AGENDA DOCUMENT NO. 02-36-B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 8, 2002

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Draft Notice of Proposed Rulemaking re Soft Money

In reviewing the agenda document submitted by the Office of General Counsel (Agenda Document No. 02-36), as well as the drafts that preceded it through the Regulations Committee, several issues or concerns are worth noting.

First, the avoidance of the terms 'soft money' and 'hard money' may lead to some confusion on the part of the regulated community and the public. These have become terms of art. They have been used by Congress in BCRA ("Sec. 101 Soft money of political parties."), by the courts (the Supreme Court in *Colorado Republican Party I* referred to "unregulated 'soft money' contributions"), and in virtually every practitioner's daily speech for years. The term 'soft money' actually has more accurate meaning than 'nonfederal funds' because the former conveys the very problem Congress sought to address: so-called nonfederal funds were in fact being used improperly to influence federal elections and creating *quid pro quo* situations involving federal elected officials. The first draft from OGC utilized the term 'soft money' in a much more effective fashion to convey the point that the funds being restrained under BCRA were those that were going into nonfederal accounts, but primarily having a 'federal' impact. My suggestion at this point is to add language in footnote 1 on p. 5 as follows: "Nonetheless, the Commission seeks comment on whether use of the term 'soft money' would in some instances be a better approach." Further, I would suggest adding on p. 1, lines 13 and 16, the word "supposedly" before "non-Federal funds." This would convey our understanding of the central problem Congress was addressing.

The agenda document at pp. 4, 7, and 28 indicates that a separate rulemaking will address the impact of BCRA on nominating conventions and raising funds for host committees. OGC's first draft contained specific proposed rules for that very purpose. I am not convinced the soft money provisions in BCRA can be put off to a later

rulemaking. We have a statutory deadline to complete rules in this area within 90 days. I would have preferred leaving OGC's proposed rules in the proposed notice. It might be argued that the general rules most applicable, e.g., the restrictions on party officials or federal candidates or officeholders soliciting unregulated funds or for certain 501(c)'s, will be in effect anyway. True, but the convention/host committee/municipal fund situation warrants special clarification, especially since the parties soon will be entering contracts to sort out all the players' roles.

On p. 10, some redrafting is in order at lines 5 and 6. The phrase "when they occur in close proximity to a Federal election" should be applied only to voter registration activity. Only the latter has a statutory restriction in the definitional provisions, i.e., the limit to the period 120 days before a federal election. The other activities (voter ID, GOTV, and generic campaign activity) are qualified only by the statutory phrase "in connection with an election in which a candidate for Federal office appears on the ballot." I'd suggest rewording as follows at lines 5 and 6: "the following activities: voter registration that occurs in close proximity to a Federal election; voter identification; GOTVdrives; and public communications that refer to".

On p. 11, some confusing language has been added since the OGC version. At some points it seems to be addressing "voter identification," while at others "GOTV." Moreover, the primary question posed, "[S]hould non-partisan GOTV drives be excluded from the definition of 'Federal election activity' in 11 CFR 100.24?" warrants more explanation. Indeed, if such activity were excluded from "Federal election activity," it would have significant ramifications regarding the restrictions on solicitations on behalf of 501(c)'s whose primary purpose is other than clauses 431(20)(i) and (ii) of the statutory definition of "Federal election activity." If non-partisan activity is excluded, federal candidates and officeholders will be able to solicit unlimited donations to organizations claiming to undertake such non-partisan voter registration and GOTV activity. At this point, I only raise the issue.

On pages 12 and 13, the various possible interpretations of "in connection with an election in which a candidate for Federal office appear on the ballot" seem to omit the most plausible. In my view, unless we are dealing with a State that conducts most of its nonfederal elections in odd-numbered years, the full two years of any standard federal election cycle should be considered the time period covered by the foregoing phrase. In other words, we should contemplate exempting from the "Federal election activity" definition only that voter ID, GOTV, and generic campaign activity that occurs in odd-numbered years in those states holding regularly scheduled nonfederal elections in odd-numbered years. Otherwise, we are looking at a horribly complicated system that makes too many changes in the midst of a standard federal election cycle. I suggest adding on p. 13, after "purposes." The following: "In some States, most non-Federal elections are held in odd-numbered years. Should the Commission only exempt from "Federal election activity" that voter identification, GOTV, and generic campaign activity that occurs in such states in odd-numbered years?"

On pp. 13 (lines 17-19), 14 (lines 9-12), and 88 (lines 15-17), the changes from the original OGC version misstate the statutory exception from "Federal election activity" for public communications referring to nonfederal candidates. The statutory provision requires that the public communication refer **solely** to nonfederal candidates. The version in the document misses this. Moreover, the statutory condition is that such communications do not constitute "Federal election activity described in [431(20)(A)(i) or (ii)]." The proposed notice instead simply requires that the communication not "promote, support, attack, or oppose any candidate for Federal office." We better stick with the statutory language. Otherwise, an ad that mentions a federal candidate and that constitutes "Federal election activity described in [431(20)(A)(i) or (ii)]" might be deemed exempt from the term "Federal election activity." A correction could be accomplished by adding "solely" and "is not a Federal election activity described in . . ." at appropriate places.

On pp. 15 and 89, the language in OGC's original version including Internet communications within the definition of "public communication" has been eliminated, and only a request for comment on this issue is included. While there are difficult issues about valuing a website communication or an e-mail communication, I have a hard time seeing how we can exclude these from a definition that includes "mass mailings," "telephone banks," and "any other form of general public political advertising." At this point, I only raise the issue, because we can adopt this approach rather easily at the final stage.

On pp. 18, 19, 115, and 116, the changes from OGC's version take out proposed language from the definition of "agent" that would have treated someone with apparent authority as an agent. Going out the door, I would have preferred to keep the broader definition in. There are likely to be situations where we will not be able to prove actual authority because witnesses will not recall and documentary evidence is absent. Yet apparent authority might be shown. At this point, I only raise the issue because we have noted the possibility of using an apparent authority approach on pp. 18 and 19.

On pp. 25, 119, and 120 some revisions regarding the term "promote or support or attack or oppose" are in order. First, on p. 25, lines 14 and 15 describing *Buckley* should be revised to read: "Cf. Buckley v. Valeo, 424 U.S. 1, 43,44 (1976) (restricting reach of former 18 USC 608(e)'s "clearly identified" to "an explicit and unambiguous reference to the candidate")" We don't want to overstate or misstate the opinion. Second, language that exempts where "the reference to the Federal candidate consists only of [t]he fact that the Federal candidate endorsed another Federal, State, or local candidate" won't work if the ad otherwise is clearly a promotion for the federal candidate making the endorsement. For example, an ad featuring a federal candidate gushing about the endorsed candidate and saying, "Therefore, I endorse our very popular Governer Ben Perfect" Association with Governer Perfect is worth a lot, and is an indirect way of generating support of the federal candidate. If we automatically exempt such ads, we'll make a mess of things. Further, if we automatically exempt references to federal candidates that consist only of "[t]he fact that another Federal, State, or local candidate agrees or disagrees with the Federal candidate's position on an issue or on legislation," we are precluding inclusion of

ads where, for example, a very popular State candidate is featured in an ad pounding on the importance of 'fast track trade legislation' and then says, "Ben Rotten, running for Senate, opposes this crucial legislation." We don't want to completely exempt such things. At this point I would urge not including the language at items (ii)(A) and (B) on page 120.

On pp. 36 and 86, the draft notice has made a change from OGC's original version regarding the definitions of "State committee," and "district or local committee." OGC's draft did not include the qualifying phrase "is part of the official party structure" that now is found at p. 86 of the regulation text. I fear that commenters may not appreciate the significance of the change. Clearly, there is some room for mischief if party committees are spawned that are informally part of the party structure. Think of the "Valley Republicans," "Tri-County Democrats," etc. that could try to claim freedom from the provisions requiring "federal election activity" to paid for within certain restrictions. At this point, I only note the issue.

On pp. 39, 126, and 127, the proposed notice in essence requires that to be deposited in a federal account, the contributions would either have to result from a solicitation that makes clear the planned federal use of the funds or the application of federal restrictions or have to result from a designation by the donor for the federal account. We all will recall that current 11 CFR 102.5(a)(2) has generated some confusion. Nonetheless, I thought we all were at least aware that some contributions may not be traceable to solicitations (e.g., those stemming from oral solicitations), and some contributions may arrive without any donor designation for the federal account. Just as current 102.5(a)(2)(iii) allows a third option to deal with this, we should here also allow a notice to be sent to the donor indicating the contribution has been placed in the federal account and is subject to federal contribution restrictions. As long as records of such notice are retained, we have adequate assurance that the funds are properly in the federal account. Aside from this revision, at a minimum the language drafted will need repair because it suggests now that **all** contributions deposited in a federal account will somehow have to be "solicited and received" according to the rules provided. I don't propose any specific language changes here, but hope we can correct this at the final stage. (The same concerns apply to the language dealing with Levin funds, pp. 40 and 128.)

A huge issue that may be overlooked by some is the approach in the proposed notice whereby each separate State, county, district, and local committee would be able to accept $10,000 from a donor each year. See p. 43, lines 14-20, and p. 130, line22, through p. 131, line 5. Clearly, where there are many such parties in a State, there is an opportunity for undermining the purpose of BCRA. The draft notice relies on a floor statement of Rep. Shays for this legal approach. I make no specific suggestions on this point, but I hope this helps generate comment on this.

On pp. 46, 47, and 134, some rather confusing language has been added since the original OGC draft to the effect that a disbursement of nonfederal funds "made under State law by a State, District, or local political party committee that is not directed by the

disbursing committee for the purpose of influencing a Federal election or for Federal election activity shall not be an expenditure under 11 CFR 100.8 or an expenditure or disbursement for Federal election activity." If this will mean that any disbursement out of a nonfederal account where there is no clear evidence of some "direction" for a specific federal purpose will be automatically deemed nonfederal, in spite of how the funds actually are used, we might be creating an easy way to move large amounts through the nonfederal accounts with none of the BCRA restrictions applying. I only raise this point for future resolution.

The proposed notice changed the approach of OGC's original version by including a rule saying that voter registration conducted outside the 120 day time frame can be paid for 100% with soft money. See p. 138, line 20, through p. 139, line2. I strongly doubt that Congress intended such a result. While I can see a need to allow such a result just before special nonfederal elections, or in states that conduct nonfederal elections in odd-numbered years, I don't see carving out such a large exception without further support. At this point, I only raise the issue for comment.