FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: **THE COMMISSION**
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: **OFFICE OF THE COMMISSION SECRETARY**

DATE: **August 19, 2004**

SUBJECT: ***Ex Parte* COMMUNICATION**
Re: Final Rules for Political Committee Status

Transmitted herewith is an *ex parte* communication from Cassandra Lentchner, Counsel to NARAL Pro-Choice, regarding the above-captioned matter.

Proposed final regulations are on the agenda for Thursday, August 19, 2004.

Attachment

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Cassandra F. Lentchner	*(202) 434-1611*	*(202) 434-1690*

RECIPIENT:	COMPANY:	TELEPHONE:	FACSIMILE:
Commissioner David Mason	*Federal Election Commission*	*(202) 694-1050*	*(202) 219-0147*

RE: NARAL Pro-Choice America, Inc.

FEDERAL ELECTION COMMISSION

Re: In re Draft Final Rules for Political Committee Status	:
August 19, 2004 Meeting Agenda Document No. 04-75	:

PETITION TO HOLDOVER AND REOPEN FOR PUBLIC COMMENT

NARAL Pro-Choice America, Inc. ("NARAL") hereby petitions the Federal Election Commission ("FEC" or the "Commission") to holdover and reopen for public comment the Draft Final Rules dated August 12, 2004 (the "DFR"), in which the Commission proposes changing current regulation regarding "political committee status."

ARGUMENT IN SUPPORT OF PETITION

NARAL is a corporation that is tax exempt pursuant to section 501(c)(4) of the tax code. NARAL 's primary purpose is to protect and preserve women's right to choose while promoting policies and programs that improve women's health and make abortion less necessary. NARAL educates Americans and officeholders about reproductive rights. As such, NARAL engages in many types of activities, including lobbying, educational programs, and advocacy activities. As required by the Internal Revenue Code ("IRC"), political activity is not NARAL's primary activity. However, NARAL does conduct permissible political activity. NARAL is an "MCFL" organization. As such, NARAL has a policy against accepting, directly or indirectly, any contributions from corporations or labor

unions -- all money received by NARAL is from individual contributors. As an MCFL organization, pursuant to Supreme Court precedent as well as Commission regulations, NARAL is permitted to conduct independent expenditures in connection with federal elections.

1. The Commission Should Hold Over the DFR and Reopen the Public Comment Period

The DFR evidences significant work by the General Counsel's office. The General Counsel staff has clearly responded to a significant number of the public comments received in response to the Notice of Proposed Rulemaking dated March 11, 2004 (the "NPRM"). However, this is an area of great complexity that can and will have a serious impact on numerous organizations. As such, the Commission must tread carefully, giving itself and the public ample time to consider and evaluate the potential regulations. Given the timing of the General Counsel's draft, the Commissioners have had insufficient time to consider and evaluate the DFR. Additionally, the public has been given no opportunity to comment. Although the Commission gave the public time to comment on the NPRM, it has not given the public any time to comment on the DFR, which is significantly different from the draft regulations that were previously circulated.

The DFR suggests amending §106.6 to provide that the regulations would not take effect until January 1, 2005. This would appear to concede that there is no need for hurried action and no need for changes before this election. Under such circumstances, there is simply no need to adopt rules hastily. Certainly, there is no need for the Commission to

adopt rules within days of receiving a draft. The Commission took days of testimony and received thousands of comments – the Commissioners are entitled to time to evaluate the integration of these varied views into the staff draft.

Moreover, the public is entitled to comment on the draft. The comments received in response to the NPRM clearly demonstrate a significant public interest in this process. It is inherently unfair to publish an admittedly complex and completely refashioned rule without permitting the interested public the ability to consider and comment before the rules are adopted. Every Commissioner is entitled to an opportunity to fully and completely evaluate the newly proposed rules. To evaluate the roles, the Commission needs the benefit of additional comments from the affected public.

Permitting time to comment is particularly essential for 501(c) organizations because the DFR, unlike the last draft rules circulated pursuant to the NPRM, does not exclude all 501(c) entities. Tens of thousands of 501(c) entities, including NARAL, were led to believe by the last draft rules that any adopted regulations would not apply to them.

Instead, on six days notice, regulations have been proposed that could affect them this year – it appears to us that the DFR one-year look back provision for political committee status could cause organizations to be classified as political committees based on their conduct this year.[1] 501(c) organizations have had very little time to consider, and no

[1] The General Counsel's commentary regarding the DFR recognizes that there had been a significant amount of public comments to the effect that "changes made effective before the general election on November 2, 2004 would cause great disruption to committees and other organizations." The DFR stated an intent to "where possible, minimize the administrative burdens, and avoid a number of problems raised by commentators."

time to comment on, the effects of the new rules contained in the DFR. They have had no time to consider how these rules would require them to restructure their operations. It is too late to restructure activities for the current year, and clearly too late to change statements and solicitations that have already been sent.

The DFR goes beyond the scope of the original NPRM and incorporates unanticipated and substantial changes from the most recently published proposed regulations. These changes necessitate giving the public a fair opportunity to comment. Below is an example of just one problem that Petitioner has identified. This problem is being discussed as an example of the issues at stake in the DFR that require a full and fair opportunity to comment.

2. Impact of Treating Donations to MCFL Organizations as Contributions Depending on the Content of a Solicitation

The DFR stands to have very serious ramifications on the First Amendment rights of 501(c)(4) organizations. Based solely on the nature of an organization's fundraising solicitations, the DFR would reclassify MCFL organizations as political committees and thereby limit contributions to the entity, and require disclosure of all its activities. Indeed, the DFR could reclassify an organization as a political committee even if the organization

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However, if the DFR were adopted this week, the definition of political committee status would change for 501(c) entities before this year's election. Moreover, the DFR would entitle the FEC to look back over the last 12 months to determine organizations' political committee status. Thus, statements, disbursements and solicitations made since January 1, 2004 would potentially be considered to determine whether an organization was a political committee. Such a result would, as the General Counsel's commentary recognized, cause large administrative problems, as well as well as legal jeopardy as an ex post facto application of the law.

conducted no electoral activity. There is no justification in the administrative record or in the law for such a rule.

The definition of political committee proposed in the DFR considers fundraising solicitations and the costs thereof in several places: First, it considers fundraising statements of the organizations that describe their major purpose. There is no limitation given in this section; fundraising solicitations are deemed official statements regardless of whether they are oral or written, and regardless of who is making the solicitation. Second, § 100.5(a)(2)(iii) provides that an organization is a political committee if:

> During any twelve-month period, as calculated on a quarterly basis, more than fifty percent [50%] of the total receipts of the committee, club, association or other group is composed of contributions.

For purposes of this section, the DFR provides a definition of contribution in § 100.57, which provides:

> (a) Treatment as contributions. Except as provided in 11 CFR 102.17, a gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that <u>any portion</u> of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

(Emphasis added). This section vastly expands the organizations defined as political committees and subjected to the limitations in the FECA. More importantly, it puts into jeopardy the MCFL status of numerous organizations. In doing so, this rule would erode the First Amendment rights enjoyed by these organizations as recognized by the Supreme Court.

See FEC v. Mass. Citizens for Life ("MCFL"), 479 U.S. 238, 263 (1986). If an MCFL organization changed its solicitations to comply, this test could severely limit an organization's fundraising. Independent groups must be able to discuss their electoral work in their fundraising materials. Organizations that do political work (in accordance with both IRS and existing FEC limitations) must be able to mention that work in all of their solicitations without turning the organizations into political committees.

Indeed, FEC regulations require an MCFL organization at least to mention its political work in all its solicitations. 11 CFR §114.10(f) states:

> Whenever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

Thus, if the DFR was adopted, an MCFL organization would be required to inform donors that their contribution may be used for a political purpose, but if it went any further and gave donors any indication of work they may be supporting by identifying candidates whose views the organization supports or opposes, the organization would arguably become a political committee.

The DFR's reliance on FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995), as justification for proposed section 100.57, is misplaced. The defendant in Survival Fund, like NARAL, was a qualified nonprofit organization under FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). The Survival Fund Court merely held that the

defendant's communication could be subjected to the disclosure regime of § 441d(a). The Court did not find that the communications and donations to the organization could be otherwise limited by the Act.

This is but one example of the weighty issues raised by the DFR, and the necessity of permitting time for reasoned consideration of these issues, on the part of both the Commissioners and the public.

CONCLUSION

For all of the forgoing reasons, NARAL Pro-Choice America petitions the Commission to holdover and reopen for public comment the proposed final rule on political committee status.

Dated: August 18, 2004
Washington, D.C.

Respectfully submitted,

America

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