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April 5, 2004

VIA FACSIMILE

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

Re: Comments and Request to Testify Concerning Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dinh:

The undersigned respectfully submit these comments on behalf of the American Federation of Government Employees regarding the Notice of Proposed Rulemaking on Political Committee Status (hereinafter "NPRM") issued by the Federal Election Commission on March 11, 2004. We are additionally requesting an opportunity to testify at the hearings scheduled for April 14-15, 2004.

The American Federation of Government Employees (hereinafter AFGE) is a labor union with a statutory obligation to represent approximately 600,000 employees in the federal sector in the labor-management context. Unlike the private sector union situation, the employer for federal public sector unions is the executive branch of government. The wage level of our members is set by the legislative process. So as to represent our members in the labor relations field we must deal with elected officials who as the employer set our terms and conditions of employment. AFGE is not a political committee; AFGE is a public sector labor union. Sadly, these hastily promulgated regulations do not appear to contemplate the existence of a federal public sector labor union and do not appear to carve out reasonable accommodations for a federal public sector labor union.

Government actions affecting the budget process, staffing ratios, administrative actions, potential layoffs, collective bargaining, facility closing, and personnel policy changes happen every day and do not cease 30, 60, or 120 days prior to an election. We

can and do communicate every day to our members and the public regarding actions taken by this President and this Congress as we have with every President and Congress. It is essential in fulfilling our statutory obligation as the exclusive representative of numerous bargaining units of federal employees. We can and do mobilize our members to support or oppose various actions of the executive and legislative branches in furtherance of our statutory obligations as a bargaining unit representative and as a federal employee labor union.

As you may know, 5 U.S.C. §7101 and Title 5 Chapter 71 generally describe the rights and duties of federal labor unions. As noted in 5 U.S.C. §7101:

> Title 5. Government Organization and Employees Part III. Employees Subpart F. Labor-management and Employee Relations Chapter 71. Labor-management Relations Subchapter I. General Provisions
> **§ 7101. Findings and purpose**
>
> **(a)** The Congress finds that--
> **(1)** experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--
> **(A)** safeguards the public interest,
> **(B)** contributes to the effective conduct of public business, and
> **(C)** facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
>
> **(2)** the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

This is also the current status of the law. As the courts have found, "protecting employee rights is a matter in the public interest...." American Federation of Government Employees, AFL-CIO, Council of Social Security District Office Locals, San Francisco Region v. Federal Labor Relations Authority, C.A.D.C.1983, 716 F.2d 47, 230 U.S.App. D.C. 243.

It is of concern that the regulations could be seen to inhibit the rights guaranteed by 5 U.S.C. §7102 to federal employees. Section 7102 provides:

§ 7102. Employees' rights

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—
>
> > **(1)** to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
> >
> > **(2)** to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

There is no manner or time frame indicated for how or when employees may present their views. That those views might be presented via an advertising campaign which might gain public support for the union position on wage or working condition issues is certainly contemplated.

Based upon the NPRM, it is not clear that AFGE may fulfill its statutory obligation to oppose or support actions of the executive or legislative branches (which may be in the labor-management relations area), if it is close to an election, without running, or being alleged to be running, afoul of these new regulations. The express advocacy rule is a bright line test, and where the union is acting in the political area it must operate via its PAC and use monies which members have agreed to have placed there voluntarily for that purpose. The NPRM could appear to require use of PAC funds even to communicate with our members or the general public regarding labor management issues, if our communication might tend, in some FEC member's eyes, to promote, support, attack, or defend a candidate's vote on our members' pay raise.

Also disturbing is the regulation of expenditures on voter registration. Having the right to participate in a democracy is a cherished and fundamental right. The FEC itself conducts voter registration via its website, as do many other governmental and non-governmental entities. Clearly, the activity should be done in a non-partisan fashion, and if it is, it should not be restricted.

As currently drafted, we can see a conflict with 5 U.S.C. Section 7103 in its attempting to redefine our typical union activity as somehow being that of political activity. 5 U.S.C. §7103 defines a labor organization:

> (4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment....

Taken together with the prior case law and plain language of 5 U.S.C. §7101, any regulation of a public sector labor organization in its actions to bring grievances and make its case to the general public, who also have been found to have a clear interest in these matters, regardless of date of an election, would seem to be a violation of Title 5. Since a purpose of a federal sector union is to promote, support, attack, or oppose an agency action of the executive branch, the mere fact that the name of the head of the administration might be used, or that it occurs near an election, should not change the manner or monetary means by which to communicate the union's position. The statute clearly states that this purpose is paid for out of dues and not out of voluntary political contributions.

The time frame for these new regulations is insufficient to provide an in-depth analysis. The current election is essentially past the primary stage now and it would be inappropriate to attempt to implement any new rules at this time. Attempts to do so now could certainly appear even more partisan than the activity that is seeking to be regulated. The concept of a look back period makes the problem worse as entities would be held to standards that not only did not exist but could not have even been contemplated.

We would request that the FEC move more judiciously with these important regulations. Hopefully, we have brought to your attention the unique nature of federal sectors unions and the statutory labor relations rights and responsibilities that may be hindered by the regulations as currently drafted. So as to reduce needless requests for advisories and potentially burdensome litigation, we would hope that you will work with

us to produce a clearer set of regulations that does not impede our statutory obligations to represent our members fairly and effectively in the labor-management context as well as in the more general political context.

Respectfully submitted,

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