BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS

Hearings on the FY 1995 Budget Authorization
of the Federal Election Commission

Statement of William J. Olson
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Chairman Swift and Members of the Subcommittee:

I am grateful for the opportunity to address you today with respect to the budget of the Federal Election Commission ("FEC"). To one degree or another, my legal practice has included federal and state election law since 1977. Our clients include political committees and advocacy organizations exempt from taxation under IRC section 501(c)(4) and trade associations exempt from taxation under IRC section 501(c)(6).

I would also like to mention that I serve, together with Mark B. Weinberg, Esquire, as Legal Co-Counsel for a nonprofit association known as the Free Speech Coalition, Inc. The Free Speech Coalition was formed in 1993, and has drawn support from diverse sources to give representation and voice to the growing concern of nonprofit advocacy groups that federal and state governments have over-regulated citizens' political action. The Coalition believes that those citizens who attempt to exercise their Constitutional rights to freely associate, to petition their government, and to attempt to change their elected officials must not have those rights to participate in the American political process improperly and illegally circumscribed by the FEC and other agencies. With respect to the three regulatory examples I will relate today, the Coalition joins me

in my concerns. With respect to other comments that I might make today, I speak on my own behalf.

My central message today is that, in my opinion, the FEC has taken too expansive a view of its authority and responsibility. And some of its activities have unjustifiably impeded the free exercise of protected First Amendment rights by American citizens.

Of the criticisms that have been made against the FEC over the years, the most serious is that it has unnecessarily discouraged Americans from participating in the political process. This has resulted from unnecessary complexity in the Commission's approach to regulating elections, and the Commission's desire to stretch its authority beyond its limits set out in the Federal Election Campaign Act in order to do good, as it sees it. In certain cases, when the FEC loses a case in Court, and the Court determines that the FEC has intruded on protected First Amendment rights, the FEC has resisted implementing the ruling of the Court. Indeed, it has been said that some at the FEC treat the First Amendment as though it were a loophole in the Federal Election Campaign Act that needs to be plugged.

I do not mean to imply that the Commission has an easy task or that it is not in the hands of honest, dedicated public servants. But I do believe that there is a serious problem in the ability of the Commission to focus on its most vital

functions and to accept that it has limitations which must be respected.

The relevance of all of this to the proceedings of your Subcommittee, of course, is that if the FEC were to refocus on its core objectives, this could have an ameliorative effect on the FEC's budget.

There are a number of items that could be talked about in this regard. I have chosen three examples to illustrate the points just mentioned. Each concerns regulations proposed and/or adopted within the past two years by the FEC, over much objection and at significant cost, that are destined to be reversed by the courts at an even greater cost to all concerned.

I. New FEC Limitations on SSFs of Membership Organizations

The FEC adopted new regulations relating to "membership" organizations on August 25, 1993, which became effective last November. These regulations (11 C.F.R. sections 100.8(b)(4)(iv), 114.1(e), and 114.7) are significant because they unnecessarily restrict the opportunity for ordinary citizens to participate in federal elections.

Essentially, the issue concerns the FEC's desire to narrow the technical definition of "member," which determines which persons may be communicated with on an electoral matters (partisan communications) by membership organizations, as well as which persons may be solicited for contributions by the separate segregated fund (SSF) of a membership organization. The new

regulations change the FEC's long-standing interpretation of what is necessary for one to be considered a "member" of such a group.

For the past 15 years, under several FEC-issued Advisory Opinions, membership organizations have solicited contributions to their SSFs from all persons they classify as members, subject to only a few reasonable limitations on that definition. In general, the term "member," until adoption of the new rule, has included anyone who has expressed a desire to join the group, who regularly paid dues, and whose opinions were solicited and considered annually by the organization.

The new FEC regulatory change requires that, for a person to be a "member," the individual must have a vote to elect one or more of those on the Board of Directors of the organization. (Under the regulation, "members" can also be those with a strong financial tie with the organization, but such a criterion is useless for nonprofit social welfare organizations.) The new rule would effectively require such organizations to change their organizational structures, and formally amend their articles of incorporation and bylaws if they intend to communicate on electoral matters with, and solicit contributions from, their members.

Many nonprofit associations, and particularly IRC section 501(c)(4) groups, have members who do not elect their board od directors because these groups have seen instances where voting rights can lead to inefficient administration and a waste of funds. Many organizations are governed by boards that elect

their successors. The reality is that, if members disagree with the agenda, they can put their money elsewhere. In other words, voting is done with donors' feet.

By limiting membership organizations to solicit only voting members, the Commission would put an end to SSFs run by (c)(4) organizations who do not grant voting rights to their members. This leaves organizations with the choice of either restricting their SSF solicitation to the nonprofit organization's officers, directors and employees (usually a handful of people), or radically altering the structure of their organization to grant these voting rights to members.

The FEC represented that it felt compelled to change the regulations to effectuate the holding in the U.S. Supreme Court case, Federal Election Commission v. National Right to Work Committee, et. al., 459 U.S. 196 (1982) -- a case that is now almost a dozen years old. It is hard to believe that it is this 1982 case that has now, decades later, forced these changes. And these regulations also fail to implement any teaching in the National Right to Work case, as the Supreme Court clearly did not require the changes proposed by the FEC. There has been no sufficient explanation as to why, more than ten years after the Supreme Court's decision, and after years of effective functioning by membership organizations in line with the guidelines of the National Right to Work case and the FEC-issued Advisory Opinions, the FEC strained so hard to change the rules and narrow the definition.

The agency seems unconcerned about making organizations that have functioned for years in a particular manner turn around and effect substantial modifications of their rules and regulations, to say nothing of their structure, to accommodate the preferences of a federal agency. These regulations may be challenged, but any challenge is expensive and unnecessary changes are wasteful. What is certain, however, is that the new regulations have cost many organizations and the FEC itself untold thousands of dollars and hours of legal effort to pursue a dubious objective. And the end does not appear to be in sight.

II. Proposed FEC Regulations implementing Massachusetts Citizens for Life decision

The Federal Election Commission is currently considering proposed regulations to implement the U.S. Supreme Court case, Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) (hereinafter "MCFL"), which would improperly narrow the holding of that case and limit which advocacy organizations may engage in Independent Expenditures (IE's).

The proposed regulations center on the ban on corporate expenditures in federal elections, found in 2 U.S.C section 441b. Section 441b was the central issue in MCFL, where a pro-life group (exempt under IRC section 501(c)(4)) challenged the ban as it applied to expenditures by nonprofit corporations, arguing that the statute was justified only for for-profit corporations, not for nonprofit political organizations simply because they are incorporated. The Supreme Court agreed as to IE's, holding that

nonprofit groups such as MCFL could not be prohibited from participating in IE's, as that would be an unconstitutional infringement upon political speech protected under the First Amendment.

That was more than seven years ago, but the FEC never changed its regulations to conform with that case. Now the FEC says it is trying to implement the case by proposing regulations which, ostensibly, implement the exemption to section 441b carved out by the Court. The problem is that the FEC, having strongly disagreed with the Court's decision, has determined to interpret that decision so narrowly in defining the type of nonprofit organizations entitled to the exemption, as to virtually ensure that almost no IRC section 501(c)(4) organization in the country would qualify -- probably including the Massachusetts Citizens for Life organization itself.

The obvious principle behind the Supreme Court's ruling was to exempt nonprofit corporations akin to MCFL from the ban on independent expenditures. The apparent principle behind the FEC's regulations is to frustrate the holding of the Court. Instead of focusing on the essence of the Court's ruling, the FEC now requires that only organizations that are identical in every respect to selected words contained in the Supreme Court opinion will qualify for the exemption.

III. New FEC Regulations on Special Fundraising Projects

The FEC adopted regulations, effective November 4, 1992, that altered the ability of political committees to use candidates' names in the names of their fundraising projects. Several nonprofits opposed these proposed regulations. Not only did the FEC ignore these comments; the FEC actually went beyond its own proposal (which only dealt with strengthening or increasing the disclaimer provisions), and adopted, as a new regulation, language that absolutely banned the use of a candidate's name in the name of a project or activity of an unauthorized committee.

The new regulation was challenged in early 1993 by an unauthorized committee which wants to use, in its project name, the name of a candidate that it is opposing. The Petition for Rulemaking submitted by the organization, Citizens Against David Duke ("CADD"), urged the Commission to amend section 102.14(a) of the current FEC Regulations (11 C.F.R.), which prohibits the use of a candidate's name in the title of the project of an unauthorized committee.

Prior to adoption of the Regulation on November 4, 1992, 11 C.F.R. Section 102.14(a) prohibited the use of a candidate's name by an unauthorized committee in the official name of that committee, but the committee's official name for purposes of that regulation was determined by the FEC not to include the name of any special project of that committee.

Thus, according to the FEC prior to November 4, 1992, an unauthorized committee (e.g., hypothetically, "Citizens for Good Government"), which could not use the name of a candidate in its committee name, could sponsor a special project, such as an Independent Expenditure either for or against a particular candidate, using the name of the candidate in the title of the project. Thus, Citizens for Good Government could sponsor a project such as "Citizens for Smith" or "Citizens Against Jones," using the appropriate FEC-mandated disclaimer indicating the project's sponsor as well as the lack of affiliation with any candidate or authorized committee. That FEC interpretation of section 102.14(a) was upheld by the U.S. Court of Appeals for the D.C. Circuit in Common Cause v. FEC, 842 F.2d 436 (D.C. Cir. 1988).

By virtue of the "new" or newly-revised Regulation, 11 C.F.R. section 102.14(a), effective November 4, 1992, an unauthorized committee's "name" expressly includes any name under which a committee conducts activities. Thus, adoption of the new Regulation constitutes an attempted reversal by the FEC of its own longstanding, judicially-approved position.

It is not entirely clear what the impetus has been for the new Regulation. When the FEC published its Notice of Proposed Rulemaking in the Federal Register on April 15, 1992, the proposal was to change the FEC regulations by broadening the disclaimer requirements of 11 C.F.R. section 110.11(a)(i)(iv)(A) and prohibiting the acceptance of checks made payable to any

entity other than the registered name of the committee paying for a project. The Notice also solicited comments on whether the regulations should be amended to ban completely the use of a candidate's name by an unauthorized committee in the title of its projects, but there was no real discussion of that subject and no proposed language. Nevertheless, the FEC adopted the most restrictive limitation available on the activities of organizations conducting Independent Expenditures. There seems to be the sense that those at the FEC did not want potential contributors to mistakenly give money to non-authorized committees. Of course this does not explain how the FEC could believe it could bar the us of candidates names by committees working to defeat a particular candidate. But in either case, if the impetus was really "consumer protection," that is a function not conveyed to the Commission by the Act. And even if it were, it would be misapplied in this case, where consumers' (citizens') First Amendment rights are being abrogated.

Political advocacy groups are overwhelmingly of the view that the new special fundraising regulations are seriously flawed. After not acting on the CADD petition for almost a year, the FEC announced last December that it was proposing a modification of the new regulation to allow the use of a candidate's name in the title of a special project, but only if the special project <u>clearly opposes</u> the candidate who is the subject of the project. The FEC refused to budge from its

position that candidates' names may not be used in the titles of special projects supporting such candidates.

It is inevitable that the new FEC regulations on the use of candidates' names, whether the current version or the newly FEC-proposed version will be challenged in court, for both versions clearly and substantially impede the ability to conduct independent expenditure campaigns without any compelling or proven basis whatsoever for that serious infringement of First Amendment rights. The FEC seems oblivious to these facts. Thus, regulations continue to be proposed, opposed, adopted, amended, and challenged in court, and costs on both sides of the regulatory screen continue to rise.

CONCLUSION

I share these observations with the Subcommittee in the hope that they raise questions that are relevant to the current budgetary deliberations. The issue is not so much right versus wrong on every detail of every legal argument as it is one of philosophy, approach, planning, and working within the agency's statutory mandate. Government agencies are powerful, and the exercise of such power should be judicious. Too often, budgets are attempted to be justified by "activity" that is really wasteful and counterproductive. The regulations I have mentioned above fall into that category. Hopefully, these comments will raise questions that may assist the Subcommittee in determining whether the agency's current agenda is truly a productive one.