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Re: Enforcement policy regarding 527 groups

Dear Commissioners:

Democracy 21 believes it is essential for the FEC to take steps to ensure that the massive campaign finance violations by 527 groups that the FEC found to have occurred in the 2004 presidential election do not happen again in the 2008 election.

We strongly urge the FEC to issue a Statement of Policy that provides clear notice that 527 groups that engage in the kind of illegal activities the FEC found to have occurred in the 2004 election, and the individuals who organize and manage these groups, including major donors who play such a role, will face substantial penalties, commensurate with the size of the violations, and that such violations face being treated by the FEC as “knowing and willful” violations.

The illegal activities by 527 groups in the 2004 election were massive in their scale. As the FEC found, for example, just three 527 groups, America Coming Together, Swift Boat

Veterans for Truth and the Progress for America Voter Fund, made illegal soft money expenditures totaling *some \$150 million* to influence the 2004 election.

This represents a finding of historically unprecedented illegal campaign finance activities in an American election.

In fact, the total amount of illegal expenditures by these three groups alone equaled *the combined \$150 million* legally spent by President George Bush and Senator John Kerry in the 2004 general election.

It is the responsibility and obligation of the FEC to take the necessary steps to ensure that such illegal expenditures do not occur again in the 2008 election. This requires pro-active actions by the FEC now to make clear that the law will be swiftly enforced during the 2008 election and that massive violations will be met with massive penalties for 527 groups and for the individuals who organize and manage them.

The FEC cannot expect the relatively small fines imposed on 527 groups for their huge illegal expenditures in the 2004 election to serve as an effective deterrent for similar violations in the 2008 election.

In each of the three cases, discussed above, the 527 group making the illegal expenditures received a civil penalty that was only a small fraction of the illegal expenditures made by the group. In each case, the penalty was not imposed until more than two years after the election.

For example, the FEC entered into a conciliation agreement with ACT on August 29, 2007, more than two and a half years after the 2004 election. In the agreement, the FEC found that ACT had illegally spent *\$100 million* in the 2004 campaign, yet imposed a civil penalty of *\$775,000, or less than one percent* of the total illegal expenditures made.

In the case of each group, furthermore, the penalty was borne solely by the 527 entity involved. No penalty was incurred by the organizers and managers of the 527 groups for the illegal activities that took place. In two of the three cases, the 527 group planned to cease operations and go out of business after conducting its illegal activities.

All of this amounted to little more than a “cost-of-doing-business” expense for the 527 groups and sent a message that there were minimal consequences for their illegal activities.

These settlements, if not accompanied by additional FEC actions to establish a strong enforcement policy for 527 groups, set the stage for a repeat in the 2008 election of the huge illegal expenditures that occurred in the 2004 presidential campaign.

The settlements also set the stage for new “drive-by shooters” in the 2008 election – 527 groups formed to illegally spend soft money to influence the 2008 elections and then to disappear once the election is over.

If political operatives believe they can set up disposable 527 groups to illegally spend tens of millions of dollars of soft money to influence the 2008 federal elections and two or three

years later face a civil fine equal to only one or two percent of their illegal expenditures, there will be little incentive for them to comply with the campaign finance laws.

To avert this, and to create an effective deterrent, the FEC needs to formally put 527 groups, and their organizers and managers, including their major donors who play such a role, on notice that the Commission will impose very substantial civil penalties on them for violations of the law in the 2008 election.

Furthermore, the message must formally be sent by the FEC that future violations by 527 groups face being treated as knowing and willful violations and that the penalties imposed for such violations will be commensurate with the violations that occur.

As you are aware, “knowing and willful” violations of the campaign finance laws trigger substantially higher civil penalties under the Federal Election Campaign Act (FECA). Under FECA, the FEC may impose a civil penalty for “knowing and willful” violations up to “an amount equal to 200 percent of any contribution or expenditure involved in such violation ...” 2 U.S.C. §437g(a)(5)(B).

This level of sanction stands in sharp contrast to the penalties imposed by the FEC on the three 527 groups discussed above, which ranged from less than 1 percent to 2.4 percent of the illegal expenditures made by these groups.

At the COGEL conference in Victoria, B.C. last month, FEC attorney Mark Shonkwiler discussed the Commission’s enforcement actions dealing with the illegal activities by 527 groups in the 2004 campaign.

According to an article in the *BNA Money in Politics Report* (September 20, 2007), “FEC critics have suggested that the amount of money involved in the settlements, compared to the tens of millions spent by these groups during the campaign, would not serve as an adequate deterrent to the activities involved.”

The *BNA Report* continues (emphasis added):

Shonkwiler countered this sentiment by suggesting that, now that the rules have been clarified, future activity by Section 527 groups could face stiffer penalties, including penalties against the leaders of groups and their donors.

The settlements reached by the FEC so far have excluded any liability for individual donors or officers of groups, reflecting a judgment by the commission not to go after these individuals, Shonkwiler said. But this could change in the future, he suggested.

The recent settlements have “provided a stronger basis for going after the donors,” Shonkwiler said during the panel discussion.

We believe it is essential for the FEC to issue a formal Statement of Policy that sets forth such an approach for the 2008 election, including stiffer penalties and broader liability for violations.

The organizers and managers of 527 groups, including their major donors who play such a role, should be placed formally on notice that they are not exempt from enforcement actions in the 2008 elections, and that they and their 527 groups will face sanctions for “knowing and willful” violations if they repeat the same kind of illegal activities that occurred in the 2004 election.

We are not suggesting that the Commission should impose penalties on every individual who makes a donation to a 527 group that engages in illegal activities, nor do we understand Mr. Shonkwiler’s remarks to suggest such an approach. But where major donors are involved in organizing or managing a 527 group that violates the law, they should be held accountable for the illegal conduct that occurs.

There is clear precedent for the FEC to issue a “Statement of Policy” on enforcement matters. The Commission’s Web site contains 10 different “Statements of Policy” that the FEC has issued on a range of matters in recent years, most of which relate to policies on various enforcement issues.

We strongly urge the FEC to issue a formal “Statement of Policy” that puts 527 groups, their organizers and managers, and their major donors who play such a role, formally on notice that spending soft money to influence federal elections as was done in the 2004 election is illegal; that such violations in the future will be swiftly addressed and will face being treated by the FEC as “knowing and willful” violations; that the FEC will hold organizers and managers of 527 groups, including their major donors who play such a role, liable for such violations; and that 527 groups, their organizers and managers and their major donors who play such role, face penalties for such violations in amounts that are commensurate with the size of the illegal contributions and expenditures that are made.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
President

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Counsel to Democracy 21

Copy to:
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