Bob_Schiff@judiciary.senate.gov (Bob Schiff) on 10/11/2002 04:37:18 PM

To: BCRAcoord@fec.gov
cc:

Subject: Comments of BCRA Sponsors

Attached please find comments on Notice 2002-16 from Sen. John McCain, Sen. Russ Feingold, Rep. Christopher Shays, and Rep. Marty Meehan, the principal sponsors of the BCRA. A signed copy of the cover letter will be transmitted by fax.

The postal address for the Senators is "U.S. Senate, Washington, DC 20510" and for the Members of the House is "U.S. House of Representatives, Washington, DC 20515." The public email addresses used by the members are generally not a good way to reach them directly.

If you have any questions, please contact Bob Schiff of Sen. Feingold's staff at 202-224-5353. Thank you.

· FECcoord-2.wpd

Congress of the United States

Washington, DC 20510

October 11, 2002

VIA FAX and E-MAIL

Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2002-16

Dear Mr. Vergelli:

We appreciate the opportunity to comment on the Commission's proposed rules to implement Sections 213 and 214 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), issued as Notice 2002-16, and published in the Federal Register at 67 Fed. Reg. 60042 (Sept. 24, 2002).

Attached please find our specific comments on the proposed regulations, which are limited to comments on proposed 11 CFR Part 109. We look forward to continuing to work with the Commission throughout this rulemaking process to ensure that the implementation of BCRA is consistent with the clear statutory language in the Act and our intent as authors of the legislation.

Sincerely,

John McCain
United States Senate

Christopher Shays
Member of Congress

Russell D. Feingold
United States Senate

Marty Meehan
Member of Congress

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, and Representative Marty Meehan

Proposed 11 CFR § 109, Coordinated and Independent Expenditures

Subpart A

The Commission's proposed definition of agent for purposes of part 109 is insufficient for many of the reasons that the definition that the Commission adopted in 11 CFR § 300.302(b) is insufficient. Because candidates and parties very often act through agents, the definition is crucial to a meaningful coordination rule. As Sen. McCain noted on the floor of the Senate:

> Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill.

Cong. Rec. S2145 (Mar. 20, 2002). Similarly, Sen. Feingold noted:

> [T]he Federal Election Commission's current regulation defining when general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns.

Cong. Rec. S2144 (Mar. 20, 2002). Congress intended that the regulations promulgated pursuant to Section 214 of BCRA reflect the real world of political campaigns. Defining agent to include only an individual with actual authority, express or implied, to engage in certain activities could very well limit the effective application of the coordination rules. The critical factor in coordination is the transmission of campaign strategy from a candidate or party to an outside group. Even if the person who conveys that information does not have express or implied authority to do so, or express or implied authority to take part in campaign decision making, the resulting communication may very well be, in the real world, be a coordinated communication.

If an outside group uses information obtained from a campaign in creating a communication relating to that campaign, it should be considered coordinated. The key fact is that the information was conveyed, not who conveyed it, or whether the conveyance was authorized. Therefore, the Commission should reconsider the definition of "agent" contained in 11 CFR § 109.3.

Subpart B

We support the proposed regulations in this subpart.

Subpart C

Congress in Section 214 mandated the repeal of the Commission's current coordination regulation. It did so because, as Sen. McCain stated, "the current regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill." Cong. Rec. S2145 (Mar. 20, 2002). Sen. Feingold elaborated on the importance of an adequate and realistic coordination rule:

> Absent a meaningful standard for coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six-figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and candidates to spend their own treasury funds – soft money – on federal electioneering activities.

Cong. Rec. S2144 (Mar. 20, 2002).

In repealing the current regulation, Congress did not prescribe a precise standard for coordination, believing that the FEC would be best able through a new rulemaking proceeding to craft a rule to respond to the congressional concern that the existing rule was too narrow, and also make sure that the standard does not discourage legitimate non-campaign related interactions between groups and candidates or parties.

Because Congress remained silent on exactly what the new rules should say and instead set out general topics that they should address along with an admonition that they must not require formal collaboration or agreement in order to establish coordination, we will make only general comments concerning the Commission's proposal rather than specifically analyzing each component.

First, as discussed above, the fact that internal campaign information or strategy is conveyed from a candidate or party to a group is more important than who conveys it or whether that person holds a specific position of authority in a campaign. The proposed definition of "agent" threatens to reduce the effectiveness of whatever standard the Commission promulgates.

Second, in order to adequately deal with the real world of campaigns and elections, the standard for coordination may very well need to be more stringent as an election approaches. Title II of BCRA reflects congressional judgment that communications concerning federal elected officials during the 60 day period prior to a general election and the 30 day period prior to a primary is usually campaign related. If such communications by outside groups derive from internal campaign information or strategy provided by a candidate or a political party, then it should not matter whether a candidate is specifically mentioned in those ads.

Third, even when a communication is made a significant amount of time before an election, if it is based on information from or discussion with a campaign, and deals with a candidate's qualifications, character, or fitness for office, it could very well be considered coordinated. A

key factor in making this determination is whether a communication is targeted to the electorate of the candidate from whom information was obtained.

Fourth, the legislative history is very clear that a lobbying meeting between a group and a candidate should not trigger a finding that subsequent communication is coordinated. Sen. McCain stated:

> [N]othing in the section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate. Obviously, if the group and the candidate discuss campaign related activity such as ads promoting the candidate or attacking his or her opponent , then coordination might legitimately be found, depending on the nature of the discussions. We do not intend for the FEC to promulgate rules, however, that would led to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate.

Cong. Rec. S2145 (Mar. 20, 2002).

Part D

Proposed 11 CFR § 109.35 incorrectly interprets clear statutory language, creating a rule that directly contradicts the intent of Section 213 of BCRA. That section was designed to require parties to choose, after they nominate a candidate, between making independent expenditures as they are permitted to do under the first *Colorado* decision and coordinated expenditures under 2 U.S.C. § 441a(d). As Sen. McCain stated: "Section 213 allows the political parties to choose to make either coordinated expenditures or independent expenditures on behalf of each of their candidates, but not both." Cong. Rec. S2144 (Mar. 20, 2002).

In order to enforce the decision to require the parties to make a choice between independent and coordinated expenditures, Congress provided in Section 213(b) as follows:

> For purposes of this paragraph, all political committees established and maintained by a national political party.... and all political committees established by a State political party . . . shall be considered to be a single political committee.

2 U.S.C. § 441a(d)(4)(B). Proposed 11 CFR § 109.35 contradicts that clear statutory command by considering all national political party committees to be one "group" for purposes of the section and all state political parties to be a separate "group" able to make a separate choice of whether to make coordinated or independent expenditures. There is a plethora of legislative history that shows that that is an incorrect interpretation of the statute. For example, a section by section analysis of the bill placed in the record by Sen. Feingold states:

> For purposes of this section, all national and state party committees are considered to be one entity so a national party cannot make an independent expenditures if a state party has made a coordinated expenditure with respect to a particular candidate.

Cong. Rec. S1993 (Mar. 18, 2002). Sen. McCain stated this point just as clearly and unambiguously:

> Section 213 provides, for this purpose only, that all the political committees of a party at both the state and national levels are considered to be one committee for the purpose of making this choice. This will prevent one arm of the party from coordinating with a candidate while another arm of the same party purports to operate independently of such candidate.

Cong. Rec. S2144 (Mar. 20, 2002).

Perhaps most striking, the opponents of BCRA recognized and understood exactly what Section 213 was meant to do, and strongly criticized it. Shortly before the final vote on the bill in the Senate, Senator Mitch McConnell (R-KY) requested changes that he characterized as "technical." A few of the items he raised were in fact addressed in a technical corrections bill enacted a few days after BCRA passed the Senate. Other modifications that the opponents suggested were far from technical, and the supporters of the bill refused to accept them. On March 5, 2002, Sen. McConnell, the leading opponent of the bill, put in the Congressional Record a summary of the changes to the bill that he was promoting. That document discussed one "technical correction" as follows:

> 4. Permit Party Coordinated And Independent Expenditures. *Shays-Meehan treats all party committees (from national to local parties) as a single committee.* Prohibits all committees from doing both coordinated expenditures and independent expenditures after nomination by party (contrary to S. Ct. ruling in Colorado I).
>
> Solution: Do not treat all party committees as a single committee and do not prohibit them from doing both independent and coordinated party expenditures.

Cong. Rec. S1529 (Mar. 5, 2002) (emphasis added). The BCRA supporters' response to the suggested change confirms that Sen. McConnell's interpretation in this case was correct and intended, and that the change he wanted was not acceptable and would undermine a central purpose of the bill. A document Sen. McCain submitted for the record immediately after Sen. McConnell's document states in part as follows:

> 3. Hard Dollar Candidate Support by Parties--This is a proposed substantive change to the pending CFR legislation. The proposal would allow parties to make both independent and coordinated expenditures in individual races.
>
> The requirement that the parties choose between these expenditures was contained in both

the Senate and House-passed bills and is not inconsistent with the Colorado I decision. *For purposes of this provision only, national and state party committees are treated as a single entity.*

Cong. Rec. S1530 (Mar. 5, 2002) (emphasis added).

In sum, the statutory language itself is unambiguous and the legislative history is replete with confirmation of the interpretation we present in these comments. The Commission proposal's reliance on a subsequent subsection of the new law to create a supposed ambiguity or conflict is mistaken. The Commission must revise proposed 11 CFR § 109.35 accordingly.