standard) applicable to other persons and organizations. And FECA, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), currently contains two distinct definitions of expenditure activity. The FEC can and should incorporate this dichotomy into its regulatory regime to appropriately differentiate the activities of political committees from those of other non-profit organizations, as intended by FECA and BCRA.
- "Political committee" status, subject to the source and contribution limits and reporting requirements of federal election law, should be conferred upon entities that make $1,000 or more in political expenditures (or contributions) in a calendar year and have as their major purpose affecting the election or defeat of federal candidates. This definition includes Section 527 organizations involved in federal elections, but not 501(c) non-profit groups.
- The FEC should not apply an "allocation ratio" to expenditures made to influence federal elections by organizations whose major purpose is affecting federal elections. FECA was never intended to permit political committees with the major purpose of influencing federal elections to raise and spend money for that purpose outside federal election law.

B. Definition of Expenditure

The definition of "expenditure" is critical in deciding which organizations and what activities are subject to the contribution and reporting requirements of federal election law. The concept of "expenditure" is one of two criteria defining which entities are in fact political

committees subject to regulation. As a result, it is first necessary to develop an appropriate definition of expenditure before discussing what constitutes a political committee.

1. "Expenditures" Under FECA and *Buckley v. Valeo*

FECA generally defines "expenditure" as any purchase, payment, or promise of payment for an activity or communication "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8) and (9). In the *Buckley* decision, the Supreme Court found that the ambiguity of this phrase posed constitutional problems, but only *as applied to persons and organizations whose major purpose is not the election of federal candidates.* The Court therefore narrowed the definition of expenditure for such entities to include "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Thus, the Court concluded that FECA "as construed imposes independent reporting requirements on individuals and groups *that are not candidates or political committees* only in the following circumstances: (1) when they make [certain] contributions ..., and (2) when they make expenditures that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added).

In footnote 52 of *Buckley*, the court provided examples of what would satisfy the "express advocacy" standard determining whether a communication constitutes election activity subject to FECA. In what became known as the "magic words" test, the court listed eight examples of terms that would constitute express advocacy in communications: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."

At the same time, the Court recognized that because the statutory definition of "political committee" depended solely on whether a group made "expenditures" of more than $1000, a broad definition of "expenditures" that encompassed "issue advocacy" could bring within the definition of "political committee" "groups engaged purely in issue discussion," posing additional constitutional concerns. Accordingly, the Court endorsed a narrow construction of "political committee" including only organizations "that 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. Thus, expenditures by organizations not meeting that criterion were subject to FECA only if they engaged in express advocacy (as defined above). Importantly, however, the Court recognized that candidates and political committees meeting the major purpose test remained subject to the statutory language defining expenditures more broadly, as their spending was "by definition, campaign related." 424 U.S. at 79. In other words, *Buckley* did *not* construe FECA to regulate only "express advocacy" expenditures *by candidates and political committees.*

Consistent with *Buckley*, all campaign expenditures by candidates (whether or not including "express advocacy") have always been assumed to be for the purpose of influencing the election or defeat of candidates, and thus are expenditures under FECA. However, in the years following *Buckley*, the express advocacy standard – largely due to the FEC's "allocation ratio" – gradually came to be treated as if it were applicable to parties and other political committees, such that the expenditures of parties and, more so, independent groups, thereafter became regulated largely according to the content of communications. In other words, non-

FECA-regulated funds, or "soft money," were effectively permitted to be used for non-express advocacy expenditures even by parties and other organizations that had a major purpose of electing candidates

2. The Impact of BCRA and *McConnell*

In the aftermath of *Buckley*, controversies over the coverage of FECA frequently turned on whether the express advocacy standard had been satisfied, and litigation over whether the eight magic words were an inclusive or exclusive list defining expenditure went on for decades. An accumulated body of empirical evidence and practical experience, however, showed that the magic words test in many instances failed to distinguish campaign ads from genuine issue ads, and that money from prohibited sources and in unregulated amounts was being used both by parties and by independent entities to influence the outcomes of elections.[2] Congress ultimately responded by enacting BCRA, which — without changing the basic statutory definition of "expenditure" — extended regulation to certain clearly defined types of spending, both by parties and by other organizations.

First, for party committees, BCRA added a new category of activity regulable under the campaign finance law: "federal election activity." 2 U.S.C. 431(20). "Federal election activity" includes four distinct categories of activities: (i) voter registration activity within 120 days of a federal election; (ii) voter mobilization drives conducted in connection with a federal election; (iii) a public communication at any time that promotes, supports, attacks or opposes a federal candidate; and (iv) certain work performed by state party staff. Recognizing the close association between federal candidates and party committees, BCRA provides that state and local parties conducting any of these four activities will be classified as making federal expenditures subject to FECA's sources and amount restrictions.

Second, for all persons, including independent groups, BCRA amended the definition of expenditure in 2 U.S.C. 441b to include any payment for an "electioneering communication" within 30 days of a primary election or 60 days of a general election. This change subjects certain carefully defined non-express advocacy expenditures to FECA regulation. By amending the definition of expenditure in this section of FECA, which explicitly prohibits union and corporate treasury contributions and expenditures in federal elections, rather than under the more general definition of expenditure at 2 U.S.C. 431(8) and (9), FECA is left with two distinct approaches to expenditures in separate parts of the statute, with somewhat inconsistent ramifications for political players.

Under BCRA, expenditures for express advocacy communications and independent expenditures by any entity, and for "federal election activity" by party committees only, are subject to both the reporting requirements and the source prohibitions and contribution limits. Expenditures for electioneering communications by any entity are subject to the reporting

---

[2] See, for example, Jonathan Krasno and David Seltz, *Buying Time* (2000); and Craig Holman and Luke McLoughlin, *Buying Time 2000* (2001). As observed by the court: "While the distinction between issue and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." McConnell, slip op. at 15.

requirements and the source prohibitions, though not the limits on contributions from individuals and PACs.

In *McConnell*, the Supreme Court validated the key provisions of BCRA that subject "federal election activity" by the political parties, and "electioneering communications" by other persons and organizations, to regulation under FECA. In so holding, the Court ruled that the *Constitution* does not in all circumstances limit congressional regulation of campaign-related speech to the magic words test of express advocacy, as long as the regulation is neither vague nor overbroad. Simultaneously, however, the Court acknowledged that it had held in *Buckley,* as a matter of *statutory construction*, that "expenditures" (other than by candidates and political committees) under 2 U.S.C. § 431(9) were limited to express advocacy. 124 S. Ct. at 688, 694. Nothing in BCRA, or in *McConnell*, displaces this statutory construction outside of the well-defined areas ("federal election activity" by parties and "electioneering communications" by others) where Congress imposed additional regulation through BCRA. In short, by enacting BCRA, Congress constitutionally chose to expand the statutory definition of election activity subject to regulation beyond the existing express advocacy standard to capture some additional activities and additional political players, but it did not nullify the express advocacy standard altogether as applied to non-electioneering communication expenditures by persons and organizations other than parties and political committees.

In sum, BCRA and *McConnell* leave the statutory law with respect to regulation of expenditures by entities that are not political committees largely where it was under FECA and *Buckley*. *Buckley* definitively held that FECA, properly construed, does not authorize regulation of non-express-advocacy expenditures by such organizations (which include most nonprofits, and in particular 501(c)(3) and 501(c)(4) organizations). BCRA altered that result only with respect to the narrowly defined category of electioneering communications. On the other hand, both before and after BCRA, FECA and *Buckley* permitted regulation of non-express advocacy expenditures by political committees (that is, entities with the major purpose of electing candidates) just as it permitted regulation of non-express-advocacy expenditures by candidates themselves.

3. Legitimate 501(c) Organizations Should Not Be Subjected to the Broad Regulation of Expenditures Appropriate for Political Committees

The statutory limits on the FEC's ability to regulate non-express-advocacy by organizations other than political committees — limits that, as explained above, remain intact after BCRA and *McConnell* — continue to serve important interests in keeping campaign finance law within proper bounds. This is particularly true where ideological and educational non-profit organizations that qualify for tax exemption under IRC 501(c)(3) and 501(c)(4)-(6) are concerned. Discussion of issues of public concern, which may carry with it criticism or praise of elected officials who are candidates for federal office, is central to the mission of such organizations, and is entitled to substantial constitutional protection. Defining all communications that "attack," "oppose," "promote," or "support" candidates as "expenditures"

under FECA would sweep within the scope of FECA regulation almost everything done by organizations devoted to discussion of, or advocacy of positions on, issues of public importance.[3]

The implications of such an expansion of FECA coverage would be huge. It is one thing to say that political parties or political committees whose business is electioneering may be subject to regulation aimed at electioneering. It is another thing altogether to sweep in organizations that engage in criticism of elected officials as a necessary part of commenting on public issues, but whose tax status forbids them to make electioneering their major focus (or, in the case of 501(c)(3)'s, any part of their focus). Although such organizations are not constitutionally immune from regulation where Congress determines that particular activities have a direct and significant effect on elections, and then tailors its regulation precisely to address that effect (as it did in the case of electioneering communications), the significant constitutional issues raised by subjecting them to wholesale regulation are best avoided absent a clear congressional directive.

Here, such a directive is lacking. Nothing in BCRA suggests that Congress intended such a far-reaching change. Congress did not perform major surgery on the expenditure provisions construed in *Buckley*, but instead made a far more modest change by introducing regulation of "electioneering communications." The limits on the definition of "electioneering communications," however, would be rendered meaningless by a revision that turned all communications that criticize or praise candidates into regulated "expenditures." Similarly, Congress's decision in Title I of BCRA to regulate "federal election activity" by *parties* would be rendered superfluous by an expenditure definition that applied the same regulation, in effect, to the whole world. The Congress that enacted BCRA's carefully considered extension to such activities by parties could not have intended to revolutionize the world of non-profits by subjecting them to regulation whenever their issue discussions involve "attacks" on or "promotion" of persons who are candidates for office.

Indeed, the unique nature of the 501(c) non-profit community is widely recognized throughout FECA, the *McConnell* decision, and the Internal Revenue Code, as well as BCRA. FECA specifically exempts nonpartisan voter mobilization and education activity – the type of political activity frequently engaged in by 501(c) non-profits – from the definition of expenditure. 2 U.S.C. 431(9)(B)(ii).

Similarly, *McConnell* praised the restraint of BCRA, and some of the FEC's implementing regulations, in attempting to avoid over-extending the campaign regulatory regime into the 501(c) non-profit community. The *McConnell* court clearly upheld the authority of Congress to subject most interest groups, including 501(c) non-profit groups, to the electioneering communications restriction. However, while acknowledging the evidentiary record showing that both Section 527s and some 501(c) non-profits have served as soft money conduits in federal elections, the Court recognized the value of treating the regulation of 501(c) non-profits differently from the regulation of Section 527 groups. "First, and most obviously, §323(d) restricts solicitations [by federal officeholders and national parties] only to those 501(c)

[3] It is just as important to protect the advocacy rights of for-profit corporations and labor unions, as well as 501(c) non-profit groups. Corporations and unions should not be swept into FECA's regulatory regime simply by addressing specific candidates or officeholders in their communications.

groups 'making expenditures or disbursements in connection with an election for federal office,'" as opposed to most "Section 527 organizations, which *by definition* engage in partisan political activity." 124 S. Ct. at 679 (emphasis added).

The court went on to single out Section 527 groups as major conduits for evasion of federal campaign finance law. The court cited several studies by Public Citizen documenting the extensive circumvention of FECA's contribution limits posed by Section 527 organizations. "Parties and candidates have also begun to take advantage of so-called 'politician 527s,' which are little more than soft money fronts for the promotion of particular federal officeholders and their interests.... These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves." 124 S. Ct. at 679..

McConnell was reluctant, however, to throw similar barbs at the 501(c) non-profit community. The court again noted that "Section 527 'political organizations' are, unlike 501(c) groups, organized for the express purpose of engaging in partisan political activity." 124 S. Ct. at 678 n.67.

Underlying the different treatment of Section 527s and 501(c) non-profits by FECA, BCRA, and the courts is the fact that these groups are constituted as very distinct entities in terms of permissible political activities under the Internal Revenue Code. Groups that avoid the express advocacy or electioneering communications definitions of FECA, but which pursue other electioneering activity as their *primary purpose*, must register with the IRS as Section 527 groups. Business, labor and ideological groups that intend to conduct substantial electioneering activity, but not as the "primary purpose" of the organization, may register with the IRS as 501(c) non-profit groups, entitled to dramatically reduced disclosure requirements as compared to Section 527s. Finally, groups that do not plan to conduct substantial lobbying and electioneering activity may register as 501(c)(3) charities, entitled to generous tax benefits.[4]

4. The Appropriateness of a Bifurcated Definition of Expenditure

Although BCRA and *McConnell* do not justify significant revision of the expenditure standard articulated in *Buckley* for organizations that are *not* political committees, the FEC's regulations should be amended to establish definitively that, consistent with *Buckley*'s original construction of FECA, expenditures of political committees may be regulated more broadly. *Buckley* acknowledged that expenditures by political committees (that is, organizations whose major purpose is electing candidates) are, like candidate expenditures, inherently designed to influence elections.

Accordingly, the FEC should adopt regulations applying a more comprehensive definition of expenditure as embodied in Alternative 1-A for organizations whose major purpose is to affect the election or defeat of federal candidates, while retaining the current narrow

---

[4] 501(c) non-profits other than 501(c)(3)'s may conduct substantial electioneering activities, so long as those activities are pertinent to the interests of the organization. Precisely how much electioneering activity is permissible is an issue to be decided by the facts and circumstances of each particular case—in other words, it is a gray area. It is perhaps easier for the IRS to determine when the electioneering activities of a non-profit group have exceeded the legitimate interests of the organization than to define when an organization is in compliance with the tax code.

definition of expenditure consisting of express advocacy, plus those communications that fall within the definition of electioneering communications, for organizations that do not have as their major purpose the election or defeat of federal candidates. Two distinct constructions of expenditure would be consistent both with the original FECA and the amendments offered by BCRA[5].

For entities whose major purpose is electioneering for or against federal candidates, an "expenditure" should be defined by regulation as a payment or obligation for: (1) voter registration activity in connection with a Federal election; (2) voter identification, get-out-the-vote ('GOTV'), and generic campaign activity that is conducted in connection with an election in which a candidate for Federal office appears on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks, or opposes a candidate for that office; or (4) an electioneering communication as defined in 11 CFR 100.29. (In these comments, we refer to an expenditure falling within this definition as a "political expenditure.")[6]

For entities that do not have electioneering for or against federal candidates as their major purpose, an "expenditure" should be defined by regulation as a payment or obligation for any communication that expressly advocates the election or defeat of a candidate or candidates, or a partisan slate of candidates, or for an electioneering communication as defined in 11 CFR 100.29. (In these comments, we refer to an expenditure falling within this definition as an ["electioneering expenditure."") Voter registration and voter mobilization activities should not constitute an expenditure under FECA for a 501(c) non-profit group, *as long as political activity does not become the group's major purpose.*

This bifurcated regulatory definition of expenditure returns federal election law to its original stated objective in FECA, as amended by BCRA, while preserving the court-sanctioned protections of legitimate advocacy work by independent groups. It also stays the course of BCRA, which is to capture a narrowly-tailored class of communications by any and all entities – express advocacy and electioneering communications – as campaign activity, subject to the reporting requirements and source prohibitions and contribution limits of FECA.

C. Political Committee Status

Under the definition of "expenditure" proposed above, whether an entity is a "political committee" assumes even greater importance than under existing regulations. This is potentially

---

[5] It would also more clearly capture the financing of electioneering communications under the full regulatory regime of FECA, including limits on contributions from individuals and PACs.

[6] While the first three parts of this definition track parts of the BCRA definition of "federal election activity," that is *not* because that definition in itself applies to organizations other than parties. Rather, in light of the Supreme Court's recognition that the "federal election activity" definition permissibly and appropriately identifies categories of expenditures that are "for the purpose of influencing federal elections" if engaged in by political parties (*McConnell*, 124 S. Ct. at 674), it is appropriate for the FEC to use a similar standard to define expenditures for the purpose of influencing federal elections when engaged in by entities that, like parties, have the major purpose of influencing elections. Not all of the limitations on the "federal election activity" standard applicable to parties necessarily need apply, however, since the Title I definition of "federal election activity" may be under-inclusive as to activities of political committees that are directed at influencing federal elections.

problematic in part because, under the statute, whether an entity is a "political committee" depends on whether it has engaged in "expenditures." If the definition of an "expenditure" itself depends on whether the organization making it is a "political committee," there is an obvious problem of circularity.

The solution to this difficulty lies in the fact that under the law as it has evolved the definition of "political committee" has come to rest on two distinct criteria. First, whether an organization is defined under the terms of the statute as a "political committee" turns on whether it engages in "expenditures" totaling more than $1,000. *See* 2 U.S.C. § 431(4)(A). Second, the class of "political committee" is further narrowed, not by statute, but by the Supreme Court's ruling in *Buckley* that an organization is a "political committee" subject to FECA only if its "major purpose" is the election or defeat of candidates. 424 U.S. at 79.

The issue, therefore, is how to coordinate these criteria so as to achieve the purposes of FECA and BCRA without extending regulation further than the statutes or the Constitution permit. In this respect, it is essential that the definitions *not* go so far as to bring an entity within the definition of a "political committee" simply because it engages in activities that are advocacy in nature. In particular, a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials.

This imperative follows from *Buckley*'s holding that an organization may not be treated as a "political committee" simply because it engages in "issue discussion and advocacy of a political result." 424 U.S. at 79. It was precisely to avoid such an extension of campaign finance regulation to legitimate, non-electoral organizational activity, that *Buckley* construed the statute to incorporate the "major purpose" standard.

If, however, the "major purpose" standard is circumvented by permitting it to be satisfied whenever an organization spends a certain amount of money (whether $50,000 or any other arbitrary amount) on communications that "attack" or "support" a candidate, precisely what the *Buckley* Court feared will have come to pass: An organization may become subject to regulation as a "political committee" simply by engaging in political issue-related criticisms of public officials, and communications that would not otherwise have qualified as covered expenditures will become covered by a process of bootstrapping.

To avoid this problem, the FEC's regulations should follow the dichotomy between political organizations and other non-profits under the Internal Revenue Code. The Code establishes two separate classes of non-profit groups based on an organization's major purpose. Organizations whose primary purpose is to influence the election or defeat of candidates are classified as Section 527s. Groups meeting this definition *for federal candidates* should be deemed to satisfy the "major purpose" criterion for "political committee" status. Organizations whose primary purpose is to affect legislation and public policy are classified under the IRC as 501(c) non-profit groups.[7] These groups, if properly qualified for tax exempt treatment under 501(c), should be deemed not to satisfy the "major purpose test."

[7] Both classes of groups may conduct some similar types of activity, including political activity to an extent, but they are treated differently based upon their major purpose.

Under this standard, a group that falls within the scope of Section 527 because its major purpose is to influence elections would be a "political committee" if it makes more than $1,000 in expenditures under the broad "political expenditure" definition cited above. Candidates, parties, segregated funds, multicandidate committees, and Section 527 groups would all be captured under this definition, and therefore they would be subject to the reporting and contribution requirements as to sources and amounts under federal election law. In particular, donations to such committees would qualify as "contributions" under FECA because they would, by definition, be for the purpose of influencing federal elections.

By contrast, entities that do not have as their major purpose the election or defeat of federal candidates would be subject to FECA's requirements only for the more narrow category of expenditures (referred to above as "electioneering expenditures") for express advocacy communications and electioneering communications, as intended by BCRA. In addition to expanding the scope of political activities subject to regulation, including and defining the "major purpose" standard in the regulatory definition of "political committee" would serve the useful purpose of bringing clarity to what is currently a poorly defined legal standard.

We recognize that the tax code's differentiation of groups based on primary purpose may not be synonymous with the term "major purpose" as used by the Supreme Court. Nonetheless, at least for the present, we recommend using the distinction between the types of tax exempt groups because it allows those groups that are clearly political committees to be regulated while avoiding the overly broad regulation of non-electioneering advocacy groups that the FEC's broader alternative proposals would bring about.

Thus, in our view, "major purpose" should be determined by two of the several tests that are touched on in the NPRM, but scaled back so as not to improperly capture legitimate advocacy organizations. The first should be an avowed purpose test. An organization satisfies the avowed purpose test if its articles of incorporation, solicitations, advertisements, public pronouncements or other written materials demonstrate that its main activity is to nominate, elect or defeat a federal candidate or candidates or partisan slates of candidates. This test would clearly capture candidate committees and political parties as well as entities whose stated objective is the election or defeat of federal candidates.

A second test should be an "exempt function" standard as proposed in Alternative 2-A. This variant of the "major purpose" definition should encompass an entity that is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for an exempt function as defined in Section 527 for elections for federal offices.[8] This test would appropriately capture all Section 527 groups involved in federal elections that are not currently registered with the FEC as "political committees" because they have avoided making express advocacy communications or electioneering communications.

---

[8] The FEC's Alternative 2-A has five exceptions designed to exclude 527 groups that are not oriented toward election of federal candidates. However, we believe that the fourth exception, for single-state groups, is inappropriate, because a group may operate in only one state but still have a major purpose of influencing federal elections.

The other expenditure tests proposed in the NPRM – more than 50% of an entity's budget spent on activities that promote, support, oppose or attack federal candidates, and the $50,000 disbursement threshold – are far too sweeping and could unjustly capture legitimate advocacy organizations. The avowed purpose and exempt function tests are sufficient for capturing the entities whose major purpose is to affect the election or defeat of federal candidates.

D. Allocation Ratio

In *McConnell*, the Supreme Court rightly identified the FEC's "allocation formulas" – allowing regulated entities to pay for activities that influence elections with a mix of hard and soft money – as a major loophole in FECA's regulatory regime. As observed by the court in relation to political parties: "[T]he FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections.... The evidence in the record shows that candidates and donors alike have in fact exploited the soft money loophole, the former to increase the prospects for election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." 124 S. Ct. at 662.

FECA has no language whatsoever allowing for such an allocation ratio of hard money and soft money spending by candidates, parties or committees. BCRA specifically ended the practice for the national parties; the FEC should do the same for political committees and return to the plain language of federal election law.

Corporate and union treasury funds, and money in excess of the contribution limits, are generally prohibited by FECA to be spent on FECA-regulated "expenditures." Expanding the definition of political expenditures to include a larger pool of election activity by political committees would substantially curtail the FEC's allocation ratio loophole. Soft money could not be used by political committees to finance voter registration drives and GOTV activities under the proposed definition. In our view, it would be entirely appropriate to go still further and end the allocation ratio altogether for expenditures (as defined above) by political committees. The effect of this change would be to require political committees to use only hard money for expenditures, except where FECA explicitly permits committees to use soft money (e.g., to pay for administrative expenses, as to which some allocation may be appropriate), or where a political committee expended funds that were *entirely* unrelated to influencing a federal election (such as communications relating solely to an election where no federal candidates appear on the ballot).

The folly of the FEC's allocation ratio is made evident in its very complexity. Over the decades, the FEC has opened the soft money spigot through a variety of different allocation formulas. This NPRM speaks of a "funds expended" formula, which conceivably could permit up to 85% of a committee's expenditures in soft money under certain conditions. But the FEC has also toyed with formulas based on a fixed percentage method, funds received ratio, time or space ratio, and ballot composition ratio. All the formulas have essentially the same effect: to permit soft money expenditures to influence federal elections.

The Federal Election Commission should return to its reasoning in a 1976 advisory opinion – before it broke open the soft money loophole – prohibiting the use of soft money by political committees to pay for voter registration and voter mobilization activities or for other supposedly "mixed purpose" expenditures.[9]

E. Effective Date

The FEC has requested comment on whether these regulatory proceedings are occurring too late in the election cycle and that changing the rules of the game in mid-stream imposes undue burdens on Section 527 groups that may be affected. Although this is a genuine concern, it is our view that, *with prompt action*, the FEC can still make changes affecting this election, and should proceed to do so.

The last time the FEC made significant changes in its campaign finance regulations well into the election cycle happened in 1976, in response to *Buckley*. Then, as now, the FEC had to balance the needs of establishing fair and clear campaign finance regulations with their potential impact on political players late in the game. Though it would have been preferable to receive an earlier ruling in *McConnell*, the Supreme Court did an admirable job expediting its review of a complex law. Similarly, the FEC has proceeded expeditiously in weighing this matter, though temporarily sidetracked by Advisory Opinion 2003-37 (Americans for a Better Country).

The *McConnell* decision is as sweeping as the *Buckley* decision, accompanied with directions from the Court for the FEC to fix its regulations concerning the types of political activity that is subject to regulation. Changing the definition of political activity necessarily changes the class of entities subject to regulation. This order from the Court came in December, leaving the FEC with little choice but to re-consider its regulations as we enter the general election.

Some of the fundraising and spending by Section 527 groups that would be subject to revisions in these rules has already occurred, but to a quite limited extent. The last available financial records with the IRS show that the 527 groups under consideration have met only about 10% of their stated fundraising goals thus far. Moreover, some of these groups, such as MoveOn.org, have raised much of their money in "hard" dollars permissible under FECA. If the FEC can promulgate a rule on this issue by May 2004, prior to the flurry of financial activity expected in the summer as the conventions and general election period approach, the disruption to outside groups planning to participate in the 2004 federal elections is likely to be minimal. A May ruling (perhaps, if necessary, in the form of an interim final rule) would provide Section 527 groups with ample time to modify their operations and to ensure the bulk of their finances complies with federal election law prior to the summer launch of electioneering activity.[10] If

---

[9] Advisory Opinion 1976-83.

[10] As described in a publicly-distributed action plan of Americans Coming Together, the Section 527 organized by Steve Rosenthal: "We'll begin with an early canvass, knocking on people's doors, getting the lay of the land. Then, come summer, we'll launch a massive door-to-door effort – contacting voters, identifying our supporters, and learning what issues matter most in their lives. We'll follow up with a stream of individual communications around the issues people have told us they are most concerned about." America Coming Together, "A Bold Action Plan Essential to Victory 2004." (n.d.).

final FEC action is delayed much beyond May, it may be appropriate to make the regulations effective following the 2004 general election.

F. Advisory Letter to the IRS

Although the 501(c) non-profit community deserves special protection from the campaign finance regulatory regime, the prospects for abuse of the tax code will be considerably heightened if the FEC modifies its definition of political committee to capture Section 527s. Some political operatives seem determined to evade the campaign finance laws and may be encouraged to seek cover under 501(c) of the tax code. Several "shadow groups" whose major purpose is electioneering, but which desire to sidestep FECA's reporting requirements and contribution limits, have already formed as 501(c) non-profit groups. These groups raise and spend unlimited soft money in connection with federal elections and do not declare these political expenditures, other than as aggregate "lobbying" expenditures.[11]

The notice of proposed rulemaking asks whether the FEC should modify its regulatory framework to follow the functional distinction of "grass roots lobbying" as prescribed in the tax code. It is precisely this functional distinction, however, that has allowed some shadow electioneering groups to hide as 501(c) non-profit groups, all the while conducting electioneering activities as their major purpose and not reporting it. Take, for example, the suspicious case of Americans for Job Security (AJS), a 501(c)(4) that has been registered with the IRS for several years. AJS was the subject of scrutiny over its extensive political television advertising in the 2000 federal elections, ranking seventh of among all groups nationwide in television "issue" advertising.[12] AJS paid for 4,983 airings of television ads in the nation's 75 largest media markets in 2000, at a conservatively-estimated cost for only the television buys themselves, not including production costs, of $2,797,830. All of these ads, without exception, were deemed by a team of coders at the University of Wisconsin as "intended to generate support or opposition to a candidate." One example – "Don't be Gored at the tax pump" – is attached. Yet, on its Form 990 for the year 2000, Americans for Job Security declared "$0" in political expenditures, opting instead to classify its political advertising for and against candidates as "grass roots lobbying."

This is exactly the type of electioneering issue advocacy that BCRA has brought into FECA's regulatory framework. The FEC should not entertain the notion of creating a new loophole by incorporating the IRS's definition of "grass roots lobbying" into the campaign finance regime.

Although enforcement of the tax code over such 501(c) shadow groups is beyond the purview of the FEC, Public Citizen recommends that the Commission issue an advisory letter to the IRS, alerting the agency to recent and pending changes in the campaign finance regulatory regime. The letter should warn the IRS of the heightened potential for abuse of 501(c) tax status by political operatives and recommend appropriate changes in reporting requirements by 501(c) non-profit groups. The IRS should revise its definition of "political expenditures" subject to

---

[11] For further discussion of such shadow 501(c) electioneering groups, see Public Citizen, Common Cause, Democracy 21 and Center for Responsive Politics, "Public Comment to the IRS on Form 990," (2003) at [http://www.citizen.org/congress/campaign/issues/nonprofit/articles.cfm?ID=8890].

[12] Craig Holman and Luke McLoughlin, *Buying Time 2000* (2001).

annual reporting requirements on its Form 990 to make it more consistent with federal campaign finance law. This would have the effect of defining "grass-roots lobbying" activity that promotes or attacks candidates – the refuge sometimes used by shadow groups to hide their electioneering activity – as "political expenditures" for reporting purposes only. It would require disclosure forms filed by non-profit groups to distinguish political expenditures that focus on candidates from lobbying expenditures that focus on issues. Such an improved disclosure system for the non-profit community would not penalize groups with extensive political expenditures – for a substantial amount of electioneering advertising is permissible for 501(c) groups, and many or most of these political communications may in fact be deemed genuine issue advertising – but it would help the IRS flag potential abuses of the tax code for closer scrutiny under the "facts-and-circumstances" test.

G. Conclusion

The FEC is being handed a golden opportunity to reverse historical trends and reestablish the spirit and the letter of FECA. The Supreme Court has opened the way to restoring the integrity of FECA; the FEC should choose to pursue it. Entities whose major purpose is to affect federal elections should be required to play by the rules of federal election law. At the same time, non-profit groups that pursue legitimate advocacy work should be insulated from the regulatory regime. A broadened regulatory construction of "expenditure" applicable only to political committees would capture the former, while a narrower construction of "expenditure" based on the tenets of BCRA – express advocacy and electioneering communications – would appropriately apply a narrow regime for other non-profit groups.