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February 3, 2012

By Electronic Submission

Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463
Attn: Robert M. Knop, Assistant General Counsel

Re: Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

Dear Mr. Knop:

These comments are submitted on behalf of the Alliance for Justice Action Campaign (AFJAC)in response to the Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80803 (December 27, 2011) (hereinafter "NPRM"), issued by the FEC in response to the decision of the United States Supreme Court in *Citizens United v. FEC,* 558 U.S. ____, 130 S.Ct. 876 (2010) (*"Citizens United").* AFJAC requests an opportunity to testify at the hearing to be held on this matter on March 7, 2012.

AFJAC is a 501(c)(4) organization that was established in 2004 to improve access to justice and to protect all forms of advocacy in the public interest. AFJAC serves as the leading resource on the legal framework for 501(c)(4) advocacy efforts. It provides definitive information and technicl assistance for organizations and their funding partners seeking to be active participants in the democratic process, while advancing policies that enable them to do so. AFJAC also promotes a national conversation about the importance of the courts with a goal of advancing core constitutional values, preserving human rights, securing unfettered access to the judicial system, and guaranteeing the even-handed administration of justice for all Americans.

1. The Commission Has No Authority To Impose A New Disclaimer Requirement for Solicitations by Corporations and Labor Organizations . [Prop. Reg. 114.10(c)]

Section 114.10 of the current FEC Regulations sets forth the criteria under which a nonprofit corporation may qualify as a qualified nonprofit corporation (QNC) so as to be exempt from the statutory prohibition on corporate independent expenditures and electioneering communications. These criteria derive from the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), which ruled that certain politically engaged organizations do not pose the risk of corruption at which FECA was aimed. The NPRM proposes to extend these criteria to all corporations, including all nonprofit corporations. While the effect of this proposal is redundant in part with other regulatory requirements, such as the disclaimer and reporting requirements applicable to independent expenditures and electioneering communications, *see* Prop. Reg. §§ 114.10(b)(1), .10(b)(2) and (d), in one important respect the NPRM proposes a requirement for all corporations and labor organizations that has not existed before.

Prop. Reg. 114.10(c) provides that any corporation or labor organization that "solicits donations that may be used for political purposes" shall in the solicitation "inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates." There is no statutory basis in the Federal Election Campaign Act (FECA) or the Bipartisan Campaign Reform Act (BCRA) for this expanded disclaimer requirement. FECA § 441d, which provides the sole statutory basis for requiring disclaimers on communications by political committees and others, only applies to persons who solicit "contributions" within the meaning of the Act. "Donations" to nonprofit corporations are not contributions within the meaning of FECA and therefore are not covered by this provision. Furthermore, even if they were covered, § 441 only requires that solicitations for contributions include a statement of who paid for the communication and that the communication was or was not authorized by a candidate or authorized political committee of a candidate. There has never been a requirement that all corporations or unions give notice that donations will be used for political purposes, including supporting or opposing candidates.

The NPRM relies on the fact that the Supreme Court in *Citizens United* upheld under the First Amendment the disclaimer requirements of § 441d(d)(2) because they "'provide the electorate with information,' ... and thereby 'insure that the voters are fully informed' about the person or group who is speaking,"130 S.Ct. at 915, (quoting *McConnell v. FEC,* 540 U.S. at 196, and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) The fact that the disclaimer requirements actually included by Congress in the statute do not violate the Constitution does not, however, give the Commission *carte blanch* to adopt new disclaimer requirements whenever it believes there is a reason to do so. Furthermore, while the current solicitation requirement for QNCs might have been justified as a way to limit the *MCFL* exemption to the narrow category of organizations contemplated by the Supreme Court, the requirement is no longer necessary after *Citizens United* expanded the right to make independent expenditures and electioneering communications to all corporations and unions.

The proposal in the NPRM would also be both misleading and difficult to implement. The disclaimers currently required by § 441d involve information, such as who paid for the communication and whether it was authorized by a candidate, which is known at the time that the communication is disseminated. Prop. Reg. § 114.10(c) would require virtually every organization exempt under sections 501(c)(4), (c)(5) and (c)(6) of the Internal Revenue Code to include the required statement because all such organizations are permitted to engage in political campaign activity and therefore "may" use the funds for that purpose. Such a statement would be misleading if the organization does not in fact use solicited funds for political purposes. When a nonprofit corporation solicits funds, it may have no idea whether those funds will ever be used for political purposes, yet it would risk civil and criminal penalties if it later decides to engage in such activities.

The language of Prop. Reg. § 114.10(c) is also overbroad and unacceptably vague. First, the term "solicitation" may apply to a wide range of communications which are not defined. In construing the statutory language regarding the "solicitation" of contributions to separate segregated funds, the Commission has given an extremely broad construction to the term "soliciation" that includes even articles describing the SSF's activities, tables at conventions, and speeches. *See* e.g. Advisory Opinions 1995-14, 1992-9, 1981-14, 1979-13, 1978-83, 1976-96, 1976-27. The NPRM provides no guidanance to nonprofit corporations as to how the same term would be construed in this context.

The term "donations" is also unclear. Does the proposed requirement apply to solicitations of annual dues paid by members of a social welfare organization, labor organization or trade association ? If not, would it apply to an organization that does not have voting members but nevertheless refers to member donations as "dues"?

Finally, and most importantly, the words "political purposes" are not found in FECA or the Commission's current regulations and could include far more than the narrow category of communications (independent expenditures and electioneering communications) to which the disclaimers in § 441d now apply. Do "political purposes" include issue ads in newspapers that mention candidates by name but do not meet the definition of independent expenditures.? Do they include radio or tv ads that mention a candidate by name but are disseminated outside the periods specified in the definition of electioneering communications and are not the functional equivalent of independent expenditures? Indeed, does the term "political purposes" include nonpartisan voter registration and gotv activities, or is it limited to "partisan" political activities. One is reminded of the difficulties which the Commission faced for so many years in applying its coordination rules without a clearly defined content standard. "Political purposes" is even less clear than the "electioneering message" standard that the Commission attempted for a number of years to use in defining coordinated communications but later found to be unworkable. Prop. Reg. § 114.10(c) would reopen all of those issues once again.

Although Prop. Reg. § 114.10(c) by its terms applies to all corporations and labor organizations, the NPRM suggests that the solicitation requirement might, in the alternative, be applied only to QNCs. *See* 76 Fed. Reg. at 80813. Since *Citizens United* held unconstitutional the corporate prohibitions on both independent expenditures and electioneering communications, there is no longer any reason for a nonprofit corporation to seek to qualify as a QNC. Retaining a solicitation disclaimer for organizations that could have qualified as QNCs in the past would be confusing at best. Moreover, there is no reason why IRC § 501(c)(4) organizations, which are the only nonprofits eligible for QNC status, *see* Reg. § 114.10(b)(5), should be treated differently from trade associations,which are not eligible for QNC status because they are exempt under IRC § 501(c)(6), let alone business corporations and labor organizations.

2. The Commission Should Not Enumerate Specific Communications That May Be Disseminated To The Public By Corporations and Unions. [Prop. Reg. § 114.4(c)(2)-(6)]

The NPRM proposes to revise § 114.4(c)(1) and § 114.10(a) of the current regulations to make clear that corporations and labor organizations may make independent expenditures or electioneering communications. These changes are required by the decision in *Citizens United.* The NPRM also proposes, however, to continue the practice in the current regulations of setting out in §§ 114.4(c)(2)-(6) certain types of communications that "a corporation or labor organization may make to the general public." These provisions are not necessary and can lead to confusion in several ways.

First, the language in the new regulation can be read to infer that the enumerated communications are the only types of communications which corporations and unions may make to the general public. This is, of course, manifestly not the case, as the NPRM seems to recognize. *See* 76 Fed. Reg. at 80810 ("corporations and labor organizations are no longer limited to the specific types of communications listed in these paragraphs"). Including these paragraphs thus serves no purpose.

Second, the NPRM suggests that §§ 114.4(c)(2)-(6) are included to make clear that these types of communications may not be coordinated with candidates or political parties.[1] *See* 76 Fed.

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[1] In addition to the issue discussed in text, which applies to all of the subsections of Prop. Reg. § 114.4(c), the proposed language pertaining to endorsements in Prop. Reg. § 114.4(c)(6) raises a separate problem. Specifically, this subsection states that a corporation or labor organization may endorse a candidate and may communicate the endorsement "to its restricted class or to the general public." Since the general prohibition on coordination set forth in Prop. Reg. § 114.4(c)(1) applies to this subsection, the draft language mistakenly suggests that communications about endorsements to the restricted class may not be coordinated. Since Prop. Reg. § 114.4 deals only with communications to the public, the reference to communications with the restricted class should be deleted if subsection (c)(6) is retained.

Reg. at 80810. This may create additional confusion, however, since § 109.21 of the current regulations already defines with great care those public communications that constitute "coordinated communications". If the purpose of the new provisions is to reach certain types of "communications"[2] that are not covered by § 109.21, the NPRM offers no explanation for expanding a regulation which has been the subject of several previous rule-makings and is not addressed or implicated by the decision in *Citizens United.* Nor does the NPRM offer any guidance whatsoever on the types of conduct that may violate the proposed regulation. If the Commission is unwilling to drop these provisions entirely, it should at the very least make clear that the listed types of communications *may* constitute "coordinated communications" only if they fall within the definition of coordinated communications in § 109.21, rather than suggesting that a different, undefined, coordination rule applies. *Cf. e.g.*, Reg. § 100.16(a).

Third, by placing these provisions in a regulation which now addresses independent expenditures and electioneering communications, the NPRM suggests that each of these types of communications is a form of independent expenditure or electioneering communication and therefore that they must include disclaimers and be reported as if they were. In reality, many voter registration and GOTV communications, voting records, and voter guides do not meet the definitions of independent expenditure or electioneering communication and do not need to include disclaimers or be reported as such.

3. The Commission Should Not Require A Single Report For Communications to the Restricted Class and to the General Public. [Prop. Reg. §114.3(b)]

The NPRM would not change the current requirement at Reg. § 114.3(b) that corporations and unions report disbursements for express advocacy communications to the restricted class in accordance with Reg. §§ 100.134(a) and 104.6. *See* 76 Fed. Reg. at 80807. Thus, corporations and unions could continue to report express advocacy communications to the restricted class separately from such communications beyond the restricted class. We agree with this approach for several reasons.

First, treating the reporting requirements for restricted class communications in a single requirement with reporting communications beyond the restricted class would be confusing in the extreme. As noted in the NPRM, under FECA communications by corporations and unions to their restricted class are explicitly exempted from the definition of "expenditure." *See* 2 U.S.C. § 431(9)(B)(iii). Furthermore, the thresholds for reporting restricted class communications are different from the thresholds for reporting communications beyond the restricted class. *See* 2

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[2] Prop. Reg. § 114.4(c)(1) uses the term "communications" in describing the types of activities that may not be coordinated. Reg. § 109.21 of the current regulations, in contrast, defines coordinated communications as "public communications," *see* Reg. § 109.21(c)(2)-(5), a more narrow term that does not include, for example, most Internet communications.

U.S.C. §§ 431(9)(B)(iii), 434(a)(4)(A)(i), and 434(a)(4)(A)(ii). Finally, communications to the restricted class by corporations and unions are not subject to reporting on a 24 or 48 hour basis, as are some communications beyond the restricted class.

Second, communications to the restricted class cannot be reported in a single form with communications beyond the restricted class because only the latter communications are subject to the rules for coordinated communications. At present, Form 5 requires corporations and unions (as well as PACs) to certify that their independent expenditures were not made in coordination with any candidate or political party. Since corporations and unions may coordinate their restricted class communications with candidates and parties, they could not properly execute this certification with respect to many of their restricted class communications.

Finally, the distinction between communications to the restricted class and those beyond the restricted class is well-recognized and well-understood by the regulated community and has important tax implications that require nonprofit corporations to separately record their disbursements for membership communications and general public communications regardless of FEC requirements. Organizations exempt under sections 501(c) of the Internal Revenue Code ("IRC") are subject to tax under IRC § 527(f) on their communications to the public, but not on their membership communications. *See* Treas. Reg. § 1.527-6(b)(3). Furthermore, apart from tax considerations, the distinction between membership and general public communications has been relied on by many nonprofit corporations and unions in designing internal firewalls to comply with the rules on coordinated communications. *See* Reg. § 109.21(h). Changing the reporting requirements for restricted class communications could cause substantial disruption and misunderstanding with respect to these and other similar arrangements.

4. <u>The Commission Should Clarify the Requirements for Reporting Express Advocacy Communications Made Simultaneously to the Restricted Class and to the General Public.</u>

The NPRM seeks comment on how corporations and unions should report disbursements for express advocacy communications that are disseminated simultaneously to both the restricted class and to the general public. *See* 76 Fed. Reg. at 80808. Specifically, the NPRM asks whether "the fact that a communication went outside the restricted class [should] result in the entire disbursement being treated as an independent expenditure, subject to the relevant reporting requirements." *Id.* This is an alarming proposal with which we strongly disagree.

Many communications by corporations and unions that go to both the restricted class and the general public present little difficulty in allocating costs between the two audiences. For example, mailers, emails, telephone calls, robocalls and other similar one-on-one communications may be separately accounted for with little difficulty as between the restricted class and the general public. The fact that a corporation or union distributes the same direct mail piece to both groups does not convert the mailers to the restricted class into communications with the general

public for reporting purposes, even if they are paid for with a single disbursement. Any effort by the Commission to do so would run afoul of the plain requirements of FECA.

5. The Commission Should Not Narrowly Restrict Voter Registration and GOTV Activity by Corporations and Labor Organizations. [Prop. Reg. §§ 114.2(b)(2)(i) and 114.4(d)]

The NPRM includes several proposals that could significantly restrict the ability of nonprofit corporations and labor organizations to engage in voter registration and GOTV activities. Not only are these proposals problematic in their own right, but the NPRM fails to explain how, if at all, they would relate to each other.

A. The NPRM proposes two alternative revisions to Reg. § 114.2(b)(2)(i) which currently prohibits corporations and labor organizations from making "expenditures," with certain exceptions. Alternative A would prohibit corporations and labor organizations from making coordinated expenditures as defined in Reg. § 109.20 and coordinated communications as defined in Reg. § 109.21, but, as the NPRM explains, this alternative "would permit corporations and labor organizations to make all types of expenditures from their general treasuries for any non-coordinated activities, whether or not they are communications." 76 Fed. Reg. at 80806. Alternative B would continue to prohibit corporations and labor organizations from making expenditures as defined in part 100, subpart D of the Regulations, except for communications that are not coordinated communications as defined in Reg. § 109.21. *See id.* at 80815. The NPRM explains that this alternative would prohibit "non-expressive expenditures" by corporations and labor organizations regardless of whether they are coordinated with a candidate or political party. *See id.* at 80806.[3]

As noted in the NPRM, the Supreme Court's decision in *Citizens United* did not

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[3] The NPRM thus seems to suggest that Alternative B would prohibit corporations and labor organizations from using general treasury funds to support all non-communicative elements of such activities, including paying for transportation to the place of registration or the polls, providing babysitting services, etc.. This, however, is not an accurate description of Alternative B, which only prohibits "expenditures as defined in 11 CFR part 100, subpart D." Under section 100.133 of the current regulations, "activity designed to encourage individuals to register to vote or to vote" is, with certain exceptions, excluded from the definition of prohibited "expenditures" and therefore could be supported by corporations and unions even under Alternative B. It is essential that the Commission make this point clear if it decides to adopt Alternative B.

distinguish between expenditures for non-communicative conduct[4] and expenditures for communications. Rather, the Court focused on the fact that the expenditures in question were made independently of any candidate and therefore did not present the same risk of corruption (or the appearance of corruption) as expenditures that are coordinated with the candidate. The Court's reasoning is as valid with respect to activities for non-communicative activities as for expenditures involving communications, as long as they are made independently of candidates. As Justice Kennedy wrote for the majority:

> "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidates." ... Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.

130 S.Ct. at 908, *quoting Buckley v. Valeo*, 424 U.S. at 47.

Alternative B is inconsistent with the Court's reasoning in *Citizens United* insofar as it would prohibit corporations and unions from making some non-expressive expenditures even when they are not coordinated with a candidate or political party.[5] As explained in note 2, *supra*,

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[4] The NPRM's use of terms such as "non-expressive" and "non-communicative" to describe certain kinds of political expenditures are misleading if they are meant to suggest that such activities are not protected by the First Amendment. As the Supreme Court recognized in *Buckley v. Valeo*, "First Amendment protections are not confined to 'the exposition of ideas.'" 424 U.S. at 14, *quoting Winters v. New York*, 333 U.S. 507, 510 (1948). *See id* at 15 ("The First Amendment protects political association as well as political expression.") *Buckley* rejected the argument that election laws are outside the protection of the First Amendment because they regulate conduct. Any suggestion in the NPRM that non-expressive political expenditures by corporations or unions are not within the ambit of the First Amendment is wholly inconsistent with the Court's reasoning.

[5] Since *Citizens United* did not reach the constitutional question presented by direct corporate and union contributions, *see* 130 S.Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."), it did not, *ipso facto*, reach the different question of whether in-kind contributions by corporations and unions are protected by the First Amendment. Nonetheless, although the line between in-kind

the difference between the two alternatives in this area is whether corporations and unions would be permitted to support voter registration and GOTV activity that falls within the exception to Reg. § 100.133. Specifically, Alternative A would allow corporations and unions to support voter registration and GOTV even where "an 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,." while Alternative B would not. As long as voter registration and GOTV activity is not coordinated with a candidate or political party, the activity is no more likely to cause corruption or the appearance of corruption simply because the corporation or union has identified the candidate or party preference of the individuals whom it seeks to assist.[6] For this reason, we support Alternative A and urge the Commission to reject Alternative B.

B. The NPRM also includes two alternatives to revise current Reg. § 114.3(c)(4), which permits corporations and labor organizations to conduct voter registration and GOTV drives aimed at the restricted class. Because these drives are directed to the restricted class, the current regulation allows them to include express advocacy. However, the current regulation prohibits corporations and unions from withholding or refusing to give information and other assistance regarding registering or voting "on the basis of support for or opposition to particular candidates, or a particular political party." This last restriction would be removed as a prohibition on corporate or union expenditures in Alternative A to Prop. Reg. § 114.3(c)(4), but apparently would be retained in determining whether voter drives need to be reported.[7] *See* 76 Fed. Reg. at 80808. Alternative B would retain the restriction as a prohibition on corporate and union activity. *Id.*

As with Prop. Reg. § 114.2(b)(2)(i), discussed in point A of this section, the rationale for Alternative B is based on the incorrect notion that *Citizens United* allows a distinction to be made

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contributions and non-expressive *expenditures* may not always be clear, this is no reason to ban corporations and unions from making all non-expressive expenditures when coordination is not present.

[6] Although the NPRM focuses on the effect of the alternative proposals on corporate and union voter registration and GOTV activities, Alternative B would also prohibit corporate and union non-expressive expenditures outside the area of voter registration and GOTV. For example, if a nonprofit corporation circulated flyers urging the general public to support a candidate by attending her up-coming rally, this would surely be a communicative expenditure protected by *Citizens United.* If the nonprofit also provides buses to transport non-restrictive class members to the rally, the expenditures for the buses would apparently be unlawful under Alternative B even in the absence of any coordination with the candidate. As we discuss in text, there is no support for this result in *Citizens United.*

[7] With respect to the NPRM's proposal to retain this requirement for reporting purposes, *see* Point 6, *infra.*

between communicative and non-communicative expenditures. Again, there is no basis for finding that the non-communicative elements of a voter drive are more likely to cause corruption or the appearance of corruption than drives that are limited to communicative elements, as long as they are not coordinated with a candidate or political party, We therefore urge the Commission to reject Alternative A and adopt Alternative B to Prop. Reg. 114.3(c)(4).

C. Finally, the NPRM offers two alternatives for revising current Reg. 114.4(d), which prohibits corporate and union expenditures on voter drives aimed at the general public. In order to comply with *Citizens United,* both alternatives would remove the current prohibition on communications expressly advocating the election or defeat of candidates or political parties made in connection with a voter registration or GOTV drive, and both would retain the current prohibition on coordination of corporate and union voter registration and GOTV drives aimed at the general public.[8] *See* 76 Fed. Reg. at 80811. Alternative A would also remove the three current prohibitions[9] where corporations or labor organizations (1) withhold or refuse to give information and other assistance on the basis of support for, or opposition to, particular candidates or a political party; (2) direct their drives primarily based on registration with a particular party; and (3) pay individuals conducting such drives on the basis of number of individuals registered or transported to the polls who support a particular candidate or candidates or political party. *See* Reg. § 114.4(d)(3)-(6). Alternative B would retain these prohibitions on corporate and union voter registration and GOTV activity.

As with the other provisions in the NPRM that propose to restrict corporate and union voter registration and GOTV activities, Alternate B is based on the erroneous view that *Citizens United* allows the government to restrict non-communicative expenditures even where they are not coordinated with a candidate or political party. *See* 76 Fed. Reg. at 80811 ("Alternative B is based on the interpretation that *Citizens United* did not disturb the prohibition on corporate and labor organization expenditures that do not involve communications....") Alternative B prohibits far more conduct than is permitted by the Supreme Court and should be rejected for that reason.

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[8] As with the coordination language in Prop. Reg. §§ 114.4(c)(2)-(6), discussed in section 2 above, the coordination language in both alternatives for Prop. Reg.§ 114.4(d) does not incorporate the existing regulation on coordinated communications in Reg. § 109.21 and, therefore, can be interpreted as adopting a different coordination rule for voter registration and GOTV activities. For the reasons discussed above, we strongly urge that this language be clarified in whichever alternative the Commission adopts for Prop. Reg. § 114.4(d).

[9] While removing these rules as prohibitions on corporate and union activity, Alternative A would retain them as part of the definition of "expenditure", thereby requiring activities that do not meet these requirements to be reported. As discussed in point 6, *infra,* there is no statutory basis for this new reporting requirement.

6. The Commission Has No Authority to Require Corporations and Unions to Report Expenditures Other Than Independent Expenditues and Electioneering Communications.

In two separate places, the NPRM appears to suggest that corporations and unions are currently required to file reports with the FEC on their "expenditures." Thus, in discussing Alternative A of Prop. Reg. § 114.3(c)(4), concerning voter registration and GOTV activities directed to the restricted class , the NPRM explains that Alternative A would remove the current *prohibition* on corporations and unions that withhold or refuse to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates or a particular party, but would retain this restriction for reporting purposes. *See* Fed. Reg. at 80808. Referring to Prop. Reg. § 114.3(c)(4)(ii), the NPRM states:

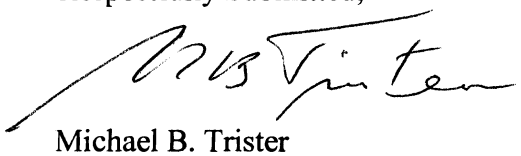
> Alternative A, however, would adhere to the statutory exception to the definition of "contribution or expenditure" for nonpartisan voter registration and GOTV drives. *See* 2 U.S.C. 441b(b)(2)(B). Under existing regulations, corporations and labor organizations do not have to report to the Commission disbursements for voter registration and GOTV drives that meet the conditions of the statutory exception, since such disbursements are neither contributions nor expenditures. While voter registration and GOTV drives are permissible under Alternative A, regardless of whether the drives meet the conditions of the statutory exception, corporations and labor organizations conducting drives that meet those conditions are not required to report disbursements for those drives. Thus, Alternative A would specify that disbursements for voter registration and GOTV drives are not contributions or expenditures if the drives are conducted in such a manner that the corporation or labor organization does not withhold or refuse to provide information or other assistance regarding registering or voting on the basis of support for or opposition to particular candidates or a particular political party, consistent with the statutory exception in 2 U.S.C. 441b(b)(2)(B).

Id. See also id. at 80809. Although the NPRM does not state explicitly that corporations and unions must report voter registration and GOTV activities that do not fall within the "statutory exception," this appears to be the intent of this confusing paragraph. Indeed, if this is not the purpose of the paragraph, then why point out that corporations or unions that do meet the requirements of the exception are not required to report; and, what point is there to making clear that activities which do not meet the exception remain within the definition of "contribution or expenditure". The NPRM includes a similar discussion, with the same apparent intent, with respect to Alternative A of Prop. Reg. § 114.4(d), dealing with voter registration and GOTV

directed beyond the restrict class. *See* 76 Fed. Reg. at 80811 (using virtually identical words).

The fundamental problem with both of these discussions is that there simply is no provision in FECA or the current FEC regulations that requires corporations and labor organizations to file reports of any kind on their "contributions or expenditures" or on their "expenditures." Corporations and unions are "persons" under the statute and therefore must file reports of their independent expenditures under FECA § 434(c) and Reg. § 109.10(b)-(e). They must also file statements concerning their electioneering communications under FECA § 434(b) and Reg. § 104.20(b). Finally, they are required to file reports regarding their internal communications under FECA § 431(9)(B)(ii) and Reg. §§ 104.6 and 100.34, but only those that include express advocacy. However, there is no statutory requirement for corporations and unions to report their expenditures unless they are political committees.[10] The Commission has no authority to create such a reporting requirement out of whole cloth and, if it adopts Alternative A for either of these two provisions, it should make clear that it is not doing so.

Respectfully Submitted,



Michael B. Trister

[10] The fact that certain voter registration or GOTV activities are "expenditures" may be relevant in determining whether a corporation or union is a political committee. This, however, is a far cry from requiring corporations that are not political committees to file reports on their voter registration and GOTV activities that do not fall within the definition of "independent expenditure" or " electioneering communication."