September 30, 2005

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

Re: Notice of Proposed Rulemaking on Electioneering Communications (11 CFR 100.29) Federal Register Vol. 70 No.163 Page 49506 August 24, 2005

Dear Ms. Dinh,

OMB Watch is a nonprofit organization that promotes government accountability and citizen participation in public issues and decision-making. We appreciate the opportunity to comment on proposed rule on exemptions to the electioneering communications rule. In addition to filing these comments, we would like to testify at the public hearing on October 19-20.

Because of our commitment to strengthening the voice of the nonprofit sector in public policy debates, we work to protect their advocacy rights and educate them about laws and regulations that impact their advocacy work. For that reason, we are very concerned about the negative impact this rulemaking could have. In addition, we are directly affected since we are a 501(c)(3) organizations.

For the reasons stated below, we urge you to:

- Exempt 501(c)(3) organizations that are in compliance with Internal Revenue Service (IRS) rules
- Use IRS rules to define what is and is not a partisan broadcast communication for a 501(c)(3) organization. There must be one body of law governing our communications;
- If you propose a definition under the "promote, support, attack, or oppose" standard that is not based on IRS rules, publish a new proposed rule for public comment.

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The IRS rules defining prohibited intervention in elections are the best standard to apply to 501(c)(3) organizations.

The FEC should recognize that the Internal Revenue Code prohibits charities and religious organizations from engaging partisan electioneering. Specifically, Section 501(c)(3) says we cannot "participate in, or intervene in (including publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." This prohibition applies to all elections, not just federal elections, and has no exceptions. IRS sanctions for violating the standard are severe, including loss of tax-exempt status.

Since 501(c)(3) organizations have been following the Internal Revenue Code prohibition for over 50 years, it makes sense for the FEC to incorporate IRS rules and standards into its exemption to the electioneering communications restrictions. The IRS rulings and materials interpreting this ban on intervention in elections have historically defined intervention very broadly, including both direct and indirect intervention. As a result, charities will not be intervening in federal elections during the 60/30 blackout period.

Examples of IRS rulings and materials defining prohibited intervention in elections are:

- IR-2004-59, April 28, 2004 *Charities May Not Engage in Political Activities* at http://www.irs.gov/newsroom/article/0,,id=122887,00.html This pre-election communication warns charities of the hazards of engaging in partisan activity. It states, in part, that

  "These organizations cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of section 501(c)(3)."

- Publication 1828 *Tax Guide for Churches and Religious Organizations* at http://www.irs.gov/pub/irs-pdf/p1828.pdf

- Rev. Rul. 78-248, 1978-1 C.B. 154 and Rev. Rul. 80-282, 1980-2 C.B. 178, addressing publication of voter guides and legislative scorecards. Factors that make such communications permissible as educational or lobbying activity include the absence of endorsements and release not timed to coincide with an election.

Charities are not generally familiar with campaign finance law since we are not involved in activities campaign finance law is designed to regulate. Few charities are aware of rules like the electioneering communications ban. If it applied to 501(c)(3) organizations many would stop advertising advocacy messages that refer to federal candidates.

IRS enforcement of ban on intervention in elections is compatible with FEC enforcement of campaign finance laws.

In order for a charity to be recognized as a 501(c)(3) by the IRS it must have language in its governing documents that prohibit it from intervening in elections at the local, state or federal level. IRS rules interpreting ban on partisan intervention in elections have historically defined intervention very broadly, including both direct and indirect intervention.

The IRS has the lead on regulating charities. The FEC has the lead on regulating federal election activity. Therefore, it makes sense for the FEC to defer to IRS standards and expertise, because the FEC has no prior experience regulating organizations that do not intervene in elections. It is beyond the scope of what the FEC was established to do. It is the Federal Election Commission, not the Federal Speech Commission.

The FEC has the power to initiate an enforcement proceeding when a charity expressly endorses or opposes a candidate. However, this would be a rare occurrence, since the IRS enforcement of the ban on intervention in elections is increasingly vigorous. IRS officials have publicly stated that their compliance strategy is moving away from an emphasis on education to an emphasis on enforcement.

This was evident during the 2004 election season. The IRS Political Intervention Project (PIP) in established in June 2004 to "fast track" referrals and prevent recurring violations by groups exempt under Section 501(c)(3). A three-person committee reviewed the cases and decided which should be referred for further action. Of the 131 cases the PIP committee reviewed, 10 were dismissed because they did not involve partisan political activities. Of the remaining 121 cases, the committee found that 80 warranted further investigation based on a "reasonable belief" that a violation may have occurred or that examination would lead to discovery of a violation. Of these 80 organizations, 34 are religious. Slightly more pro-Republican groups than pro-Democratic groups were in the pool selected for further investigation.

This spring IRS Commissioner Mark Everson told the Senate Finance Committee that the IRS plans to continue and expand the PIP program for the 2006 election season. Therefore, it is not unreasonable for the FEC to acknowledge and take advantage of IRS enforcement activity.

The statutory and regulatory limits placed on the amount of legislative lobbying 501(c)(3) organizations may engage in[1] also limit the possibility that these organizations will become soft money conduits and pay for partisan broadcasts. The expense of purchasing air time could quickly place a charity or religious organization over the allowable limit. In addition, charities that use the expenditure test under Section 501(h) of the tax code must limit grassroots lobbying communications to one quarter of their overall allowable lobbying budget. A special rule on paid mass media communications[2] defines an ad as a grassroots lobbying communication even if it does not ask the public to contact legislators if it appears within two weeks of a vote on highly publicized legislation. These rules effectively block any significant attempt to abuse the 501(c)(3) exemption.

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[1] See IRC 4911(c)(1) and IRS 501(c)(3), 26 CFR 56.4911-1(c)
[2] 26 CFR 56.4911-2(B)(5)

Grassroots lobbying in not campaigning, and must be protected.

Grassroots lobbying by charities and religious organizations has been recognized as protected speech by Congress and the courts. These communications provide valuable information and insight to the public and to elected officials. The FEC must craft an exemption that protects this flow of information and the fundamental constitutional rights of 501(c)(3) organizations.

The NPRM asks if grassroots lobbying communications could "promote, attack, support or oppose" federal candidates. Any attempt to answer would only be speculation, since the FEC has not explained what it means by this standard. A definition based on IRS rules would lead the FEC to the conclusion that grassroots lobbying communications "promote, attack, support or oppose" legislation, not candidates.

IRS Revenue Ruling 2004-6 illustrates the IRS's superior expertise in distinguishing genuine issue advocacy form partisan electioneering. The ruling identifies factors that help identify the difference. For instance, one or more of the following factors may indicate a partisan communication if it:

- Is made during a time that coincides with an election
- identifies a candidate as a candidate
- targets voters in a particular election
- identifies a candidate's position on an issue
- distinguishes the candidate's position from others (in the communication or in the overall campaign)
- is not part of an ongoing series of substantially similar advocacy on the same issue.

The guidance given also identifies communications that are genuine issue advocacy as ones that:

- identify specific legislation or a specific event outside the control of the organization
- are timed to coincide with the specific event
- identify the candidate solely as a government official in a position to act on the policy or specific event
- mention the candidate solely as the a key sponsor of legislation.

The six examples in the ruling show how these factors apply in specific situations.

The NPRM cites a grassroots lobbying message by the Federation for American Immigration Reform (FAIR) that "appears to attack or oppose a federal candidate." This example clearly illustrates the problems with applying an undefined "promotes, attacks, supports or opposes" standard on communications by 501(c)(3) organizations.

The FAIR ad is clearly a legitimate grassroots lobbying communication for a charitable organization. It refers to an upcoming vote in Congress on an issue central to FAIR's mission. It criticizes a member of Congress whose past position has been inconsistent with FAIR's and urges the public to contact him about the issue. The ad does not mention an election, a political party or compare the Senator's position to that of his opponent.

This case illustrates the need for the FEC to adopt IRS rules and standards to define a nonpartisan broadcast by a 501(c)(3) organization. It would be absurd for an ad like FAIR's to be allowable under strict IRS rules, but violate FEC regulations. The end result would be to ban criticism of federal officials during the election season. Members of Congress should not be able to insulate themselves from criticism when they are both running for office and running the government.

The government does not shut down during the 60 days before an election or 30 days before a primary or convention. If charities are silenced, what is to stop elected officials from holding action on controversial issues to the blackout period so they can avoid public criticism?

Charities and religious organizations are entitled to a clear definition of what communications "promote, attack, support, oppose" a federal candidate.

The NPRM does not define what it means by the phrase "promote, support, attack, or oppose" standard. This is not a reasonable way to decide when charities and religious organizations can broadcast grassroots lobbying and other messages about the issues of the day. It does not distinguish between a candidate in his or her capacity as a candidate and references to public officials acting in their official capacity. It does not consider whether the broadcast makes a comparison between competing federal candidates, refers to the election or political parties or comments on the candidate's character and fitness for office. It could mean grassroots lobbying messages that ask people to call a Senator and urge him or her to change a past position on a bill are considered partisan attacks on the Senator.

This approach would have a chilling effect on constitutionally protected speech because charities will not want to risk FEC investigations, even if they are ultimately cleared. The public would be the ultimate loser if this happens.

In the NPRM the FEC notes that the Supreme Court held that the "promote, attack, support, oppose" standard does not require definition in the context of rules that apply to political parties. It goes on to ask if this standard is self-executing and understandable without further definition for entities that are not political parties. The answer, for organizations that cannot engage in activities central to political parties, is a resounding NO! The NPRM itself proves this point, by pointing to conflicting testimony in its first examination of this issue. Without a definition, charities may assume the broadest possible reading of the standard in order to be cautious, thereby self-censoring what would otherwise be legitimate broadcasts. Those that assume the IRS definitions also define "promote, attack, support, oppose" would come to different conclusions. In the end, without a definition, a charity could not reasonably know what is prohibited and what is not.

There is no record of abuse of the 501(c)(3) exemption.

As noted above, the FAIR example cited in the NPRM is not evidence of abuse of the exemption by charities. There is no anecdotal record from the 2004 election that indicates abuse of the rule.

While charities may have supported or opposed ideas or legislation, they have not supported or opposed candidates.

Research studies, such as *Buying Time,* have not focused on 501(c)(3) organizations. There have not been statistical studies that have focused on broadcast communications by charities and religious organizations. Absent a record of abuse, there is no justification for limiting fundamental constitutional speech rights of these organizations.

In 2002 we submitted comments on this same issue that described our research on advocacy by 501(c)(3) organizations. The point made then still applies. We said,

> "Strengthening Nonprofit Advocacy Project: Recent Research Supports Need for 501(c)(3) Exemption
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> In 1999 Tufts University, OMB Watch, and Charity Lobbying in the Public Interest launched a multi-year research to action project, called the Strengthening Nonprofit Advocacy Project (SNAP), to investigate factors that motivate nonprofit organizations to engage in public policy matters. SNAP is the first national research effort designed to investigate the public policy role of charitable organizations. Past research on nonprofit advocacy has not distinguished nonprofits based on tax exempt status. Since 501(c)(3) organizations are the only nonprofits prohibited from supporting or opposing candidates for office and the only nonprofits with limitations on legislative lobbying, there was a compelling need to look at advocacy within the constraints of 501(c)(3) status.
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> The goals of the research are to determine charities' level of involvement in public policy issues, and to identify factors that motivate their involvement as well as impede them. In May of this year we published an Overview of Findings, which is available on our website at www.ombwatch.org/snap. The final report will be published in late 2002.
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> The findings are based on a three part research process including: 1) A national survey of a random sample of 1,738 nonprofit organizations – tax-exempt public charities organized under Section 501(c)(3) of the federal tax code – conducted between January and June, 2000; 2) Data on survey respondents from IRS Form 990, the annual information return most nonprofits must file with the IRS; 3.) Telephone interviews with 45 of the survey respondents (primarily executive directors) – conducted from September, 2000 to February, 2001; and 4) 17 focus groups with executive directors, board members, and foundation staff held in different parts of the country from February through September, 2001. Religious organizations, private foundations, hospitals and universities were excluded from the sample.
>
> The data provides a profile of the charitable community. The average age of organizations in the sample was 34 years. Two-thirds have 11 or fewer professionals on their staff, and half have a total paid staff of 11 or less. The number of volunteers is impressive: the average minus the ten largest groups is 150, and increases to 2,084 when they are included. More than two-thirds of the survey sample have members. The median expenses of the sample is $450,000 per year. One-quarter of their revenue comes from individual contributions. Overall, the vast majority of 501(c)(3) organizations are

relatively small and modestly funded.

Our analysis looked at nine types of policy participation, and found charities engage in all of them. These include:

- testifying before government bodies,
- direct lobbying,
- grassroots lobbying,
- responding to government requests for information,
- working in planning or advisory groups with government officials,
- meeting with government officials about the organization's work,
- discussing grants or contracts with government officials, and
- interacting socially with government officials.

We found that 86% of the charities in the study engage in advocacy work involving testifying or lobbying. 78% are involved in grassroots lobbying. This result clearly indicates that charities are communicating with the public on legislative issues, and the final regulations on electioneering communications will have a significant impact on the only segment of the nonprofit sector that is already prohibited from supporting or opposing candidates for office.

The charitable community is well aware of this prohibition. The survey results indicate that 87% of charities know they cannot endorse candidates for office. In fact, many have an overly restrictive understanding of the tax rules, since 43% thought they could not sponsor a candidate debate or forum.

Although the level of policy participation by charities is high, the frequency of their participation is low. For example, a total of 69% say they lobby infrequently or not at all. The responses to questions about barriers to policy participation indicated that the complexity of tax rules is the second highest barrier to participation. A significant majority, 68% of respondents, made it second only to lack of financial resources (81%) as a barrier.

OMB Watch believes these research findings demonstrate a need to remove or reduce barriers to policy participation so the frequency of charity involvement increases. Society and government can only benefit if the most nonpartisan segment of society is more involved in policy debates and discussions. This makes simplification of rules governing advocacy a priority. The FEC should take all possible steps to avoid further complication by adopting the recommendations we have made in these comments."

Conclusion

The FEC should recognize that nonpartisan nonprofits have the right to speak out on the issues of the day, any day. The right to criticize federal officeholders in television, radio, satellite and cable media should not depend on arbitrary application of the undefined "promote, attack, support or oppose" standard, or on the desire of federal officials to avoid public criticism. If the FEC is unable or unwilling to define the "promote, attack, support or oppose" standard, it should

retain the exemption for 501(c)(3) organizations. It can always initiate its own enforcement proceedings, and use the IRS rules as a guide.

Yours truly,

Kay Guinane
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