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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 23, 2003

AGENDA ITEM
For Meeting of: 07-24-03

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Proposed revision to Agenda Doc. 03-51

I still hope to persuade my colleagues that the analysis regarding application of 2 U.S.C. 441i(d) is mistaken. The draft suggests we interpret the actions of the host committees and municipal funds as "in connection with an election for Federal office." To me this runs directly contrary to the argument we elsewhere spend a lot of time making, i.e., that we do not consider the actions of the host committees and municipal funds to be "in connection with" an election because they are driven by commercial and civic purposes. Specifically, it seems legally inconsistent to be saying corporations and unions can donate to host committees and municipal funds because the latter are **not** undertaking activity "in connection with a federal election" (the overriding standard at 2 U.S.C. 441b) and incorporated host committees and municipal funds are able to provide certain services to the convention committees because they are **not** "in connection with" an election (again the 441b standard), yet at the same time saying the host committee and municipal fund activities are in connection with an election for purposes of 441i(d).

I'd suggest revising the language from p. 81, line 10, through p. 85, line 5 as follows:

> BCRA prohibits national party committees, their officers and agents acting on their behalf, and entities directly or indirectly established, financed, maintained, or controlled by them from soliciting any funds for, or making or directing any donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). These prohibitions extend to funds solicited or directed for only certain tax-

exempt organizations described in 26 U.S.C. 501(c) that make "expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)" and organizations described in 26 U.S.C. 527. Id.; 11 CFR 300.2(a).

A "disbursement" is defined, in 11 CFR 300.2(d), as "any purchase or payment made by: (1) a political committee; or (2) any other person, including an organization that is not a political committee, that is subject to [FECA]." FECA defines "election" to include nominating conventions. 2 U.S.C. 431(1)(B). The Commission's previous treatment of permissible host committee and municipal fund disbursements has been that they are not "contributions or expenditures" under 2 U.S.C. ~~431(9)(A)(i)~~ 441b because they are not made ~~"for the purpose of influencing an election."~~ "in connection with" an election. However, BCRA reaches beyond expenditures and requires only "disbursements in connection with an election" to make a 501(c) organization subject to the prohibition in 2 U.S.C. 441i(d)(1). In light of these definitions and the previous treatment of host committees and municipal funds, the Commission sought comment on whether, as a matter of law, host committees and municipal funds make "disbursements" "in connection with an election for Federal office," even as they adhere to the requirements in current 11 CFR 9008.52.

Two commenters stated that because host committees have not been considered political committees, host committees cannot be considered to make "disbursements in connection with an election." However, the Commission notes that FECA defines "political committee," in part, as any committee that receives

contributions or makes expenditures aggregating in excess of $1,000 during a calendar year. 2 U.S.C. 431(4). The definitions of "contribution," 2 U.S.C. 431(8)(A)(i), and "expenditure," 2 U.S.C. 431(9)(A)(i), both include the requirement that the transaction be "for the purpose of influencing any election for Federal office." Thus, the determination that host committees are not political committees does not resolve the question of whether they make "disbursements in connection with a Federal election."

One commenter also asserted that, in litigation challenging BCRA, the Commission explained that 2 U.S.C. 441i(d) reflected Congressional recognition that some tax-exempt organizations engage in campaign activities to benefit Federal candidates. The commenter suggested that because this purpose is not relevant to host committees, the Commission should not consider solicitations for host committees subject to 2 U.S.C. 441i(d). The Commission disagrees. The passage of the government's brief quoted by this commenter did not purport to be an exhaustive list of activities prohibited by 2 U.S.C. 441i(d). Indeed, later in the same brief, the wider effect of the provision was made clear: "Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same potential problems of corruption that other unregulated fund-raising by the national party engenders ...." Brief of Defendants, at 118, McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003); prob. juris. noted, 123 S.Ct. 2268 (U.S. 2003).

The Commission has determined that host committee and municipal fund disbursements related to convention activities are not "disbursements in

connection with an election" sufficient to trigger the prohibition in 2 U.S.C. 441i(d) with respect to those host committee and municipal funds that are 501(c) organizations. ~~Section 431(1)(B) of FECA defines "election" to include Presidential nominating conventions. BCRA's provision in this regard, 2 U.S.C. 441i(d)(1), very specifically applies to 501(c) organizations. In crafting the activities of these organizations covered by the provision, Congress took care to use a well-defined term of art in campaign finance law, "expenditure." 2 U.S.C. 431(9). However, the language of BCRA plainly includes more than expenditures under FECA in this provision; the provision includes "expenditures and disbursements in connection with an election for Federal office."~~

~~In another context, the Commission has recognized the distinction between disbursements for election-related activities and contributions or expenditures. Commission regulations at 11 CFR 114.2(c) state: "Disbursements by corporations and labor organizations for the election-related activities described in 11 CFR 114.3 and 114.4 will not cause those activities to be contributions or expenditures, even when coordinated with any candidate's authorized committee(s) or any party committee to the extent permitted in those sections." Thus, "disbursements ... for ... election-related activities" need not be "contributions or expenditures." Because Presidential nominating conventions are elections, and because host committees and municipal funds are permitted to provide convention-related facilities and services to convention committees, the Commission has determined that host committee and municipal fund~~

~~disbursements are in connection with an election for Federal office sufficient to trigger the prohibition in 2 U.S.C. 441i(d)(1).~~

Therefore, the Commission is not promulgating a new rule~~,~~ at 11 CFR 9008.55(d)~~,~~ in order to apply 11 CFR part 300 to the solicitation of funds for those host committees or municipal funds that have 26 U.S.C. 501(c) status. ~~Section 9008.55(d) provides that host committee and municipal fund payments in connection with a Presidential nominating convention are disbursements in connection with a Federal election for purposes of 11 CFR part 300. The proposed rules are being slightly modified to clearly include any convention related activities not in compliance with 11 CFR part 9008. The final rule is intended to cover all host committee and municipal fund activities in connection with a Presidential nominating convention.~~[1]

Further, ~~Because~~ host committees and municipal funds ~~do make disbursements in connection with a Federal election, such organizations~~ therefore will not be ~~eligible~~ required to make ~~the~~ any certification pursuant to 11 CFR 300.11(d) or 300.50(d). ~~Therefore, new 11 CFR 9008.55(d) also clarifies that host committees and municipal funds are not eligible to make the certification pursuant to 11 CFR 300.11(d) or 300.50(d).~~

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[1] ~~The determination that host committee and municipal fund activities are in connection with a Federal election does not contradict their exemption from 2 U.S.C. 441b. The exemption from 2 U.S.C. 441b was not premised on a determination that the activities were not in connection with an election, but instead was premised on the determination that equal value is exchanged between the convention committee and the community hosting the convention, which means no payment of anything of value results.~~

The Commission concluded that consistent with the longstanding rationale for not treating host committee and municipal fund activity "in connection with" an election for purposes of 2 U.S.C. 441b, it should similarly apply the "in connection with" language at 2 U.S.C. 441i(d). As noted earlier, the overriding purpose of permissible host committee and municipal fund activity is commercial or civic in nature.

Even though the restrictions of 441i(d) may not apply, national party agents will still be bound by the broad proscription at 2 U.S.C. 441i(a). This will mean that such agents may not solicit any funds not subject to the limits, prohibitions, and reporting requirements of the statute. In effect, such agents will be able to solicit funds that would be subject to the contribution limit for "any other political committee" (i.e., $5,000 per year pursuant to 2 U.S.C. 441a(a)(1)(C), (2)(C)), but no donations from prohibited sources could be solicited, and the funds would have to be reported by the recipient host committee or municipal fund.