National Council of Nonprofit Associations

NCNA
1030 15th Street NW
Suite 870
Washington, DC 20005-1525

tel: 202-962-0322
fax: 202-962-0321
web: www.ncna.org

January 4, 2004

By Hand Delivery and Facsimile Delivery (202.219.3923)

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Commission Secretary:

The National Council of Nonprofit Associations (NCNA) submits these comments in response to the General Counsel's draft of Advisory Opinion 2003-37 (the "Draft Opinion"). NCNA strongly encourages the Commission not to issue the Draft Opinion due to the broad ramifications it could have not only on political committees but also on 501(c)(3) and 501(c)(4) organizations by virtually cutting off a significant voice for the American people.

NCNA is a membership-based organization organized as a nonprofit corporation under state law and exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). It represents a network of 38 state and regional associations of nonprofits serving over 22,000 charities nationally. The majority of our members and their members are organized as nonprofit corporations under state law and exempt from federal income taxation under Code section 501(c)(3).

We recognize that while this Draft Opinion is given in response to a request from a political committee, many of the activities that the Draft Opinion would treat as expenditures under the Bipartisan Campaign Reform Act of 2002 (BCRA) seem strikingly similar to activities of 501(c)(3) organizations that had not previously been treated as expenditures. These activities are more appropriately characterized as lobbying or fundraising or nonpartisan voter activation. We fear that in its attempts to regulate the activities of political committees, the Commission would be announcing its intent to limit legitimate,

nonpartisan activities of 501(c)(3) organizations as well. Such overreaching threatens constitutionally protected activities.

One of our major concerns is the Commission's redefinition of "expenditures" to include all communication that "promotes, supports, attacks, or opposes" a candidate for federal office. This move would be creating a new test, one that far exceeds the broadcast limits contained in BCRA and could be viewed as overstepping the legal authority of the Commission. BCRA does not allow the Commission to extend the definition of "expenditures" to include all communication, including print ads, letters to members, fundraising letters, web sites, and messages from door-to-door canvassers. In upholding BCRA, the United States Supreme Court stated that interest groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising." McConnell v. FEC, 540 U.S. ___ at ___ [slip op. at 80]. By accepting the Draft Advisory Opinion, the Commission would be limiting speech that Congress itself refused to limit.

The NCNA network and other 501(c)(3) and 501(c)(4) organizations are actively engaged in educating the public and advocating positions on legislative and policy issues related to our charitable missions and the people we serve. We represent an essential, if not the only, method to assure that the voices and concerns of the general public are presented during ongoing policy and legislative debates. To cut off this necessary method of communicating, which this Draft Opinion may do, is unconscionable. For example, in our advocacy work, it is frequently valuable to refer to current elected federal officeholders who support or oppose our positions. The Draft Opinion fails to distinguish between speech that "promotes, supports, attacks, or opposes" an elected official acting in her official capacity and speech that praises or criticizes a candidate for public office, even if already an elected official. We currently abide by federal law, through the tax code, that prohibits 501(c)(3) organizations to participate in, or intervene in political campaigns on behalf of (or opposition to) candidates for public office. More critically, it is essential to preserve the right to criticize our government, including our elected officials, one of the most cherished rights granted us under the United States Constitution.

For NCNA and its members, another disturbing outcome of the approval of the Draft Opinion may be that we could no longer conduct our advocacy activities unless we raise and spend funds in accordance with the source and contribution limits of the Federal Election Campaign Act ("FECA"). FECA prohibits contributions over $5000 from individuals, and all grants and contributions from corporations, which includes most foundations— a major source of funding for most 501(c)(3) organizations. Consequently, 501(c)(3) organizations, often the only voice for the voiceless on all sides of the political spectrum, would be silenced.

As described above and as the Commission recognized in its BCRA rulemaking when it exempted the communications of 501(c)(3) organizations from the definition of electioneering communication, federal tax law requires that 501(c)(3) organizations avoid even the slightest hint of support for or opposition to candidates for public office. Thus, any Commission ruling that legitimate 501(c)(3) activities might also be expenditures under BCRA would create inevitable complications for charitable organizations seeking to comply with both tax and election laws. The Commission has already stated that "the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity," and we encourage the Commission to remain consistent with its earlier decision. Final Rules, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002).

For all of the reasons discussed above, we urge the Commission not to adopt the Draft Opinion.

Sincerely,

Audrey R. Alvarado, Ph.D.
Executive Director

cc: Commissioner Bradley A. Smith, Chairman
Commissioner Ellen L. Weintraub, Vice Chair
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner