PERKINS COIE LLP
607 FOURTEENTH STREET, N.W. · WASHINGTON, D.C. 20005-2011
TELEPHONE: 202 628-6600 · FACSIMILE: 202 434-1690

October 11, 2002

Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington DC 20463

Dear Mr. Vergelli:

The Democratic National Committee, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (the "Democratic committees"), submit these comments on the Notice of Proposed Rulemaking on Coordinated and Independent Expenditures, published at 67 Fed. Reg. 60,042 (Sep. 24, 2002).

Introduction: Limiting the Rulemaking to Issues the Commission Must Address under BCRA

The Commission has initiated this rulemaking as one in a series required to implement the Bipartisan Campaign Reform Act of 2002l. One of BCRA's provisions directed the Federal Election Commission to develop a rule, to replace the one now in effect, governing the coordination of expenditures with persons other than candidates, their authorized committees and political parties. Other provisions of the Act changed the law governing the making and reporting of independent expenditures, and the circumstances in which political parties may make independent and coordinated expenditures.

While these are all areas addressed by the Commission, and appropriately so, the Commission has also elected to develop proposed rules for the political party communications which may be "coordinated with" candidates. Yet Congress did not include within BCRA a provision concerned with these communications. Nor did Congress direct the FEC to develop a rule in this area. That the Congress declined to

do so, cannot be discounted as oversight. BCRA is largely focused on the activities of political parties, and with these activities squarely before it, Congress decided in very specific terms which ones it would address. While enacting far-reaching rules on party "issue advertising" and other activities financed with "soft money", BCRA created new law on party "hard money" activities in only limited, specific instances. None of these instances involved the coordination of party communications (much less other expenditures) with their candidates.

The significance of this Congressional choice for the Commission is not one of jurisdiction, but of timing. The Commission should consider these questions at some time in the future, but it is best that it do so when it can take up the matter judiciously, with ample time to work with the regulated community on the selection and shape of rules. The current rulemaking does not present this opportunity: it is compelled by the imminent effective date of BCRA and the deadlines for implementing rules set by statute, and the Commission's task is to complete it speedily so that it may turn attention to additional rulemakings still to come.

The question of how a party relates to its own candidates is one of obviously major importance for the party, its candidates and its voters. The Commission in its Notice has touched to some degree on the complexity of some of the key questions. Hence it stated:

> Should political party committee communications be subject to the same conduct standards...as are communications by other persons? Should the "content standards'...be the same for political party communications as for communications for other persons? If not, how should the standards vary? Would such variations be confusing? Are any of the possible content standards...appropriate for political party committees? In light of the relationship between political party committees and candidates, should any of the conduct standards...be excluded from application to political party communications? On the other hand, in light of such relationship, should there be additional or different conduct standards that would apply only to political party committees? Should any exceptions apply to political party committees?

67 Fed. Reg. at 60,058. These are only some of the questions raised by the Notice, which notes others, such as significance for such rules, if any, of the difference between pre-and post-nomination expenditures. Id.

These vast and vital questions are not fairly, comprehensively—or likely, successfully—addressed on the current timetable. The party committees called upon to consider these questions, and to propose sound approaches to the agency, are in the thick of operations only weeks before the November elections. The time and resources available to them at this time, for this task, is necessarily and sharply limited. The Commission's time for considering and producing rules is also short. As Congress has not forced the Commission's hand, requiring it to devise rules in this area, the Commission should decline to take on more—or to insist that the parties and their candidates do so-- than absolutely necessary at this time.

"Agency"

The Commission proposes to define "agent" of political party, as this definition would affected coordinated communications, in part on the basis chosen for this definition in the party "soft money" rulemaking. An agent would be one with actual authority, express or implied, to engage in specific activities on behalf of the party. It is in the specification of those activities that the Commission should carefully avoid the type of ambiguity that could give rise to unintended liability issues, or impede constructive relationships between parties and those individuals supporting them.

In the first instance, the Commission should avoid any activity defined in part by a term such as "suggest", or it should take some pains to define what it means by "suggest". The Commission has heard before the anxiety expressed in some quarters that the absence of terms like "suggest" could invite "winks and nods". The Democratic committees are not promoting any rule that would encourage "winks and nods". Their concern is a clear and intelligible rule, so that committee and "agent" alike can understand the scope and meaning of a rule of liability and thereby be able to conform their conduct to it. If the Commission means by "suggest", a palpable communication intended to, and reasonably understood to, convey a request for some action, then the term might appropriately be used. But if the term "suggest" is used in a more impressionistic or subjective sense, then it leaves the regulated community with little means of determining the boundary line separating permissible from impermissible conduct.

The distinction is best illustrated by contrasting different dictionary definitions of the term "suggest". The New Shorter Oxford English Dictionary defines "suggestion" in two different ways. One such definition is "The action of proposing a theory, course of action, etc." Yet another is: "A slight trace, a hint (*of* something)." New Shorter Oxford English Dictionary (1993). Which type of suggestion does the Commission have in mind? It should provide some concrete definition, or delete the term altogether. This same approach should govern each and every instance where the Commission refers to "suggestions" or "suggest".

Second, the Commission should provide for "agency" only where the person in question is "acting within the scope of his or her authority as an agent". See 67 Fed. Reg. 60043. Political parties involve in their programs and activities a wide array of individuals. In establishing a basis for legal liability on account of the actions of such individuals, the rules should reflect a sharply defined notion of true "agency". If an individual for these purposes is considered an "agent", then this agency should be grounded in actual authority to engage in those activities for which liability would be assessed. It is not enough therefore that the individual is generally authorized to "solicit or receive contributions or other transfers of funds", or "holds a formal or honorary position or title with the candidate's campaign or a political party committee". Id. In short, there is no warrant under the law for per se agency.

Coordinated Communications: Content Standards

The Commission's proposed rules provide generally that a coordinated communication consists of actions that meet both "content" and "conduct" standards. It is the Commission's stated goal to provide for content standards that reflect what "is reasonably related to an election". 67 Fed.Reg. 60,048. The Democratic committees take no position on the overall approach, but do note the Commission's proposed alternatives (A-C) for the content of various "public communications" as defined under BCRA. The Commission should give effect to the standard of "reasonable relationship" to an election by a focus on content, not on other external criteria. This content standard is satisfied, of course, by any communication that includes "express advocacy". The farther the standard strays from a secure mooring in "express advocacy", the more complex—and constitutionally frail—the application of the coordination rule.

Parties have traditionally broad responsibilities in the political process, mobilizing their members and participating in the public dialogue to achieve goals

other than the winning of elections for public office. In discharging these responsibilities, the parties communicate with a broad range of interest groups and civic organizations. Many of these communications may concern the "record or position or views on an issue" of public officials or figures who are also candidates for public office. An attempt to disrupt these communications, by bringing them within the ambit of BCRA and thereby prohibiting them, does not advance the objectives of the new law but impedes important and constitutionally protected activity. The "reasonable relationship" to elections, which is the focus of the Commission's "content standards", requires attention to content that is explicit about the electoral nature of the communication.

Coordinated Communications: Conduct Standards

The Commission's conduct standards include ones that determine the application of the rules to "former" employees or independent contractors of parties and candidates, and to "common vendors" providing services to those parties. The political parties have a significant stake in avoiding an increased risk of legal liability for a) the parties, arising from services provided to the committees by common vendors, and former employees and independent contractors, and b) those who now or formerly provided services— common vendors, and former employees or independent contractors—and who as a result of such increased risk, might avoid or limit their professional involvement with the parties. The rule as proposed poses a significant risk of liability in both cases, and it should be revised to more precisely address the underlying statutory objective.

Common Vendors

The problems with the current formulation for common vendors are several. First, the rule creates far too broad a class of vendors whose activities are apparently believed to provide a channel of prohibited communication. There is no basis, for example, for including within that class fundraising professionals. These kinds of professionals assist with the development of fundraising appeals, and in some cases with their implementation, and they do so typically for a broad range of political and commercial clients. It is not necessary to the fundamental objectives of the rules to reach this class of professionals, when the result will be serious damage to the practice of their trade and to their availability for party work, without a commensurate gain in controlling strategically sensitive communications. The same holds true, for example, for vendors involved in "selecting personnel, contractors, or subcontractors",

providing all kinds of general "consulting", or "identifying or developing voter lists, mailing lists, or donor lists". In all cases, in fact, the Commission should seek to carefully distinguish those common vendors whose activities bear a rational and direct relationship to the purposes of the rule.

The limited number of vendors providing particular services raises another problem. Some services provided to candidates, political parties and other organizations are highly technical and specialized in nature, resulting in a circumstance where very few provide them. Similarly, the technical nature of these services sometimes diminishes their role in controlling the content of strategically sensitive communications. The classic example in the political arena are media timebuyers, who are few in number, high in their degree of specialization, and who normally implement strategic decisions made broadly by others.

Second, the rule establishes a test for the conduct of the affected vendor that merely throws open the doors to endless litigation and contention. Under the proposed rule, the conduct standard would be satisfied if the common vendor, as defined, "makes use of or conveys" to the person paying for the communication, "material information" about the "plans, projects, activities, or needs" of a candidate or party. This reference to "material information" includes information "used previously" in providing services to the candidate or party. How a common vendor can account for the "use" of material information is more than unclear. Such use can always be alleged, and the defense is costly and time-consuming. Common vendors may conclude that the risk outweighs the benefit of service to the party, if the association would cripple business or create legal exposure.

In fairness to the individuals and parties affected, and with a view toward fashioning a practicable rule, the Commission should consider a number of steps:

- Limit the class of affected vendors, setting out more clearly the rationale for the inclusion of any particular type. Fundraising professionals and media time buyers should be among those excluded.

- Do not establish for any one class of vendors a per se inclusion, but rather a presumption that could be rebutted by specific vendors providing specific types of services.

- Allow those common vendors included within the rule to fashion legally binding confidentiality agreements by which they can avoid choosing between potential clients, or risking significant legal liability. The Commission might consider measures to assure careful attention to these agreements, including proposing acceptable language for such agreements and requiring that copies be filed under seal (to protect proprietary information) with the Commission.

Former Employees and Independent Contractors

Similar issues are presented by the rules for former employees and independent contractors. In this instance, there is no apparent remedy for the unfairness entailed in the proposed rule. Former employees and independent contractors are effectively "stigmatized". In a profession that features wide mobility and turnover, the Commission rules would add a significant disability to the career and job prospects of former party and candidate employees. Any new employer who might make "communications" as defined under the rule would have to consider whether the former employee or independent contractor brought to the new position "material information" and made "use of it". There would be no means of settling the issue definitively one way or the other—other than by defending against a charge. Some employers might prefer to forego the risk altogether; and some professionals in the field will have to evaluate the costs of associating in the first instance with campaigns or parties.[1]

The Commission is also establishing this burdensome rule without any record to suggest that it is necessary, that it responds to a genuine problem. Congress did not compel the development of such a rule. Experience does not counsel, as of this date, that it is required to guard against violations of BCRA. Should it develop in a particular case, or more broadly, that the activities of former employees or independent contractors present problems for the enforcement of the law, the Commission will have the time and authority to address the problem. New rules, based on experience, can be proposed with more foundation than the one now under consideration.

---

[1] The impact on such a rule might be especially hard on younger women and men at the beginning of their political involvement, who work in lower-level positions at lower levels of pay, and who would find opportunities for greater experience and upward mobility curtailed.

Conclusion

The Democratic committees appreciate the opportunity to comment on these proposed rules, and counsel to the committees request the further opportunity to testify at the public hearing on these issues scheduled for October 23 and 24, 2002.

Very truly yours,

Robert F. Bauer
Counsel to the DSCC and DCCC

Joseph E. Sandler
Neil P. Reiff
Counsel to the DNC