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

Re: Notice of Proposed Rulemaking – Political Committee Status

Dear Ms. Dinh:

These comments are submitted in reference to the above rulemaking on behalf of the Democratic Governors Association (DGA), a political organization under 26 U.S.C. Section 527 of the Internal Revenue Code.

I. Organizational Background

DGA was formed in 1983, and is an independent, nonprofit, voluntary political organization consisting of the Governors of the States and Territories who are members of the Democratic Party. In 1989, its operational arm, DGA Services Corporation was incorporated in the District of Columbia. DGA is not a political party committee and has filed as a nonparty political committee in each State in which it makes contributions and expenditures that trigger State reporting requirements. Pursuant to its Articles of Organization, DGA operates independently of any other organization. Decisions regarding the operation of DGA are exclusively made by DGA and are not subject to the approval of any other person, group or organization. DGA makes contributions and expenditures permitted under the laws of the various States for the purpose of influencing the election of Democratic Governors. DGA does not make contributions or expenditures for the purpose of influencing Federal elections within the current meaning of the Federal Election Campaign Act of 1971 as amended (FECA).

II. Summary of Comments

DGA files these comments because the Federal Election Commission (FEC or Commission) Notice of Proposed Rulemaking (NPRM) published in the Federal Register

on March 11, 2004 (69 Fed. Reg. 11736), raises questions and proposes regulatory language that would dramatically impact the legitimate and longstanding activities of DGA on behalf of the election of State and local candidates. DGA has been a "527 organization" for many years. Contrary to the flavor of some news accounts and comments, 527 organizations have not suddenly sprung up in response to BCRA. Section 527 has been in the Internal Revenue Code since the 1970s, and there are many 527s that have engaged for years in activities that are wholly unrelated to federal elections and whose activities are governed by the laws of the various States in which they conduct political activity.

If adopted, there are also many proposals in the NPRM that would have a dramatic and over-reaching effect on State and local candidate committees as well as on organizations which, like DGA, were established by State and local candidates and officeholders. Nothing in the Bipartisan Campaign Reform Act of 2002 (BCRA) suggests that Congress intended to federalize political committees established by State and local candidates to further their own election to State and local office, or to federalize political committees, such as DGA, established by groups of State and local candidates and officeholders to further their own re-election or the election of their peers. Yet, this is precisely what some proposals contained in the NPRM would do.

The transformation of these organizations into Federal political committees is not consistent with the current FECA as amended by BCRA. It is not supported by any case law from the Supreme Court down, and is outside the jurisdiction of the FEC.

III. Summary of Questions Posed in the NPRM Relating to Purely Non-Federal Entities

Among the questions posed in the NPRM that would affect DGA and the candidates it supports are the following:

"Would a definition of 'expenditure' that includes voter drive activities by State or local candidate committees on behalf of their own candidacies be overly broad?" *NPRM* at 11739.

"Should the Commission treat funds raised by a State or local candidate committee through solicitations advocating their own election, as well as incidentally expressly advocating the election or defeat of a clearly identified federal candidate, or promoting, supporting, attacking or opposing a clearly identified Federal candidate, as funds contributed 'for the purpose of influencing any election for Federal office?'" *NPRM* at 11739.

"The approach of including all funds disbursed for Federal election activities in the definition of 'expenditure,' if adopted, would extend restrictions related to Federal election activities beyond political party committees and Federal candidates to all persons, including a State or local candidate committee. Would such a regulation be

consistent with FECA, as amended by BCRA? Would it be consistent with Congressional intent?" *NPRM* at 11739.

"The proposed regulations would treat many of the voter activities conducted by State and local candidate committees on behalf of their own candidacies as 'expenditures.' Is there any evidence that Congress intended for the Commission to categorize such activities as 'for the purpose of influencing any election for Federal office?'" *NPRM* at 11740.

"Should funds raised by a State or local candidate for his or her own candidacy be treated as contributions 'for the purpose of influencing a Federal election' if the State or local candidate's solicitation includes express advocacy for or against a clearly identified Federal candidate? Should proposed section 100.57 also include solicitations that expressly advocate the election or defeat of Federal candidates of a particular party without clearly identifying the particular candidates?" *NPRM* at 11743.

"The proposed rule would require that the organization have as a major purpose the nomination or election of candidates for Federal office, as opposed to non-Federal office. The Commission seeks comment regarding whether the proposed rule should be limited to the nomination or election of Federal candidates or, instead, whether the nomination or election of all candidates, including candidates for non-Federal office will suffice." *NPRM* at 11744.

In addition to these specific questions related to State and local candidates and committees, the NPRM also suggests treating disbursements "promoting, supporting, attacking or opposing a political party" as "expenditures." *NPRM* at 11741. Thus, DGA or any State or local candidate's committee could become a Federal committee merely by promoting the Democratic Party without mentioning any Federal candidates.

In a similar vein, the NPRM would also treat certain disbursements for Federal election activity, including voter registration, voter ID and GOTV, as "expenditures," thus rendering State and local candidate committees Federal "political committees," even though their communications mention no Federal candidate. *NPRM* at 11745 and 11747. It is unclear what the effect of this provision would be on DGA, because the definitions of GOTV and voter ID set forth in the regulations at 11 CFR Section 100.24(a)(3) and (4) exclude "any communication by an association or similar group of candidates for State or local office if such communication refers only to one or more State or local candidates. While the NPRM is confusing in this regard, it appears that the Commission is considering treating voter registration, voter ID and GOTV, if paid for by a State or local candidate, as "expenditures" that would then count toward whatever monetary threshold is adopted for "political committee" status. On the other hand, only voter registration communications, if made by DGA, would count as "expenditures" for determining whether they would become "political committees". Apparently, DGA's disbursements, if any, for voter ID and GOTV, because they are excepted from the definition of Federal election activity, would thus not be considered "expenditures" and thus would not trigger

"political committee" status, while the same disbursements by State and local candidates would be "expenditures" for purposes of determining their "political committee" status.

Finally, there is a proposal to treat all 527s as Federal political committees with only five exceptions, one of which would apply to State and local candidate committees, but none of which would apply to DGA, because, although its purposes are solely related to the election of non-Federal candidates, it is a not single candidate committee and it operates in more than one State. *NPRM* at 11748.

For the reasons set forth more fully below, the FEC does not have the authority to adopt these proposals and answer these questions in any way that transforms State and local candidate committees and organizations supporting them into Federal political committees.

IV. Nothing in FECA, as Amended by BCRA, Supports the Transformation of State and Local Candidate Committees and Other 527 Organizations Supporting Their Election into Federal Political Committees

DGA and the political committees established by gubernatorial and other State and local candidates are "political organizations" under Section 527 of the Internal Revenue Code. This section has been in effect since the 1970s. 527 organizations that are not "political committees" within the meaning of the FECA register only with the IRS and not with the FEC. The test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in FECA (2 U.S.C. Sections 431(8)(9). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Similarly, the Court construed "contributions" as those donations used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

Thus, under FECA, 527 organizations operating independently of any Federal candidate, that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees. This has been the law since 1976, and there are many organizations that have been organized under Section 527 of the Internal Revenue code but not registered at the FEC as political committees, including DGA and the political organizations established by State and local candidates to further their own election.

Recent developments make clear that Congress has not changed the legal definition of political committee since *Buckley.*

In 2000, Congress passed legislation addressing 527s that are not federal political committees. This law requires them to register with the IRS and file reports with the IRS

disclosing their donors and disbursements -- precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted). Congress did not require any additional 527s to register as political committees with the FEC and did not change the FECA definition of political committee when it passed this legislation. In fact, section 527 also exempts from IRS disclosure political committees established by State and local candidates that file reports in a State disclosing all of their financial activity. DGA files reports under this law disclosing all of its receipts and disbursements, in addition to the reports it files in the States in which it is active.

In 2002, the Bipartisan Campaign Reform Act (BCRA) was passed as a statute of limited scope intended by Congress to address two primary issues of concern related to soft money. First, it prohibits Federal candidates and national party committees from raising and spending non-Federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a federal primary or general election.

There is only one specific provision in BCRA that places any limitation whatsoever on spending by non-Federal candidates. 2 U.S.C. Section 441i(f)(1) provides that:

> A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in ...2 U.S.C. Section 431(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

Section 431(20)(A)(iii) covers only a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate). Public communications under BCRA are only those that are made by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. Section 431(22).

BCRA did not repeal the coattails exception that allows candidates for State and local office to pay for their own campaign materials which include information or reference to other candidates (including Federal candidates) if these materials are used solely in connection with volunteer activity, and are not used for general public communications. While the amounts spent by State and local candidates for the portion of the communications referencing Federal candidates must be paid for with funds permissible under the Federal limits and prohibitions, the amounts spent do not count as "contributions" or "expenditures" under FECA and thus, do not trigger Federal political committee status. 2 U.S.C. Section 431(8)(x).

Thus, FECA as amended by BCRA, permits State and local candidates to pay for campaign materials that mention a Federal candidate as long as they are used in connection with volunteer activities. It is only if a State or local candidate makes a public communication that supports, promotes, attacks or opposes a clearly identified Federal candidate that the State or local candidate must use funds subject to the limitations, prohibitions **and** reporting requirements of the Act. With the limited exception of this one section, Congress did not make State and local candidates subject to the restrictions on party committees contained in the BCRA section regarding Federal election activity.[1] Similarly, Congress did not extend these prohibitions to political organizations established by groups of State and local candidates (such as DGA).

This history of Congressional action provides no indication that Congress intended or sanctioned any provision that would transform all State and local candidate committees and committees established by groups of non-Federal candidates into Federal committees. Nor is there any basis in this history to conclude that Congress intended to hamstring State and local candidates and limit their own ability to advocate their own election with funds permissible under their State laws. To the contrary, it is clear that Congress enacted very limited and focused restrictions on State and local candidate activity ***only if*** those candidates made public communications promoting, supporting, attacking or opposing clearly identified Federal candidates. Thus, there is nothing in the statute or history of Congressional action regarding 527s that gives the FEC the authority to adopt any regulation that would Federalize committees established by State and local candidates individually or in groups.

V. No Case Law from Buckley v. Valeo through McConnell v. FEC Justifies the Transformation of State and Local Candidate and Other State and Local Committees into Federal Political Committees

There is no support in the opinion of any Court for the FEC proposals to extend Federal regulation to purely State and local candidate and committee activity. In *Buckley,* the Court began its analysis of the constitutionality of FECA by noting that "[t]he constitutional power of Congress to regulate **federal** elections is well established...". *Buckley,* 424 U.S. at 632 (emphasis added). In order to ensure that FECA's reach did not impermissibly extend to groups engaged in activities unrelated to Federal elections, the Court construed the term "expenditure" to apply only to "communications that expressly advocate the election or defeat of a particular federal candidate." *Buckley*, 424 U.S. at 664.

Similarly, the Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those

[1] In fact, Section 431(20)(B)(ii) excludes from the definition of Federal election activity, contributions by State and local party committees to State and local candidates "provided the contribution is not designated by pay for a Federal election activity." Clearly, this section contemplates that it is perfectly legal for State and local candidates to make expenditures without limitation from their own campaign accounts that would be "Federal election activity" if made by State and local party committees. If Congress had intended to subject State and local candidates to these restrictions they could have done so, and did not.

groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Subsequent courts have specifically rejected the extension of "political committee" status to groups exclusively engaged in activities related to the election of State and local candidates, even if their ultimate goal was to affect Federal elections. In *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under the *Buckley* "major purpose" test, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859. The FEC declined to appeal this decision.

Finally, in *McConnell v. FEC,* 124 S.Ct. 619, 683-685 (2003), the Supreme Court found that the BCRA restrictions on State and local candidates were very limited. The Court found that BCRA only prohibits State and local candidates and officeholders from spending soft money to pay for public communications referring to a clearly identified Federal candidate and supporting, promoting, attacking or opposing that candidate. *McConnell,* 124 S.Ct. at 683-684. The Court further found that BCRA "places no cap on the amount of money that state or local candidates can spend on any activity," and that it **only** limits public communications promoting, supporting, attacking or opposing a Federal candidate, but "does not prohibit a state or local candidate from advertising that he has received a federal officeholder's endorsement." *McConnell,* 124 S.Ct. at 684. There is no basis in the *McConnell* decision to conclude that Congress intended to extend further the limitations or prohibitions on activity by State and local candidates and committees.

Notwithstanding the *McConnell* interpretation of BCRA's effect on State and local candidates as very narrow, and limited only to the use of funds to pay for certain public communications about Federal candidates, several of the FEC alternative proposals included in the NPRM would determine the "major purpose" of an organization by reference to the amount of funds spent on activities that would be "expenditures" under a new definition of the term "expenditure." The new definition of "expenditure" would include activity by State or local candidates or political committees (such as DGA) that mention no Federal candidates and are designed to get out the vote for State or local candidates only. For example, under proposals 2 and 3 set forth in the NPRM at 11746 and 11747, the Commission proposes to determine an organization's "major purpose" by its spending. If it spends 50% (proposal 2) or $50,000 (proposal 3) in a calendar year on types 1 through 3 of Federal election activity (11 CFR Sections 100.24(a)(2), (3) and (4)), under the proposed new regulations, its major purpose would be to influence Federal elections and it would be a Federal "political committee." Under these proposals, combined with the current definition of Federal election activity, a gubernatorial candidate committee that spent 50% or more of its funds (if proposal 2 is adopted) or $50,000 (if proposal 3 is adopted) or more in a calendar year on voter registration, voter

ID and GOTV to influence his or her own election would become a Federal political committee. Id. This result would be absurd.

Similarly, committees such as DGA, if they spent 50% or $50,000 or more on voter registration within 120 days of an election would also become Federal political committees, because the regulations would presume that their major purpose is to influence a Federal election, even if they engage in no other activity related to a Federal election and never mention a Federal candidate in any communication. This result is similarly absurd.[2]

Thus, as set forth above, these proposals are directly contrary to the *Buckley* definition of political committee and the *McConnell* Court's construction of the effect of BCRA on State and local candidates. These proposals that would make organizations like DGA and State and local candidate committees Federal political committees if they engage in voter registration, voter ID and GOTV efforts without advocating the election or defeat of a clearly identified Federal candidate are not supported by any of the relevant judicial precedent.[3]

VI. Federalization of State and Local Candidate and Committee Activity is Outside the Jurisdiction of the FEC and Would Be an Unconstitutional Extension of Federal Authority

As described in Sections IV and V above, neither Congress nor the Courts have given the FEC any authority to transform State and local candidate committees and committees supporting them into Federal political committees. Congress very carefully and narrowly limited any intrusion into purely State and local activity. With respect to State and local candidates themselves, the limitations on national, State and local party activities do not apply. Even with respect to State and local party committees whose activities are regulated in part by BCRA, Congress was careful to make clear that these party committees could provide funds permissible under State law to State and local

[2] Under BCRA, committees established by groups of State and local candidates or officeholders (such as DGA) are treated differently than committees established by individual State and local candidates to further their own election. Thus, if the FEC were to use either of proposals 2 or 3 related to the "major purpose" test, without amending Section 100.24(a)(2) and (3), then State and local candidate committees would become political committees if they spend 50% or more of their funds or $50,000 respectively on voter registration, voter ID and GOTV, while committees established by **groups** of State and local candidates and officeholders would become political committees only if they spend 50%or more of their funds or $50,000 respectively on voter registration within 120 days of an election.

[3] The proposal to treat all 527s as political organizations except for five specified entities as Federal political committees does not solve the DGA problem. DGA operates in more than one State and complies with the State laws of each State in which it operates. While we do not support this alternative for reasons unrelated to DGA (which we understand will be addressed by other commenters), if the Commission were to adopt this alternative, section (2) of Alternative 2-A should be revised to read: "any 527 organization that is organized solely for the purpose of promoting the nomination or election of a particular individual **or individuals** to non-Federal office." This alternative would be acceptable only if the Commission did not make any changes to the definitions of expenditure that would limit the ability of State and local candidates and committees supporting them to engage freely in activities related to their own election with funds permissible under applicable State law.

candidates – **even if these candidates themselves would engage in activities defined as Federal election activity** – so long as the party committees did not earmark the funds for that purpose. 2 U.S.C. Section 431(20)(B)(ii). Congress had no intention and did not limit the ability of State and local candidates and committees supporting them to spend funds permissible under applicable State law to advocate their own election, register voters, identify their supporters, and get their supporters out to vote.

The FEC has no statutory basis and no Congressional authority to adopt such a sweeping change in the scope of FECA.

Respectfully submitted,

Lyn Utrecht

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James Lamb
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