

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2006 JUL 28 A 11:04

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: ELECTIONS COMMISSION TITLE NUMBER: 146

CITE AUTHORITY: §3-8-2b

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 5

TITLE OF RULE BEING PROPOSED: REGULATION OF CAMPAIGN FINANCE DURING
ELECTIONEERING COMMUNICATION PERIODS

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 27, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Secretary of State
Administrative Law Division
Suite 157K, Building 1
Charleston WV
558-6000 bcummings@wvsos.com

LEGISLATIVE RULE TITLE: Regulations of Campaign Finance During Electioneering
Communication Periods

1. Authorizing statute(s) citation §3-8-2h

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
May 4, 2006

b. What other notice, including advertising, did you give of the hearing?
None

c. Date of Public Hearing(s) or Public Comment Period ended:
June 9, 2006

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 27, 2006

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

<u>Dan Kimble</u>	<u>dkimble@wvsos.com</u>
<u>Secretary of State</u>	<u>558-6000</u>
<u>1900 Kanawha Blvd E</u>	<u>Fax 558-0900</u>
<u>Charleston WV</u>	

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

<u>Bryan Cummings</u>	<u>bcummings@wvsos.com</u>
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3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**TITLE 146
LEGISLATIVE RULE
ELECTION COMMISSION**

FILED

2006 JUL 28 A 11: 05

**SERIES 5
REGULATION OF CAMPAIGN FINANCE DURING ELECTIONEERING
COMMUNICATION PERIODS.**

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§146-5-1. General.**

1.1. Scope. -- This rule clarifies and provides for implementation of state law relating to the regulation of campaign finance, reporting and filing requirements set forth under W. Va. Code §3-8-2b and §3-8-12(g).

1.2. Authority. -- W. Va. Code §3-8-2b.

1.3. Filing Date. --

1.4. Effective Date. --

§146-5-2. Definitions.

2.1. "Ballot issue" means a constitutional amendment, special levy, bond issue, local option referendum, municipal charter or revision, an increase or decrease of corporate limits or any other question that is placed before the voters for a binding decision.

2.2. "Broadcast, cable, or satellite communication" means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

2.3. "Candidate" means an individual who:

2.3.1. Has filed a certificate of announcement under W. Va. Code §3-5-7 or a municipal charter;

2.3.2. Has filed a declaration of candidacy under W. Va. Code §3-5-23;

2.3.3. Has been named to fill a vacancy on a ballot; or

2.3.4. Has declared a write-in candidacy or otherwise publicly declared his or her intention to seek nomination or election for any state, district, county or municipal office or party office to be filled at any primary, general or special election.

2.4. "Candidate's committee" means a political committee established with the approval of or in cooperation with one pre-candidate or candidate to explore the possibilities of seeking a particular office and/or to support or aid his or her nomination or election to an office in one election cycle. If a candidate directs or influences the activities of more than one committee, those committees shall be considered one committee of the purpose of contribution limits.

2.4.1. "Direct or influences" as used in this rule, means creating, establishing organizing, or administering, directly or indirectly, any committee, group or organization, with the intent to avoid or evade contribution limitations.

2.5. "Clearly identified" means that the name, nickname, photograph, drawing or other depiction of the candidate appears or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the Governor", "your Senator" or "the incumbent", or through an unambiguous reference to his or her status as a candidate such as "the Democratic candidate for Governor" or "the Republican candidate for Supreme Court of Appeals".

2.6. "Contribution" means a gift subscription, assessment, payment for services, dues, advance, donation, pledge, contract, agreement, forbearance or promise of money or other tangible thing of value, whether conditional or legally enforceable, or a transfer of money or other tangible thing of value to a person, made for the purpose of influencing the nomination, election or defeat of a candidate. An offer or tender of a contribution is not a contribution if expressly and unconditionally rejected or returned. A contribution does not include volunteer personal services provided without compensation.

2.7. "Direct costs of purchasing, producing or disseminating electioneering communications" means:

2.7.1. Costs charged by a vendor, including, but not limited to, studio rental time, compensation of staff and employees, costs of video or audio recording media and talent, material and printing costs and postage; or

2.7.2. The cost of airtime on broadcast, cable or satellite radio and television stations, the cost of disseminating printed materials, establishing a telephone bank, studio time, use of facilities and the charges for a broker to purchase airtime.

2.8. "Disclosure date" means either of the following:

2.8.1. The first date during any calendar year on which any electioneering communication is disseminated after the person paying for the communication has spent a total of five thousand dollars or more for the direct costs of purchasing, producing or disseminating electioneering communications; or

2.8.2. Any other date during that calendar year after any previous disclosure date on which the person has made additional expenditures totaling five thousand dollars or more for the direct costs of purchasing, producing or disseminating electioneering communications.

2.9. "Election" means any primary, general or special election conducted under the provisions of the West Virginia Code or under the charter of any municipality at which the voters nominate or elect candidates for public office. For purposes of Article Eight, Chapter Three of the West Virginia Code, each primary, general, special or local election constitutes a separate election. This definition is not intended to modify or abrogate the definition of the term "nomination" as used in Article Eight, Chapter Three of the West Virginia Code.

2.10. "Electioneering communication" means any paid communication made by broadcast, cable or satellite signal, mass mailing, telephone bank, leaflet, pamphlet, flyer or outdoor advertising or published in any newspaper, magazine or other periodical that:

2.10.1. Refers to a clearly identified candidate for a statewide office or the Legislature;

2.10.2. Is publicly disseminated within:

2.10.2.a. Thirty days before a primary election at which the nomination for office sought by the candidate is to be determined; or

2.10.2.b. Sixty days before a general or special election at which the office sought by the

candidate is to be filled; and

2.10.2.c. Is targeted to the relevant electorate.

2.11. "Electioneering communication" does not include:

2.11.1. A news story, commentary or editorial disseminated through the facilities of any broadcast, cable or satellite television or radio station, newspaper, magazine or other periodical publication not owned or controlled by a political party, political committee or candidate: *Provided*, That a news story disseminated through a medium owned or controlled by a political party, political committee, or candidate is nevertheless exempt if the news is:

2.11.1.a. A bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and

2.11.1.b. Is part of a general pattern of campaign-related news that gives reasonably equal coverage to all opposing candidates in the circulation, viewing or listening area;

2.11.2. A communication that is required to be reported to the State Election Commission or the Secretary of State as an expenditure pursuant to any provision of Article Eight, Chapter Three of the West Virginia Code, other than section two-b of Article Eight, Chapter Three of the West Virginia Code, or the rules of the State Election Commission or the Secretary of State promulgated pursuant to such provision: *Provided*, That, independent expenditures required to be reported pursuant to subsection (b), section two of Article Eight, Chapter Three of the West Virginia Code are not exempt from the reporting requirements of this section;

2.11.3.

2.11.3.a. A candidate debate or forum conducted pursuant to rules adopted by the State Election Commission or the Secretary of State or a communication promoting that debate or forum made by or on behalf of its sponsor;

2.11.3.b. In order for a debate or forum to qualify under this exemption it must be a debate or forum that is sponsored by a person or group that does not have a direct or indirect political interest of a particular candidate or political party which will be affected by the outcome of the pending election.

2.11.4. A communication paid for by any organization operating, and in good standing, under Section 501(c)(3) of the Internal Revenue Code of 1986;

2.11.5. A communication made while the Legislature is in session which, incidental to promoting or opposing a specific piece of legislation pending before the Legislature, urges the audience to communicate with a member or members of the Legislature concerning that piece of legislation;

2.11.6. A statement or depiction by a membership organization, in existence prior to the date on which the individual named or depicted became a candidate, made in a newsletter or other communication distributed only to bona fide members of that organization;

2.11.7.

2.11.7.a. A communication made solely for the purpose of attracting public attention to a

product or service offered for sale by a candidate or by a business owned or operated by a candidate which does not mention an election, the office sought by the candidate or his or her status as a candidate.

2.11.7.b. Any "business advertisement" will be scrutinized with regard to the following criteria: whether the advertisement ran prior to the electioneering communication period; the originating date of business; the regularity and timing of the advertisement in comparison to prior advertising efforts; and, the content of the advertisement; and

2.11.8. A communication, such as a voter's guide, which refers to all of the candidates for one or more offices, which contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history. An advertisement is considered to "contain the appearance of endorsement," and not therefore exempt, if it assigns a value to a candidate's position, such as, "Candidate Doe receives an 'F' on environmental issues."

2.12. "Financial agent" means any person acting for and by himself or herself, or any two or more natural persons acting together or cooperating in a financial way to aid or take part in the nomination or election of any candidate for public office, or to aid or promote the success or defeat of any political party at any election.

2.13. "Fund-raising event" means an event such as a dinner, reception, testimonial, cocktail party, auction or similar affair through which contributions are solicited or received by such means as the purchase of a ticket, payment of an attendance fee or by the purchase of goods or services.

2.14. "Independent expenditure" means an expenditure made by a person other than a candidate or a candidate's committee in support of or opposition to the nomination or election of one or more clearly identified candidates and without consultation or coordination with or at the request or suggestion of the candidate whose nomination or election the expenditure supports or opposes or the candidate's agent. Supporting or opposing of the election of a clearly identified candidate includes supporting or opposing the candidates of a clearly identified political party. An expenditure which does not meet the criteria for an independent expenditure is considered a contribution.

2.15. "Mass mailing" means a mailing by United States mail, facsimile or electronic mail of more than five hundred pieces of mail matter of an identical or substantially similar nature within any thirty-day period.

2.16. "Membership organization" means a group that grants bona fide rights and privileges, such as the right to vote, to elect officers or directors and the ability to hold office, to its members and which uses a majority of its membership dues for purposes other than political purposes. "Membership organization" does not include organizations that grant membership upon receiving a contribution.

2.17. "Name" means the full first name, middle name or initial, if any, and full legal last name of an individual and the full name of any association, corporation, committee or other organization of individuals, making the identity of any person who makes a contribution apparent by unambiguous reference.

2.18. "Person" means an individual, partnership, committee, association, and any other organization or group of individuals.

2.19. "Political action committee" means a committee organized by one or more persons for the purpose of supporting or opposing the nomination or election of one or more candidates or the passage or defeat of one or more ballot issues.

2.20. "Political party" means a political party as defined by W. Va. Code §3-1-8 or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party.

2.21. "Political purposes" means supporting or opposing the nomination, election or defeat of one or more candidates or the passage or defeat of a ballot issue, supporting the retirement of the debt of a candidate or political committee or the administration or activities of an established political party or an organization which has declared itself a political party and determining the advisability of becoming a candidate under the pre-candidacy financing provisions of Chapter Three of the West Virginia Code.

2.22. "Statewide Office" means the offices of Governor, Secretary of State, Attorney General, Auditor, State Treasurer, Commissioner of Agriculture, and the Justices of the Supreme Court of Appeals.

2.23. "Targeted to the relevant electorate" means a communication which refers to a clearly identified candidate for statewide office or the Legislature and which can be received by ten thousand or more individuals in the state in the case of a candidacy for statewide office and five hundred or more individuals in the district in the case of a candidacy for the Legislature.

2.24. "Telephone bank" means telephone calls that are targeted to the relevant electorate, other than telephone calls made by volunteer workers, regardless of whether paid professionals designed the telephone bank system, developed calling instructions or trained volunteers.

2.25. "Two-year election cycle" means the twenty-four month period that begins the day after a general election and ends on the day of the subsequent general election.

§146-5-3 Disclosure of Electioneering Communications.

3.1. Every person who has spent a total of five thousand dollars or more for the direct costs of purchasing, producing or disseminating electioneering communications during any calendar year shall, within twenty-four hours of each disclosure date, file with the Secretary of State a prescribed form containing the following information:

3.1.1. The name of the person making the expenditure, the name of any person sharing or exercising direction or control over the activities of the person making the expenditure and the name of the custodian of the books and accounts of the person making the expenditure;

3.1.2. If the person making the expenditure is not an individual, the principal place of business of the partnership, committee, association, organization or group which made the expenditure;

3.1.3. The amount of each expenditure of more than one thousand dollars made for electioneering communications during the period covered by the statement and the name of the person to whom the expenditure was made;

3.1.4. The elections to which the electioneering communications pertain and the names, if known, of the candidates referred to or to be referred to therein; and

3.1.5. The names and addresses of any contributors who contributed a total of more than one thousand dollars between the first day of the preceding calendar year and the disclosure date and whose contributions were used to pay for electioneering communications, along with the following information:

3.1.5.a. The month, day and year that the contributions of any single contributor exceeded

two hundred fifty dollars;

3.1.5.b. If the contributor is a political action committee, the name and address by which it is registered with the State Election Commission;

3.1.5.c. If the contributor is an individual, the name and address of the individual, his or her occupation, the name and address of the individual's current employer, if any, or, if the individual is self-employed, the name and address of the individual's business, if any;

3.1.5.d. A description of any contribution, other than money; and

3.1.5.e. The value in dollars and cents of the contribution.

3.2. "Within twenty-four hours of each disclosure date" means:

3.2.1. Received in the Secretary of State's office by the close of business on the next regular business day of the office; or,

3.2.2. Filed electronically, with the Secretary of State's Office within twenty four hours of the event triggering disclosure.

3.3. "Direction or control over the activities" means creating, establishing organizing, managing or administering, directly or indirectly, the expenditure.

3.4. For purposes of subsection 1 of this section: any person who makes a contribution for the purpose of funding the direct costs of purchasing, producing or disseminating an electioneering communication under Article Eight, Chapter Three of the West Virginia Code shall, at the time the contribution is made, provide his or her name and address to the recipient of the contribution.

3.5. Any individual who makes contributions totaling two hundred fifty dollars or more between the first day of the preceding calendar year and the disclosure date for the purpose of funding the direct costs of purchasing, producing or disseminating electioneering communications shall, at the time the contribution is made, provide the name of his or her occupation and of his or her current employer, if any, or, if the individual is self-employed, the name of his or her business, if any, to the recipient of the contribution.

3.6. In each electioneering communication, a statement shall appear or be presented in a clear and conspicuous manner that:

3.6.1. Clearly indicates that the electioneering communication is not authorized by the candidate or the candidate's committee; and

3.6.2. Clearly identifies the person making the expenditure for the electioneering communication; and

3.6.3. If the electioneering communication appears on or is disseminated by broadcast, cable or satellite transmission, is both spoken clearly and appear in clearly readable writing at the end of the communication.

3.7. For the purposes of this section, a person is considered to have made an expenditure when the person has entered into a contract to make the expenditure at a future time.

§146-5-4. Contribution Limitations and Sources.

4.1. If any person, including but not limited to, a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) makes, or contracts to make, any expenditure for electioneering communications which is coordinated with and made with the cooperation, consent or prior knowledge of a candidate, candidate's committee or agent of a candidate, the expenditure shall be treated as a contribution and expenditure by the candidate. If the expenditure is coordinated with and made with the cooperation or consent of a state or local political party or committee, agent or official of that party, the expenditure shall be treated as a contribution to and expenditure by the candidate's party.

4.2. Contributions to candidates for national elective office, including President, Vice President, U.S. Senate and U.S. House of Representatives, and to political committees registered with the Federal Election Commission pursuant to 2 U.S.C. 433 engaged solely in activities intended to influence federal elections, are subject to the restrictions and requirements of Chapter 14, Title 2 of the United States Code and the Code of Federal Regulations are regulated by the Federal Election Commission (FEC, 999 E Street, N. W., Washington, D.C. 20463 Telephone (800)424-9530), and are not subject to this rule.

4.3. A solicitation made specifically on behalf of one or more candidates for President, Vice President, U.S. Senate or U.S. House of Representatives is governed by the United States Code and the Code of Federal Regulations and is not subject to this rule.

4.4. A solicitation or contribution made within the state by a federal committee is subject to regulation the West Virginia Code and State Election Commission, Regulation of Campaign Finance, 146 CSR 3, if all or part of any contribution received as a result of the solicitation is used to support one or more statewide, legislative or local candidates in West Virginia.

4.5. During the two-year election cycle, a political organization (as defined in Section 527 (e) (1) of the Internal Revenue Code of 1986) attempting to influence state elections may not accept contributions totaling more than one thousand dollars from any one person prior to the primary election and contributions totaling more than one thousand dollars from any one person after the primary and before the general election.

§146-5-5. Filing Requirements of Political Organizations (as Defined in Section 527(e)(1) of the Internal Revenue Code of 1986).

5.1. No political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986) may solicit or accept contributions in this state in regard to the nomination or defeat of a candidate for statewide or legislative office until it has filed with the Office of the Secretary of State a form containing:

- 5.1.1. The organization's name.
- 5.1.2. The organization's physical address.
- 5.1.3. A contact person for the organization.
- 5.1.4. A statement of the organization's purposes for which it was formed.



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Paul S. Ryan
FEC Program Director &
Associate Legal Counsel
pryan@campaignlegalcenter.org

June 8, 2006

Bryan Cummings
Secretary of State's Office
157-K, Building 1
1900 Kanawha Blvd E
Charleston, WV 25305-0770

Re: Public Comment on Proposed Rule 146-5: "Regulation of Campaign Finance During Electioneering Communication Periods"

Mr. Cummings:

Please accept these comments of the Campaign Legal Center regarding the Secretary of State's Proposed Rule 146-5: "Regulation of Campaign Finance During Electioneering Communication Periods," May 4, 2006, available at <http://www.wvsos.com/adlaw/proposed/146-05.pdf>.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding disclosure, political advertising, contribution limits, enforcement issues, and many other matters. The CLC served as counsel to defendant intervenors Senator John McCain, Senator Russell Feingold, *et al.*, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), before the U.S. Supreme Court—the lawsuit establishing the constitutionality of regulating "electioneering communications." The CLC has also been active in Washington, DC and around the nation with respect to 527 political organization activity. Most recently, the CLC filed a brief *amicus curiae* with the State of Washington Supreme Court arguing that a section 527 organization active in the state violated state law by failing to register with the state as a political committee. See Brief Amicus Curiae of the Campaign Legal Center, *Voters Education Committee v. State of Washington*, No. 77724-1 (May 3, 2006), available at <http://www.campaignlegalcenter.org/attachments/1582.pdf>. The CLC also represented U.S. Senators John McCain and Russ Feingold as *amici curiae* in *Shays v. Federal Election Comm'n* (FEC), 424 F. Supp. 2d 100 (D.D.C. March 29, 2006), a lawsuit in which Congressmen Shays and Meehan successfully challenged the failure of the FEC to regulate 527 organizations as political committees under federal law. In short, the CLC has a longstanding, demonstrated interest and expertise in the legal issues raised by this rulemaking.

As a preliminary matter, the CLC applauds the State of West Virginia for enacting the important "electioneering communications" and "527 political organization" statutes necessitating this rulemaking. By enacting this legislation, the State of West Virginia has shown leadership and commitment to addressing two areas of campaign finance activity that pose a great threat of real and apparent corruption of the electoral process nationwide.

The CLC identifies only one significant legal problem with the new "527 political organization" statute and, though the Secretary of State can effectively remedy this problem through the rulemaking process, Proposed Rule 146-5 fails to do so.

Specifically, state law provides that:

No political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986) may solicit or accept contributions until it has notified the Secretary of State of its existence and of the purposes for which it was formed. During the two-year election cycle, a political organization (as defined in Section 527 (e) (1) of the Internal Revenue Code of 1986) may not accept contributions totaling more than one thousand dollars from any one person prior to the primary election and contributions totaling more than one thousand dollars from any one person after the primary and before the general election.

W. Va. Code § 3-8-12(g) (emphasis added).

On its face, this statutory provision applies to *all* "political organizations" as defined at 26 U.S.C. § 527(e)(1). Section 527, in turn, defines "political organization" to include any group "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . for the function of influencing or attempting to influence the selection, nomination, election, or appointment of *any individual to any Federal, State or local public office . . .*" 26 U.S.C. § 527(e)(1)-(2) (emphasis added).

As such, W. Va. Code § 3-8-12(g), on its face, imposes a registration requirement and contribution limit not only on those political organizations operated for the purpose of influencing West Virginia state elections, but also on political organizations operated for the purposes of influencing federal elections and elections in other states.

Federal law explicitly provides that the Federal Election Campaign Act (FECA) "supersede[s] and preempt[s] any provision of State law with respect to election to Federal office." 2 U.S.C. § 453(a). Similarly, FEC regulations provide that "Federal law supersedes State law concerning the . . . [o]rganization and registration of political committees supporting Federal candidates." 11 C.F.R. § 108.7(b)(1). *See also Weber v. Heaney*, 793 F. Supp. 1438 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir, 1993) (Minnesota Congressional Campaign Reform Act preempted by FECA and FEC regulation). Similarly, it is undoubtedly beyond the scope of the State of West Virginia's legal authority to regulate the activities of political organizations operating solely for the purpose of influencing elections outside the State of West Virginia.

The Secretary of State, through Proposed Rule 146-5, wisely recognizes that federal political committees fall under the jurisdiction of the Federal Election Commission, not the state. Accordingly, the proposed regulations clarify that W. Va. Code § 3-8-12(g) *does not* apply to “candidates for national elective office,” nor to “solicitation[s] made specifically on behalf of one or more candidates” for federal office. Proposed § 146-5-4.2 and 4.3.

However, the proposed rule does not exempt from coverage federal political committees acting independently of candidates (*i.e.*, nonconnected committees and separate segregated funds, *see* 11 C.F.R. § 106.6); nor does the proposed rule exempt from coverage political organizations operating solely for the purpose of influencing elections outside the State of West Virginia.

Consequently, the CLC believes the statute, combined with Proposed Rule 146-5, is overbroad. The CLC urges the Secretary of State to amend the proposed regulations to exempt from state law coverage any political organization as defined in Section 527(e)(1) of the Internal Revenue Code that is registered with the Federal Election Commission as a “political committee” pursuant to 2 U.S.C. § 433. The CLC further urges the Secretary of State to amend the proposed regulations to exempt from state law coverage any political organization operating solely for the purpose of influencing elections outside the State of West Virginia. Doing so will make clear that the State of West Virginia does not intend to regulate the activities of federal political committees or political organizations operating solely for the purpose of influencing elections outside the State of West Virginia.

The CLC appreciates the opportunity to submit these comments.

Respectfully,

/s/ Paul S. Ryan



June 6, 2006

Mr. Bryan Cummings
WV Secretary of State's Office
157-K, Building 1
1900 Kanawha Blvd East
Charleston, WV 25305

Re: §146CSR5 – Proposed Rules Regulating Electioneering Communications

Dear Bryan,

Overall the Secretary of State's office has done an excellent job of addressing the issues and concerns raised by the 527 advisory committee. That said, there are some areas that I feel could be improved. Following are my suggestions:

1. Under §146-5-2.11.1, regarding the exemption for news stories, commentary or editorials distributed by a medium controlled by a political party, political committee or candidate, the term "reasonably equal coverage" needs to be clarified.
2. The criteria specified for a "candidate debate or forum" under §146-5-2.11.3b should be taken a step further by requiring participation by at least two candidates for the same office.
3. Regarding 501(c)(3) organizations, §146-5-2.11.4 should further clarify that nothing in the code shall be construed to authorize a 501(c)(3) organization to carry out any activity that is prohibited under the Internal Revenue Code.
4. The scorecard exemption in §146-5-2.11.8 should further specify that scorecards that use inflammatory names or language to describe bills or votes, or use terms such as "pro" or "anti" in reference to an issue or candidate are not exempt.
5. Although the definition of "membership organization" in §145-5-2.16 was written to prohibit sham or fake "membership organizations" from engaging in electioneering communications, it would be beneficial to clarify what constitutes, perhaps by borrowing from 11CFR100.134, which defines members as follows: *"all persons who are currently satisfying the requirements for membership in and organization, affirmatively accept the membership organizations invitation to become a member and either:*
 - (1) *Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or*
 - (2) *Pay membership dues at least annually, of a specific amount predetermined by the organization; or*

WEST VIRGINIA-CITIZEN ACTION GROUP
1500 DIXIE STREET • CHARLESTON, WEST VIRGINIA 25311
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(3) Have a significant organizational attachment to the membership organization that includes: affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. ...

Under 11CFR, the Federal Election Commission may determine, on a case-by-case basis, that persons who do not precisely meet the requirements of the general rule, but have "*a relatively enduring and independently significant financial or organizational attachment to the organization*" are members. Examples given include "*student members who pay a lower amount of dues while in school, long term dues paying members who qualify for lifetime membership status with little or no dues obligation, and retired members.*"

While the emphasis on "*financial attachment*" makes me a little uneasy, requiring members to affirmatively accept membership might prevent groups from indiscriminately adding individuals to a mailing list and then calling them "members."

6. Finally, §146-5-2.4.1 seems to imply that anyone who "directs or influences" the activities of a group or organization is intent on avoiding the law. The words "with the intent to avoid or evade contribution limitations" should be deleted. The concern over a candidate directing or influencing more than one committee is addressed in §146-5-2.4

Thank you for your consideration in this matter. I appreciate the opportunity to share my thoughts and concerns regarding the proposed rules.

Sincerely,



Julie Archer

Following a review of the comments received, the Secretary of State's Office has amended its rule to further clarify that any political activity that is either of a purely Federal nature or does not influence state elections inside the State of West Virginia is beyond the scope of authority of state law. To that end, the rule was amended purely for clarification purposes as the recommendation was already the intended substantive position of the Secretary of State's position.

As for further recommendations for clarification, the Secretary of State's office appreciates the position and input of all concerned, but at this time believes that its rule reflects the position it desires.