May 22, 2008

Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear General Mukasey:

We are writing to strongly urge the Justice Department to closely monitor the spending of soft money to influence the 2008 federal elections by 527 groups and nonprofit groups, and, where appropriate, to exercise its authority to conduct criminal investigations and bring criminal proceedings to enforce the federal campaign finance laws as they apply to such groups.

Any such criminal investigations of potential campaign finance violations should include, in addition to the 527 groups or nonprofit groups involved, the individuals who organize, manage and lead those groups, including major donors who play such a role.

As you know, while the FEC has exclusive jurisdiction over civil enforcement of the campaign finance laws, the Justice Department has its own independent and exclusive jurisdiction to bring criminal enforcement proceedings for violations of these laws.

Following the 2004 election, the Federal Election Commission took enforcement actions against a number of groups organized under section 527 of the tax code for illegally spending soft money to influence that election.

The FEC enforcement actions found that four 527 groups alone made massive illegal expenditures totaling more than $200 million to influence the 2004 presidential election. One 527 group was found by the FEC to have made illegal expenditures of $100 million to influence the presidential race.

These FEC actions represent findings of campaign finance violations in an American election of a historically unprecedented magnitude. The penalties imposed by the FEC, however, were a small fraction of the size of the violations that occurred and do not serve as an effective deterrent to future violations.
The FEC enforcement actions against 527 groups arising from the 2004 elections established a body of law that sets forth the campaign finance rules that apply to 527 groups and nonprofit groups spending soft money to influence the 2008 federal elections.

Based on this established body of law, campaign finance violations by 527 groups and nonprofit groups in the 2008 election that are similar to the kinds of violations that occurred in the 2004 election should be treated as "knowing and willful" violations of law and subject to potential criminal prosecution.

In the 2008 election cycle, there already have been multiple instances of 527 groups and nonprofit groups raising and spending unlimited soft money to influence the presidential primary elections in both parties, as well as to influence special elections in congressional races.

These efforts foreshadow larger soft money spending by 527 groups and nonprofit groups this summer and fall to influence the 2008 general election campaign.

It is essential that the responsible enforcement agencies, including the Justice Department, take effective and timely steps to ensure that the same kind of massive campaign finance violations that were found to have occurred in the 2004 election do not occur again in the 2008 election.

The Federal Election Campaign Act (FECA) provides for criminal sanctions, enforced by the Justice Department, in the case of "knowing and willful" violations of the campaign finance laws that exceed a threshold dollar amount. 2 U.S.C. § 437g(d).

While the Federal Election Commission is authorized to refer potential criminal violations to the Department, id. at § 437g(a)(5)(C), the Department has its own independent and exclusive authority to undertake criminal investigations and bring criminal proceedings to enforce the campaign finance laws.

The Department’s recently re-issued handbook, “Federal Prosecution of Election Offenses” (7th Ed. May 2007), makes clear that the Department has independent prosecutorial jurisdiction to enforce the criminal sanctions of the FECA in the case of “knowing and willful” violations of the law. The Handbook takes particular note of the fact that Congress recently increased criminal penalties for campaign finance violations as part of the Bipartisan Campaign Reform Act of 2002 (BCRA). [BCRA is incorporated into FECA]. As the Handbook states, at pp. 198-199:

BCRA significantly enhanced the criminal penalties for knowing and willful violations of the Federal Election Campaign Act. BCRA did so in response to identified anti-social consequences, namely, corruption and the appearance of corruption arising from FECA violations, and their adverse effect on the proper functioning of American democracy....

In view of the enhanced criminal penalties for FECA crimes and the legislative history supporting their enactment, it is the Justice Department’s position that all
knowing and willful FECA violations that exceed the applicable jurisdictional floor specified in the Act’s criminal provision should be considered for federal prosecution...

The 527 groups which the FEC found had illegally spent soft money to influence the 2004 presidential election failed to register as “political committees” under FECA and failed to comply with the contribution limits and reporting requirements that apply to such such political committees.

In a series of enforcement decisions after the 2004 election, the FEC imposed civil penalties on these groups, and also set forth in detail the law applicable to when such groups must register as federal political committees and comply with contribution limits.¹

In light of the fact that the FEC has found these kinds of expenditures illegal in the past, and has set forth a body of law governing these activities, any such illegal spending that occurs in the 2008 campaign can and should be treated as “knowing and willful,” violations and subject to criminal enforcement by the Justice Department.

Furthermore, the Handbook notes that the evidence relied upon to prove that FECA violations have been committed knowingly and willfully includes proof “that the offender is active in political fundraising and is personally well-versed in the federal campaign finance laws (such as offenders who can be shown to be professional lobbyists or fundraisers.)” Handbook at 179-80.

A number of individuals who were involved with the 527 groups that violated the campaign finance laws in the 2004 election, and individuals likely to be involved in the groups that make similar kinds of soft money expenditures to influence the 2008 elections, fall within this description.

¹ In November 2006, the FEC began entering into settlement agreements with multiple 527 organizations to resolve enforcement actions brought against the groups. These agreements were based on the Commission’s position that various independent 527 groups were “political committees” subject to FECA, because they had a “major purpose” to influence federal elections, and had made “expenditures” and received “contributions.” See, e.g., FEC Conciliation Agreement With Swift Boat Veterans and POWs for Truth (MURs 5511 and 5525) (Dec. 2006) (civil penalty of $299,500), available at http://eqs.nictusa.com/eqsdocs/000058ED.pdf; FEC Conciliation Agreement With Progress For America Voter Fund (MUR 5487) (Feb. 2007) (civil penalty of $750,000), available at http://eqs.nictusa.com/eqsdocs/00005AA7.pdf; FEC Conciliation Agreement With The Media Fund (MUR 5440) (Nov. 2007) (civil penalty of $580,000), available at http://eqs.nictusa.com/eqsdocs/000066D5.pdf; FEC Conciliation Agreement With America Coming Together (MUR 5403 and 5466) (Aug. 2007) (civil penalty of $775,000), available at http://eqs.nictusa.com/eqsdocs/000061A1.pdf.

To date, the Commission has found that at least eight 527 groups active in the 2004 election spent hundreds of millions of dollars in violation of FECA because they operated outside the rules that apply to political committees. The Commission has collected, in aggregate, more than two million dollars of civil penalties for these violations.
It is the Justice Department’s responsibility to ensure that criminal violations of the nation’s campaign finance laws are prosecuted and to help prevent the kind of massive campaign violations that occurred in the 2004 election from occurring again in the 2008 election.

In light of the massive campaign violations that occurred in the 2004 election, the Department should take steps to make clear that similar violations in the 2008 election by 527 groups and nonprofit groups, and the individuals who organize, manage and lead those groups, including major donors who play such a role, will be treated as “knowing and willful” violations and will be subject to potential criminal prosecution.

Sincerely,

Fred Wertheimer
President

Copy to: Alice S. Fisher, Assistant Attorney General, Criminal Division
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