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To: politicalcommitteestatus@fec.gov
cc:

Subject: comments- political committee status

Our comments in the political committee status rulemaking are attached in Word format.

Kay Guinane

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April 5, 2004

Mai R. Dinh, Acting Assistant General Counsel
Federal Election Commission
999 E St., NW
Washington, DC 20463

Re: Notice 2004-6, Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dinh,

OMB Watch is a nonprofit organization that promotes government accountability and citizen participation in public issues and decision-making. We appreciate the opportunity to comment on proposed rule on political committee status. OMB Watch works with and through the nonprofit sector because of its vital place in communities and our belief that the sector plays an important role in reinforcing democratic principles. To strengthen the voice of the nonprofit sector in public policy debates, we work to protect advocacy rights and educate nonprofits about laws and regulations that impact their work. In addition, we promote public accountability of the nonprofit sector through government oversight.

OMB Watch believes that the corrupting influence of money in politics is a serious problem that must be addressed. To do this effectively the Federal Election Commission's (FEC) priority should be implementation and enforcement of the Bipartisan Campaign Reform Act of 2002 (BCRA), so that parties, candidates and the political committees they control do not get or spend soft money. However, we urge you not to act on the current Notice of Proposed Rulemaking on Political Committee Status (the NPRM). It is ill timed and overbroad, and the need for the proposed action have not been established. Our reasons for this position are explained below.

We have signed on to comments submitted by the Coalition to Save Nonprofit Advocacy, but wish to supplement those comments. We also request the opportunity to testify at the public hearing on April 15 (due to a schedule conflict, we cannot appear on April 14).

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It is inappropriate for the Commission to change the campaign finance rules in the midst of this election cycle.

Fairness dictates that new rules should not be introduced during an election season, or applied retroactively. Reasonable notice on all rules is needed for any organization to plan its activities in a way that complies with the law. It would be a denial of due process to penalize organizations that have relied on existing rules by making significant changes in the middle of an election cycle. The proposed retroactive rules would add another layer of unfairness. Public confidence in the FEC and its administration of federal election law would be undermined by such a change, in part because it would appear to be driven by partisan considerations.

The Need for a New Rule is Questionable

- No Evidence That Independent Groups Present a Threat of Corruption

The proposed rules appear to be a solution in search of a problem. There is no evidence that independent groups present a threat of corrupting government, whatever their tax-exempt category. The Supreme Court has consistently made it clear that constitutional rights of free speech and association can only be limited by campaign finance laws when there is a compelling need to prevent corruption or the appearance of corruption in the federal government. That is why the Court upheld BCRA's bans on soft money fundraising by federal officials and political parties. But the proposed rule goes beyond BCRA to restrict far more than is necessary to prevent corruption.

We have been dismayed and disappointed as the debate around this proposed FEC rule has taken shape. The proposed rule, the media coverage and public discussion surrounding it have overlooked the most fundamental purpose and justification of campaign finance regulation - preventing corruption and the appearance of corruption in government.

We have not seen evidence that independent groups made up of individual citizen donors present the threat of corruption that corporate PACs or 527s with only a few large donors do. A solution, such as a proposed rule, must identify a problem it is meant to address, based on a factual record. That is the element missing from this rulemaking. The FEC must reject the assumption that a major purpose of influencing federal elections alone establishes a threat of corruption that would justify FEC regulation.

The proposed rule equates groups of citizens, who pool their resources to more effectively exercise their rights and make their voices heard, with sham or astroturf groups such as Citizens for Better Medicare that represent private corporate interests. The Supreme Court assumed BCRA would not apply to organizations "formed for the purpose of expressing political ideas and cannot engage in business activities."[1]

The Supreme Court has made it clear that only the threat of corruption justifies campaign finance regulation. The first eleven pages of the Court's opinion in *McConnell v. FEC* are devoted to a history of 100 years of federal campaign finance regulation. The Court stresses the principles

[1] *McConnell v. FEC*, No. 02-1674 (Dec. 10, 2003), at 104 (sl. op.).

that underlie the incremental steps Congress has taken to "prevent the great aggregations of wealth from using their corporate funds, directly or indirectly" to elect legislators who would "vote for their protection and the advancement of the interests as against those of the public." [2]

The primary danger of corruption has historically been the relationship between lawmakers, political parties and business interests. For example, the *McConnell* court cited the 1924 Congressional debates on legislation broadening the definition of a political "contribution," noting that a leading Senator characterized "the apparent hold on political parties which business interests and certain organizations seek and s sometimes obtain by reason of liberal campaign contributions" as "one of the great political evils of the time."[3]

Independent political committees can be important vehicles for increasing voter participation. A healthy democracy depends on a high degree of citizen participation, both in the election process and in public policy debates. On the other hand, private corporations continue to use their financial muscle to gain advantage with the electorate. For example, the Tampa Tribune recently reported that Coronet Industries pressured a local television station, WFLA-TV, into taking an ad sponsored by the Sierra Club off the air. The ad was an independent expenditure that criticized the Bush administration's record on the environment and cited Coronet Industries as an example of failed hazardous waste cleanup policies. This looks more like corruption of the electoral process than independent groups of small donors.

- Independent Political Committees are Regulated by the FEC, IRS or State Election Authorities.

Despite claims that political committees are unregulated, an existing system of disclosure provides transparency that keeps the election system honest through an informed public. These disclosure regulations apply to groups that are not directly connected to candidates or parties, and so do not pose the threat of corruption that led to passage of BCRA. For example, the Stealth PAC law of 2000 created reporting and disclosure requirements for all 527s. Two years later Congress found that political committees that work solely on local or state elections and report to state authorities were having difficulty with the additional reporting and exempted them. All other PACs must file periodic reports detailing their sources of support and their expenditures.

The information from IRS reports by 527 organizations is now available on the IRS website in a searchable database. Anyone can easily learn the identity of their donors and types and amounts of expenditures. The information is available at http://www.irs.gov.

In addition, independent groups that spend funds on express advocacy are only required to report their expenditures, and are not restricted to the contribution limits that apply to campaigns and parties. This looser level of regulation was imposed by the Supreme Court in *Massachusetts Citizens for Life v. FEC.*

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[2] *McConnell v. FEC*, slip op. at 3. (quoting *United States v. Automobile Workers*, 352 U.S. 567, 571 (1957) (quoting E. Rood, Addresses on Government and Citizenship 143 (R. Bacon & J. Scott eds. 1916))).
[3] *McConnell v. FEC*, slip op. at 4 (quoting 65 Cong. Rec. 9507-9508 (1924)).

- The FEC Has Not Asked the Right Questions

The NPRM has been criticized for posing too many questions and presenting too many options. While we agree this is a serious problem, we believe the NPRM has a more serious problem -- its failure to ask the right questions. Here are some examples of questions and issues that should be addressed before any action is taken:

1. Is there factual evidence that independent groups that do not coordinate their efforts with parties and campaigns threaten to corrupt the government?
2. Does a group pose a threat of corrupting government simply by having a major purpose of influencing federal elections? What factual evidence supports such a conclusion?
3. Did Congress intend for BCRA to stretch the law as far as the NPRM proposes?
4. What are the differences among the independent groups? For instance, are they controlled by private, corporate interests or people who have come together around a common public interest mission?
5. Should political committees with different characteristics be treated differently? For example, broad public involvement reduces the threat of corruption.
6. How can public support be measured? Do state clean election laws provide models? What other indicators distinguish a sham/astroturf organization from a real one? Possible factors include a percentage of donors under a set dollar amount, an overall percent of budget from small donors or membership.
7. How should a few large donors impact the status of a group that has broad membership or significant numbers of small donors?

It takes time, good information and careful thought to ask and find reasonable answers to these hard questions. An expedited FEC rulemaking in the middle of an election cycle is not the place to find them.

<u>The proposed rule is so long, confusing and full of alternatives that the public has no clear notice of what is actually being proposed. This makes meaningful comment impossible.</u>

The NPRM seeks to drastically reshape the landscape of activities regulated by the Commission. It is too complex and confusing to produce a clear, coherent, and constitutional rule that will improve the campaign finance system. A rule of such consequence should not be rushed. There has been no time to consider the issues thoroughly, and the NPRM presents so many alternatives and asks so many questions that it does not give the public fair or adequate notice of what is being proposed. We can only respond to the overall approaches.

In order to be valid a regulation must be a logical extension of the proposed rule. Otherwise, the public has not had an adequate opportunity to comment. This proposal, which the FEC has explicitly declined to endorse, leaves the public with very little idea of what is actually being proposed. This diminishes the fairness and effectiveness of the administrative rulemaking process.

<u>This Proposed Rule Would Chill Speech Protected by the Constitution.</u>

The proposed new definition of "expenditure" is so vague and subject to arbitrary application that it would inevitably chill genuine issue advocacy. The severe (criminal) consequences of violating federal campaign finance laws only add to this effect. This can only be avoided if the FEC withdraws this NPRM.

Concerns about the proposed use of the "promote, support, oppose or attack" standard is well grounded in experience. First, the House sponsors of BCRA, Reps. Shays and Meehan, have sued the FEC to overturn an exemption for 501(c)(3) organizations from the electioneering communications provisions of BCRA. They argue that a *per se* exemption is inappropriate. It is likely they would make the same argument in the context of this rule. They have already made this argument in their brief in the *Shays and Meehan v. FEC* case.

Shays and Meehan argue that 501(c)(3) organizations have abused issue advocacy to attack candidates. As an example they cite[4] an example that is entirely permissible as a grassroots lobbying communication for a 501(c)(3) organization. The example involves the Federation for American Immigration Reform (FAIR), a 501(c)(3) group that ran an ad in Michigan in 2000 urging the public to contact Sen. Spence Abraham and urge him to change his position and vote on a pending immigration bill.

Although the ad was critical of Sen. Abraham's past policies and votes on immigration legislation, it did not refer to the election or comment on his character or fitness for office. There was no mention of his opponent. The ad was timed to coincide with a vote in Congress, an event outside the control of FAIR. The ad also addressed an issue central to FAIR's mission. FAIR had a track record of ongoing advocacy on the issue.

The fact that Reps. Shays and Meehan see this purely grassroots lobbying communication as an attack on a candidate illustrates the potential problems with the vagueness of the "promote, support, oppose or attack" standard. As soon as an issue group loudly criticizes the President or a member of Congress there will be cries of foul play and calls on the Commission to act.

Independent political committees can be important vehicles for increasing voter participation. A healthy democracy depends on a high degree of citizen participation, both in the election process and in public policy debates. But over-regulation of federal election activity could have the unintended result of weakening the democratic system by eroding rights of speech and association. The approaches being proposed by the FEC and others could backfire on reform advocates and generate calls for deregulation of the system.

Many nonprofits involved in public policy debates are nonpartisan in elections. However, we have never been required to be nonpartisan about our mission. Should we be stopped from criticizing the President or a member of Congress about a vote or some other official action just because that person happens to be running for re-election? This principle was recognized by the Supreme Court in the *McConnell* opinion, when they stated, "[W]e assume that the interest that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."[5]

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[4] See page 78 of Shays and Meehan's brief in support of their motion for summary judgment.
[5] McConnell v. FEC, slip op. at 100 n.88.

Genuine issue advocacy must be left free of FEC regulation.

The Commission has no legitimate interest in attempting to regulate genuine issue advocacy, which addresses issues and public officials in their role as policymakers, not as candidates for federal office.

The plain language in the proposed rule could easily be used to make praise or criticism of public officials illegal. Nothing in the rule or commentary indicates that the Commission intends to exclude activities of groups exempt under 501(c) in the new definitions of political committee and expenditure. We agree with Senators McCain and Feingold that it would be "absurd" to reach this result. The assumption that the major purpose at stake – corrupt influence of federal elections – somehow requires federal regulations of public communications about issues, including criticism of officeholders who happen to be running for re-election, creates a slippery slope that would allow these standards to be applied to 501(c) groups eventually, even if the Commission excludes them now.

The *McConnell* opinion notes that in *Buckley v. Valeo*[6] the Supreme Court "rejected the argument that the expenditure limits were necessary to prevent attempts to circumvent the Act's contribution limits, because FECA already treated expenditures controlled by or coordinated with the candidate as contributions," adding that it was "not persuaded that independent expenditures posed the same risk of real or apparent corruption as coordinated expenditure." The Court "therefore held the Congress' interest in preventing real or apparent corruption as inadequate to justify the heavy burdens on the freedoms of expression and association that the expenditure limits imposed."[7]

Tax Law Should Not be Imported Into Election Law

We encourage the Commission to draw on tax law principles in developing its regulations where helpful, but caution against using tax-exempt categories as the primary basis for defining a regulated federal political committee. Tax and election law serve different purposes. The tax code imposes restrictions on the lobbying and election-related activities of 501(c)(3) organizations that request to be treated as tax-exempt in order to receive deductible contributions. Tax exemption is voluntary, and the more tax benefits an organization receives, the more restrictions are imposed on its advocacy activities. However, regulation by the Commission is not voluntary, and violation carries criminal penalties. Election law is intended to prevent undue corporate influence in government, not stifle citizen participation.

Those who claim the rule could not impact genuine issue advocacy have not taken tax law into account. Some 527 groups work on ballot initiatives and grassroots lobbying campaigns, and are exempt under section 527 for reasons that are completely unrelated to elections. We support the arguments of the Coalition to Save Nonprofit Advocacy, and refer the Commission to their comments, which clearly explain the problems that would be created by this "ill-conceived attempt to fit a square peg (nonprofit organizations) into a round hole (the ruler applicable to

[6] 424 U.S. 1 (1976)
[7] *McConnell v. FEC,* slip op. at 10

political party committees) that not only vastly exceeds the FEC's authority but it also would usurp Congress' proper role in this area."

The Need for Expanding Regulation Should be Considered by Congress

This NPRM raises legal issues about whether the Commission has the authority to regulate constitutionally protected speech. Congress has addressed the issue of 527 organizations in the Stealth PAC law and in BCRA. There is no evidence that Congress intended the FEC to expand its authority in the manner proposed in the proposed rule. Changes as sweeping as those in the proposed rule should be considered by Congress, which can conduct hearings, develop a factual record and engage the public in debate on the issues. Where ambiguity in the law exists, regulation or restriction of speech not expressly provided for by the Bipartisan Campaign Reform Act of 2002 or the Federal Election Campaign Act must be imposed by Congress, and not through administrative rulemaking.

The *McConnell* court noted that, as new forms of undue influence developed, Congress responded by amending and broadening campaign finance law. Beginning with the Tillman Act in 1907, and continuing to BCRA in 2002, it has been Congress, and not the Commission, that has extended and refined the law. If the rising influence of independent political committees is found to threaten the integrity of the electoral system, Congress is the body that must act.

Conclusion

Over-regulation of federal election activity could have the unintended result of weakening the democratic system by eroding rights of speech and association. We are concerned that the approaches proposed by the FEC and others could backfire on reform advocates and generate calls for deregulation of the system.

How should the Commission proceed? Not in an expedited proceeding in the middle of an election cycle. The issues are too large, too complex and there are too many unanswered questions and unknown variables to make a sound rule at this time. We urge you to withdraw the rule, concentrate on enforcement of BCRA as written and work with Congress and the public to address the issues raised by the proposed rule after the current election cycle.

Yours truly,

Kay Guinane

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