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RE:

[DA033510.011]

March 3, 2004

VIA FACSIMILE

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Draft Notice of Proposed Rulemaking on Political Committee Status

Dear Mr. Norton:

The undersigned respectfully submit these comments regarding the draft Notice of Proposed Rulemaking ("NPRM") on political committee status and related issues, submitted for the March 4, 2004 meeting of the Federal Election Commission.

We believe that the NPRM in its current form is a wholly inappropriate vehicle to advance the consideration of important constitutional and statutory issues. The questions raised, and the rules proposed, are fraught with consequence for thousands of organizations engaged in various kinds of political activity or issue advocacy. Yet the NPRM does not represent the dispassionate, open inquiry required for a sensitive and controversial initiative of this kind. While inviting comment on core constitutional and statutory issues, the NPRM advances to center stage specific rules shaped by a distinctive view of those issues.

Our concern is not simply one of form. As the Commission well knows, the final product of Commission action is often heavily influenced by the draft submitted by the Office of General Counsel, or by a Commissioner. When the Commission chooses to work from a particular draft, the end result cannot help but be seriously influenced by the starting point it has chosen. The stakes involved in adopting a "baseline" draft became clear during the Commission's recent deliberation on the request of the "ABC committee" (IAOR 2003-37). Then the Commission voted twice, deadlocking once, on the adoption of the "baseline" document for consideration. As this recent history demonstrates, these are critical decisions. The

adoption of these proposed rules, as the "baseline" for public comment, raises a genuine risk of prejudicing the course of the Commission's deliberations.

The NPRM is far better and more fairly framed as a series of foundational questions that the Commission should closely consider before proposed rules are formulated. Many of the pertinent questions are interspersed throughout the discussion of the proposed rules. These and other questions would elicit critical information about the nature and varieties of political and issue advocacy activity at issue, and about the sensitive constitutional and statutory questions that they present. Moreover, this information would fill an obvious gap in the current process: the Commission has not developed, nor even attempted to develop, any meaningful record to guide the fashioning of proposed rules.

The NPRM suggests that it is a continuation of the rulemaking begun on March 7, 2001, focused on possible redefinitions of the fundamentally important statutory terms "political committee," "contribution" and "expenditure." This prior Commission effort, which the Commission later voted "to hold...in abeyance pending changes in legislation, future judicial decisions, or other action . . ." does not establish a meaningful predicate for the proposed rules now before it. *See* NPRM at 3. Published in the form of an Advance Notice of Proposed Rulemaking, the 2001 Advance Notice filled but six pages in the Federal Register. It provided for comment various alternative formulations of "contribution" and "expenditure" but only described approaches to defining "major purpose" without offering regulatory language. The OGC's current draft NPRM does not build upon the 2001 proposal, or take into account the many public comments it received at the time. Instead, the new proposed NPRM starts afresh with a completely different, farther reaching and more complex document comprising 108 pages of text that sets out detailed proposed rules and poses no fewer than 185 questions raising novel, difficult and controversial questions of constitutional, statutory and administrative law.

To date, in fact, the FEC has considered a number of the pending issues only in the context of a submission of an organization, "ABC," that for all intents and purposes exists only on paper. "ABC," having not raised and spent any funds or conducted any activities whatever, could hardly help the Commission better understand the regulatory issues, if any, presented by this type of organization. In fact, half of the Commission voted for this very reason to dismiss the request presented by "ABC" as improvidently granted. The NPRM exacerbates these problems, by putting forward

very specific rules without the supporting foundation of comprehensive information-gathering and careful constitutional and legal analysis.

There is no reason why the Commission, in a rush to develop some rules, would fail to take the time and devote the consideration necessary to reach the proper conclusion about the need for or shape of proposed rules. There is every reason to avoid rushing to judgment in the middle of an election year, when organizations engaged in issues advocacy and various forms of political activity are relying on a stable legal framework within which to operate. More time for the solicitation and review of comments could only benefit the Commission in its review, as would at least one cycle's experience with BCRA and its effects.

As the NPRM itself generally acknowledges, neither BCRA nor McConnell command it to undertake this rulemaking at any time, let alone on such an accelerated and disruptive calendar in a climate of partisan maneuvering. Indeed, because any Commission regulations can only become effective after 30 legislative days have elapsed in either House of Congress without a resolution to disapprove, *see* 2 U.S.C. § 438(d), a regulation transmitted to the Congress in May could not become effective until mid-July or even September, well into the general election periods for virtually all federal and state races. It is evident that in light of this timetable, the adoption of poorly considered rules, enacted under great speed in a politically charged environment, could only be highly disruptive to activities carefully planned for some time in compliance with existing law and rules.

The current NPRM, by forcing the premature consideration of specific rules, does not allow for the time and space to truly consider the questions it otherwise raises about whether such a rulemaking should go forward, and if so, when and in what form. The Commission should instead solicit comments by publishing the questions without offering the answers. This is not only the logical order to follow, but one that will advance the Commission's inquiry without narrowing it so clearly to the prejudice of affected organizations such as ours.

Sincerely,

AFL-CIO

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