American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

February 4, 2004

2004 FEB -4 P 12:19

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington DC 20463

Re: Draft Advisory Opinion 2003-37

Dear Mr. Norton:

This letter provides comments on the General Counsel's proposed draft of Advisory Opinion 2003-37. These comments are submitted by (1) the American Federation of Labor and Congress of Industrial Organizations, on its own behalf and that of its 64 national and international union affiliates representing 13 million working men and women in innumerable occupations throughout the United States, (2) a representative group of those affiliates, and (3) the unaffiliated National Education Association, which represents an additional 2.7 million people principally working in the public education field. All of these organizations are tax-exempt under Section 501(c)(5) of the Internal Revenue Code; most sponsor one or more federal political committees registered with and reporting to the Commission pursuant to Sections 433 and 434 of the Federal Election Campaign Act; and most sponsor one or more non-federal separate segregated funds registered with and reporting to the Internal Revenue Service pursuant to Section 527 of the Internal Revenue Code. In this regard they undertake political communications and activities in a manner similar to most national and international labor organizations.

The undersigned labor organizations focus these comments on aspects of the OGC draft that, if they were law, would affect their ability to carry out and finance vital public advocacy and other activities. Specifically, we are principally concerned about and oppose a central feature of the draft: the conclusion that the term "expenditure" defined at Section 431(9) of the Act includes public communications that "promote, support, attack or oppose" a clearly identified candidate for public office, so requiring a Section 527 political entity comprised of federal and non-federal accounts finance that speech exclusively with federal funds. Because

labor organizations are prohibited from financing "expenditures" under Section 441b(b) of the Act, the effect of the proposed redefinition of "expenditure" would be to require unions to finance such candidate-referential messages with their sponsored federal separate segregated funds, rather than with their regular treasury accounts or their non-federal separate segregated funds. We submit that - - leaving aside the grave constitutional implications of such a rule - - only Congress, and not the Commission, could have the authority to adopt this definition.

At the outset, we note that each of the undersigned labor organizations, and virtually every other labor organizations, regularly engages in costly and extensive efforts to influence the public debate, legislation and government policy by communicating with the public at large, officeholders and public officials. These communications, including through mass communications by broadcast and print, leaflets, rallies, letters, the Internet and other means, routinely refer to and characterize the actions of federal officeholders, virtually all of whom are "candidates" at all times under FECA § 431(2), often including the President, Vice President and Senators who will not even be on the ballot during the election cycle when the communications are disseminated, as well as non-incumbent candidates who are promoting or opposing public policies of concern to the labor movement.

The standard for whether union (and corporate) payments for communications to the public are "expenditures" within the meaning of the Act has always been and remains whether those communications "expressly advocate" the election or defeat of a clearly identified federal candidate. The OGC draft's contrary position constitutes a fundamental misreading of both the Act and the Supreme Court's recent decision in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003).

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *See also* 11 C.F.R. Part 100, Subpart D. For many years, the Supreme Court has construed this term to encompass only those communications that "'in express terms advocate the election or defeat of a clearly identified federal candidate,'" *McConnell*, 124 S. Ct. at 647, quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), the Court specifically so construed the phrase "expenditures...in connection with a federal election" in Section 441b, which defined which communications unions and corporations were proscribed from undertaking. The Court reaffirmed that construction in *McConnell*, 124 S. Ct. at 688 n. 76.

The enactment of the Bipartisan Campaign Reform Act amendments to FECA did nothing to change the statutory definition of "expenditure." To the contrary, the legislative history of BCRA reveals that Congress considered and then rejected expanding the definition of "expenditure" as a legislative approach to union and corporate non-express advocacy communications that some perceived as influencing federal elections. Instead, Congress left Section 431(9) and the operative language of Section 441b intact, and instead added "electioneering communications" to the proscriptions of union and corporate spending in Section 441b(b)(2), carving out a specific and limited new area of proscribed public communications in

Section 434(f)(3). See Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

The OGC draft purports to find authority for its proposed expansion of the definition of "expenditure" in the *McConnell* decision. However, *McConnell* neither addressed nor suggested any modification of the FECA definition of "expenditure" or any new restriction on communications by unions, corporations, unincorporated associations, non-federal Section 527 political organizations, or non-party, non-candidate political committees, other than the only new restriction before it, namely, the ban on "electioneering communications" by unions and corporations. Indeed, in upholding that provision, the Court rejected plaintiffs' under-inclusiveness argument even though the proscription did not apply to "print media or the Internet," pointing out that the definition also leaves all "advertising 61 days in advance of an election entirely unregulated." *Id.* at 697. More generally, the Court repeated its observation in *Buckley* that "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.*, quoting *Buckley*, 424 U.S. at 105.

The *McConnell* majority did conclude that its previously adopted "express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 688 (footnote omitted). But the Court made absolutely clear that its approval of the new ban on electioneering communications did not change that longstanding limiting construction of the unamended statute otherwise:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law.... Section 203 of BCRA amends [§ 441b(b)(2)] to extend this rule, *which previously applied only to express advocacy*, to all "electioneering communications" covered by the definition of that term in amended FECA §[441b(b)(b)(2)].

Id. at 694 (emphasis added). Accordingly, the Commission lacks authority, in either an advisory opinion or even a regulation, to define "expenditure" more broadly than has Congress or otherwise to expand the scope of public communications that cannot be financed by a union, corporation or a non-federal Section 527 separate segregated fund or non-connected political organization.

The absurd and extreme consequences of the proposed adoption of the "promote, support, attack and oppose" formulation in this context may be easily understood. Only a federal political committee would be permitted to pay for a public communication that expressed an opinion about the conduct of a federal officeholder or other candidate, regardless of the timing, means or audience. Examples of implicated speech include, to take a few recent instances, a discussion of Members of Congress' conduct in leading the legislative effort to enact a Medicare prescription drug benefit, and a federal employee union criticizing Bush Administration personnel initiatives. It would be difficult to construct a more sweeping assault on the exercise of First Amendment rights, and most certainly it is neither commanded nor authorized by FECA, as amended.

Nor could the Commission adopt such a definition by purporting to confine it to Section 527 political organizations. For, the scope of the term "expenditure" in the Act has always applied universally and in the same manner to any entity that is not a federal political committee. And, as *McConnell* reconfirmed, it has been a bedrock principle of federal election and tax law that the only public communications subject to mandatory financing through a political committee is express advocacy, a principle adjusted by BCRA, as just discussed, only by extending that funding requirement to "electioneering communications."

Not only is the proposed definition inconsistent with the statutory and regulatory definitions of "expenditure," it is also inconsistent with and takes no heed of the Commission's own longstanding regulations governing the use of union and corporate treasury funds for communications to the general public at 11 CFR 114.4, regulations that the Commission retained virtually intact in the aftermath of BCRA. Section 114.4 plainly permits unions and corporations to make communications to the general public that may be election-related provided that those communications do not expressly advocate the election or defeat of a federal candidate and are not coordinated with any candidate or political party committee in, for example, making registration and get-out-the vote communications and distributing voting records and voter guides. See 11 C.F.R. § 114.4(c).

Moreover, the proposed definition also would conflict with the Internal Revenue Code principles governing public communications by Section 501(c) organizations such as unions and could jeopardize the tax status of unions' and other organizations' separate segregated funds. In Revenue Ruling 2004-6, the IRS set forth rules governing when a public advocacy communication that names a public official, including federal officeholders who may be candidates, will constitute a taxable "exempt function" expenditure within the meaning of Section 527. Section 527(e)(2) defines an "exempt function" as "influencing or attempting to influence the ...nomination or election...of any individual to any Federal, State, or local political office...." A nonprofit organization that makes an "exempt function" expenditure from its general funds is subject to tax on the lesser of its investment income or the amount of its exempt function expenditures at the highest corporate rate. See Section 527(f)(1). However, if a nonprofit organization establishes a separate segregated fund to make its exempt function expenditures, only that fund will be subject to tax.

In Revenue Ruling 2004-6, the IRS described six factors that tend to show that a public communication will be treated as an "exempt function" expenditure absent express advocacy of the election or defeat of a candidate. Payments for a communication will be treated as "exempt function" expenditures if it: a) identifies a candidate for public office; b) the timing coincides with an electoral campaign; c) the communication targets voters in a particular election; d) the communication identifies the candidate's position on the public policy issue that is the subject of the communication; (e) the position of the candidate has been raised as distinguishing that candidate from others in the campaign either in that communication or in other public

communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Conversely, the IRS described five factors that tend to show that a communication on a public policy issue is not for an "exempt function": a) any one or more factors outlined in a-f above is absent; b) the communication identifies specific legislation or a specific event outside the control of the organization that it seeks to influence; c) the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action; d) the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event; and e) the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Unlike the crude and sweeping "promote, support, attack or oppose" standard proposed in the OGC draft, the IRS standard - - whatever its merits as an application of the Internal Revenue Code, a matter that is unnecessary to address in the context of the Commission's review of the OGC draft - - for "exempt function" expenditures recognizes that there is a category of public communications that may both name and express opinions concerning candidates that are legislative or policy-oriented and not electoral and so both may not be taxed as "exempt function" disbursements if undertaken by a Section 501(c) organization with its regular treasury account, and would not be expenditures appropriate a Section 527 organization. Section 438(f) of FECA requires the Commission to "consult and work together [with the IRS] to promulgate rules [and] regulations that are mutually consistent;" certainly no advisory opinion should be adopted that creates such conflicts and disharmonies between the two regulatory regimes, especially in the wake of congressional amendments to FECA that included specific references to non-federal Section 527 political organizations but did *not* subject them to any new constraints as the OGC draft proposes. See 2 U.S.C. §§ 441b(b)(2) and 441i(d)(2). Moreover, in adding the "electioneering communications" provisions to FECA, Congress specifically provided, at Section 434(f)(7), that in doing so it could not be "construed to establish, modify or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986."

In responding to Question 24, the OGC draft states that foreign nationals may not contribute to the non-federal accounts of a federal political committee such as ABC. Unfortunately, however, the draft appears to go much further and suggest that foreign nationals may not contribute to any organizations, including labor organizations that engage in any activities in connection with federal, state or local elections. Not only is this broad language unnecessary in responding to the ABC request, it would, if adopted by the Commission, create significant problems for labor unions and other Section 501(c) organizations. For example, many unions have some dues-paying members who are foreign nationals working in the United States. Unions regularly engage in voter registration and GOTV activities among their members. Although these activities normally represent only a small fraction of a union's total budget, they

are virtually important activities. Unions also fund from their dues income nonpartisan GOTV and voter registration activities aimed at the general public, and contribute to other organizations that do so. FECA and the Commission's regulations specifically permit such expenditures by unions.

Congress could not have intended that the ban on foreign nationals making contributions, donations and expenditures in elections extend to union member dues. Such an interpretation would require unions, some with over a million members, to screen all of their dues payments to determine if any of them came from foreign nationals if they wanted to engage in these types of traditional activities. This aspect of the OGC draft should removed or at least highly qualified so as to permit further and more specific consideration of this issue.

Although it is not relevant to the questions posed in the advisory opinion request, the OGC opinion also states categorically that contributions from foreign nationals cannot be used in connection with ballot initiatives. The provision banning foreign national contributions, 2 U.S.C. §441e, before BCRA provided that the ban applied only to contributions "in connection with an election for any political *office*." (Emphasis added.) BCRA amended and rewrote that provision. 2 U.S.C. §441e now provides that the ban applies to "Federal, State and local elections." Although this represented a language change, there is no evidence that Congress intended BCRA to extend that ban beyond elections for public office. At the time that BCRA was enacted, the Commission had taken the position that contributions and expenditures relating only and exclusively to ballot initiatives, and not to elections to any political office, did not fall within the purview of the Act. See AO 1989-32, AO 1984-62, fn.2, and AO 1980-95. And, 11 C.F.R. 100.2 defines "election" as an election to Federal "office." Thus, when Congress used the word "election" in amending 2 U.S.C. §441e, it meant an election to public office, not a ballot initiative. Although there may be situations where ballot initiatives are so closely linked with federal candidates or federal elections that they fall within the Commission's regulatory authority, see AO 1989-32 and AO 2003-12, it is not reasonable to believe that Congress intended that BCRA's amendment to 2 U.S.C. §441e was intended to extend the Commission's jurisdiction to ballot initiatives that had no such relationship to federal elections or candidates and that previously had been understood to fall beyond the Commission's jurisdiction. As with the discussion above concerning the statutory term "expenditure," if Congress had intended such a significant expansion of the Commission's jurisdiction, it would have done so explicitly.

We appreciate the opportunity to provide these comments and respectfully request that, in light of the importance of this matter, if the Commission circulates a revised draft, that it provide an opportunity for further public comment on it.

Yours truly,

Laurence E. Gold
Associate General Counsel
AFL-CIO

Margaret E. McCormick, Counsel
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
202-822-7916

Judith Scott, General Counsel
Orrin Baird, Associate General Counsel
John J. Sullivan, Associate General Counsel
1313 L Street, N.W.
Washington, D.C. 20005
202-898-3453

Patrick Scanlon, General Counsel
Communications Workers of America
501 Third Street, NW, Suite 800
Washington, D.C. 20001
202-434-1234

Mark Roth, General Counsel
American Federation of
Government Employees
80 F Street, N.W.
Washington, D.C. 20001
202-639-6424

Corey Rubin
Brand & Frulla
923 15th Street, N.W.
Washington, D.C. 20005
202-662-9700
Counsel for International
Brotherhood of Teamsters

Robert Kurnick,
Sherman Dunn Cohen Leifer & Yellig –
1125 15th Street, N.W., #801
Washington, D.C. 20005
202-785-9300
Counsel for Building and Construction
Trades Department, AFL-CIO