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April 5, 2004

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

Re: Notice of Proposed Rulemaking – Political Committee Status

Dear Ms. Dinh:

These comments are submitted in reference to the above rulemaking on behalf of The Media Fund, a political organization formed under Section 527 of the Internal Revenue Code (IRC). 26 U.S.C. § 527. The Media Fund requests an opportunity for counsel to appear at the FEC hearing on April 14 or 15, 2004.

I. Summary

Under current law, 527 organizations that do not qualify as "political committees" under Federal election law register only with the IRS and not with the Federal Election Commission (FEC). The statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq., (FECA). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

Thus, under FECA, 527 organizations operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees. This has been the law for thirty years, and there is no basis or compelling reason for the FEC to change these rules now six months before the 2004 general election.

II. The FEC Notice of Proposed Rulemaking

On March 11, 2004, the FEC published a Notice of Proposed Rulemaking (*NPRM*) regarding the status of political committees, posing over 180 questions and proposing alternative methods of defining key statutory terms in what would amount to a sweeping revision to the definition of what is a political committee and an extension of Federal election law to cover a broad array of organizations and activity that are not presently covered under FECA. *NPRM*, 69 Fed. Reg. 11736 (March 11, 2004).

Along with specific proposed regulatory changes the Commission posed numerous fundamental questions, including whether the FEC should change the definitions of "expenditure" and "political committee." Whether the FEC should make any new rules at this time and if so, what should be the effective date? Does the Commission have statutory authority to amend the definitions of expenditure and political committee, and if so does it derive from the Bipartisan Campaign Reform Act of 2002 (BCRA)?

As set forth in detail below, in 2000 and again in 2002, Congress passed legislation regarding 527 organizations and did not change the definitions of "expenditure" or "political committee." Nothing in the judicial precedent from *Buckley* to *McConnell v. FEC,* 124 S.Ct. 619 (2003), requires or even gives the FEC the authority to make fundamental change in the definitions in FECA without Congressional action. Moreover, there is no record supporting the need for such fundamental changes. This is the first election cycle in which we are operating under the newly established rules under BCRA. To consider such sweeping changes as proposed in the *NPRM* without the benefit of any history of operation under the new law is unwise and unwarranted. Finally, even if the Commission determines that Congress left some necessary changes undone, and that the FEC has the authority to make these changes without additional Congressional action, it would be totally disruptive and inequitable to change the rules for this cycle midstream within months of the 2004 elections. See Section VII below for a more detailed discussion of this issue.

III. Congress Did Not Change the Definitions of Expenditure and Political Committee and the FEC Does Not Have the Authority To Do So

Congress has not changed the fundamental legal definitions of "expenditure" and "political committee" since the inception of FECA and the Supreme Court's review of its constitutionality in *Buckley.* The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years covering seven presidential elections. Congress has done nothing to change their meaning for the remaining six months of the 2004 election cycle, and there is no reason for the FEC to take it upon itself to change what Congress has left in place. A review of the history of amendments to FECA confirms this.

A. 1997 – 1999 History of Legislative Proposals

In 1997, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)."

Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003). This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107, 10108. Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176.

BCRA's sponsors abandoned their effort to redefine "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the ... bill." Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176 *quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001). The Commission explained in its brief to the District Court:

> In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, 'that constitute the most blatant form of [unregulated] electioneering.' 144 Cong. Rec. S906, S912 (Feb. 12, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which, in contrast to the earlier provisions of the McCain-Feingold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley*. Snowe-Jeffords was adopted as an amendment to both the Shays-Meehan and McCain-Feingold bill, 144 Cong. Rec. H3801, H3802 (June 28, 2001). Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176.

As the sponsors explained, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003).

B. 2000 Legislation Regarding 527 Political Organizations

In 2000, Congress considered the growing number of political organizations that were not subject to the reporting requirements of FECA and passed legislation addressing 527s that are not Federal political committees. This law requires them to register with the IRS and file disclosure reports with the IRS listing their donors and disbursements -- precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted).

The 527 disclosure law did not change the definition of "expenditure" or require these organizations to register as political committees with the FEC even though at the time this legislation was debated and enacted it was understood by Congress that 527 organizations that were engaging in non-express advocacy communications and were spending millions of dollars to do so. In his testimony before the House Ways and Means Committee on June 20, 2000, Senator McCain identified the lack-of disclosure as the problem that Congress needed to narrowly address. Quoting from a newspaper article Senator McCain stated that special interests "can donate unlimited sums to entities known as 'section 527 committees,' beyond the reach of the campaign-reporting laws designed to curb such abuses." *Disclosure of Political Activities of Tax Exempt Organizations: Hearing on H.R.4717 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 106th Cong. (June 20, 2000) (statement of Sen. John McCain).

The Committee and Dissenting Views presented in the House Report shared the same reasons for changing the law to only require disclosure. Neither suggested that the solution to the problem was for 501(c) or 527 organizations engaged in the exempt purpose of "influencing or attempting to influence" a federal election to register as a political committee with the FEC or file disclosure reports with the FEC. The Committee was clear about its goal: "[T]he bill does not regulate political activities, but instead merely requires the disclosure of such activities..." H.R. Rep. No. 106-702, at 15 (2000).

Pro-reform Members argued for an even narrower disclosure bill than H.R. 4717 that did not cover 501(c) organizations. One that was more likely to pass in 2000. H.R. 4672 was a solution adopted by the House and Senate and approved by the President that only required 527 organizations to register and file periodic disclosure reports with the IRS – not the FEC. In the summer of 2000, Congress did not limit in any way a 527's ability to continue to legally engage in non-express advocacy communications for the exempt function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." Congress did not require any additional 527s to register as political committees with the FEC and it did not change the FECA definition of political committee when it passed this legislation.

C. 2002 BCRA History

In 2002, BCRA was passed to address two primary issues of concern related to soft money. First, it prohibits federal candidates and national party committees from raising and spending non-federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a Federal primary or general election. In BCRA, rather than amend the general definition of "expenditure," Congress tacked the new term "electioneering communications" on to FECA's prohibition on corporate and labor union contributions. 2 U.S.C. § 441b(b)(2). The FEC explained to the Supreme Court that BCRA was "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime" because BCRA merely extended the reach of Federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds within a short time period before Federal elections. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003).

BCRA's Congressional sponsors supported the limited purpose of BCRA in their arguments to the Supreme Court in *McConnell*, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience ... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S.Ct. 619 (2003). They argued that the express advocacy meaning developed over the years by the Court provided a guide for Congress into which they said the electioneering communication restriction was narrowly applied: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." Brief for Intervenor-Defendants at 59, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80).

The Congressional sponsors explained that BCRA was crafted by using the express advocacy analysis developed by the Court as a roadmap with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176, (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered to in framing (the electioneering communication provisions)." Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176.

In its argument to the Court, the FEC, too, was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications." "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly interested in airing electioneering communications may easily avoid the source limitation on such communications by simply ... running the advertisement outside the 30- or 60-day window..." Brief for Appellees at 92, *McConnell,* 124 S.Ct. 619. The FEC explained that interest groups could continue to "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." Brief for Appellees at 95 n. 40, *McConnell,* 124 S.Ct. 619. BCRA's sponsors agreed: "[T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigns all fall outside its narrow scope..." Brief for Intervenor-Defendants at 158, *McConnell,* 251 F.Supp. 2d 176.

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cottage Sav. Ass'n v. Comm'r,* 499 U.S. 554, 562 (1991). The administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress considered but abandoned. Post-*McConnell*, only Congress may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to craft the statute in a manner that demonstrates that the additional restriction is not unconstitutionally vague and is narrowly

tailored to serve the requisite governmental interest, as McConnell so found regarding "electioneering communications." *See Anderson v. Separ,* No. 02-5529, slip op. at 22 (6th Cir. Jan 16, 2004).

Thus, existing law remains unchanged in this area, as it has for thirty years. The Commission has no reason or Congressional authority to unsettle this area of the law six months before the 2004 elections.

IV. No Judicial Precedent from Buckley v. Valeo through McConnell v. FEC Supports the Proposed Changes in the NPRM to the Definitions of Expenditure and Political Committee

The *NPRM* acknowledges that since *Buckley,* neither Congress nor the FEC has amended the FECA or the regulations to include the "major purpose" test set forth in *Buckley. NPRM* at 11743-44. The *NPRM* further acknowledges that BCRA did not change the definitions of "expenditure" or "political committee." *NPRM* at 11736-37.

In *Buckley*, the Court was concerned that the term "political committee...could be interpreted to reach groups engaged purely in issue discussion," noting that lower courts had interpreted the term "more narrowly" to include only those groups whose major purpose is the nomination or election of Federal candidates. *Buckley*, 424 U.S. at 79-80. In addition, the Court construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Similarly, the Court construed "contributions" as only those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

The Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Thus, the major purpose test in *Buckley* was a limitation on the number of groups that might otherwise qualify as political committees because they received "contributions" or made "expenditures" in excess of $1,000.

In *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under *Buckley*, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859 (emphasis added). The FEC declined to appeal this decision.

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure," contrary

to the assertions made by some so-called reformers.[1] While the Court seems to suggest in *McConnell* that it may be constitutional for **Congress** to re-write the definitions of "political committee" or "expenditure" in the future to cover more than just express advocacy, the Court specifically re-affirmed that under current law, 527 groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added). Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee.

V. The FEC and Individual Commissioners, Congressional Sponsors, and Others Have Acknowledged that the Law Has Not Been Changed Regarding Issue Advocacy by Outside Groups Uncoordinated with Candidates and Parties

Over the past few years, there has been agreement on one major point: BCRA would not limit groups that run non-express advocacy ads more than 60 days before a general election or 30 days before a primary election, acting independently of candidates and party committees.

Congress' BCRA solution was aimed at the problems of corruption or the appearance of corruption when Federal officeholders and candidates solicited non-Federal money and the use of corporate and labor union funds for non-express advocacy broadcast communications close to a Federal election. To solve these problems, Congress did not change the statutory definition of expenditure or require 527 political organizations running non-express advocacy ads to register as political committees with the FEC. The solutions were bright lines: a complete ban on non-Federal money solicitations by Federal officeholders, candidates and the national party committees; disclosure of the funds used to pay for the electioneering communications during the 60 day period before a Federal general election; and a prohibition against using corporate or labor funds to pay for such electioneering communications.

A review of the contemporaneous statements made by individual Members during the debates, and by others in public comments, demonstrates Congress' clear intent that, in a post-

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[1] In laying out the history of the Courts' rulings interpreting these key statutory terms, the *McConnell* Court said: In *Buckley* we began by examining 11 U.S.C. § 608(e)(1) (1970 ed. Supp. IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague." 424 U.S., at 40-42, 96 S.Ct. 612. We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* At 43, 96 S.Ct. 612. We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' ... 'defeat,' [and] 'reject,'" *Id.* At 44 n. 52, 96 S.Ct. 612, and those examples eventually gave rise to what is now known as the "magic words" requirement.

We then considered FECA's disclosure provisions, including 2 U.S.C. §431([9]) (1979 ed. Supp. IV), which defined "'expenditur[e]' to include the use of money or other assets 'for the purpose of ... influencing' a federal election.'" *Buckley*, 424 U.S., at 77, 96 S.Ct. 612. Finding the 'ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id.* At 77-78, 96 S.Ct. 612 (citations omitted). "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purpose of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* At 80, 96 S.Ct. 612 (footnote omitted). *McConnell*, 124 S.Ct. at 688 (footnote omitted).

MCFL applied the same construction to the ban, at 2 U.S.C. § 441b, on any corporate or labor union "' expenditure in connection with any [federal] election.'" 479 U.S. at 249. See *McConnell,* 124 S.Ct. at 688 n. 76.

BCRA world, 527 political organizations would be able to run independent non-express advocacy communications without regulation by the FEC. Some of the highlights include:

Sen. Feingold, introducing S. 26, the Bipartisan Campaign Reform Act of 1999: "Advocacy groups, on the other hand, are permitted to purchase what the bill calls ``electioneering communications,'' as long as they disclose their expenditures and the major donors to the effort and take steps to prevent the use of corporate and union treasury money for the ads." 145 Cong. Rec. S423 (Jan. 19, 1999) also quoted by the Federal Election Commission in its Brief for Appellees at 15a, *McConnell v. FEC,* 124 S.Ct. 619 (2003).

Sen. Snowe, in support of the Snowe-Jeffords amendment: "Certainly, this provision is not vague. We draw a bright line. Anyone will know that running ads more than $10,000 in a given year, mentioning a Federal candidate 30 days before a primary, 60 days before a general election, and seen by that candidate's electorate, being aired in that candidate's district or State, will be covered by this provision. Anyone not meeting any single one of those criteria will not be affected." 147 CONG. REC. S2455, 2456 (Mar. 19, 2001).

Sen. Snowe, explaining that Snowe-Jeffords specifically did not apply the *Furgatch* standard because it is too ambiguous and vague: "We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect. The idea is that people are designing ads, and they need to know with some certainty without inviting the constitutional question that we have been discussing today as to whether or not that language would affect them as whether or not they air those ads.

That is why we became cautious and prudent in the Senate language that we included and did not include the *Furgatch* for that reason because it invites ambiguity and vagueness as to whether or not these ads ultimately would be aired or whether somebody would be willing to air them because they are not sure how it would be viewed in terms of being unmistakable and unambiguous. That is the concern that I have." 147 CONG. REC. S2711 (March 22, 2001)

Sen. Jeffords, explaining that Congress did not intend to require groups that run electioneering communications to register as PACs:

"Now let me explain what the Snowe-Jeffords provision will not do:

The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;

It will not prohibit such groups from accepting corporate or labor funds;

It will not require such groups to create a PAC or another separate entity;

It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;

It will not require the invasive disclosure of all donors; and

Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes." 147 CONG. REC. S2813 (Mar. 27, 2001) (emphasis added).

Sen. Thompson: "It is not enough just to get rid of soft money and leave the hard money unrealistically low limitations where they are. Everything will go to the independent groups. We see how powerful they are now, and they are getting more and more so. Under the First Amendment, they have the right to do that. It will be even more in the future when and if we do away with soft money." 147 CONG. REC. S3006 (Mar. 28, 2001).

Sen. Feinstein, in context of seeking to raise hard money contribution limits: "Meanwhile, one of the effects of McCain-Feingold is that as we ban soft money, which I am all for, the field is skewed because one has to say: Can you still give soft money? Some would say no. That is wrong. The answer is: Yes, you can still give soft money. But that soft money then goes toward the independent campaign; into so-called issue advocacy. . . . It is likely that spending on so-called issued advocacy, most of which is thinly disguised electioneering, probably is going to surpass all hard money spending, and very soon." 147 CONG. REC. S3012 (Mar. 28, 2001)

Sen. Snowe, in support of Snowe-Jeffords amendment: "That is why 70 constitutional scholars and experts signed a letter in support of these provisions, because they know they don't run afoul of constitutional limitations in the first amendment because it is very specifically drafted to address those issues. . . . We are not saying they can't run ads. They can run ads all year long. They can do whatever they want in that sense. But what we are saying is, when they come into that narrow window, we have the right to know who are their major contributors who are financing those ads close to an election." 147 CONG. REC. S3042-43 (Mar. 28, 2001).

Sen. McCain, arguing against the Bingaman amendment because it was too vague and the Constitution requires bright lines:

"Frankly, after going around and around on this issue, identifying who paid for the ad, full disclosure and, frankly, not allowing corporations and unions to contribute to paying for these things in the last 60, 90 days (sic), which is part of our legislation, is about the only constitutional way that we thought we could address this issue." 147 CONG. REC. S3115, 3116 (Mar. 29, 2001).

Sen. Kohl, in support of McCain-Feingold bill: "This legislation does not ban issue advocacy or limit the right of groups to air their views. Rather, the disclosure provisions in the bill require that these groups step up and identify themselves when they run issue ads which are clearly targeted for or against candidates." 147 CONG. REC. S3236 (April 2, 2001).

Sen. Murray, in support of McCain-Feingold bill, but disappointed that the bill did not go further: "This bill also has the potential to give a disproportionately larger role in elections to third party organizations." 147 CONG. REC. S3236 (April 2, 2001)

Rep. Shays, explaining that there was no limit on the funds that may be used by advocacy groups more than 60 days before a general election: "We do not allow corporate treasury money and union dues money 60 days before an election; we allow individual contributions and PAC contributions to compete. Nobody is shutting up."

...

"[Shays-Meehan] allows people to speak out using the hard money 60 days before an election, and, frankly, they can use all that other money 60 days before an election." 148 Cong. Rec. H439 (Feb. 13, 2002)

Sen. Levin, explaining the narrow and limited reach of McCain Feingold: "The bill does not prohibit such ads from being aired by nonparty groups with unregulated money; it only requires disclosure of the sponsoring group's major contributions if the group spends over $10,000 on such ads. This is a very reasonable and modest limitation on political advocacy. It is very clear in order to withstand charges of ambiguity. 148 CONG. REC. S2116 (March 20, 2002)

Sen. Snowe, recognized that soft money would be channeled to independent groups, but was not concerned because there was no fear of real or perceived corruption: "Some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo.'" 148 CONG. REC. S2136 (March 20, 2002).

Sen. McCain, explains that under McCain-Feingold, groups advertising more than 60 days before a general election (30 days before a primary) will remain unregulated: "With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy.''

...

"Of course, the bill's bright line test also gives clear guidance to corporations and unions regarding which advertisements would be subject to campaign law and which advertisements would remain unregulated." 148 CONG. REC. S2141 (March 20, 2002).

Common Cause and Brennan Center, "BCRA as enacted did not eliminate non-PAC 527 organizations and it did not restrict their ability to participate in the political process. The Supreme Court, in *McConnell*, also acknowledged the

legitimacy of independent interest groups and that their right to function in our democracy was not abrogated by BCRA." Comments of the Brennan Center for Justice at NYU School of Law and Common Cause on FEC Draft Advisory Opinion 2003-37, at 6 (Feb. 17, 2004).

FEC Chairman Bradley A. Smith: "Indeed, the rise of 527s is exactly what Senator McConnell and other Republicans, during the legislative debates over McCain-Feingold, had said would happen – soft money would simply change its address. The Democrats prepared for this. It appears that perhaps some Republicans did not."

...

"The law clearly does not require everyone involved in partisan political activity to register as a "political committee" under the Act."

...

"Our obligation at the Federal Election Commission is to enforce the law. It is not to enforce the law as we wish Congress had written it, or as some members now wish that they had written it, or now claim to have written it, or as seems to serve the interests of a particular campaign." Bradley A. Smith, Chairman, Federal Election Commission, An Address to the Republican National Lawyers Association CLE Presentation, at 7, 14, and 16, (Mar. 19, 2004).

These statements are unequivocal evidence that Congress did not intend the regulatory extension as proposed in the NPRM.

VI. Specific Problems with FEC Proposals

In light of the history outlined above, we do not believe that any regulatory action is warranted or supportable at this time. However, should the Commission take some action, we offer the following comments on the key specific proposals outlined in the *NPRM*.

A. Changing the Definitions of Expenditure and Political Committee to Cover Activity not Currently Covered by the Law is Unwarranted

1. Only Congress can change the definition of expenditure and it did not do so

In the *NPRM*, the FEC acknowledged that "BCRA did not amend the definition of expenditure" and, therefore, did not change the definition of "political committee." *NPRM* at 11736. The purpose of this proposed rulemaking "explores whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee and what constitutes an 'expenditure'." *NPRM* at 11736. It is hard to conceive of where the Commission derives the authority to change such a fundamental definition in its regulations when Congress did not amend the statute to change the definition.

In BCRA, Congress amended Section 441b to include "electioneering communications" as expenditures **only** for the purpose of the prohibition on corporate expenditures. Thus under BCRA, if electioneering communications are made by corporations and labor organizations they

would be "expenditures" within the meaning of Section 441b and therefore prohibited. The fact that Congress did not amend the definition of "expenditure" in Section 431 to include "electioneering communications" or "Federal election activity" is compelling evidence that it did not intend the Commission to do so.

2. The NPRM Proposals Would Cover a Vastly Greater Amount of Activity That is Solely Related to Non-Federal Elections

The *NPRM* raises the question of whether extending the reach of the law to candidates for State and local office is warranted. *NPRM* at 11739-43. There is simply no basis in BCRA to extend regulation to State and local candidates and committees supporting them. There is only one specific provision in BCRA that places any limitation whatsoever on spending by non-Federal candidates. 2 U.S.C. Section 441i(f)(1) provides that:

> A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in ...2 U.S.C. Section 431(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

Section 431(20)(A)(iii) covers only a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate). Public communications under BCRA are only those that are made by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22).

Thus, with the limited exception of this one section, Congress did not make State and local candidates subject to the restrictions on party committees contained in the BCRA section regarding Federal election activity.[2] Similarly, Congress did not extend these prohibitions to political organizations established by groups of State and local candidates.

This history of Congressional action provides no indication that Congress intended or sanctioned any provision that would transform all State and local candidate committees and committees established by groups of non-Federal candidates into Federal committees. Nor is there any basis in this history to conclude that Congress intended to hamstring State and local candidates and limit their own ability to advocate their own election with funds permissible under their State laws.

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[2] In fact, Section 431(20)(B)(ii) excludes from the definition of Federal election activity, contributions by State and local party committees to State and local candidates "provided the contribution is not designated by pay for a Federal election activity." Clearly, this section contemplates that it is perfectly legal for State and local candidates to make expenditures without limitation from their own campaign accounts that would be "Federal election activity" if made by State and local party committees. If Congress had intended to subject State and local candidates to these restrictions they could have done so, and did not.

Moreover, there is no support in the opinion of any Court for the FEC proposals to extend Federal regulation to purely State and local candidate and committee activity. In *Buckley,* the Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Subsequent courts have specifically rejected the extension of "political committee" status to groups exclusively engaged in activities related to the election of State and local candidates, even if their ultimate goal was to affect Federal elections. In *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under the *Buckley* test, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859. The FEC declined to appeal this decision.

Finally, in *McConnell,* at 683-685, the Supreme Court found that the BCRA restrictions on State and local candidates were very limited. The Court found that BCRA only prohibits State and local candidates and officeholders from spending soft money to pay for public communications referring to a clearly identified Federal candidate and supporting, promoting, attacking or opposing that candidate. *McConnell,* 124 S.Ct. at 683-684. The Court further found that BCRA "does not prohibit a state or local candidate from advertising that he has received a federal officeholder's endorsement." *McConnell,* 124 S.Ct. at 684

Thus, there is nothing in the statute or history of Congressional action or in any court decision regarding 527s that gives the FEC the authority to adopt any regulation that would Federalize committees established by State and local candidates individually or in groups.

B. The Proposal to Extend the "Federal Election Activity" Concept to Groups Other than Party Committees is Unwarranted

1. Under BCRA Federal Election Activity Is Applicable Only to Party Committees

As described above, Congress did not amend 2 U.S.C. Section 431 to include "Federal election activity" in the definition of expenditure. Indeed, the concept of Federal election activity is only applicable in FECA, as amended by BCRA, to state, district and local party committees and to certain solicitations by party committees, Federal candidates and officeholders.[3] Federal election activity does not apply outside these specific provisions. There

[3] State, district and local party committees who make disbursements for Federal Election Activity must make such disbursements "from funds subject to the limits prohibitions, and reporting requirements of this Act." 2 U.S.C. §441i(b). This section then provides a limited exception for state, district, and local party committees to use Levin funds (up to $10,000 raised under State law) for certain Federal Election Activity that are not broadcast communications or do not

is simply no authority under which the Commission can extend the restrictions on Federal election activity by party committees to other groups.

2. Defining Federal Election Activity as Expenditures Would Capture Activity Not Related to Federal Elections

The *NPRM* proposals to define any disbursements for Federal election activity as "expenditures" by entities other than party committees would transform virtually all entities supporting State and local candidates into Federal political committees. For the reasons set forth in great detail above, there is simply no basis or justification for the Commission to do this, and indeed, the decision by Congress not to amend Section 431(9) to include Federal election activity compels the conclusion that the Commission does not have the authority to do so by regulation.

3. The Proposal in the NPRM to Interject the Concept of "Partisan Political Purpose" Would be Vague and Unworkable

The *NPRM* proposal to narrow the concept of Federal election activity to only that activity with a "partisan political purpose" would not cure the problem with extending the Federal election activity concept to entities other than party committees. That term is vague and would not give sufficient guidance to the regulated community as to what conduct would be covered. As with the suggestions in the *NPRM* regarding the proposed major purpose test described below, whether an organization had a "partisan political purpose" would be virtually impossible to determine.

C. A Major Purpose Test for Political Committee Status is Unworkable

1. The Buckley Concept of "Major Purpose" was a Limitation on the Definition of "Political Committee" Not an Expansion

Under *Buckley*, even an organization that receives "contributions" and "expenditures" in excess of $1,000 does not become a political committee unless its major purpose is to influence federal elections. *Buckley* 424 U.S. at 79. To the extent that the *NPRM* would apply a major purpose test to an organization that does not make "contributions" and "expenditures," it is flatly inconsistent with the statute (which defines a political committee by reference to contributions and expenditures) and with judicial precedent which limited "contributions for the purpose of influencing an election" to donations that are to be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates,

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reference a clearly identified Federal candidate. 2 U.S.C. § 441i(e)(4)(B). National, state, district, or local party committees are also prohibited from soliciting or directing funds to a 501(c) organization "that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity." 2 U.S.C. § 441i(d)(1).

Federal candidates and officeholders are prohibited from soliciting or directing funds, "including funds for any Federal election activity," unless the funds are subject to the limitations and prohibitions of FECA. 2 U.S.C. § 441i(e)(1)(A). BCRA did create an exception for these individuals permitting them to make specific solicitations of up to $20,000 from individuals for an entity that intends to use the funds for certain Federal election activities, including voter registration, voter identification, and get out the vote. 2 U.S.C. § 441i(e)(4)(B).

and "expenditures for the purpose of influencing an election" to express advocacy communications and expenditures coordinated with a candidate. *Buckley* at 77-78, 80. If an organization does not receive contributions or make expenditures as defined above, it is not a Federal political committee regardless of its purpose.

Notwithstanding this clear history, some commenters argue that there is a "major purpose" test for determining whether an organization is a political committee, regardless of whether or not the organization makes contributions and expenditures within the meaning of FECA. They argue that the major purpose test for political committees is a basis for **extending** political committee status to entities that do not make "contributions" and "expenditures" as defined under FECA. This is based on a fundamental misreading or mischaracterization of both *Buckley* and its progeny and *McConnell.* In the nearly 30 years that have passed since *Buckley,* Congress did not amend FECA to change the statutory definition of political committee to add a "major purpose" test. In a lengthy discussion in the NPRM, the Commission acknowledges that its regulations do not include *Buckley's* major purpose test and invites a discussion of whether and how such a test could be implemented. *NPRM* at 11743-49.

2. "The" Major Purpose v. "A" Major Purpose

a. Adopting "a" major purpose test is flawed

The Commission seeks comment as to whether the appropriate test for the major purpose analysis should be "the" major purpose or "a" major purpose. The major purpose test to the definition of political committee proposed in the *NPRM* is based on "a" major purpose of the organization. As indicated above, any major purpose test is flawed, due to the lack of statutory support for the concept of "major purpose" as determinative of political committee status and the limiting use of the phrase in *Buckley* and *MCFL.* However, the test of "a" major purpose suffers from even greater constitutional flaws, as discussed below.

The *NPRM* itself recognizes that *Buckley* referred to "the" major purpose of an organization:

> In first articulating, the major purpose requirement in *Buckley*, the Supreme Court determined that the definition of political committee "need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79 ...These passages indicate that the nomination or election of candidates must be *the* major purpose . . .of the organization. *NPRM* at 11744 (emphasis in original).

The *Buckley* Court clearly used "the" as a definite article, referring to an item that is "one-of-a-kind" or used in a specific, limiting way.[4] In other words, there is a clear, definable, single,

[4] See *Merriam Webster's Collegiate Dictionary*, 1221 (10th Ed. 1995).

paramount purpose of the organization, and that is the nomination and election of a candidate. See also *MCFL* at 262.[5]

Nevertheless, the *NPRM* proposes use of the indefinite article "a" in a non-specific, non-limiting manner, meaning "a" major purpose may be one of many, and as such much more difficult to discern. By doing so, the *NPRM* introduces ambiguity and confusion into the definition. Depending on the test used (and the flaws in these are discussed below), any time that there is more than one purpose for an activity, the analysis is susceptible to subjective and arbitrary interpretations, differences of opinion, and gamesmanship. Whether or not the purpose is "major" simply becomes a matter of degrees. By using the article "a", the *NPRM* dilutes the term "major" to where it is meaningless, except when referring to any purpose that is more than incidental. In other words, if there can be more than one purpose, then anything other than incidental activity will become a major purpose, whereas if only one purpose can be the major purpose – as the Supreme Court said – there is less likelihood that the same breadth of activity will be swept into the definition of political committee.

Given the *Buckley* Court's use of "the" and given its context as a limitation, rather than an expansion, on the definition of political committee, there is simply no reasonable justification from that usage whereby the Commission can give it a more expansive interpretation. By substituting "a" for "the" and by using the aforementioned "a" to expand the definition of political committee, when the *Buckley* context limits it, turns the Buckley language completely on its head.

The *NPRM* suggests that the Commission need not agree with this conclusion because it need not be held strictly to the meaning of the words of court opinions, yet even in this assertion, the *NPRM* plainly contradicts itself. The Court's own admonition is to avoid reading the words of its opinion as if they were the U.S. Code, yet the *NPRM* acknowledges that nowhere in statute – either prior to or with the passage of BCRA – does "major purpose" appear as a test. Consequently, it is absurd to think – and most certainly contrary to law to adopt – "a major purpose" of the organization that may be used to expand the coverage of the definition of political committee. Surely, the Commission ought to wait for the Congress to legislate, rather than doing so itself.

b. Intent Cannot be Demonstrative of Purpose.

As indicated above, implementing a major purpose test is particularly suspect because it introduces an arbitrary and subjective element to the analysis as to what is or is not a political committee. The flaws in the specific proposed tests are discussed below. However, as a general matter, the determination of the "purpose" of the organization, whether it be "the" or "a" major one, involves some scrutiny of intent. However, "intent" cannot work as a basis for regulation, particularly in the absence of actual activity constituting "contributions" or "expenditures" under the Act.

[5] The court in the most recent decision rendered on this topic clearly recognized that major purpose meant one sole purpose, a conclusion to which the Commission agreed in its briefs of the case. *FEC v. Malenick*, Memorandum Order, at 7-8 (D.D.C. 2004).

Although the Commission is seeking comment on "intent", an organization itself is incapable of having intent; only individuals, such as officers or donors, can have intent. Using individual intent to assess the purpose of an organization is inherently flawed. An analogy to charitable giving is especially helpful here. While individual donations to organizations tax exempt under section 501(c)(3) of the IRS Code are tax deductible, tax deductibility may not be the sole motivating factor for those making the donations, i.e., it is not always their intent. The donor's intent is irrelevant to a determination of the (c)(3)'s purpose. It is the (c)(3)'s spending that is dispositive of whether it is a tax exempt entity.

3. The Proposed Major Purpose Tests Are Not Workable and Are Overbroad and Vague

The *NPRM* proposes four tests for determining the major purpose of an organization. All four are impractical and unworkable. All four suffer from overreaching and vagueness concerns.

The first test proposed in the *NPRM* is the "public pronouncement" test whereby an organization whose organizational documents, solicitations, advertising, or other written materials or public pronouncements, or other communications demonstrate that its major purpose is to nominate, elect, defeat, promote, attack, support, or oppose a clearly identified candidate(s) for federal office or the Federal candidates of a clearly identified political party.

The second test is the fifty percent threshold test whereby an organization that spends more than fifty percent of its disbursements on expenditures, contributions, electioneering communications, or certain Federal election activity during any of the four previous calendar years is considered to have a major purpose of nominating or electing Federal candidates.

The third test is the $50,000 threshold test whereby an organization that spends more than $50,000 on expenditures, contributions, electioneering communications, or certain Federal election activity during any of the four previous calendar years or in the current year is considered to have a major purpose of nominating or electing Federal candidates.

The final test is the "527 organization" test, for which there are two proposed alternatives, one that would consider all 527 organizations to have as their major purpose the nomination or election of Federal candidates, and another that would have a few delineated exceptions to that general rule.

As indicated by the discussion above, none of these tests are consistent with the *Buckley* opinion, which used the major purpose concept as a limitation on the definition of political committee. To the contrary, all four of these tests expand the scope and reach of the definition of political committee, and despite their attempt to incorporate limiting language, will have the effect of greatly expanding the reach of this definition. All four are overbroad, vague and unfair, and, as such, are constitutionally deficient. *Buckley*, on the other hand, was directed at ensuring that the reach of this definition was not overbroad.

For example, the public pronouncement test is so arbitrary and expansive as to be almost never-ending. Its very wording refers to "other communications" which could be anything

written or oral. There are no means to determine which communications shall be dispositive. There are no means to determine how many communications are sufficient to meet this standard.

Thus, fundraising critical of a federal candidate could be used to alter the nature of an entity, even where that entity makes no expenditures under the Act. That result is untenable. A solicitation critical of a Federal candidate is a commonly used practice to motivate existing donors to an organization and attract new ones, in an effort to garner widespread appeal. For example, an anti-war group that raises money to fight the Bush Administration's stance on Iraq, may find itself deemed a political committee, even if it makes no expenditures under the Act.

The vagueness of these tests makes them neither practical nor workable in the real world, and the unintended consequences of these tests will be to foster confusion, deception and gamesmanship. Under the percentage threshold, larger and, thus, more influential, organizations will be able to spend far more in real dollars before the threshold is reached, whereas smaller entities will be regulated far sooner. Yet, these smaller entities are less likely to be able to afford the significant resources that it will take to comply with the rules. Both large and small organizations will become reticent to engage in speech if it causes them to meet the threshold, a clear chilling result.[6]

This flaw is not overcome by the $50,000 threshold test. This is simply an arbitrary number proposed in the *NPRM*; there is nothing to suggest that an organization that spends $60,000 should become a political committee, while one that spends $40,000 should not.[7]

Finally, all of these tests are overbroad and overreaching and will entangle numerous organizations or result in a chilling of speech by those who hope to avoid becoming so entangled. For example, under the public pronouncement test, a candidate for governor who is running and raising money to "become governor so that I can stop Bush from sending any more unfunded mandates to our state" would be forced to register as a Federal political committee. Other organizations that want to engage in public discourse and free speech will feel constrained or will even refrain by virtue of the analysis that they will have to undergo, e.g., does the mention of the administration trigger the public pronouncement test, or does this disbursement count toward a monetary or percentage threshold.

Unlike many of the core provisions of the Act pertaining to sources of funds or disclosure, these proposals with their layers of complicated and confusing analysis that go to the very heart of whether an entity is regulated or not, will stifle many types of political discourse. Congress could have legislatively directed that all 527 organizations by definition become political committees, but did not do so, and the Commission does not have the authority and should not legislate this in the place of Congress.

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[6] This chilling effect is far more significant in connection with this *NPRM* than, for example, the effect of simply requiring disclosure of receipts and spending of particular groups or of particular activities. Triggering the threshold changes the very nature of the organization itself, and, as such, the chilling has a greater consequence.

[7] Compounding the problem and cresting further confusion is the "look-back" period. Groups could potentially time their spending to game the look-back period, or, even more suspect, refrain from spending at all. Implementation of this provision is far from clear.

D. Conversion Requirements

The *NPRM* sets forth a set of proposed rules permitting, in short, the conversion of funds that would have been permitted to be raised and spent under the statute into actual Federal funds. This provides a mechanism for entities to use a portion of their funds after having been deemed a political committee.

This proposal is another example of Commission overreaching to sweep within the coverage of its regulations activities that occurred prior to an organization becoming a political committee and doing so in such a complicated and convoluted manner that it will cause the regulated community to devote substantial time and resources in order to achieve compliance.

The underlying premise of the proposal – that an entity must convert to a political committee if the FEC changes the rules – is wrong. Presumably, this proposal is unnecessary to reach political committees already registered with the Commission that also operate a non-Federal account, as their activities will be governed by the existing provisions of 11 C.F.R. 102.5 and 106.6, among others. Accordingly, then, if it assumed that this proposal is applicable solely to non-Federal entities, it becomes clear that it is unnecessary and could trap these entities into violations of the law.

The entire premise of this proposal is that the Commission will deem a 527 group to be a political committee retroactively, that some or all of its activity prior to that determination consisted of expenditures, and, if not paid for with federally permissible funds, constituted a violation of the law. Then if insufficient federally permissible funds exist to reimburse for those activities, the organization would be precluded from spending until such funds are raised. The result of this retroactive application would serve no purpose other than to punish the newly declared political committees.[8]

This is also precisely the type of circumstance that cries out for a "bright-line" test, a concept with which the Commission has long grappled. If the true purpose here is to enable the Commission to deem certain groups to be political committees, then there should be a clear and concise line as to when that occurs and what happens when it occurs. Activity prior to that determination should not be swept into the regulated activity, but, rather, prospectively, all activity of the new political committee should be covered.

There is no need for the conversion proposal. However, should the Commission adopt one, entities should be permitted to demonstrate – using an acceptable method of accounting – that they have a beginning balance of Federal funds. The burdens of this proposal, such as saddling the new entities with debt and requiring them to contact prior contributors, should be eliminated.

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[8] The cessation of activity required is clearly constitutionally suspect. Preventing spending infringes not only on the free speech rights of the organization, but also on the free speech and association rights of the donors to the group. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000).

E. Allocation Concerns

The *NPRM* sets forth a series of proposed revisions to the Commission's allocation rules. The major flaw in this proposal is the requirement that an entity allocate activities that promote, support, attack, or oppose Federal candidates as Federally allocable expenditures. If applied to every activity in which an organization participates, it is nearly impossible to apply at all, let alone with any degree of accuracy.

The burdensome nature of this requirement is unmatched in current Commission regulations. Not only will new reporting forms be required – and presumably implemented in the middle of an election cycle – but all groups would also have to stop and examine their internal accounting or bookkeeping systems and significantly revise those to track and allocate spending in a completely new way.

Congress itself chose not to apply this standard to all activities, but limited it to Federal election activity, as specifically defined. This standard is now being broadened beyond congressional intent to reach additional activities and require allocation thereof to Federal accounts. In the absence of appropriate congressional intent, this overreach is contrary to law and unsupported.

How can an organization possibly look at all of the ranges of activities which it might engage and determine if it promotes, supports, attacks, or opposes a Federal candidate, regardless of whether it is intended to do so or not. Clearly, intent cannot be dispositive since that would allow organizations to subjectively make these determinations, but in the absence of intent, there are no objective factors by which to make this determination.

Even worse, legitimate issue advocacy and grass roots lobbying activities will be swept into this test. The overbreadth of this proposal will be subject to First Amendment criticisms because it limits the ability of individuals and organizations to criticize their government and public officials.

The addition of minimum federal percentages, rather than helping to cure or simplify this matter, merely makes it more complicated and burdensome. Minimum percentages in the political party context have a basis in the underlying purpose of the party itself – to promote its candidates ticket-wide. Non-connected entities do not possess a similarity of purpose or mission, and whether or not they engage in some activities in support of candidates, they also engage in much more far-ranging non-candidate activities.

On first blush, it may be assumed that an organization – if it wanted to avoid the more burdensome method – would simply use the minimums. However, no organization would adopt such a simplistic analysis. Instead, groups would have to determine which method resulted in a more favorable allocation for their unique circumstances – primarily to avoid wasting crucial federal resources. In essence, this would require groups to calculate under both alternatives. That will increase, rather than ease, their burdens.

VII. Even If the Commission Acts, Under No Circumstances Should the Rules Be Effective During the 2004 Election Cycle

Even if the Commission were to adopt new regulations, under no circumstances should those changes become effective for the 2004 election cycle. The sheer magnitude and complexity of the changes being considered will be confusing and difficult for the regulated community to understand at any time, let alone in the middle-to-end of an election cycle – the very peak of activity. These are fundamental core changes and hardly the type of technical changes or clarifications that that commonly get made during the course of a cycle. Even the more substantive changes that the Commission has made in the past have rarely been to the cornerstone concepts, such as the definitions of expenditure and political committee.

The obvious broadening effect of these changes and the sweeping manner in which unregulated organizations and entities could become regulated also argues against doing so in the middle of the election cycle. The proposed regulations will likely not become effective until July, at the earliest, within weeks of the nominating conventions. Uncertainty will be rampant, and compliance will be muddled, as groups determine their future.

The impact on the regulated community should not be minimized. Even if there were compelling justifications for these changes, they should be implemented in a way to minimize disruption. Numerous organizations within the regulated community have already had to comply with new BCRA regulations for this cycle. In many cases, this has required them not simply to become familiar with the new requirements, but to alter their operations and make substantive changes to their activities, to ensure their compliance. To make another major change of the type proposed now is punitive.

The Commission should follow the lead of Congress with respect to timing. Congress – recognizing the challenges of the changes contained in the new law – made BCRA effective after the next upcoming election to provide for a smoother transition. Congress gave the Commission a deadline for the implementing regulations that also ensured that such changes would be ready for the new cycle and would not interrupt an ongoing election. These proposals, too, should follow this model. Congress set the example, and the Commission should continue to act in a way that imposes the least interruption on ongoing activities.

The primary congressional sponsors clearly understood this difficulty. The sponsors and the Congress agreed to delay the effective date of BCRA. Rep. Shays defended the post-2002 election-day effective date in the legislation, "[s]o I was asked and other, does it make sense to have this bill take effect now, and the answer was it really does not." 148 Cong. Rec. H454 (February 13, 2002) (Statement of Rep. Shays). Senator McCain also concurred with the conclusion that the effective date should not be in the middle of an election cycle, "[w]e reluctantly determined that is would simply not be practical to apply new rules in the middle of the election cycle. To change the rules in the middle of the campaign would have created uncertainty and potential unfairness . . ." 148 Cong. Rec. S2141 (March 20, 2002) (Statement of Sen. McCain). Courts, too, are loathe to throw the political process into disarray, as evidenced most recently by the District Court's stay of its decision in McConnell while the case was on appeal.

In fact, at the Commission's March 4, 2004 hearing, Commissioner Weintraub pointed out that the Commission itself is on record in support of the District Court's stay "in order to minimize potential chaos . . . in the critical period leading up to the 2004 elections." In other contexts, as well, the Commission has recognized that disruption caused by changing the regulations in mid-cycle, especially if the changes are not mandated by law.[9]

In short, no sense of urgency has been compellingly demonstrated. To the contrary, having completed the initial BCRA rulemaking, it is imperative that the Commission evaluate its effectiveness. Given that this is the first election cycle under the BCRA regime, it is likely that further clarifications and changes to the regulations will be necessary. The record of at least one complete election cycle should be thoroughly examined, so that these corrections can be made. Nothing, then, is compelling action now.

The Commission has long strived to promulgate regulations in a manner that is understandable and equitable to those effected, and should be guided by those principles in considering these changes as well. Commissioner Toner set forth a similar guideline in his statement at the Commission's March 4, 2004 hearing, "First, any rules that the Commission issues must be clear and understandable." Orderly, rather than hasty or disruptive, transitions are critical to achieving this goal. The Commission should not adopt these proposed rules, but, if it does so, then the Commission should ensure that their implementation coincides with the start of a new election cycle.

Respectfully submitted,

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[9] See, e.g., Final Rule: Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,398 (Aug. 8, 2003) ("The Commission is mindful of the potentially disruptive effects of modifying existing regulations . . . in such close proximity to the 2004 conventions.")