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**VIA ELECTRONIC MAIL AND HAND DELIVERY**



April 9, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

**Re: Notice 2004-6**

Dear Ms. Dinh:

INDEPENDENT SECTOR and the 80 undersigned charitable and philanthropic nonprofit organizations respectfully submit the attached comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission, Notice 2004-6, on March 11, 2004.

Sincerely,

Diana Aviv

Diana Aviv
President and CEO
INDEPENDENT SECTOR

**COMMENTS OF INDEPENDENT SECTOR ON THE PROPOSED RULES REGARDING POLITICAL COMMITTEE STATUS (NOTICE 2004-6)**

INDEPENDENT SECTOR and the 80 undersigned charitable and philanthropic nonprofit organizations submit these comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission (the "Commission"), Notice 2004-6, on March 11, 2004.

INDEPENDENT SECTOR is a nonpartisan, nonprofit coalition of approximately 600 nonprofit organizations, private and community foundations, and corporate philanthropy programs. It represents millions of volunteers, donors, and people served in communities around the world. INDEPENDENT SECTOR is organized as a nonprofit corporation under District of Columbia law and is exempt from federal income tax under section 501(c)(3) of Title 26 of the U.S. Code, also known as the Internal Revenue Code ("IRC"). Its members and all of the undersigned organizations are also organized as nonprofit corporations under state or District of Columbia law and are exempt from federal income tax under IRC § 501(c)(3) or IRC § 501(c)(4). All of the undersigned organizations, and many INDEPENDENT SECTOR members, are actively engaged in educating the public and advocating positions on legislative and policy issues, including the positions on those issues taken by elected officials, or support such efforts. In addition, many of us are actively involved in increasing citizen participation in elections, including voter registration and get-out-the-vote efforts, as well as participation in candidate debates and forums.

INDEPENDENT SECTOR and all of the undersigned organizations believe that adoption of the proposed changes to the definition of "political committee" and "expenditure" would lead most nonprofit organizations to cease or significantly curtail their critical issue advocacy work and their efforts to inform and motivate potential voters to engage in elections. The proposed changes would thus effectively limit the essential work of addressing public policy issues pending before the legislative and executive branches of the federal government and increasing citizen engagement in our nation's democratic process to partisan political committees, while other voices, particularly those of the nonprofit sector, are shut out.

We therefore strongly urge the Commission to withdraw the proposed rules and to leave consideration of these issues to the Congress. Congress had ample opportunity to revisit the definitions of "political committee" and "expenditure," or to instruct the Commission to reconsider those definitions, when Congress considered and passed the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), but Congress did not do so. The Commission lacks both congressional direction and authority to revisit these definitions at its own initiative. Furthermore, to enact such changes in the midst of a heated federal election year, and while federal, state and local legislative bodies are considering numerous critical legislative and policy issues, would create chaos and undermine legitimate issue advocacy and voter participation efforts already well underway.

## I. The Definition of "Political Committee" Should Not Include IRC § 501(c)(3) and IRC § 501(c)(4) Organizations

### A. The Commission Should Not Disturb the Detailed and Finely Calibrated Legal Structure Already Governing the Partisan Political Activities of IRC § 501(c) Organizations

IRC § 501(c) organizations have an astounding breadth and diversity, reflecting the central role of voluntary associations in American society. They are also heavily involved in ensuring the civic participation necessary to keep our democracy strong. As Alexander de Tocqueville noted almost 170 years ago and as continues to be true: "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." *Democracy in America*, vol. I, ch. 12.

Our nation's over 900,000 IRC § 501(c)(3) organizations include international relief organizations such as World Vision International, national health organizations such as the American Cancer Society, think tanks such as the Brookings Institution and the Heritage Foundation, universities and colleges, hospitals, rural health clinics, urban soup kitchens and homeless shelters, community and professional theater groups, and museums. *See 2003 IRS Data Book*, Table 22. This figure does not include most of the hundreds of thousands of religious congregations, as churches and certain church-related organizations are not required to file for tax-exempt status with the IRS. *Id.*, n.1. The over 137,000 IRC § 501(c)(4) organizations range from national membership organizations such as the AARP and Rotary International to veterans organizations such as the Veterans of Foreign Wars to community pools and recreational facilities. *See id.*, Table 22.

IRC § 501(c)(3) organizations are prohibited from supporting or opposing candidates for elected public office and limited in their permitted amount of lobbying, but Congress, the IRS and the courts have recognized that many advocacy and election-related activities are consistent with this prohibition and limit. For example, the IRS has provided precedential guidance regarding the circumstances under which IRC § 501(c)(3) organizations can conduct candidate forums, produce candidate questionnaires and legislative scorecards, and educate students about political campaigns. Rev. Rul. 86-95, 1986-2 C.B. 73 (candidate forums); Rev. Rul. 80-282, 1980-2 C.B. 178 (legislative scorecards); Rev. Rul. 78-248, 1978-1 C.B. 154 (candidate questionnaires); Rev. Rul. 72-512, 1972-2 C.B. 246 (educating students). The IRS has also provided precedential guidance for IRC § 501(c)(4), (c)(5) and (c)(6) organizations, that should also be applicable to IRC § 501(c)(3) organizations, to determine whether advocacy activities are partisan political activities. Rev. Rul. 2004-6, 2004-4 I.R.B. 328. The IRS has recognized in nonprecedential guidance that voter participation activities targeted at previously disenfranchised demographic groups are consistent with IRC § 501(c)(3) status, even if they raise public policy issues of particular interest to that group. *See, e.g.*, PLR 9751029 (Sept. 19, 1997) (low-income, young or minority women; included "issue education"); PLR 9223050 (June 5, 1992) (homeless; included raising issues of poverty, housing, health care and crime). Congress has also created an elective regime under which IRC § 501(c)(3) organizations have brightline expenditure limits on their permitted amount of lobbying. IRC §§ 501(h), 4911.

These restrictions are constitutional only because IRC § 501(c)(3) organizations are easily able to create affiliated IRC § 501(c) organizations that can engage in an unlimited amount of lobbying and a limited amount of partisan political activity. *See Regan v. Taxation with Representation*, 461 U.S. 540 ("*TRW*"), 551-54 (Blackmun, J., concurring) (1983) (reasoning that the lobbying limitations for IRC § 501(c)(3) organizations are only constitutional because of the ease with which an IRC § 501(c)(3) organization can create an affiliated IRC § 501(c)(4) organization); *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (affirming the reasoning in the *TRW* concurrence); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (applying this same reasoning to reject a constitutional challenge to the prohibition on partisan political activity by IRC § 501(c)(3) organizations). The IRS has expressly recognized that many types of IRC § 501(c) organizations can engage in a limited amount of political activity. 26 C.F.R. § 1.501(c)(4)-1(a)(2) (relating to IRC § 501(c)(4) organizations); Rev. Rul. 81-95, 1981-1 C.B. 332 (same); GCM 36286 (May 22, 1975) (relating to IRC § 501(c)(5) organizations); GCM 34233 (Dec. 3, 1969) (relating to IRC § 501(c)(5) and IRC § 501(c)(6) organizations). *See generally* John Francis Reilly & Barbara A. Braig Allen, "Political Campaign and Lobbying Activities of IRC 501(c)(4),(c)(5), and (c)(6) Organizations," *IRS Exempt Organizations - Technical Instruction Program for FY2003* L-1 (available at www.irs.gov/charities/article/0,,id=101915,00.html).

Many IRC § 501(c) organizations therefore engage in permitted advocacy and lobbying activities involving federal legislation and federal officials. Under permitted lobbying limits and definitions, it would not be unusual for an organization to spend more than $50,000 in any given year to research and communicate information about the positions and voting records of Members of Congress and other elected officials on issues directly related to their charitable missions. For example:

- United Way of America, an IRC § 501(c)(3) organization, is working to pass federal legislation to create a national telephone for health and human services assistance. The organization recently held a press conference to recognize and thank Representatives Burr and Eshoo and Senators Dole and Clinton for their work on the Calling for 2-1-1 Act of 2003. The organization's website includes several photos of the Members of Congress with leaders of the organization and thanks specific Members who have supported the legislation.

- Through its Cancer Action Network, the American Cancer Society has established a new national non-profit, non-partisan membership organization that allows individuals to have a more direct impact on health care policies that affect families with cancer by generating significant grassroots lobbying efforts.

- The National Council of La Raza, an IRC § 501(c)(3) organization and one of the nation's largest Hispanic organizations, has been giving annual leadership awards to Members of Congress since 1988. Recipients of the award are honored at an annual event which brings together over 700 participants including Hispanic leaders, community activists, elected and appointed officials, leaders from nonprofit organizations, executives from Fortune 500 companies, philanthropic leaders, academicians, students, and others with a professional or personal connection to

Hispanic America. Awardees also receive acknowledgement on the organization's website.

- Defenders of Wildlife, an IRC § 501(c)(3) organization, recently issued a press release praising the stands of Senators Richard Durbin (D-Illinois), Russ Feingold (D-Wisc.) and Olympia Snowe (R-Maine) in opposing opening the Arctic National Wildlife Refuge to oil drilling. The organization also has posted the press release on its website.

IRC § 501(c) organizations are also heavily involved in ensuring civic participation not only through advocacy but also through the ballot box. In reaction to the declining percentages of eligible voters who actually choose to vote, numerous organizations such as Project Vote Smart, Rock the Vote, and Southwest Voter Registration Project, all IRC § 501(c)(3) organizations, have arisen to encourage voter registration, education and participation. Given the diversity of our society, these organizations have naturally chosen to focus on specific demographic or interest groups, particularly ones that are underrepresented in the voting public, such as minorities (Southwest Voter Registration Project focuses on Latinos) and young people (Rock the Vote). Their efforts join the long-time efforts of many other organizations, such as the NAACP, an IRC § 501(c)(3) organization, to increase voter participation. To motivate infrequent voters and non-voters, these organizations emphasize the public policy issues that most directly affect these individuals, and the need for them to vote if they wish to have a say in who will decide these issues. For example, Rock the Vote's website identifies important issues that are decided by elected officials to motivate young people to register and vote. All of these activities are completely consistent with the tax-exempt status of IRC § 501(c) organizations, as the IRS has recognized. These activities are also critical to ensuring that disenfranchised and underrepresented voices are heard.

### B. The Commission Should Withdraw the Proposed Rules Because They Would Destroy This Congressional Constructed Structure for Advocacy and Political Involvement of Citizens Through IRC § 501(c) Organizations

Proposed 11 C.F.R. § 100.5(a) would expand the definition of "political committee" to include many organizations, including IRC § 501(c)(3) and IRC § 501(c)(4) organizations, simply because they engage in now permitted types of advocacy and voter participation activities. This expansion would be devastating for these organizations because it would force them either to abandon these activities or to be subject to the draconian political committee hard money limits on contribution amounts and sources.[1] The impact of such an expansion would

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[1] Political committees are generally only permitted to accept up to $5,000 from each donor per calendar year and are prohibited from accepting any donations from corporations or labor unions. 11 C.F.R. §§ 110.1(d), 114.2(d). They are also subject to extensive reporting and procedural requirements. *See FEC v. Massachusetts Citizens for Life Inc.*, 479 U.S. 238, 253-54 (1986) (listing those requirements).

also be felt by the grantmakers who support these organizations. IRC § 501(c)(3) foundations in corporate form would be absolutely prohibited from supporting not only the advocacy activities, but all activities of any IRC § 501(c) organization swept under the proposed broad definition of political committee. Further, under the expanded definition, foundations' financial support of advocacy and nonpartisan voter participation activities alone could lead to the classification of these grantmakers as political committees. This expansion would also force many existing IRC § 501(c) organizations to shut their doors because the proposed rules would retroactively make many nonprofit organizations political committees based on their activities before 2004, and force them to raise hard money to reimburse themselves for past activities or end their operations. Proposed 11 C.F.R. §§ 102.50-102.55.

Under existing law, an organization is a political committee if it has contributions or expenditures in excess of $1,000 in a calendar year and if its major purpose is the nomination or election of a Federal official. 11 C.F.R. § 100.5(a) (setting $1,000 threshold); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (stating the "major purpose" requirement). Proposed 11 C.F.R. § 100.5(a) presents two alternatives for expanding the definition of what counts as an "expenditure" for purposes of meeting the "in excess of $1,000" in expenditures during a calendar year test for a political committee. Either way would sharply increase the types of activities that would be considered expenditures and therefore chill the speech of nonprofit organizations.

Under the first alternative, Proposed 11 C.F.R. § 100.5(a) would expand the definition of "expenditure" to include payments for any voter registration activity within 120 days of a Federal election, any voter identification or get-out-the-vote activity in connection with a Federal election, or any public communication that refers to a clearly identified candidate that promotes, supports, attacks, or opposes a Federal candidate (collectively, "advocacy and election activities"). A "public communication" is defined broadly as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility (*e.g.*, a billboard), mass mailing (more than 500 substantially similar pieces over 30 days), or telephone bank (over 500 substantially similar calls over 30 days) to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22)-(24); 11 C.F.R. §§ 100.26 -100.28. Referring to a "clearly identified" candidate is defined similarly broadly and does not require any mention of the candidate's candidacy or the election. 11 C.F.R. § 100.17 (stating that "clearly identified" "means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia'"). The proposed rule does not define "promote, support, attack or oppose" and therefore makes it almost impossible for organizations to understand and make decisions about what falls within this standard.

These broad definitions of "public communication" and "clearly identified", when combined with the lack of definition for promote, support, attack, or oppose, will have a significant chilling effect on the activities of nonprofit organizations. All of the examples of current advocacy activities, interactions with candidates and voter participation efforts cited above would be curtailed. Any public communication about an award to a member of Congress or a President who is a candidate for re-election would be an "expenditure," as would any public

communication characterizing the position of a member of Congress or the President in a negative or positive way. Any voter registration activities with 120 days of either a Federal primary or general election and any voter identification or get-out-the-vote efforts, even if completely nonpartisan and done without any mention of specific candidates, political parties or issues, would also be an "expenditure."

Under the second alternative, Proposed 11 C.F.R. § 100.116 would expand the definition of "expenditure" to include amounts paid for a public communication that either (1) "[r]efers to a clearly identified candidate for Federal office, and promotes or supports, or attacks or opposes any candidate for Federal office," or (2) "promotes or opposes any political party." The problem with the undefined promote, support, attack or oppose standard has already been discussed. The phrase "promotes or opposes any political party" is similarly undefined, and raises even greater concerns because it lacks the "refers to a clearly identified" requirement. This phrase therefore would reach any positive or negative references to "conservatives," "liberals" or "progressives," as well as any positive or negative reference to positions closely associated with a certain political party, such as "pro-choice," "pro-life," "pro-gay rights," "pro-family," "pro-gun rights" or "pro-gun control." Proposed 11 C.F.R. §§ 100.133, 114.4(c), discussed further below, would also greatly expand the range of voter registration and get-out-the-vote activities that would be considered an "expenditure." These expansions would apply for purposes of the major purpose test and for the purposes of the existing absolute prohibition against all types of corporations, including tax-exempt nonprofit corporations, making any "expenditures" imposed by 2 U.S.C. 441b(a),(b)(2), (c) and 11 C.F.R. §§ 114.2(b)(2)(iii), 114.14.

Either expansion of "expenditure" would therefore sharply curtail existing speech by IRC § 501(c) organizations. INDEPENDENT SECTOR would itself feel compelled to advise its members and the other tax-exempt organizations that seek its advice to refrain from any mentions of or interactions with federal public officials who are also candidates for public office or political parties for fear of inadvertently making an expenditure that could trigger political committee status.

Proposed 11 C.F.R. § 100.5(a) would also change "the major purpose" test to an "a major purpose test," and greatly expand the actions that would be result in an organization meeting the "a major test" standard. Merely spending $50,000 in a calendar year on advocacy and election activities satisfies the "a major purpose" test even if such activities are strictly nonpartisan. Proposed 11 C.F.R. § 100.5(a)(2)(iii). The other proposed ways of meeting the "major purpose" test are hardly better. These include if more than half of the organization's annual disbursements are for advocacy and election activities, again even if such activities are strictly nonpartisan. Proposed 11 C.F.R. § 100.5(a)(2)(ii). They also include if only $10,000 of an organization's annual disbursements are for this purpose and the organization's written materials or communications "demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose" a clearly identified Federal candidate or candidates or the Federal candidates of a clearly identified political party, without providing any guidance regarding what statements and what volume of materials would be sufficient to make this demonstration. Proposed 11 C.F.R. § 100.5(a)(2)(i). These various aspects of the major purpose test, whether taken together or individually, will prevent most if not almost all IRC § 501(c) organizations

that engage in advocacy and election activity from doing so in the future unless they wish to be classified as, and abide by the contribution restrictions on, political committees.

Finally, the proposed rules fail to provide an exception for membership communications when they expand the definition of political committee to include organizations that make minimal payment for advocacy and election activities because the general membership communication exception of 11 C.F.R. § 100.34 does not apply to such activities. Many IRC § 501(c) organizations are membership organizations, including INDEPENDENT SECTOR itself, and as such have a duty to keep their members informed of relevant legislative and political developments. The proposed rules would prevent any communications that fell within the expanded definition of "expenditure" or that would place the organization at risk of becoming a political committee.

## II. The Commission Should Not Adopt the IRS Standards for Partisan Advocacy, Which Were Designed for a Different Regulatory and Enforcement Regime

The Commission's suggestion that it could redefine "expenditures" by importing the standards that have been carefully crafted to reflect the federal tax statutory scheme is also misguided. The IRS has taken many years (the IRC § 501(c)(3) prohibition on partisan political activity was enacted 50 years ago as part of the Revenue Act of 1954) to develop and refine its facts and circumstances test for determining whether an activity is partisan political activity for tax-exempt organizations. *See generally* Judith E. Kindell & John Francis Reilly, "Election Year Issues," *IRS Exempt Organizations Technical Instruction Program for FY 2002,* 335 (available at www.irs.gov/charities/article/0,,id=96251,00.html).

The IRS' standard is necessarily vague because it is a facts and circumstances test, but this is acceptable and appropriate for two reasons that are not applicable to the federal election law process. First, only IRC § 501(c)(3) organizations are prohibited from engaging in any partisan political activity. They live with this vague standard by generally identifying as best as possible where the line is between permissible and impermissible behavior and then taking a good two steps backs from that line, since crossing that line can result in loss of their tax-exempt status. They do not have a constitutional argument against the vagueness of the standard for the simple reason that they have the easy alternative of creating an affiliated, IRC § 501(c)(4) (or other IRC § 501(c)) organization which is permitted to engage in partisan political activities. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (rejecting a constitutional challenge to the prohibition on partisan political activity by IRC § 501(c)(3) organizations). Other IRC § 501(c) organizations are generally permitted both to be affiliated with IRC § 501(c)(3) organizations and to engage in partisan political activity, as long as such activity is not their primary activity. *See generally* John Francis Reilly & Barbara A. Braig Allen, "Political Campaign and Lobbying Activities of IRC 501(c)(4),(c)(5), and (c)(6) Organizations," *IRS Exempt Organizations Technical Instruction Program for FY 2003* L-1 (available at www.irs.gov/charities/article/0,,id=101915,00.html) *and the authorities cited therein.*

Second, for IRC § 501(c) organizations other than IRC § 501(c)(3), the issue of whether an activity is partisan political activity is primarily a cost allocation question. While IRC § 501(c) organizations must pay tax on payments for partisan political activity, the amount subject

to tax under IRC § 527 is limited to their amount of net investment income, which usually is relatively low, while the standard for what is a primary activity is relatively high (informally estimated by one IRS official as possibly being as high as 49% of an organization's total expenses). *See* The Exempt Organization Tax Review, July 1990, p. 472 (reporting on the comments of then Director of the IRS's Exempt Organizations Technical Division Marc Owens). There are therefore no tax consequences if, when applying the vague IRS standard for partisan political activity, an IRC § 501(c) organization with minimal net investment income mistakenly categorizes even a significant amount of expenditures as long as its primary activity remains something other than partisan political activity.

The federal election law regime is not so forgiving. Even a single dollar of "expenditures" is prohibited for any corporation, including a nonprofit corporation that is tax-exempt under IRC § 501(c), and so can trigger an investigation by the Commission, financial penalties and even criminal sanctions. 2 U.S.C. 441b(a),(b)(2), (c); 11 C.F.R. §§ 114.2(b)(2)(iii), 114.14. To redefine "expenditures" using the IRS standard for partisan political activity would therefore require all prudent corporations, including tax-exempt ones, to take two steps back from the, now vague, line between permissible and impermissible behavior to ensure that they did not cross that uncertain line and expose themselves to Commission action.

The problem with using the vague federal tax standard is magnified by the differences between the IRS and Commission enforcement regimes and practices. If a tax-exempt organization engages in activity that arguably is inconsistent with its tax-exempt status, a watchdog organization or opponent can file a complaint against the offending organization with the IRS. Based on the experiences of our members and conversations with IRS officials, that complaint will only trigger an IRS audit if an internal review by the IRS of the complaint and the organization's IRS filings ascertains that further investigation is warranted.

In contrast, the Commission's procedures react to a complaint by automatically requiring the named organization to provide a written response to the allegations made. 11 C.F.R. § 111.5. The burden on the named organization is therefore already much heavier than the burden in the case of a complaint filed with the IRS, as in the latter case the named organization may very well never have to respond officially to the complaint. Furthermore, the Commission's procedures have an extensive discovery process if the Commission concludes there is reason to believe there has been a violation of the law, at the end of which the results of the investigation and documents referred to in the closing report become public knowledge. 11 C.F.R. §§ 111.9-111.13, 111.20. While the IRS has similar investigatory powers, its conclusions and any information it receives during the audit remain confidential, unless the organization chooses to challenge those conclusions in court. IRC § 6103. Again, the burden on the offending organization is significantly less under the IRS' procedures.

The IRS' standard is therefore appropriate for tax-exempt organizations only because it is primarily a cost allocation mechanism and is backed by an enforcement regime which requires more than a single complaint to force an organization to respond to an official government inquiry. Neither of these characteristics is present under the federal election law rules and so that standard is inappropriate for the federal election law system. Instead, the bright lines provided by the existing express advocacy and election communication standards are appropriate to

enforce the absolute prohibition on expenditures by nonprofit corporations and the low spending thresholds under the political committee definition.[2] The Commission should therefore not expand the definition of prohibited expenditures, either by incorporating the IRS' standard or as proposed in Proposed 11 C.F.R. §§ 100.116, 110.133, 114.4(c).

## III. Voter Registration and Get-Out-the-Vote Activities Should Only Be Considered "Expenditures" if Clearly Tied to a Candidate or Party

The proposed rules would prevent efforts to encourage the most disenfranchised and underrepresented members of our society to register and vote, contrary to both good public policy and justice. Proposed 11 C.F.R. §§ 100.133, 114.4(c) would prevent such efforts by barring all corporations, including nonprofit corporations described in IRC § 501(c), especially IRC § 501(c)(4) organizations, from engaging in a broad range of activities designed to encourage individuals to register to vote or to vote in two key ways. First, such voter participation activities would need to not include "a communication that promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party." Second, such voter participation activities could not involve selecting the targeted individuals based on "information concerning likely party or candidate preference."

The problems of the "promotes, supports" language have already been addressed above. These problems are compounded in the voter participation context because to be effective such efforts often need to address specific issues of interest to potential voters and emphasize the role of elected officials in deciding those issues. Would a reference to the "importance of family issues" be considered a veiled reference to the Republican party and therefore a message in support of that party? What if the reference were to the "importance of family issues, such as ensuring health care and decent wages for American's working families"? Would that now be a reference to the Democratic party? If an issue is important enough to motivate potential voters to become engaged in the political process, it is likely also important enough for the various political parties to have taken a stance on that issue. It also is common to refer to current problems to encourage individuals to vote, because if everything is fine there is little motivation to become politically engaged, but could that be perceived as an attack on all incumbent candidates? For example, on its website Rock the Vote cites to the economy, debt issues, diversity and other issues of concern to young people in order to motivate them to register and vote. This proposed rule therefore could reach almost all conceivable messages used by organizations urging voter participation, and as a practical matter eliminate voter participation activities by nonprofits.

The "information concerning likely party or candidate preference" standard is equally chilling. It is well known that certain demographic groups tend to vote more heavily for

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[2] BCRA did not repeal the express advocacy standard adopted in *Buckley*, 424 U.S. at 79-80, and the Supreme Court acknowledged its continued application when the Court upheld the major provisions of BCRA. *McConnell v. FEC*, 540 U.S. ____, 124 S.Ct. 619, 694 (2003).

candidates of one party as opposed to of others. Little research is needed to show that voters in certain geographic areas also have party preferences, as may voters who have an interest in a particular issue. Does this mean that every IRC § 501(c) organization that engages in voter participation efforts would have to be sure to reach all demographic groups and all geographic areas equally (or proportionately based on population), and avoid any mention of public policy issues, to be able to demonstrate that it did not base its decisions on "information concerning likely party or candidate preference"? This result hardly seems plausible, yet targeting of any type which could, in hindsight, be shown to favor one party or candidate over another would leave an IRC § 501(c) organization vulnerable to a complaint that it made a prohibited expenditure and with the burden of proving a negative — that it did not use such information in making its targeting definitions.

Perhaps the most troubling aspect of the proposed rules is not who they would prevent from engaging in all but the most innocuous, and therefore probably ineffective, Federal election-related activities, but who they would leave to engage in all other types of Federal election-related activity. By broadening either the definition of political committee or the definition of expenditure, as has been proposed, the Commission would leave essentially all Federal election-related activities and much advocacy to political committees. These avowedly partisan organizations, with limited resources because of the restrictions on raising hard money, would presumably use those resources in the most partisan fashion possible.

For example, it would not be efficient to target a large demographic group, such as African Americans, simply because as a statistical matter they tend to vote Democratic more often than Republican. The targeting would have a much tighter focus, refined to ensure that the targeted potential voters would in fact vote Democratic (or Republican) and, preferably, for the particular candidate of interest to that political committee. Such efforts would also only be aimed at "battleground" or "swing" states and districts, eliminating voter participation and advocacy efforts in communities that did not fall within such geographic areas.

## IV. The Commission Lacks the Authority to Issue the Proposed Rules Without Further Guidance from Congress

Other commentators will undoubtedly address the issue of the Commission's authority, so INDEPENDENT SECTOR will only address these issues briefly. The Commission lacks the authority to revisit the definitions of "expenditure" and "political committee" under the existing statutes. The Commission itself acknowledges that Congress did not alter these definitions with the passage of BCRA. 69 Fed. Reg. 11736, 11736. Furthermore, Congress demonstrated in the coordination area that when existing Commission rules did not match Congress' view of the correct interpretation of the Federal Election Campaign Act, Congress was capable of taking corrective action when it passed BCRA. There is therefore no congressional authority or direction that would authorize the Committee to revise these definitions.

## V. The Commission Should Not Change the Rules in the Midst of an Federal Election Year and With Retroactive Effect

The timing of the proposed rules is as troubling as the Commission's lack of authority. First, the Commission violates standard rulemaking requirements by proposing that the rules apply to expenses that organizations incurred before they became political committees, even if this reaches to a time before the introduction of the proposed rules. *See* Proposed 11 C.F.R. §§ 102.50-102.55. Combined with the breadth of the proposed rules, this retroactive effect and the requirement that "retroactive" political committees raise sufficient hard money to repay all of their previous "expenditures" before making any new expenditures would effectively end the existence of most if not all IRC § 501(c) organizations that had engaged in Federal election-related activity in the past, much less during the current year.

The breadth of both the issues raised and the potential effect of the proposed rules also argues strongly against consideration both during a presidential election year and on an expedited basis. Many organizations, forced by the political calendar to begin their activities, will find themselves essentially caught midstream when the flood rolls down, having hired staff, begun programs, and made commitments to donors that were permissible as of January or even May of this year but that have suddenly become prohibited or have to be completely restructured even while the clock is ticking down. The haste in which these rules have apparently been drafted, as evidenced by the Commission's numerous questions in the preamble, and the haste in which the Commission will have to consider the numerous comments that have and will be submitted, hardly bodes well for a deliberative process.

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INDEPENDENT SECTOR thanks the Commission for its consideration of these comments.

The undersigned organizations join INDEPENDENT SECTOR in submitting the above comments:

Advocates for Connecticut's Children and Youth
Agenda for Children
Alliance for Children and Families
America's Fund for Communities
America's Second Harvest
American Association of Community Colleges
American Association of Museums
American Cancer Society
American Council on Education
American Foundation for the Blind
American Heart Association
American Symphony Orchestra League
Americans for the Arts
AngelCare
The ARC of the United States
Association of Performing Arts Presenters
California Budget Project
The California Endowment
The California Wellness Foundation
Center on Budget and Policy Priorities
Center on Philanthropy and Civil Society, City University of New York
Children's Alliance
Colorado Association of Nonprofit Organizations
Connecticut Voices for Children
Consumers Union
Corporation for Enterprise Development
Council on Foundations
Demos: A Network for Ideas and Action
Donors Forum of Chicago
Easter Seals
Girls Incorporated
Good Shepherd Rehabilitation Hospital
The George Gund Foundation
Hispanic Federation
Indiana Coalition on Housing and Homeless Issues
International Primate Protection League
Izaak Walton League of America
Jobs for the Future
John S. and James L. Knight Foundation
Libraries for the Future
Lutheran Advocacy and Public Policy Office of South Carolina
Lutheran Chaplaincy Service
Lutheran Counseling Network
Lutheran Family Services of Nebraska
Lutheran Services in America