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Fax Cover Sheet

Date: January 24, 2000

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202-219-3923

From: Nan Aron & Elliot Mincberg

Number of pages (including cover): 9

Comments:

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January 24, 2000

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
BY FACSIMILE AND MAIL

RE: Supplemental Notice of Proposed Rulemaking 1999-27: General Public Political Communications Coordinated with Candidates

Dear Ms. Smith,

The Alliance for Justice welcomes the opportunity to submit comments in response to the Notice Inquiry issued on December 9, 1999. We are pleased to submit these comments to help prevent an overbroad definition of a coordinated "general public political communication" under which a legitimate public communication might be characterized as a prohibited corporate contribution under the Federal Election Campaign Act (FECA) or a prohibited intervention in a political campaign by a 501(c)(3) organization under the Internal Revenue Code (IRC).

The Alliance is a national association of environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. Most of the Alliance's members are charitable organizations, recognized as tax-exempt under IRC Section 501(c)(3) and therefore prohibited from supporting or opposing candidates for public office. In addition, a significant number of the Alliance's members also work with or are affiliated with social welfare and advocacy organizations that engage in political activity. The Alliance requests an opportunity to testify at the hearing on February 16.

Joining the Alliance on these comments is People For the American Way (PFAW), a 501(c)(4) organization. PFAW organizes and mobilizes Americans to fight for fairness, justice, civil rights and the freedoms guaranteed by the Constitution, lobbies for progressive legislation, and helps to build communities of activists. In addition to being concerned about the implications of these rules for non-501(c)(3) organizations, including other 501(c)(4) organizations and political action committees, PFAW is concerned about the impact of these rules on our many 501(c)(3) partners and allies. PFAW does not request an opportunity to testify.

Like many other organizations, we believe that the Commission's definition of coordinated communications should be restricted so that contact with a candidate does not taint otherwise legitimate communications with the public. In particular, however, our comments are grounded in a concern that a broad definition of coordination poses a particular risk for 501(c)(3)s because these organizations both play an essential role in the policy and electoral process and also face severe penalties if found to be intervening in political campaigns. While we applaud the Commission's attempt to craft a narrow definition of coordinated communications, in keeping with the decision in the *Christian Coalition* case, we believe that the proposed regulations need further refinement to adequately protect the constitutional rights of 501(c)(3)s and other organizations.

I. 501(C)(3)S HAVE A VITAL ROLE IN COMMUNICATING WITH BOTH VOTERS AND CANDIDATES.

501(c)(3)s have an essential and constitutionally protected role in the public policy process that Congress and the courts have long protected.

Charities are uniquely positioned to provide information about key social problems and solutions. Because many 501(c)(3)s provide direct services to their communities — healthcare, housing, education, legal services, etc. — they have a grassroots view of the underlying social problems that create these needs. Frequently, these organizations know from direct experience which policy solutions offer a greater promise for addressing these problems. In addition, 501(c)(3)s have a credibility in discussing these concerns because their social mission makes their position less likely to be tainted by a desire for profit or the interests of a small group of individuals.

The election season is an important opportunity for 501(c)(3)s to capture the attention of both the candidates and the public as a way to influence the public policy. Candidates are more accessible during the campaign when they are eager to demonstrate their responsiveness to public concerns. More importantly, the campaign is the time when these would-be public officials are setting their policy positions, and information a 501(c)(3) provides at this time is far more likely to have an impact than a briefing after the election, when decisions on broad policy directions have already been made.

During the campaign, the public is more likely to focus on issues of policy as well. With a need to distinguish among competing candidates, voters pay greater attention to policy alternatives. By raising the public's awareness of an issue, 501(c)(3)s encourage the candidates

to address the issue. Just as important, the additional public attention helps 501(c)(3)s identify and attract people who will support the organization in the future, especially the organization's legislative agenda.

Congress and the courts have recognized and protected the role of 501(c)(3)s and other tax-exempt, policy organizations in the electoral process. Under the FECA, Congress and the courts have tried to limit the corrupting influence of large political expenditures, but have protected corporations' right to communicate with the public.[1] Likewise, the IRC forbids 501(c)(3)s from intervening in campaigns in support of or in opposition to candidates, but charities are permitted to provide nonpartisan information to candidates and voters. The courts have cited communications on public policy as central to the First Amendment's protection of speech. For example, the Supreme Court in *Buckley v. Valeo* stated that:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[2]

With this assurance, 501(c)(3)s are actively involved in the public debate during the election season. The Alliance for Justice contacted 501(c)(3)s in preparation for drafting these comments and found extensive communication with voters, including:

- petitions through which voters can indicate their support of a particular policy position and which are then distributed to all candidates;
- flyers distributed prior to candidate forums and similar events that encourage voters to question the candidates on key issues or policy proposals;
- distribution of yard signs that enable voters to indicate their support of a particular policy position;
- discussions about possible resolutions to be introduced at state party caucuses to determine the party platform's position on an issue;
- phone banks and mass mailings that encourage voters to participate in the state's caucus or primary process;

and many more. At the same time, these 501(c)(3) organizations are in contact with the various campaigns, with substantive and ministerial communications that include:

- copies of press releases, news articles, fact sheets, reports, and other substantive material about issues;
- questionnaires and similar tools to document the candidates' positions on an issue;

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[1] *See, e.g., FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (upholding right of MCFL to engage in independent public advocacy).

[2] 424 U.S. 1, 14 (1976), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

- briefings by staff from various campaigns about the mechanics of participating in the state's caucus process;
- daily contact with each campaign to determine the candidates' schedules (so that the 501(c)(3) can ensure an activist presence at the events);
- communications to organize nonpartisan candidate debates and forums;

and similar nonpartisan communications.

In short, 501(c)(3)s often link campaigns and the public, creating a fuller, more substantive debate. As a representative from one 501(c)(3) told us, his organization works to "bring the candidates and communities together to talk." The organization's goal is to "create a dialogue between voters and candidates, not just monologues from candidate to voters." The value of this in the era of the political sound-bite cannot be underestimated.

II. AN OVERBROAD DEFINITION OF COORDINATION THREATENS 501(C)(3)S.

An overbroad definition of coordination creates burdens for 501(c)(3)s and other types of corporate and individual speakers, but, for a 501(c)(3), it could be a threat to the organization's existence. As others will no doubt point out in their comments, a broad definition of coordinated communications would penalize constitutionally permissible speech, chilling speakers not just through fear of the penalties, but also through fear of a costly, time-consuming investigation by FEC staff. 501(c)(3)s, however, face an additional threat from an ill-considered definition of coordinated communications — a threat to the tax-exempt status that allows them to survive.

Others have spoken eloquently about the dangers of using a broad definition of coordination to declare too much speech to be an impermissible campaign contribution under the FECA. As the court in the *Christian Coalition* case said, "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions."[3]

The risk of a penalty for violating section 441b could seem insignificant compared to the threat of a Commission investigation, given that such an investigation requires its target to document the circumstances and content of every contact between the organization and a campaign. If those contacts are extensive, (and our conversations with 501(c)(3) organizations suggest that they are) even an investigation that clears the organization could consume hundreds of hours of staff time and thousands of dollars in legal fees.

For 501(c)(3)s, however, there is an additional danger. Section 501(c)(3) of the IRC forbids charities from intervening in political campaigns. In general, this provision has been seen as more restrictive than the FECA. In fact, many 501(c)(3) organizations are surprised to learn that any aspects of the FECA are relevant to them in light of the strong IRC provision. The

[3] *FEC v. The Christian Coalition*, 52 F.Supp.2d 45, 88-89 (D.C. 1999).

penalty for violating the IRC provision is loss of the organization's tax-exempt status, a penalty that the Internal Revenue Service (IRS) has been known to enforce.[4] The loss of 501(c)(3) status frequently forces an organization to severely cut back its operations or even dissolve because donors lose the incentive of tax-deductible contributions, and foundations are generally unwilling to undertake the additional legal steps required to fund a non-501(c)(3) organization.

It seems likely that the IRS would find that a ruling that a 501(c)(3) has made a "contribution" to a political campaign would demonstrate that the 501(c)(3) had violated the IRC's campaign intervention prohibition. Thus, if the Commission were to find that coordination between a 501(c)(3) and a campaign had turned a public communication into a prohibited contribution under section 441b, the IRS could act to revoke the organization's tax-exempt status.

III. THE PROPOSED REGULATIONS ARE OVERBROAD AND SHOULD BE MODIFIED.

Although we applaud the Commission's desire to follow the lead of the *Christian Coalition* court by developing a narrow definition of coordination, we feel that the proposed regulations miss the mark. In particular, we think that the regulations would characterize as contributions certain legitimate communications by 501(c)(3)s by finding that permissible contact between a 501(c)(3) and a campaign constitutes "coordination." We propose several alternatives to more closely reflect the goal we share with the Commission — to guard against the corrupting influence of improper campaign contributions while protecting the essential constitutional guarantees of speech on political and policy matters.

While proposed section 100.23 attempts to restrict the scope of the speech regulated, the rules, as currently drafted, would nonetheless regulate protected speech. As we attempt to demonstrate with examples drawn from our contact with 501(c)(3)s across the country, the efforts throughout the proposed regulation to limit its reach are insufficient, either separately or taken as a whole:

- The term "general public political communication" is defined only as a communication that reaches more than 100 people and thus could easily encompass permissible communications on legislative policy issues. For example, a 501(c)(3)s might send out a mail and e-mail communication urging members to attend a nonpartisan candidate forum the 501(c)(3) is sponsoring.[5]

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[4] *See, e.g., Branch Ministries v. Rossotti*, __ F.Supp.2d __ (D.D.C., Mar. 30, 1999) (Civil Action No. 95-0724 (PLF)) (upholding IRS revocation of 501(c)(3) status from church that ran newspaper advertisements critical of a presidential candidate).

[5] The proposed regulation would specifically include "communications . . . made through . . . the Internet or on a web site." (Proposed section 100.23(e)(1).) As the Alliance for Justice has recently indicated in its comments in response to the Commission's Notice of Inquiry on the Use of the Internet for Campaign Activity (1999-24), we believe that these regulations and others should exclude Internet communications because the Internet is fundamentally different from other types of communication. Both law and policy urge a different approach to Internet communications.

- Limiting regulated communications to those that include a "clearly identified candidate" does not sufficiently restrict the communications regulated because many legitimate communications concerning policy issues necessarily identify elected officials who are key players on the issue and who may also be candidates for re-election. For example, an alert to members urging support of the McCain/Feingold campaign finance reform bill would clearly identify presidential candidate Senator John McCain.
- The option suggested in Alternative 1-B for paragraph (c) of limiting the reach of the regulation by reference to the geographic area in which the candidate is running is not sufficient because many legitimate policy communications occur in the context of a national campaign. For example, because Senator McCain is running for national office, the alert described above would always be "within the geographic area in which the candidate is running" as long as it was distributed in the United States.
- Limiting communication to those made "at the request or suggestion" of the candidate is likewise too broad, even if cabined by the addition language suggested in Alternative 2-B for Paragraph (c)(1) that such a request concern the "content, timing, location..." or other specific attributes of the distribution. For example, under federal tax and election law, 501(c)(3)s may produce nonpartisan legislative voting records.[6] Under the proposed regulation, such a voting record would become a prohibited, coordinated communication if, as part of its distribution, a 501(c)(3) were to make voting record copies available for distribution by any elected official or candidate and asked a candidate's campaign how many voting records it would like for distribution. Likewise the proposed regulation would appear to be violated if, in the example above, Senator McCain requests the help of 501(c)(3) organizations, urging them to contact their members to generate grassroots support for his campaign finance proposal in Congress.

It is worth highlighting some successful attempts in the proposed regulations to narrow the scope of the definition of coordinated communications. In particular, we applaud the Commission's clear intent in proposed section 100.23(c) that coordination only occurs when the coordination with the campaign *concerns the public communication at issue*.[7] We also approve of the Commission's attempt to define a clear safe harbor for inquiries about a candidate's "position on legislative or public policy issues" in proposed section 100.23(d). We think that the assurance such safe harbors provide urges a greater use of them as we suggest below.

The Alliance for Justice believes that the best approach to ensuring the constitutionality of these regulations would be to require that, as a threshold test, only communications that

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[6] *See*, Rev. Rul. 78-248, 1978-1 C.B. 154 (describing permissible voting records prepared and distributed by 501(c)(3)s) and 11 CFR §114.4(b)(4) (permitting corporations to prepare and distribute nonpartisan voting records). Note that although section 114.4(b)(4) already forbids corporations from coordinating the decision on the content and distribution of voting records with campaigns, proposed section 100.23 appears to reach further to include communications made after a mere request by a campaign (or, under Alternative 2-B, a request "regarding the "timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication").

[7] In the same vein, the Commission should revise section 114.2(c) of the regulations that suggests that prior, legitimate contact between a corporation and a campaign could nonetheless taint as "coordinated" subsequent communications on an entirely different subject.

contain "express advocacy" may constitute a prohibited, coordinated communication under the FECA.[8] The Alliance believes that this definition is constitutionally required based on the decision in Buckley and the language of the FECA. However, it is clear that, at this time, the Commission has chosen to follow the District Court's decision in *Christian Coalition* in rejecting this approach, and the Alliance will not include a lengthy discussion of the arguments here.[9]

Short of this solution, the Alliance for Justice and People for the American Way offer several specific suggestions for better ways to confine this regulation to appropriate constitutional boundaries. Our basic goal is to create bright-line rules and safe harbors that will provide assurance to 501(c)(3)s that might otherwise be chilled in their speech.

The Commission should create additional threshold tests to clarify the types of communications that might constitute a "contribution" to a campaign. In addition to requiring that a coordinated communication is one that clearly identifies a candidate, the regulation should require that the communication:

- either identify that person *as* a candidate or contain a clear, unambiguous reference to the election; and
- clearly express approval or disapproval for the candidate.

By following these bright-line rules, a 501(c)(3) can protect itself from the threat of an investigation by the Commission and yet still name elected officials and candidates in the context of voter education and advocacy on public policy issues.

The Commission should create an additional safe harbor for communications that occur outside the context of an election. We suggest that the regulation reach only communications made within 30 days of an election. A straightforward time-based rule provides the greatest certainty for policy advocates. If the Commission is unwilling to set an absolute time limit, the regulations could provide that a communication outside the time limit is presumed not to be an impermissible contribution, putting the burden on the Commission staff, not the organization.

Finally, the Commission should make clear that a request from a candidate or campaign at most creates a presumption that a communication made in accordance with that request is coordinated. A 501(c)(3) or other organization should be able to rebut that presumption by showing, for example, that the organization had preexisting plans to make the communication or that the communication was part of an ongoing effort by the organization to communicate with the public on a particular issue.

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[8] People for the American Way has not taken a position on whether or not a coordinated communication must contain express advocacy to be prohibited under the FECA. While PFAW joins in the other suggestions in these comments, it neither joins nor rejects this argument.

[9] For an excellent discussion of the constitutional, legislative, and policy reasons for applying an express advocacy standard, see Brief Amici Curiae on Behalf of the American Federation of Labor and Congress of Industrial Organizations and the American Civil Liberties Union, *FEC v. The Christian Coalition*, 52 F.Supp.2d 45 (D.C. 1999).

The application of our suggestions to the hypotheticals offered in the Notice demonstrates their value. The communication in first hypothetical would constitute an impermissible coordinated communication under our suggestions. The communication identifies Congressman Jones, contains an unambiguous reference to the election ("keep that in mind on Tuesday"), and clearly expresses disapproval of Congressman Jones. The advertisement runs within 30 days of the election. The advertisement would be presumed to be a "contribution" under the regulation.

The communication in the second hypothetical, as initially described, would not constitute an impermissible coordinated communication under our suggestions. It neither identifies Senator Moore as a candidate nor makes reference to the election. Furthermore, it does not express approval for Senator Moore, and the advertisement runs several months before the November election. Even if, as suggested in the hypothetical, the advertisement were to run the week before the election and were to include the words "Please support Senator William Moore," we would argue that this would *not* constitute a "contribution" because the ad would still not refer to Moore as a candidate or refer to the election. While such a result may be frustrating to some, regulations that sufficiently protect constitutional speech, will, of necessity, sometime fail to capture speech that arguably attempts to support or oppose a candidate's campaign.[10]

IV. CONCLUSION

While we praise the Commission for its efforts to craft a rule that protects constitutional speech, its proposed rule falls short. Not only is the rule overbroad, it also fails to provide sufficient safe harbors and bright-line rules to allow 501(c)(3)s and others to conduct themselves without fear of the threats associated with an FEC challenge. 501(c)(3) organizations face not just the threats of penalties under the FECA and the extreme burdens of an FEC investigation but also a threat to their tax-exempt status and their very existence. For this reason we urge the Commission to reconsider these regulations in accordance with our suggestions.

Thank you for the opportunity to comment on these regulations. We would be happy to provide whatever additional information or thoughts that the Commission would find helpful in its consideration of this rule.

Sincerely,

Nan Aron,
President,
Alliance for Justice

Elliot Mincberg,
Vice President and General Counsel,
People for the American Way

[10] It is worth noting that using an "express advocacy" test in lieu of our patchwork suggestions *would* capture this second version of hypothetical 2.