Democracy 21

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FACSIMILE TRANSMITTAL SHEET

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RE:	

Attached is a letter from Democracy 21, the Campaign Legal Center and the Center for Responsive Politics regarding the pending rulemaking Notice 2004-06.

March 16, 2004

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Re: Rulemaking on political committees

Dear Commissioners:

We are writing concerning the rulemaking noticed by the Commission regarding "political committee status," Notice 2004-06, 69 Fed. Reg. 11736 (March 11, 2004).

We are submitting this letter in advance of our substantive comments to express our deep concern that the Commission is attempting to resolve far too many issues in this expedited rulemaking, rather than focusing on the critical issues that must be resolved now in order to prevent the campaign finance laws from being circumvented and undermined in the 2004 elections.

At the outset, we want to state that the law as written already requires section 527 groups whose major purpose is to influence federal elections to register as federal political committees and to comply with federal campaign finance laws. The recent Supreme Court

decision in *McConnell v. FEC* reaffirmed that the Commission has been incorrectly interpreting longstanding provisions of the federal campaign finance laws in this regard.

As the Commission is aware, we have filed a complaint against three section 527 groups, America Coming Together, The Media Fund and The Leadership Forum, for failing to comply with federal campaign finance laws. In our view, the Commission does not need a new rulemaking to address the matters raised in this complaint.

However, since the Commission is proceeding with a rulemaking, we believe it is essential that the far-reaching proposed rulemaking be substantially narrowed to focus only on the urgent issues that must be resolved to prevent major circumvention of the federal campaign finance laws in the 2004 election cycle. The Commission should focus on an expedited basis on the issues relating to section 527 groups active in the 2004 elections.

The other issues raised in this rulemaking can and should be postponed to a later date. We fear that otherwise, the current rulemaking proposal is a recipe for failure. The Notice of Proposed Rulemaking adopted by the Commission is so lengthy, addresses so many issues, raises so many questions and proposes so many new rules that the Commission is unlikely to be able to conclude this matter by its mid-May deadline and promulgate new rules for the 2004 general elections.

A failure by the FEC to focus its rulemaking effort on the issues critical for the 2004 elections is likely to result in agency gridlock and inaction. This would leave the Commission in the position, once again, of subverting the federal campaign finance laws, as the Supreme Court in *McConnell* stated the Commission had done with regard to soft money and the political parties.

There are two major federal campaign finance law problems that have become manifest in the 2004 election and that should be the focus of the current FEC rulemaking.

First, one or more non-connected political committees are engaged in partisan voter mobilization activities aimed at the general public, and are planning to allocate that spending between their federal and non-federal accounts, pursuant to 11 C.F.R. § 106.6. That regulation allows a committee to calculate its allocation ratio for the use of hard and soft money based on its "ratio of federal expenditures to total federal and non-federal disbursements" over a two-year election cycle. *Id.* at § 106.6(c)(1).

This regulation is contrary to the Federal Election Campaign Act (FECA) and leads to indefensible and absurd results. Under the Commission's existing Part 106 allocation rules, for example, America Coming Together (ACT) is claiming a right to spend 98 percent soft money on its voter mobilization activities, even though ACT and its donors have made publicly clear their overriding purpose is to mobilize voters to defeat President Bush in the 2004 elections.[1]

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[1] *See* Comments of Democracy 21 *et al* on AOR 2004-05 (filed February 12, 2004) at 12-17.

This rule, just like the allocation rules the FEC previously had established for political parties, fails to properly interpret and implement the FECA. It is subject to the very same criticism the Supreme Court made in the *McConnell* case about the political party allocation rules – that the "FEC regulations permitted more than Congress, in enacting FECA, had ever intended."

The complete inadequacy of the Commission's existing allocation rules to prevent the kind of absurd result that has occurred with ACT is a question of immediate and urgent importance in the rulemaking. The question is raised in the Notice of Proposed Rulemaking, *see* Notice at §§ V(C) ("Minimum Federal percentage") and D ("Clarifying the ratio in the 'funds expended' method), and should be segregated and resolved on the expedited track that the Commission has set for the rulemaking.

Second, the Commission recently ruled in A.O. 2003-37 that a section 527 group that is registered as a federal political committee and has a non-federal account must fund exclusively from its federal account any public communications that "promote, support, attack or oppose" federal candidates.

In so ruling, the Commission reserved the question of when a section 527 "political organization" that has not registered with the Commission is required to register as a federal political committee and to use federally legal money to finance ads that "promote, support, attack or oppose" federal candidates.

This question broadly raises the major overall issue addressed in the proposed rulemaking – what constitutes a "political committee." And this broad question in turn includes the important subsidiary questions of what is the definition of "major purpose," and what is the definition of "expenditure."

Although these are all issues of importance to the proper administration of the campaign finance laws, the problem posed in this campaign, and which needs to be resolved in a way that is effective to meet the challenge of this election cycle, is how these rules apply in the specific context of section 527 groups that are conducting ad campaigns promoting and attacking federal candidates with soft money.

The Notice of Proposed Rulemaking provides a specific proposed rule for section 527 organizations. *See* § III(B)(4) ("Proposed 11 CFR 100.5(a)(2)(iv) – 527 Organizations"). This specific treatment of section 527 organizations can and should be segregated from the broader set of questions raised in this rulemaking, and resolved on the expedited track set by the Commission for this rulemaking.

By contrast, for example, the proposed rules in the Notice relating to section 501(c) groups raise a number of questions that do not need to be addressed at this stage and, in fact, need to be resolved by Congress.

Section 501(c) groups by tax law definition are not allowed to have a major purpose to influence elections. Their public communications, unlike section 527 groups, have been

entitled since the *Buckley* decision to some form of bright-line standard for determining when the communications have to be financed with federally legal contributions.

Following the *McConnell* decision, the public communications of section 501 (c) groups are still governed by the "express advocacy" standard, as well as by the "electioneering communications" standard added by BCRA. While Congress has the authority to change or supplement these "bright-line" standards for 501 (c) groups, the Commission does not.

There are a number of advantages in the Commission proceeding in the fashion we suggest.

First, paring down the scope and number of issues that the Commission attempts to resolve on such a highly expedited basis maximizes the chances that it will actually be able to resolve those issues. The more issues that the Commission attempts to resolve over the next 60 days, the less likely it will be able to successfully resolve any of them.

Second, the Commission needs to set priorities in this rulemaking. Those priorities should be based on the problems that are already occurring in this election, and that are likely to continue in the absence of the Commission taking a clear stand on what the law requires. By resolving these priority issues on an expedited basis, the Commission maximizes its ability to enforce the law effectively and expeditiously.

Third, this approach will allow the Commission, and the public, a greater opportunity to address in a more appropriate time frame a number of proposals that do not appear to be urgent problems in this election.

Finally, separating the various issues raised in this rulemaking and considering them on separate time lines that reflect the priorities involved is precisely the approach that was taken in the rulemaking conducted for the Bipartisan Campaign Reform Act of 2002 (BCRA). Congress itself set the BCRA Title I rules, relating to soft money, as the highest priority, and required the Commission to resolve those rules in a 90-day rulemaking after the effective date of the statute, while allowing the other BCRA regulations to be written in a 270-day period. BCRA § 402(c)(2).

In order to prevent the circumvention of the federal campaign finance laws in the 2004 elections, the pending rulemaking on political committees must succeed, not fail.

It is important that the Commission expeditiously promulgate rules that address the serious problems that have already become manifest in this year's election. It is important that the Commission not allow itself to become paralyzed, or deadlocked, by complexity and controversy generated by issues that are collateral to the immediate and urgent challenges facing the Commission if it is to properly enforce the laws in the 2004 elections.

For these reasons, we strongly urge the Commission to implement the approach we have set forth in conducting its pending rulemaking.

Sincerely,

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