STATEMENT OF COMMISSIONER SCOTT E. THOMAS

April 30, 2004

I am joining Commissioner Toner in circulating a proposal to clarify when a group qualifies as a federal "political committee" for several reasons. First, it is apparent there is great confusion and disagreement regarding the state of the law. The FEC has a statutory responsibility to provide guidance to the public and the regulated community. Second, it is untenable, in my view, for groups whose major purpose clearly is influencing elections to claim they can avoid the restrictions applicable to "political committees" by simply avoiding the use of 'magic words' like "vote for" or "defeat" in their activities. The Supreme Court's decisions before BCRA and *McConnell* make clear that the 'express advocacy' construction is not required for such groups; and *McConnell* notes that even for groups that are not "political committees," the 'express advocacy' test is a failure. Third, it is important that even outside groups operating independent of candidates be subject to the contribution restrictions when their major purpose is to influence elections. Such entities, run by experienced political operatives, are likely to convey the interests of their donors to elected officials who have benefited from their efforts. Presumably for this reason, the Supreme Court has signaled the permissibility of restricting contributions to groups that intend to influence elections independent of candidates.

Our proposal reflects consideration of the many comments received and attempts to provide a proper balance among the competing interests. Following Supreme Court guidance, it clarifies that *the* major purpose of the group must be influencing elections. This will exclude groups operating properly as 501(c) organizations, as their primary purpose pursuant to tax rules must *not* be influencing elections. On the other hand, if it can be proved that a group's major purpose is influencing elections, its purported tax status will not serve as a shield.

The proposal does treat 527 groups as meeting the major purpose test. However, it frees from the major purpose test (and hence from "political committee" status) non-federal candidate committees, committees supporting only non-federal candidates, committees involved in elections where no federal candidate is involved, ballot question groups, and committees devoted to judicial or other appointments or to internal party elections. So tailored, the proposal leaves the focus on groups that have a federal election component.

To clarify the type of "expenditure" that will trigger political committee status pursuant to the statutory $1,000 threshold, the proposal narrows the approach in the NPRM significantly. For groups whose major purpose is influencing elections, voter registration (VR), voter identification (ID), and get-out-the-vote (GOTV) activity that qualifies as "federal election activity" under the new BCRA provisions is treated as an

expenditure only to the extent it is 'partisan,' and only to the extent of the federally allocable portion. The proposal treats VR, ID, and GOTV as partisan if, as current regulations provide, there is some effort to determine the candidate or party preference of voters before contacting them, or if there is some use of public communication that "promotes, supports, attacks, or opposes" a clearly identified federal or non-federal candidate or that "promotes or opposes" a political party. This approach should assure that 527 groups staying on the 'nonpartisan' side of the line will not have to register as a political committee based on their VR, ID, and GOTV efforts.

Also counting as an "expenditure" would be a public communication by or on behalf of a group whose major purpose is influencing elections that "promotes, supports, attacks, or opposes" a clearly identified federal candidate or "promotes or opposes" a political party. Like the VR, ID, and GOTV approach just mentioned, this test only applies to groups whose major purpose is influencing elections. For other groups, the 'express advocacy' standard and "electioneering communication" rules will apply to non-coordinated public communications.

For purposes of allocation, political committees that otherwise work with the 'funds expended' method would have to use a minimum federal percentage of 50%. Further, in calculating the 'funds expended' percentages, communications that "promote, support, attack, or oppose" a clearly identified federal or non-federal candidate would have to be treated as amounts "spent on behalf of specific [federal or non-federal] candidates." Without these changes, the funds expended calculations are too easily manipulated to permit the use of federally prohibited funds for ads or other activities that help federal candidates at least as much as any non-federal candidates.

The proposal also clarifies that where a communication includes a 'generic' message (e.g., "Republicans are good" or "vote Democratic") with a message 'promoting, supporting, attacking or opposing' a clearly identified federal or non-federal candidate, the cost can be split so that a portion is allocated under the funds expended method and the candidate-specific portions are allocated to the federal and non-federal account, as appropriate, under existing rules. This construction of law was adopted by the Commission in Advisory Opinion 2003-37.

It should surprise no one that I favor the foregoing approach. I have long agreed with the Congressional judgment that our political system operates best with reasonable restrictions on the ability of wealthy interests to make contributions. In my view, the average citizen will be pushed aside and cease participating if only sources of aggregated wealth can get the attention of our elected leaders.

It is clear that the existing statutory provisions provide adequate authority for the Commission to interpret the terms "political committee" and "expenditure" as noted above. As I see it, Congress has passed these laws by a majority vote, and my job is to make them work.

I do not subscribe to the view that the proposal outlined above will disadvantage one side of the political aisle over the other. It is apparent that the leading presidential aspirants are able to raise truckloads of money under the federal restrictions. Further, the national parties are permitted to raise donations of $25,000 per year from each and every individual donor. State and local parties are able to raise whatever funds state law allows and still can use such funds to pay for a significant portion of their activities. Lastly, individuals remain free to spend on their own unlimited amounts for 'express advocacy' on behalf of federal candidates, and can contribute a total of $95,000 every two years to federal candidates and committees. If a candidate or a party has the winning message, the federal campaign finance rules pose no burden to success.