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To: pcstestify@fec.gov
cc: mmccormick@nea.org, kurnick@shermandunn.com

Subject: Comments on NPRM

Attached are comments by the AFL-CIO, the Building and Construction Trades Department, AFL-CIO, and the National Education Association. A hard copy will follow.

Thank you for your attention to this matter.

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April 5, 2004

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

Re: Notice of Proposed Rulemaking, "Political Committee Status,"
69 Fed. Reg. 11736 (March 11, 2004)

Dear Ms. Dinh:

The undersigned national labor organizations submit these comments on the Commission's notice of proposed rulemaking entitled "Political Committee Status." These comments are submitted by (1) the American Federation of Labor and Congress of Industrial Organizations, on its own behalf and that of its 64 national and international union affiliates representing 13 million working men and women in innumerable occupations throughout the United States, (2) the Building and Construction Trades Department, AFL-CIO, whose affiliates represent several million of those workers, and (3) the unaffiliated National Education Association, which represents an additional 2.7 million people principally working in the public education field. All of these organizations are tax-exempt under § 501(c)(5) of the Internal Revenue Code; most sponsor one or more federal political committees registered with and reporting to the Commission pursuant to §§433 and 434 of the Federal Election Campaign Act; and most sponsor one or more non-federal separate segregated funds registered with and reporting to the Internal Revenue Service pursuant to § 527 of the Internal Revenue Code.

These labor organizations undertake political and policy communications and activities in a manner similar to most national and international labor organizations. But the scope of those activities sets them apart from the tens of thousands of local labor organizations that operate throughout the United States, most without full-time staff or the wherewithal and resources to establish non-federal separate segregated funds to spend for electoral purposes. And as a practical matter, virtually none of them does or could establish a federal PAC, because the FECA affiliation standards aggregate them for purposes of imposing limits on the contributions they receive and make; and, of course, federal PACs must comply with the Commission's registration and recordkeeping regulations, tasks beyond the ability of many small organizations to undertake.

I. The Commission Lacks Authority to Redefine "Expenditure" as It Proposes

We strongly oppose a central feature of the draft: the proposal that the term "expenditure" defined at § 431(9) of the Act include public communications that "promote, support, attack or oppose" a clearly identified candidate for public office, or include other aspects of "federal election activity" defined at § 431(20) of the Act, and requiring that these activities be financed exclusively with federal funds. Because labor organizations are prohibited from financing "expenditures" under § 441b(b) of the Act, the effect of the proposed redefinition of "expenditure," coupled with the NPRM's proposed alternative new definitions of "political committee," either would convert unions into political committees themselves, or force them to use their federal separate segregated funds for those purposes, rather than their regular treasury accounts or their non-federal separate segregated funds. We submit that -- leaving aside the grave constitutional implications of such a rule -- only Congress, and not the Commission, could have the authority to adopt these proposals.

At the outset, we note that each of the undersigned labor organizations, and virtually every other labor organization, regularly engages in costly and extensive efforts to influence the public debate, legislation and government policy by communicating with the public at large, officeholders and public officials. These communications, including through mass communications by broadcast and print, leaflets, rallies, letters, the Internet and other means, routinely refer to and characterize the actions of federal officeholders, virtually all of whom are "candidates" at all times under FECA § 431(2), often including the President, Vice President and Senators who will not even be on the ballot during the election cycle when the communications are disseminated, as well as non-incumbent candidates who are promoting or opposing public policies of concern to the labor movement. The NPRM's suggestion to the contrary constitutes a fundamental misreading of both the Act and the Supreme Court's recent decision in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003).

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *See also* 11 C.F.R. Part 100, Subpart D. For many years, the Supreme Court has construed this term to encompass only those communications that "'in express terms advocate the election or defeat of a clearly identified federal candidate,'" *McConnell*, 124 S. Ct. at 647, quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), the Court specifically so construed the phrase "expenditures...in connection with a federal election" in § 441b, which defined which communications unions and corporations were proscribed from undertaking. The Court reaffirmed that construction in *McConnell*, 124 S. Ct. at 688 n. 76.

The enactment of the Bipartisan Campaign Reform Act amendments to FECA did nothing to change the statutory definition of "expenditure." To the contrary, the legislative history of BCRA reveals that Congress considered and then rejected expanding the definition of "expenditure" as a legislative approach to union and corporate non-express advocacy communications that some perceived as influencing federal elections. Instead, Congress left §

431(9) and the operative language of § 441b intact, and instead added "electioneering communications" to the proscriptions of union and corporate spending in § 441b(b)(2), carving out a specific and limited new area of proscribed public communications in § 434(f)(3). See Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

The NPRM purports to find authority for its proposed expansion of the definition of "expenditure" in the *McConnell* decision. However, *McConnell* neither addressed nor suggested any modification of the FECA definition of "expenditure" or any new restriction on communications by unions, corporations, unincorporated associations, non-federal § 527 political organizations, or non-party, non-candidate political committees, other than the only new restriction before it, namely, the ban on "electioneering communications" by unions and corporations. Indeed, in upholding that provision, the Court rejected plaintiffs' under-inclusiveness argument even though the proscription did not apply to "print media or the Internet," pointing out that the definition also leaves all "advertising 61 days in advance of an election entirely unregulated." *Id.* at 697. More generally, the Court repeated its observation in *Buckley* that "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.*, quoting *Buckley*, 424 U.S. at 105.

The *McConnell* majority did conclude that its previously adopted "express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 688 (footnote omitted). But the Court made absolutely clear that its approval of the new ban on electioneering communications did not change that longstanding limiting construction of the unamended statute otherwise:

> Since our decision in Buckley, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law. . . . Section 203 of BCRA amends [§ 441b(b)(2)] to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA §[441b(b)(b)(2)].

Id. at 694 (emphasis added). Accordingly, the Commission lacks authority by regulation to define "expenditure" more broadly than has Congress or otherwise to expand the scope of public communications that cannot be financed by a union, corporation or a non-federal Section 527 separate segregated fund or non-connected political organization.

The absurd and extreme consequences of the proposed adoption of the "promote, support, attack and oppose" formulation in this context may be easily understood. Only a federal political committee would be permitted to pay for a public communication that expressed an opinion about the conduct of a federal officeholder or other candidate, regardless of the timing, means or audience. Examples of implicated speech include, to take a few recent instances, a discussion of Members of Congress' conduct in leading the legislative effort to enact a Medicare prescription drug benefit, and a federal employee union criticizing Bush Administration personnel initiatives. It would be difficult to construct a more sweeping assault on the exercise of First Amendment rights, and most certainly it is neither commanded nor authorized by FECA, as amended.

Nor could the Commission adopt such a definition by purporting to confine it to § 527 political organizations. For, the scope of the term "expenditure" in the Act has always applied universally and in the same manner to any entity that is not a federal political committee. And, as *McConnell* reconfirmed, it has been a bedrock principle of federal election and tax law that the only public communications subject to mandatory financing through a political committee is express advocacy, a principle adjusted by BCRA, as just discussed, only by extending that funding requirement to "electioneering communications."

Not only is the proposed definition inconsistent with the statutory and regulatory definitions of "expenditure," it is also inconsistent with and takes no heed of the Commission's own longstanding regulations governing the use of union and corporate treasury funds for communications to the general public at 11 CFR § 114.4, regulations that the Commission retained virtually intact in the aftermath of BCRA. Section 114.4 plainly permits unions and corporations to make communications to the general public that may be election-related, provided that those communications do not expressly advocate the election or defeat of a federal candidate and are not coordinated with any candidate or political party committee in, for example, making registration and get-out-the vote communications and distributing voting records and voter guides. See 11 C.F.R. § 114.4(c).

Moreover, the proposed definition also would conflict with the Internal Revenue Code principles governing public communications by § 501(c) organizations such as unions and could jeopardize the tax status of unions' and other organizations' separate segregated funds. In Revenue Ruling 2004-6, the IRS set forth standards guiding analysis of when a public advocacy communication that names a public official, including federal officeholders who may be candidates, will constitute a taxable "exempt function" expenditure within the meaning of § 527.[1] Section 527(e)(2) defines an "exempt function" as "influencing or attempting to influence the ...nomination or election...of any individual to any Federal, State, or local political office...." A nonprofit organization that makes an "exempt function" expenditure from its general funds is subject to tax on the lesser of its investment income or the amount of its exempt function expenditures at the highest corporate rate. See 26 U.S.C. § 527(f)(1). However, if a

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[1] In Revenue Ruling 2004-6, the IRS described six factors that tend to show that a public communication will be treated as an "exempt function" expenditure absent express advocacy of the election or defeat of a candidate. Payments for a communication will be treated as "exempt function" expenditures if it: a) identifies a candidate for public office; b) the timing coincides with an electoral campaign; c) the communication targets voters in a particular election; d) the communication identifies the candidate's position on the public policy issue that is the subject of the communication; (e) the position of the candidate has been raised as distinguishing that candidate from others in the campaign either in that communication or in other public communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Conversely, the IRS described five factors that tend to show that a communication on a public policy issue is not for an "exempt function": a) any one or more factors outlined in a-f above is absent; b) the communication identifies specific legislation or a specific event outside the control of the organization that it seeks to influence; c) the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action; d) the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event; and e) the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

nonprofit organization establishes a separate segregated fund to make its exempt function expenditures, only that fund will be subject to tax.

Unlike the crude and sweeping "promote, support, attack or oppose" standard proposed in the NPRM, the IRS standard -- whatever its merits as an application of the Internal Revenue Code, a matter that is unnecessary to address in the context of this NPRM -- for "exempt function" expenditures recognizes that there is a category of public communications that may both name and express opinions concerning candidates that are legislative or policy-oriented, and not electoral. So, these communications may not be taxed as "exempt function" disbursements if undertaken by a § 501(c) organization with its regular treasury account, and they would not be disbursements appropriate for a § 527 organization to make. Section 438(f) of FECA requires the Commission to "consult and work together [with the IRS] to promulgate rules [and] regulations that are mutually consistent;" certainly no regulation should be adopted that creates such conflicts and disharmonies between the two regulatory regimes, especially in the wake of congressional amendments to FECA that included specific references to non-federal § 527 political organizations but did *not* subject them to any new constraints as the OGC draft proposes. See 2 U.S.C. §§ 441b(b)(2) and 441i(d)(2). Moreover, in adding the "electioneering communications" provisions to FECA, Congress specifically provided, at § 434(f)(7), that in doing so it could not be "construed to establish, modify or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986."

II. The Commission Lacks Authority to Promulgate Proposed Rules that Would Apply Retroactively

In his concurring opinion in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), Justice Scalia observed that "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Id.* at 855. The Commission itself has previously acknowledged the wisdom and applicability of this principle. In explaining the promulgation of 11 C.F.R. § 300.2(c)(3) – which provides that after November 6, 2002, no entity shall be deemed to be established, maintained, or controlled by another entity [such as national political party committee] except as a result of actions and activities occurring after BCRA's effective date – the Commission stated that the rule was intended "to prevent a retroactive application of BCRA or, specifically, to prevent the actions and activities of entities before November 6, 2002, that [were] legal under current [pre-BCRA] law from creating potential liability based on the new requirements of BCRA." 67 Fed. Reg. 49084 (July 29, 2002). Or, as the Commission stated more simply, "BCRA should not be interpreted in a manner that penalizes people for the way that they ordered their affairs before the effective date of BCRA." *Id.*

Two parts of the NPRM – the expanded definition of "political committee" and the conversion rules relating to federal funds and federally permissible funds – would in effect punish people and organizations for the way in which they had ordered their affairs before the adoption of the rules. Under those parts of the proposed rules, the legal effect of conduct would

be determined, not by the law in effect at the time that the conduct occurred, but instead by rules adopted years later. The consequences of conduct occurring in years prior to the adoption of the proposed rules would thus be altered retroactively, and with potentially extreme adverse consequences.

Under proposed revised § 100.5(a), the status of an organization, including a labor organization, as a political committee could depend on the quantity or percentage of disbursements made for contributions, expenditures, federal election activities or electioneering communications "during the current calendar year *or during any of the previous four calendar years*." Proposed § 100.5(a)(2)(i), (ii), (iii) (emphasis added). If these provisions were adopted in 2004, an organization's status as a political committee in 2004 could be based on disbursements made solely in 2000, even though in the year 2000, those disbursements would not have classified that organization as a political committee.

A labor organization, for example, that makes over $1,000 in expenditures (as newly and expansively defined in § 100.5(a)(1)(iii)) could be deemed a political committee because four years earlier it had made substantial disbursements for "federal election activity," a concept that did not even exist four years ago. Accordingly, an organization could be deemed a political committee in 2004, despite the fact that its conduct in 2004 would not classify it as a political committee under rules applicable in 2004 and the fact that its conduct in earlier years would not have classified it as a political committee under rules applicable then. Thus the legal consequences of conduct that occurred as long ago as 2000 would be determined, not by rules applicable in 2000, but by the retroactive application of rules adopted in 2004.

The Commission's proposed conversion rules relating to federal funds and federally permissible funds would have a similar retroactive effect. Under those proposed rules, an organization deemed a political committee would be required to ascertain, and treat as a debt owed to its non-federal account, the amount of any contributions, expenditures, independent expenditures and allocable expenditures made, not just in the year in which the organization is deemed a political committee, but also during the previous calendar year. § 102.52(c). The organization would then be prohibited from making any additional contributions or expenditures until it had paid that fictional debt by collecting federal funds and depositing them into a non-federal account. § 102.52(a), (c). These rules would, in effect, require an organization deemed a political committee to use federal funds to pay for expenses incurred in an earlier year, when applicable law did not require the use of federal funds for such disbursements – thus applying the requirement of using federal funds for such disbursements retroactively.

The Commission, however, lacks the authority to apply such rules retroactively. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court held that an agency's authority to promulgate regulations is limited to the authority delegated by Congress and that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms." *Id.* at 208. And, although the Supreme Court did not address the issue, the District of Columbia Circuit in *Bowen*, held that the Administrative Procedure Act precludes an agency from adopting rules that apply retroactively. 821 F.2d 750, 757 ("the APA requires that legislative rules be given future effect only").

Nor does the Act itself give the Commission authority to issue rules that apply retroactively. See 2 U.S.C. §§ 437d(a)(8), 438(a)(8). The Commission thus has no authority to promulgate rules under which the determination whether an organization is a political committee depends on its conduct years earlier, or rules that require the use of federal funds to pay for disbursements made prior to the promulgation of the rules.

Even if the Commission did have such authority, exercising it as proposed in the NPRM would be a gross abuse of discretion. Such rules would be manifestly unfair and punitive to membership organizations that in good faith, and in reliance on established legal principles, have pursued their rights and prerogatives to be engaged in civic life, and to foster citizen participation in the political and legislative processes, only to learn now that doing so utterly transformed their legal identity, carries onerous new requirements and restrictions, and wreaks havoc on their financial operations and stability. There is no policy justification for adopting regulations with such consequences.

III. The NPRM Violates the Regulatory Flexibility Act And Must Therefore Be Withdrawn

In issuing proposed rules, the Commission is required to comply with the requirements of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612 (2000). Under the RFA a federal agency that issues proposed regulations must prepare a "regulatory flexibility analysis" describing the impact of the proposed rule on small entities. *See* 5 U.S.C. § 603(a). That analysis must be available for public comment. *Id.* The initial regulatory flexibility analysis must include: a description of the reasons why the agency action is being considered; a statement of the objectives of and legal basis for that action; an estimate, where feasible, of the number of small entities[2] to which the proposed rule will apply; a description of the compliance requirements of the proposed rule (e.g. recordkeeping and reporting); and identification of all other federal rules which may duplicate or conflict with the proposed rule. *See* 5 U.S.C. § 603(b)(1)-(5). The agency must also describe alternatives to the proposed rule that would minimize its economic impact on small entities. *See* 5 U.S.C. § 603(c).

In lieu of preparing a regulatory flexibility analysis, both at the proposed rulemaking and the final rulemaking stage, the RFA allows the head of an agency to certify that the rule will not have a significant impact on a substantial number of small entities. *See* 5 U.S.C. § 605(b). However, in the event of such a certification, the agency must "provid[e] the factual basis for such certification. See *Id.*

Rather than conduct a regulatory flexibility analysis, the NPRM instead certifies that the proposed political committee rulemaking "is not expected to have a significant economic impact on a substantial number of small entities. See 69 Fed. Reg. at 11756. However, the NPRM fails

[2] The RFA defines "small entity" as a small business, small governmental jurisdiction, or a small organization. See 5 U.S.C. §601(6). A "small organization" is defined as a "not for profit enterprise which is independently owned and operated and is not dominant in the field." *See* 5 U.S.C. § 601(4). Labor unions with annual receipts of less than $6 million are "small organizations" under the RFA, as are other nonprofits such as § 501(c)(3) and (c)(4) organizations. *See* 13 CFR § 121.201.

to state any factual basis for this conclusion. Indeed it would be difficult for the Commission to provide *any* facts to support its RFA certification since the Commission has conducted no empirical investigation into the possible impact of the proposed regulations on small organizations, including unions and other nonprofits. In fact, by its own admission, the Commission cannot even estimate "the number of organizations that may be affected by the proposed change in the definition of political committee." *Id.*

Even a small amount of effort would have led the Commission to determine that a substantial number of small organizations may be significantly affected economically by the proposed political committee rules. For example, under Alternative 2-B, every "committee, club, association, or group of persons ...organized under Section 527 of the Internal Revenue Code" would be treated as a federal political committee. *Id.* at 11757. According to the IRS website, there are *29,306* § 527 organizations that have filed IRS Form 8871. That number, of course, does not include § 527 organizations that have annual receipts of less than $25,000 per year or that are state and local committees that are exempt from the registration requirement. The NPRM certification acknowledges that political organizations are "small entities" under the RFA if they have less than $6,000,000 in annual receipts. *Id.* at 11755. In contrast, as of January 1, 2004, there were only 3,868 political committees registered with the FEC. FEC Press Release ("FEC Release"), "FEC Issues Semi-Annual Federal PAC Count" (Feb. 2, 2004).

The NPRM certification fails to take into account the impact of the proposed regulations on potentially hundreds of thousands of nonprofit organizations that could also become federal political committees by virtue of the proposed regulations. For example, the proposed definition of "political committee" potentially affects all labor organizations, since labor organizations routinely make disbursements for legislative advocacy, nonpartisan voter registration and get-out-the-vote efforts aimed at members, and solicit contributions to their political action committees. Thus the potential universe of regulated entities that may be affected by the proposed regulation at this time is all unions; and, according to the U. S. Department of Labor, there are nearly 25,000 labor organizations in the private sector alone. See Dept. of Labor, "Labor Organization Annual Financial Reports," 68 Fed. Reg. 58374, 58426, 58433 (Oct. 9, 2003).

The NPRM likewise ignores the fact that hundreds of thousands of § 501(c)(3) and 501(c)(4) organizations may become federal political committees because of the proposed rules. *As of 2003, there were 964,000 § 501(c)(3) and 138,000 § 501(c)(4) organizations registered with the IRS.* "Internal Revenue Service Data Book," in The New Nonprofit Almanac and Desk Reference 30 (Independent Sector to Urban Institute, Jossey-Bass 2003). The Commission has made no attempt to ascertain how many of these organizations could be affected by the proposed political committee rules. In the absence of such a factual record, and with the knowledge that many 501 (c)(3)'s and (c)(4)'s engage in issue advocacy and/or nonpartisan voter registration activities, it is difficult to understand how the Commission can certify in good faith that "most of the organizations that would be affected by the proposed rules are 'political organizations' organized under section 527." See 69 Fed. Reg. at 11755.

In addition to arguing that the proposed regulations will not affect a substantial number of small entities, the NPRM also concludes that the proposed rules will not have a "significant

economic impact" on those organizations that are affected by the political committee rules. *Id.* No empirical data is provided by the Commission to support this conclusion. The NPRM does acknowledge that organizations that become federal "political committees" under the new rules will "have certain reporting obligations that do not apply to non-political committees' and will be subject to "restrictions and limitations on receipt of funds that do not apply to non-political committees". *Id.* However, the NPRM concludes that "the reporting requirements ...are not complicated and would not be costly to complete ...[since] for the most part the reports would be filed electronically using the free software provided by the Commission "and it is highly unlikely that additional staff would be required" or that the organization would have to retain "professional services" to comply with the reporting requirements. *Id.*

This assessment of the costs of FEC reporting is entirely unsupported by fact and to the best of our belief is manifestly untrue. For example, national and international unions routinely pay thousands of dollars to consultants and software providers in order to store the data needed and to prepare their FEC reports. And, most labor unions and other nonprofit organizations do not have the accounting and data collection systems in place to allow them to collect and maintain the detailed receipts and expenditure records required by the FECA. They would have to transform their current accounting systems in order to do this. Such a transformation could be very costly. For example, in recent comments to the Department of Labor, the AFL-CIO submitted a study prepared by an independent expert that indicated that it would cost AFL-CIO affiliates approximately $712 million to revise their accounting procedures in order to comply with the detailed receipts and expenditure reporting required by the regulations issued by that Department regarding annual financial reporting by unions.[3] There is no reason to expect that it would cost unions less to transform their present accounting systems into FEC-appropriate systems. Indeed, the experiences of the undersigned reflect the opposite. Clearly, the Commission needs to engage in further fact-finding on this matter.

The NPRM also states that organizations that become political committees under the new rules will not suffer substantial economic consequences as a result of the Act's restrictions on their funding because they would only be limited as to "the types of funds that could be used to pay for certain activities." *Id.* at 11756. Not only does the Commission lack any factual basis for this conclusion; it is also unsupported by the law. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-56 (1986). The economic impact on a labor union becoming a political committee is more than substantial -- it is total. A union that becomes a federal political committee will either lose its entire source of funding, since it will no longer be able to be funded with members' dues, or it will have to surrender its First Amendment rights to speak out on public issues in which federal officeholders and candidates are involved. Under the former scenario, the union would have to rely on contributions conforming to FECA's requirements in order to support all of its activities. Moreover, other nonprofit organizations will suffer the same consequences if they are forced to rely on voluntary contributions instead of dues as a source of funding. These consequences, patently absurd as they may be, must be confronted by the Commission under the RFA.

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[3] Report of Dr. Ruth Ruttenberg 27-28, 31, attached as Appendix A to AFL-CIO comments to U. S. Department of Labor Proposed changes to Union Financial Reporting Requirements (March 27, 2003).

Moreover, organizations that operate as federal political committees need to know all of the FECA political committee rules, not just the reporting requirements. It is simply not credible that a local union with a handful of staff could operate as a federal political committee without professional legal and accounting help, let alone to conform with the complicated and incomprehensible "lookback" rules contained in the NPRM. The nation's 25,000 labor organizations sponsor only 310 federal political committees. See FEC Release. If untold thousands of them must become or sponsor political committees, this will entail very substantial costs.

In sum, the Commission is attempting to engage in rulemaking in an empirical vacuum, completely ignoring the substantial economic impact that these regulations could have on thousands, perhaps hundreds of thousands, of unions and other nonprofit organizations that could be transformed into federal political committees. Unless the Commission withdraws the proposed regulations and engages in the appropriate fact-finding, any ensuing regulations cannot comply with the requirements of the RFA.

IV. If the Commission Adopts Any Regulations, Their Effective Date Should Be Set After the 2004 General Election

If the Commission does issue new regulations on any of the subjects of the NPRM, it is critical that it render their effective date *after* the 2004 general election, in order to preserve the legitimate plans and expectations of thousands of organizations and millions of individuals that have been predicated on the BCRA legal regime that they have already made tremendous efforts to accommodate.[4] It is difficult to overstate the unfairness, confusion and expense that would ensue from having to adapt the new and complex a new and unanticipated set of regulations affecting basic political activities and speech, at the peak of the election season, scant weeks within the two major party conventions, and just weeks or a few months before the general election – especially if those regulations abruptly convert organizations into federal political committees or compel them to establish such committees or switch spending from treasury to hard money accounts.

When Congress enacted BCRA itself on March 27, 2002, it took special measures to avoid disrupting the 2002 *and* 2004 election cycles. First, it made BCRA effective seven months later, on November 6, 2002, the day after the general election, with further transitional rules until January 1, 2003. See BCRA § 402. Second, Congress directed the Commission to undertake expedited rulemakings so new regulations would be ready before the 2004 election cycle (in the case of BCRA Title I regulations) or a few weeks into that cycle (in the case of all other BCRA regulations). See BCRA § 402(c). As Senator McCain explained at the time:

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[4] The Commission has the discretion to set such an effective date. Section 438(d)(2) of the Act provides: "if either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form." 2 U.S.C. § 438(d)(2). This provision is explicitly permissive, and nothing else in the Act requires that a proposed rule must go into effect immediately when Congress' period for review ends. As a general matter, agencies may set a delayed effective date for a rule, so long as it provides not less than 30 days' notice. 5 U.S.C. § 553(d). *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539-40 (D.C. Cir. 1983); *Recording Industry Ass'n v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir 1981).

> We reluctantly determined that it 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, particularly since primaries are imminent in some states.

148 Cong. Rec. 52141 (March 20, 2002). *See also* 148 Cong. Rec. H454 (February 13, 2002) ("[We] are 16 months into a 24-month election cycle, and by the time this bill becomes law, if it does become law, it is 2 or 3 or 4 months from now, and then we only have 4 months [in the election cycle]") (statement of Rep. Shays); 148 Cong. Rec. S2142 (Mar. 20, 2002) ("[I]t became clear that there would be a number of very complicated transition rule issues and implementation problems if we were to try to put the bill into effect for the 2002 elections.") (statement of Sen. McCain); *id.* (same) (statement of Sen. Feingold).[5]

On May 1, 2003, the district court in *McConnell v. FEC* issued its decision upholding some provisions of BCRA and invalidating others, *see* 251 F. Supp. 2d 176 (D.D.C.), and various parties immediately filed motions to stay parts or all of the district court's decision. The Commission and its co-governmental defendants, the defendant-intervener BCRA sponsors, and the district court panel all recognized the harms that would be inflicted upon the public if the court's decision were to go into effect and change the law again. As the Government defendants aptly stated:

> [T]he Court's ruling creates significant harm for the government and regulated entities alike by virtue of the confusion that it would create if it is allowed to take effect during the period of Supreme Court review. . . . To minimize the potential chaos to which the Nation's campaign-financing system is subjected in the critical period leading up to the 2004 elections, the Court should leave BCRA in place while the Supreme Court is considering the parties' appeals.

Gov't Memo in Support of Mot. for Stay at 13 (May 13, 2003). The Government warned of imposing new rules even 17 months before the 2004 election:

> [A]llowing the decision in this case to go into effect during an appeal would have tumultuous consequences for the Nation's federal electoral system...The [FEC] and regulated participants in the federal electoral process have been adapting to BCRA's major reforms over the past year. The FEC has issued comprehensive regulations construing and implementing BCRA and, during the past six months, has sought to educate political participants concerning the new statutory and regulatory scheme. Many political organizations already have restructured their operations and planned their activities for the 2004 elections in compliance with BCRA's scheme . . . .

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[5] Congress also anticipated that BCRA would be challenged in court, and provided for expedited judicial treatment of such litigation. See BCRA § 403. It seems virtually certain that a legal challenge would be mounted against the regulations suggested in the NPRM, so a post-election effective date would permit such a challenge to proceed in an orderly manner rather than plunge the Commission and the regulated community into frantic injunction proceedings during the peak of the general election.

> Allowing this Court's decision to take immediate effect would create significant confusion for the FEC and those subject to its regulation by requiring them to readapt, again, from the rules enacted by Congress in BCRA to the rules established by this Court's decision. That confusion would be compounded if, as is likely to happen, the Supreme Court in reviewing this Court's decision changes the rules governing campaign financing B a third time B while the 2004 congressional and presidential campaigns are in full swing [in the] fall of [2003].

Id. at 4-5. As the government concluded, "[a] stay would . . . [ensure] that an established set of administrable rules governs all participants in the 2004 election cycle." Gov't Reply Memo in Support of Mot. for Stay at 3. BCRA's sponsors conveyed similar concerns in supporting a stay. Interveners' Reply Br. to Pl. Mot. for Stay at 5. And, the district court agreed, issuing a stay and expressing its "desire to prevent the litigants from facing potentially three different regulatory regimes in a very short time span." Mem. Opinion at 7-8 (May 19, 2003).

The 2004 campaign is in even fuller "swing" now, and the dangers of confusion and disruption from significant new regulations concerning the meaning of "expenditure" and "political committee" and the nature of allocation obligations are much greater, and increase every day.

Notably, of course, Congress delayed BCRA's effective date until after the 2002 general election despite BCRA's legislative condemnation of soft money transactions involving federal and state officeholders and candidates and political party committees, and widespread broadcast advertising practices by independent groups. Congress thus knew and tolerated the continuation of those practices for another eight months in order to assure an orderly transition to new legal rules. The Commission is now considering far-reaching changes in rules and practices that have been extant for 30 years, and without any legislative determination of their incorrectness or inadequacy; surely, any such proposed regulatory changes can and should be deferred until after the 2004 general election is over.

We appreciate the opportunity to provide these comments and respectfully request an opportunity to testify at the hearing scheduled for April 14 and 15.

Yours truly,

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