HARMON, CURRAN, SPIELBERG & EISENBERG LLP

1726 M Street, NW, Suite 600 Washington, DC 20036 (202) 328-3500 (202) 328-6918 fax

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Ms. Mai T. Dinh, Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
BY ELECTRONIC MAIL

Re: Treatment of IRC Section 527 Organizations in Notice of Proposed Rulemaking on Political Committee Status (Notice 2004-6)

Dear Ms. Dinh:

The law firm of Harmon, Curran, Spielberg & Eisenberg, LLP, submits these comments in response to the Commission's notice of proposed rulemaking on Electioneering Communications.[1] We request an opportunity for Elizabeth Kingsley, a partner with our firm, to testify at the Commission's planned hearing on this rulemaking.

Harmon, Curran, Spielberg & Eisenberg, LLP specializes in providing legal advice to nonprofit organizations and individuals in the areas of nonprofit organization tax law, election law, employment law, and environmental law. In our day-to-day practice we work closely with a wide variety of nonprofit organizations, citizen groups, political action committees, and individuals. Many are primarily focused on electoral politics, but most are not, and only enter that arena incidentally to their core mission focus. We write as lawyers, and as citizens, familiar with and concerned about the role that nonprofit organizations play in our national debate over important public policies. Although we represent a number of different nonprofit issue advocacy organizations, we submit these comments on our own behalf, not representing the viewpoint of any client or indeed any other organizations.

No doubt others will provide comprehensive comments addressing the many questions raised in the NPRM. These comments will focus on a small number of issues where we believe the perspective of a nonprofit, tax-exempt organization can be relevant to the Commission as it wades into these regulatory waters.

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[1] Federal Election Commission Notice of Proposed Rulemaking on Political Committee Status, Notice 2005-20, 70 Fed. Reg. 49508 (August 24, 2005) (NPRM).

1. PASO – What It Is

Whether it defines the term in this rulemaking or not, the Commission must take "PASO" into account in crafting any exceptions to its definition of electioneering communication, as it is not permitted by statute to create an exemption for any communication that PASOs a federal candidate.

We urge the Commission in the strongest possible terms not to simply incorporate the PASO "standard" into its regulations. Rather, when appropriate, the Commission should set out specific criteria that would allow a communication to meet a regulatory definition or not. (For instance, as discussed below, we hope the Commission will adopt clear, objective standards that may serve to protect genuine PSAs from the electioneering communication ban.) However, should the Commission choose to insert the PASO standard in the regulations, it is critical to further elucidate the meaning of "promote, support, attack, or oppose."

We are fully cognizant that the United States Supreme Court has held that PASO gives a person "of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell v. FEC*,124 S. Ct. 619, 674 n. 64 (2003). Certainly there are many instances where most people could be certain that a communication does "PASO" a candidate, but there are still more where we cannot reach a firm conclusion without further definition of the term. Although we confess that we consider ourselves to be people of at least ordinary intelligence, we do not find this standard so plainly intelligible on its face that we can determine what conduct is permitted or prohibited if it is established as a criterion for exemption from the scope of the electioneering communication ban.[2]

As implied in the NPRM, while the Court may have decided that this standard is "essentially self-executing" as applied to political party committees, it most certainly is not when applied to citizens' organizations that are primarily focused on issues, not elections. Political parties exist primarily to promote their own candidates and oppose those of other parties. Given the close relationship between parties and candidates, it may be unlikely that any public communication by a party would fail to PASO a candidate it mentions (whatever PASO may be taken to mean). The situation is quite different for nonprofit organizations that are focused on issues and a non-political mission. They frequently talk about officeholders and policymakers in their non-candidate capacity and for non-electoral reasons. Organizations seeking to influence policy frequently target key decision makers and ask members of the public to urge them to take a specific action. To make these messages effective, it is useful to indicate whether the public

[2] Technically, BCRA does not ban electioneering communications, but requires that they be funded only with money from certain sources. However, 501(c)(3) organizations are generally corporations, and therefore prohibited from using general treasury funds to pay for electioneering communications. Under the FEC's regulations, they are not Qualified Nonprofit Corporations, and so cannot qualify for the regulatory exception available to those organizations. They are also effectively prohibited by their tax status from creating an SSF registered with the FEC as a political committee. Therefore, the prohibition on corporations funding electioneering communications effectively acts as a ban on these messages for 501(c)(3) organizations.

official is likely to respond favorably, i.e. to refer to her or his past record on the issue.[3] Does merely stating that the organization is seeking to change an officeholder's mind on a legislative issue constitute an "attack"? Or does "attack" suggest a use of harsher language, an implied assessment of overall fitness or character? Neither we nor the organizations we advise can be certain how to interpret this standard without further guidance.

In broad terms, there seem to be three ways to read this term, with infinite shadings of variation applicable to each. Both the *Shays* court and the NPRM suggest that even featuring a person who happens to also be a candidate could promote or support that person. As discussed further below, we believe this would be an incorrect interpretation of the statute. A somewhat less extreme interpretation would conclude that expressing agreement or disagreement with a an officeholder's position on a policy matter would amount to supporting or opposing that person.[4] Finally, one might read PASO to mean promote, support, attack, or oppose *as a candidate* –to promote, support, attack, or oppose their candidacy. While we find the first of these three approaches somewhat strained, clearly there are people who consider it plausible. Without further guidance, the nonprofit community cannot reasonably determine whether the phrase, standing on its own, is more likely to encompass the second or third of these possibilities.

It may be relevant to note that our experience when talking to clients and other organizations about this standard is that people who are not primarily political actors hear "PASO a candidate" to mean PASO a person *as a candidate*. In order to make clear to them the potential reach of this term, we frequently add the words "who happens to be" in front of "candidate." We have learned that otherwise the response will be, "We don't support or oppose any candidates. We may comment on their performance in another capacity, or support or oppose a position they have taken on an issue, but we don't comment on candidates or elections." To people who are not immersed in the world of campaign regulation, PASO a candidate is most naturally heard to mean PASO that person as a candidate. The Commission may wish to consider this as evidence supporting adoption of such an interpretation of the statutory phrase. Although the statutory language is not completely conclusive, it is consistent with this result. The repeated use of the phrase "candidate for that office" in 2 U.S.C. § 431(20)(A)(iii) certainly suggests that one is talking about people as candidates, either expressly or implicitly.

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[3] Indeed, IRS regulations defining lobbying for public charities that have elected to be governed by the expenditure test consider that a mention of a legislator's position as being different from that of the charity to be an indirect grass roots lobbying call to action. That is, when the charity identifies a legislator as disagreeing with it (or being undecided) on specific legislation it is treated as having encouraged the audience to take action with respect to the legislation, even without a more direct request for action. 26 C.F.R. § 56.4911-2(b)(2)(iii)(D).

[4] Not all candidates are incumbents or even professional politicians. There have been a number of examples in recent memory of people famous from other spheres of society, such as prominent actors, who have decided to seek political office. Although he has not (yet) been a candidate for federal office, one might well question whether expressing a negative view of Arnold Schwarzenegger's performance in a given film constitutes an "attack" on him at a time when he may happen to be a candidate. In other words, if PASO means expressing a view on the current or past job performance of a person who is a candidate, it could have a broad reach indeed.

At the very least, if the Commission does not agree that PASO means PASO a person who happens to be a candidate as a candidate, and if it intends to apply this standard to non-party citizen groups, it must state clearly and unambiguously the proper understanding of PASO in this context.

2. May 501(c)(3)s PASO Candidates?

The NPRM asks whether 501(c)(3) organizations operating in compliance with IRS guidelines could PASO a candidate. Without clarification of the scope of PASO, no one can say. 501(c)(3)s may express agreement or disagreement with an officeholder's policy position in the context of a legitimate lobbying campaign, but they may not directly or indirectly, expressly or implicitly, PASO that officeholder's candidacy. In other words, the most reasonable interpretation of "PASO" is something that 501(c)(3)s may not do.

501(c)(3) organizations may not "intervene in . . . any political campaign on behalf of, or in opposition to, any candidate for public office." The IRS interprets this prohibition broadly, and will weigh all relevant facts and circumstances to determine whether an organization has illegally intervened in a political campaign. Indeed, the Service has adopted standards suggesting that the slightest manifestation of partisanship is enough to characterize an activity as prohibited campaign intervention. Given the breadth of the interpretation of this prohibition, I can say confidently that a 501(c) may not PASO a candidate as a candidate. Even if the support or opposition is based solely on objective criteria, a 501(c)(3) may not express its opinion about a candidate's qualifications. *Association of the Bar of the City of New York v. Commissioner of Internal Revenue.* 858 F.2d 876 (2d Cir. 1988), *cert. denied,* 490 U.S. 1030 (1989).

On the other hand, if PASO includes expressing agreement or disagreement with a particular action or position of a person who is a candidate, even in the context of advocating that they take a different position on an issue, then (c)(3)s almost certainly could PASO lawmakers who happen to be seeking reelection. Although the IRS is extremely cautious about allowing any activity that could serve as a surreptitious route for impermissible campaign intervention, it also strives to protect legitimate advocacy of public policy issues, recognizing that nonprofit organizations play a unique and important role in the national debate over legislative and other policies:

> Basically, a finding of campaign intervention in an issue advertisement requires more than just a positive or negative correspondence between an organization's position and a candidate's position. What is required is that there must be some reasonably overt indication in the communication to the reader, viewer, or listener that the organization supports or opposes a particular candidate (or slate of candidates) in an election. Judith E. Kindell & John Francis Reilly, "Election Year Issues," IRS FY 2002 Exempt Organizations Continuing Professional Education Technical Instruction Program Handbook 335, 345 (2002 CPE Text).

In addition, recent precedential guidance has plainly indicated that under certain circumstances a 501(c)(3) organization may indicate disagreement with an elected official even in relatively close proximity to an election. In one of the examples in Revenue Ruling 2004-6, 2004-4 I.R.B. 328, an organization places a newspaper advertisement that indicates support for a pending bill in the U.S. Senate, states that Senator C has opposed similar measures in the past, and asks the reader to contact Senator C and ask him to vote for the measure. The ad is treated as lobbying and not campaign intervention[5], because it appears immediately before a legislative vote. In addition, this conclusion is bolstered by the fact that the issue has not been raised in the campaign as distinguishing Senator C from his opponent.

As can be seen from these examples of IRS guidance, the 501(c)(3) standard is not so strict that an organization may not express agreement or disagreement on a policy stand held by a public official who happens to be seeking reelection. The Service would likely consider the tone and language employed in a communication as well. If it is seen as attacking the officeholder's character or fitness for office, even if veiled behind a cloak of issue discussion, the communication would potentially be classed as campaign intervention.

In order to obtain IRS recognition of its 501(c)(3) status, an organization must submit a lengthy and detailed application.[6] Its operations are subject to significant scrutiny before the IRS will issue a determination letter finding that it qualifies as a 501(c)(3).[7] Political campaign intervention is an area that the IRS is concerned about and will examine closely. Thus, unlike those entities regulated by the FEC, 501(c)(3)s must undergo an extensive review of their activities and qualifications in order to be recognized as exempt under that code section.

In sum, while 501(c)(3)s may permissibly express agreement or disagreement on a policy position with a candidate whose action on a legislative (or other) matter they seek to influence, they may not promote or attack that person's overall fitness for office, and they may not support or oppose any candidate in their capacity as a candidate. Before an organization can qualify for that status, a federal regulatory agency has reviewed its operations and determined that it is likely to comport itself consistent with this standard. The Commission may reasonably conclude that this prohibition does not permit 501(c)(3)s to PASO a federal candidate, and that therefore a 501(c)(3) organization may not run an electioneering communication that PASOs a candidate consistent with its tax-exempt 501(c)(3) status.

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[5] Technically, the ruling addresses whether the activity is for an "exempt function" under Internal Revenue Code section 527. However, substantial amounts of other guidance clearly indicate that the IRS considers 527 exempt function activity to be determined by the same test that defines prohibited 501(c)(3) campaign intervention. This ruling is therefore widely seen as a useful source of guidance on the range of advocacy activities permitted to charities.

[6] Form 1023, available at http://www.irs.gov/pub/irs-pdf/f1023.pdf.

[7] Except for churches and very small groups, organizations must file this application and obtain an IRS determination in order to qualify as 501(c)(3)s. Even those entities who are exempted from the filing requirement may choose to do so, and many do because of ancillary benefits that hinge upon IRS recognition.

3. Does Mere Appearance in a PSA or Other Message Promote or Support a Candidate?

One of the questions raised by the NPRM is whether the mere fact that a person who is a candidate appears in a broadcast message on behalf of a nonprofit organizations could be construed per se to promote or support that person. It is true that nonprofits are generally very careful about whom they select as their spokesperson. An organization's good name is frequently one of its most valuable assets, and it will not willingly allow it to be associated with a representative whose reputation does not enhance the public's perception of the organization. Some degree of approval is necessarily inherent in the choice of a public figure to deliver an organization's message in a public service or paid announcement.

However, to conclude that this implicit approval of a spokesperson to deliver a message means that the message itself promotes or supports that person would render other statutory language superfluous. The Commission is authorized to establish appropriate regulatory exceptions from the definition of electioneering communication, except that a communication may not be exempted if it PASOs a candidate. If a candidate appearing in an ad constitutes promoting or supporting that candidate, this provision becomes virtually meaningless. Indeed, if Congress intended to prohibit any communication in which a candidate appears, it could easily have said so clearly. A reading which equates appearance with support is thus not only strained but renders other statutory language extraneous, in contravention of accepted principles of statutory interpretation. We believe the Commission correctly concluded in AO 2004-14 that a Member of Congress's appearance in an advertisement promoting a nonprofit corporation's fundraising event does not promote or support the candidate.

4. PSAs

The *Shays* court struck the Commission's requirement that a communication be placed for a fee in order to qualify as an electioneering communication, because this could arguably permit some PASO communications in contravention of the statutory directive. We recognize the theoretical possibility that an absolute "PSA" exemption could be open to exploitation. Nonetheless, many nonprofit organizations rely on the use of legitimate PSAs to disseminate their messages, promote events, or educate the public.[8] A rule that makes it difficult or impossible for elected officials to appear in such announcements would do a great disservice to the public interest and the nonprofit sector.

It is no doubt unnecessary to tell this Commission about the level of spending on broadcast communications in the 2004 election cycle. Yet to date we are not aware of a single report that

[8] We use "PSA" herein to refer to those public service announcements which the media outlet does not charge a fee to run. Other paid advertisements may be considered public service announcements in a more general sense, but we use the term narrowly for present purposes.

the PSA "loophole" was exploited by a single organization.[9] Media outlets already enjoy a broad exemption allowing them to disseminate their political views in commentary and editorials; they simply have no motivation to collude with nonprofit organizations to run "sham PSAs" that are intended to promote a candidate. With no evidentiary record suggesting that PSAs have been abused to circumvent the otherwise applicable campaign finance laws, the Commission should be cautious about adopting any regulation that would impede this form of speech that is of significant public value.

We are not experts in the area of communications law, but both personal experience and insight gained from years of advising nonprofits suggest that the Commission would do well to seek input from those who are more knowledgeable about how public service announcements are typically produced, distributed, and aired. We are particularly concerned with the suggestion in the decision of the Court of Appeals, quoted in the NPRM, that eliminating a PSA exemption would only preclude officer holders from participating in broadcasts promoting worthy causes for ninety days out of every two years. This would be the case if the time for airing these messages were purchased. Organizations that buy air time are able to control the placement of their messages fairly closely. Those relying on broadcasters to run their messages as a public service have far less control. Many PSAs may have no set "shelf life," and could be used for many months after they are distributed, without the control or even knowledge of the nonprofit that created and disseminated the ad. If the Commission is not careful, its electioneering communications rules may make it practically impossible for federal office holders to assist nonprofit organizations by appearing in PSAs. Indeed, given the frequency with which prominent people from other spheres of life enter politics, an inflexible rule could even prevent organizations from asking famous actors or other community leaders to appear in their PSAs lest they later decide to seek federal office.

We encourage the Commission to look carefully into this question. If a blanket exception is not possible, you should adopt standards that permit legitimate PSAs and do not risk allowing "sham" PSAs that PASO candidates. This is not an easy task, but we suggest that the following are characteristics of genuine PSAs that are non-electoral in intent and effect and should therefore remain unregulated:

- No reference to elections or candidacy
- Not initially distributed by the charity in the immediate pre-election period unless targeted to another event (e.g., national breast cancer month which is in October, a planned fundraiser or blood drive) taking place in that timeframe
- No comment from the organization on the official's performance in office or character

[9] A similar observation may be made with regard to the 501(c)(3) exemption that was in place during this cycle. Other vehicles are apparently much more attractive to campaign operatives, perhaps because violation of the 501(c)(3) campaign intervention prohibition can trigger penalty taxes not only on the organization but on the individuals who cause its misbehavior.

- Prominently includes an explicit request to support the organization, a request to participate in an event or activity it is sponsoring, or a substantive educational message consistent with the organization's mission (e.g., eat your vegetables, read to your kids)

At an absolute minimum, it should be possible to create a safe harbor protecting organizations that release PSAs outside the electioneering communications window and have no control over when they air.[10]

In conclusion, we note that it is somewhat ironic that the electioneering communication provisions of BCRA were upheld by the Supreme Court despite the fact that they may limit some otherwise constitutionally protected speech, yet we are now engaged in a debate over rules that threaten to regulate significant amounts of non-electoral speech because of the imagined possibility that a small number of partisan communications may otherwise evade regulation. After a complete election cycle with exemptions in place for unpaid placements and communications by 501(c)(3)s, there is no record demonstrating any abuses of these regulatory provisions. Surely this is evidence that there is no compelling need to regulate these entities and types of communications.

Sincerely,

/s/ Elizabeth Kingsley

Elizabeth Kingsley

[10] It may be tempting to adopt a rule that puts the onus of compliance on the media outlets, i.e. they must screen PSAs and not run those that include candidates within the 30/60 day window. Should this be under consideration, we strongly urge you to seek input from experts in the field of media operations to determine whether such screening is practical. We fear it might lead to a situation where broadcast stations simply refuse any PSAs that include elected officials, or indeed any outside PSAs at all.