Notice of Proposed Rulemaking on Political Committee Status
Statement for the Record

Vice Chair Ellen L. Weintraub
March 4, 2004

The Commission is considering today a Notice of Proposed Rulemaking that concerns important questions at the heart of our mission. We are contemplating changes to the basic terms that define who will be subject to the complex regulatory regime enforced by the Commission. This rulemaking has the potential to subject vast numbers of entities to new restrictions on their political speech, and it has the potential to mask from public view reams of information that are currently being disclosed.

At this stage of the election cycle, it is unprecedented for the Federal Election Commission to contemplate changes to the very definitions of terms as fundamental as "expenditure" and "political committee." This notice of proposed rulemaking has the potential to set a new standard for sowing uncertainty during an election year.

Certainly, we must begin to confront how to interpret the law in a post-*McConnell* world in which the Supreme Court has declared the "express advocacy" distinction, thought to be the trigger for so many legal consequences, to be "functionally meaningless." We're going to be dealing with the fallout from that opinion for years to come. These are decisions that should be made through a rulemaking, affording full opportunity for public participation. I support that process. These are decisions that we should make thoughtfully, after thorough consideration of the issues, and with due notice to the regulated community. I will not be rushed to make hasty decisions, with far-reaching implications, at the behest of those who see in our hurried action their short-term political gain.

If Congress, through the passage of the Bipartisan Campaign Reform Act ("BCRA"), had required the FEC to embark on this rulemaking, then I would understand the Commission's haste and departure from precedent. Congress, however, did no such thing. As part of BCRA, Congress mandated that the Commission complete key implementing rulemakings by December 2002. Changes to the definition of "expenditure" and "political committee" were not on the table then, for the simple reason that BCRA did not make any changes to either of those definitions, although it surely could have, had Congress seen the current definitions as deficient.

Moreover, both Congress and the courts have shown sensitivity to the disruptive effect that new rules can have in the midst of an election cycle. As we all know, BCRA passed in the spring of 2002, but its effective date was delayed until the day after the 2002 election. Thus, Congress intentionally allowed the corruption and appearance of corruption that it considered inherent in the pre-BCRA regime to continue until the law could be implemented in an orderly fashion at the beginning of an election cycle. Even the District Court, which labored for months to construe BCRA, agreed to grant a stay of its own opinion in *McConnell* and declined to subject the regulated community to a new set of rules in the middle of a cycle.

In this Commission's brief to the court requesting that stay, the Commission warned the court of the "tumultuous consequences for the Nation's federal electoral system," and the "significant confusion for the FEC and those subject to its regulation" that would arise from mid-

cycle changes to the regulatory regime.[1] We noted in particular: "Many political organizations already have restructured their operations and planned their activities for the 2004 elections in compliance with BCRA's scheme."[2] We urged the court "[t]o minimize the potential chaos to which the Nation's campaign-financing system is subjected in the critical period leading up to the 2004 elections."[3] We should heed our own advice.

I know full well that in merely suggesting that we regulate in a responsible manner that will not wreak havoc amongst all who engage in political speech, I will bring upon my head an outcry about the evils of delay and dire warnings about circumvention of the law. No one wants to condone circumvention of the law, least of all me. But we must balance the need to craft a rule that is not capable of easy evasion with the requirement that we not be so overbroad as to impede legitimate advocacy. If, for example, we merely regulate 527 organizations and not 501(c)4s, the 527s will simply dissolve and reincorporate as (c)4s, and we will have accomplished nothing. On the other hand, if we try to capture the 501(c)4s, we run the real risk of interfering in Constitutionally protected areas where we have no business going.

One of the proposals in this NPRM would be to incorporate Federal election activities or "FEA" into the definition of "expenditure" (and remember that $1,000 in expenditures can trigger political committee status and all that that entails). FEA is a term of art that includes public communications (at any time) that promote, support, oppose, or attack a clearly identified candidate. This week's newspapers provide a ready example of one public communication that might meet this test.

I saw this full-page ad in Sunday's Washington Post. It was paid for by FRCAction, the 501(c)(4) legislative action arm of the Family Research Council (itself a 501(c)(3) organization). According to the organization's website, it is part of a $2 million ad campaign to appear in 22 newspapers across the country, including the New York Times, Los Angeles Times, Miami Herald, Dallas Morning News, Chicago Tribune, and Atlanta Journal-Constitution. The ad proclaims:

> DEAR MISTER PRESIDENT:
>
> WE ARE DEEPLY GRATEFUL
>
> We deeply appreciate your long-standing and deep-seated commitment to the preservation of the family. We especially thank you for the decision you have announced to support and work for the passage of the ***Federal Marriage Amendment*** . . .
>
> WE APPLAUD YOUR COURAGE
>
> * * *
>
> WE PLEDGE TO YOU
>
> We will do everything in our power to inform and to educate our constituents about the importance and urgency of this issue both for the preservation of the family in America as well as the right ordering of our government. . . .

The ad compares the President to Abe Lincoln and contains what might be considered a tacit commitment to spread the good word about George W. Bush throughout "our communities."

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[1] *See* Memorandum of Points and Authorities in Support of the Government Defendants' Motion for Stay of Final Judgment Pending Appeal to the Supreme Court of the United States at 4, 5, *McConnell v. FEC* (No. 02-582).

[2] *Id*. at 5.

[3] *Id.* at 13.

Does it promote or support a clearly identified candidate? I think it does. Is this the kind of communication that the Federal Election Commission should be regulating? I think not. Yet that is the path on which this NPRM could set us.

See how complicated this can get? We need to take the time to get this right.

Then there is the other major change offered in the NPRM: the "major purpose" requirement. The Supreme Court taught us in *Buckley* (in 1976) that a political committee is an entity the major purpose of which is influencing elections. This has been accepted, but never codified. As we have gotten along this long without a "major purpose" component to our definition of political committee, it is hard for me to see the urgency in adding it right now. If any one of the alternatives proposed for defining the major purpose test is adopted, it could result in entities dropping off our radar screen. That is, even though they have raised contributions or made expenditures of over $1,000, they might argue that they need not report because their major purpose is not influencing elections. We could end up with a net loss of disclosure about the funding of political activities. Is that what BCRA and *McConnell* were all about?

As for the proposed extension of some of BCRA's provisions to independent groups (the so-called 527s and others) that do not receive fundraising help from Federal officials, I have several observations.

First, BCRA did not ban all soft money from politics.

The notion that all money not subject to the Federal Election Campaign Act's contribution limits or source prohibitions is inherently tainted does a disservice to the careful tailoring of BCRA. BCRA's goal was to sever the connection between Federal officeholders and soft money. The Supreme Court upheld BCRA based on the voluminous record documenting the appearance of corruption that arises from that nexus. But nothing in BCRA requires that all entities that conduct Federal Election Activities or produce Electioneering Communications (defined terms under the law) register with the Commission.

The Supreme Court understood that. It stated: "Interest groups . . . remain free to raise money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."[4] Congress understood that. When it appeared, during the pendency of the ABC advisory opinion, that the FEC was the only group that didn't understand that, 8 Members of the Senate (seconded by 58 House Members) wrote to us to emphasize that Congress knowingly chose to address the raising and spending of soft money by parties and officeholders, and not to "aim similar restrictions at political organizations or tax-exempt groups that are neither controlled by, nor coordinated with, parties or candidates."[5]

One of the proposals contained in the NPRM calls on the agency to base our regulatory reach on the words that outside groups use to describe themselves. We have to be careful that our own descriptions do not become self-fulfilling prophecies. The word "circumvention" implies that what is being done is not actually illegal. If it were, the actors would not be circumventing the law, they'd be breaking it. We should not use our description as a justification for ignoring the distinction between legal and illegal conduct. Similarly, if we describe a group as a "shadow

[4] *McConnell*, 124 S. Ct. 619, 686 (2003).
[5] Letter dated Feb. 12, 2004, from Senator Daschle, *et al*., to Commissioners. *See also* Letter dated Feb. 10, 2004, from Representative Pelosi, *et al*., to Commissioners.

political party," then it may justify our regulating that entity as if it were a party, regardless of whether it performs any of the functions (e.g., choosing candidates, formulating platforms) that the Supreme Court found distinctive.

In fact, various provisions within BCRA appear to be inconsistent with some of the basic premises of this NPRM. For example, BCRA allows Federal candidates to solicit up to $20,000 from individuals for entities that conduct voter drives.[6] How could this be if entities that conduct voter drives are to be defined as political committees that can only raise money in $5,000 increments? Increased public education and voter turnout were not the evils BCRA sought to curtail. And given the low rates of voter participation in this country, I am reluctant to go beyond the terms of the law to make it more difficult for groups to engage in GOTV efforts.

Moreover, even if the Commission were to require that only hard money could be used by any group that ever had a kind or harsh word to say about a Federal candidate, or that tried to encourage like-minded citizens to vote, there would remain one potentially enormous source of legal, unlimited money to be used quite openly to influence federal elections: money spent by a wealthy individual. Ever since the Supreme Court's decision in *Buckley*, an individual has had the right to spend an unlimited amount of money on independent expenditures that expressly advocate the election or defeat of a candidate.

So even if the FEC embarked on a quest to sideline every single soft money advocacy group, we could never take George Soros off the playing field. It is perfectly legal for him to spend millions of dollars employing people to work around the clock to expressly advocate the election or defeat of the Federal candidate of his choosing, and there's no branch of the government that can stop him, as long as he refrains from coordinating with any candidate or party committee. I suspect that with the money he has available, he doesn't need to coordinate with any candidate or party committee. He can hire his own consultants and focus groups to test the effectiveness of his message among voters.

As can be seen, I have serious concerns about the timing and the underlying premises of this NPRM. But perhaps equally significantly, the text itself is so full of confusing, contradictory, and just plain bad ideas that I cannot fathom why we would want to push this document forward. Let me give a just a few examples.

The proposed changes to the definition of "expenditure" are full of potential traps for the unwary, who might be quite surprised to learn that their activities might be deemed "for the purpose of influencing any election for Federal office" and subject to hard money requirements. It is true that the Supreme Court upheld restrictions on political party committees that are tied to whether or not a communication "promotes, supports, attacks, or opposes" a Federal candidate. But I question whether the Commission has the authority to require that <u>any</u> group, including, for example, a lobbying organization, that wants to promote, support, attack or oppose a Federal candidate at any time must do so with hard money.[7] And do we really have a mandate to treat state and local candidates' efforts to promote *their own* candidacies as "for the purpose of influencing a federal election."[8] And are there four votes, or even one vote, for treating 501(c)(3) charities as political committees? Can't we at least take them off the table, and spare ourselves the deluge of mail from that sector?

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[6] *See* 2 U.S.C. 441i(e)(4)(B).
[7] *See, e.g.*, Agenda Doc. 04-20, at 24, 92.
[8] *See, e.g.,* Agenda Doc. 04-20, at 91.

Taking such an expansive view of the definition of "expenditure" carries implications even for those who manage not to trigger political committee status. The Commission's regulations currently require organizations that are not political committees to pay for expenditures with funds subject to the prohibitions and limitations of the Act.[9] So even if a group does not satisfy the major purpose requirement and trigger political committee status, any changes to the general definition of "expenditure" could impose significant new restrictions on how that group pays for voter drive activities.

The NPRM contains a number of tortured variations on how the major purpose requirement might translate into objective criteria. Does it have to be the major purpose or will a major purpose suffice? Is there a difference between the various statutory formulations, "major purpose," "primary purpose" and "principal purpose?" How many angels can dance on the head of that pin? The NPRM suggests that *Buckley* requires us to codify the major purpose test, but at the same time the NPRM recommends that we not read the Court too literally.[10] What are we, or prospective commenters, to make of this?

On page 57 of the NPRM, you will find a section entitled "Conversion of Federally Permissible Funds to Federal Funds." This section contains 14 pages of guidance on what to do should an entity find itself suddenly deemed a political committee. This contains a mechanism for catching those entities that used soft money for expenditures in their pre-political committee days. If the Commission adopts a new definition of "expenditure" and expects entities to have been using hard money to pay for those "expenditures" in the past year or so, the unfairness to the regulated community will only be compounded by an effectively retroactive application of the new rule. And this is only one of several look-back provisions in the proposed rules, some of which attach legal consequences to conduct that took place as long as four years ago (not only before this rulemaking, but before BCRA and *McConnell* changed the regulatory landscape).

The draft NPRM contains some statements that are not only inexplicable, they are preposterous. At the end of the narrative portion of the NPRM, in a section entitled "Certification of No Effect," the Commission certifies that "this proposed rule would not have a significant economic impact on a substantial number of small entities."[11] I believe that a small advocacy organization suddenly told that it could not accept an offered donation of more than $5,000 would indeed find that to be a significant economic impact.

This section further states that "the reporting requirements [for political committees] are not complicated and would not be costly to complete," and it would be "highly unlikely that a political committee would need to hire additional staff or retain professional services to comply with the reporting requirements."[12] You would never guess from reading this that since the advent of our administrative fines program in July 2000, we have assessed over $2 million in fines, from almost 1,000 committees, all for reporting violations. And substantial reporting errors may not only carry fines, but may trigger an audit. I imagine there might be some difference of opinion about whether hiring additional staff or retaining professional services is necessary or advisable to comply with the reporting requirements. An inadequate analysis of the economic impact can be grounds for invalidating the regulation.

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[9] *See* 11 CFR 102.5(b).
[10] *See* Agenda Doc. 04-20, at 35.
[11] Agenda Doc. 04-20, at 85.
[12] Agenda Doc. 04-20, at 83.

While I support the notion of addressing the important issues at stake here today in a rulemaking, I cannot support this document. It is poorly organized, confusing, full of what one observer calls "FEC-speak" that is indecipherable to the public at large, and littered with inadequately expressed concepts that have scant chance of attracting four votes but will needlessly alarm the interested community and force them to spend their resources responding to chimeras. I do not say this to criticize the Counsel's office, which bore the burden of attempting to put into words the hodgepodge of ideas tossed out by the various Commissioners' offices, on a timeline not of their or my choosing. We simply did not give them the time to do the job right.

We just went through one exercise in hopelessly confusing the regulated community, when we issued the ABC advisory opinion,[13] on a related topic, an opinion variously described as "almost incomprehensible" (by a liberal left coast law professor) and an "exquisite opacity" by a conservative East coast commentator. I would like to think that we would have learned something from that experience. And I do think that we owe it to the public from which we seek comment to have spent the time and effort to refine this document into a more focused and articulate product. I asked my colleagues to take even one more week to try to do that before we launched this document on the world. My colleagues, I am sorry to say (with the exception of Commissioner McDonald), were more interested in rushing this document out the door than in honing it into the most productive basis for meaningful comment and further action. So, while I would like to address these important substantive issues, I would like to do so in a responsible and thoughtful way. I'd rather do it right than do it fast. I will vote against issuing this NPRM in its current form.

[13] AO 2003-37.