Public Citizen

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Joan Claybrook, President

February 4, 2004

Federal Election Commission
Mary Dove, Commission Secretary
Lawrence Norton, General Counsel
999 E Street, N.W.
Washington, D.C. 20463

VIA FAX

RE: Comments of Public Citizen, Inc., on FEC Draft Advisory Opinion 2003-37

Public Citizen, Inc., respectfully submits these comments on the General Counsel's Office's draft of Advisory Opinion 2003-37, concerning the circumstances under which non-profit entities, such as "Americans for a Better Country," may use federal and non-federal funds for communications that discuss candidates for federal office.

A. Interests of Public Citizen

Public Citizen has worked hard on behalf of strengthening campaign finance regulations in general, and the passage and defense of the Bipartisan Campaign Reform Act in particular.

Public Citizen is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when the influence of corporate money is brought to bear on the electoral system. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in administrative proceedings and litigation raising campaign finance issues and related First Amendment issues arising out of the electoral process. For example, Public Citizen filed amicus curiae briefs in *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and joined in an amicus curiae brief in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*").

Attorneys from Public Citizen Litigation Group also participated in the representation of the defendant/intervenors in the Supreme Court proceedings in *McConnell v. Federal Election*

Commission, 124 S. Ct. 619 (2003). In addition, Public Citizen has studied and reported extensively on the increasing involvement of so-called 527 groups and other non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues addressed by this opinion.

Public Citizen has long believed that 527 groups, in particular, should be subject to increased regulation comparable to that applicable to political committees under the Federal Election Campaign Act (FECA), and it has supported legislative reforms that have taken steps in that direction by imposing disclosure requirements on such groups. While Public Citizen believes that further regulation of such groups is desirable, we are troubled by the implications of proceeding in the manner proposed in the draft advisory opinion. Specifically, Public Citizen is concerned that the *proposed definition of federal election activity and "expenditures" subject to the source prohibitions and contribution limits of FECA is so broad that legitimate activities of all non-profit organizations, not just Section 527s, may be inappropriately captured under FECA.*

B. The Proposed Definition of "Expenditures" Is Not Limited in Scope

By importing the definition of "federal election activity" in 2 U.S.C. § 431(20)(a)(iii) into the definition of "expenditure" in 2 U.S.C. § 431(9), the Commission would subject a potentially wide range of activities by a variety of groups to regulation not authorized by statute. The far-reaching, and possibly unintended, ramifications of the draft opinion's reasoning are not limited to FECA "political committees" or to 527 groups.

The aspects of the draft opinion that are of special concern to Public Citizen are its statements that communications not involving express advocacy that "promote or support, or attack or oppose a clearly identified federal candidate" constitute "expenditures" within the meaning of 2 U.S.C. § 431(9), and hence can only be made by a political committee using federal funds. *See, e.g.* Draft Opinion at 12-13. Further, the draft opinion extends the definition of federal election activity subject to regulation under FECA to political advertisements beyond the 60-day bright-line standard of BCRA's definition of "electioneering communications" (at least for Americans for a Better Country). *See* Draft Opinion at 14-15.

The draft opinion reaches these conclusions by positing that the definition of "federal election activity," which determines (under BCRA, Title I) whether political parties and officeholders (and related persons) must pay for particular types of communications with federal funds, "is equally appropriate as the benchmark for determining whether communications paid for by political committees must be paid for with Federal funds." Draft Opinion at 3. The draft opinion therefore reads the definition of federal election activity into the FECA definition of "expenditure" and thus, effectively, requires that such communications be financed with Federal funds even when engaged in by entities not otherwise subject to Title I of BCRA: "As explained above, a payment by a political committee for a communication that promotes, supports, attacks, or opposes a clearly identified federal candidate is 'for the purpose of influencing a federal

election,' and therefore an 'expenditure' within the meaning of 2 U.S.C. § 431(9) that must be paid for entirely with Federal funds." Draft Opinion at 12.

While there appears to be some expectation among other commenters that the scope of this draft opinion is limited to Section 527 groups, nothing in the draft opinion provides any such reassurances. In fact, due to the nature of the advisory opinion request from Americans for a Better Country (ABC), which concedes that the group is a political committee and a Section 527, the draft opinion avoids the arduous task of detailing the breadth or limits of the definition of "political committee" here under consideration. Instead, the draft opinion focuses its ruling on the *activity* subject to regulation – communications that "promote or support, or attack or oppose a clearly identified federal candidate" – rather than the class of *groups* subject to regulation.

Public Citizen recognizes that the advisory opinion on its face says only that a "political committee" would be found to make an "expenditure" within the meaning of 2 U.S.C. § 431(9) if it engaged in non-express advocacy that promoted, supported, attacked or opposed a federal candidate. But we are concerned that the draft opinion's reasoning cannot be confined to "political committees," at least as traditionally understood. Nothing in § 431(9)'s definition of "expenditures" turns on whether the speaker is a "political committee." Indeed, under the statute, it is the other way around: Whether an organization is a "political committee" turns on whether it engages in "expenditures" totaling more than $1,000. *See* 2 U.S.C. § 431(4)(A). The class of "political committee" was further narrowed, not by statute, but by the U.S. Supreme Court when it opined that an organization subject to FECA only includes those groups that have as a "major purpose" the election or defeat of candidates. *Buckley v. Valeo*, 424 U.S. at 79.

It is reasonably assumed that Section 527 groups, which are defined by the tax code as entities whose "primary purpose" is electioneering activity, could conceivably be captured by the "major purpose" test. But if the $1,000 financial activity and the "major purpose" test are the only limitations being offered to the scope of federal election activity subject to FECA, as suggested by this draft opinion, the activities of many 501(c) non-profit groups and other non-527 associations and individuals who dedicate a substantial portion of their activities to praising or criticizing candidates and officeholders *on policy issues* may be subject to capture. Under the advisory opinion, if such organizations spend money on issue-related communications *in any form* that are critical of an officeholder who is a candidate for federal office, they run the risk of being found to have made an "expenditure" subject to FECA and thus to be subject to the gamut of FECA's limitations on the raising, reporting, and expenditure of federal funds.

Arguably, *any* organization that spends at least $1,000 on communications with some significant amount of activity that criticizes (or praises) a federal candidate would turn itself into a "political committee" under the reasoning of the draft opinion, and all of its issue advocacy could thereafter become subject to FECA's requirements. Such organizations would be prohibited from using grant funds from foundations, corporations and unions and funds received from individuals in excess of contribution limits for activities that discuss candidates and officeholders.

Public Citizen shares one of the principal goals that appears to animate the draft opinion: bringing organizations that are in fact devoted to electioneering — in particular 527 groups —

under more effective regulation. The means chosen by the draft opinion, however, seem questionable to us in that they appear to contradict what remains the authoritative construction of FECA by the Supreme Court in both *Buckley* and *McConnell*. We respectfully suggest that much of the analysis of the draft opinion (indeed, virtually all of its discussion of what activities must be paid for with federal funds) be reconsidered in light of these concerns.

Respectfully submitted,

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