**National Republican Congressional Committee**

Donald F. McGahn II
General Counsel

September 27, 2002

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

Re: Comments – Disclaimers, Fraudulent Misrepresentation, Personal Use

Dear Mr. Vergelli:

These comments on the Federal Election Commission's Proposed Rules in the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), are submitted on behalf of the National Republican Congressional Committee ("NRCC"). Specifically, our comments below address the rulemaking relating to disclaimer requirements for campaign communications, fraudulent misrepresentation in connection with soliciting contributions, permissible uses of campaign funds by candidates and officeholders, and civil penalties for knowing and willful violations of FECA. Established in 1866, the NRCC is composed of Republican Members of the U.S. House of Representatives, and seeks the election of Republicans to House as well as other state and local offices.

## 1. Disclaimers

*a. Overview*

Our view is that current law governing disclaimers is, for the most part, working reasonably well. Unless the BCRA clearly changes existing law, the regulatory body of law should remain the same. We are unaware of the purpose behind the changes imposed by the BCRA with respect to disclaimers. Of course, occasionally someone forgets to include or otherwise omits a disclaimer. But the law already addresses the situations, and for the most part, the Commission has dealt with such situations fairly. So it remains a mystery as to why there is a need for additional disclaimer requirements.

That being said, the BCRA does in fact impose new requirements. In implementing these new requirements, we ask that the Commission be mindful of the free speech issues that arise. Every time the BCRA or the Commission requires that additional information be provided in a disclaimer, the message of the political advertisement is altered. Obviously, the various current media -- television, print, and radio -- disseminate political messages in different ways and operate under different practical constraints – television and radio spots tend to only be thirty seconds long, for example. But the free speech concerns are present regardless of medium of expression.

Moreover, developing technology could present new challenges not contemplated by the BCRA. A recent Advisory Opinion illustrates the point. In Advisory Opinion 2002-9, the Commission found that, because SMS text messages are by their nature limited to a mere 160 characters of text, a full-blown disclaimer literally could engulf the political message. An abbreviated disclaimer, "Paid for by Smith for Congress," would already use 30 of the 160 characters, and most of the remaining characters might not even be available to the advertiser, the space having already been dedicated to news headlines or box scores. The Commission decided that, until the capability of SMS technology improves, the best solution was to not require any disclaimer at all. It therefore granted a disclaimer exception under 11 CFR § 110.11(a)(6)(i). Although print, radio, and television ads currently offer more breathing room for expression than the bumper stickers, pins, buttons, and wireless communications that are exempt under section 110.11(a)(6)(i), the concept still applies: at some point, regulatory disclaimers begin to impinge upon free expression, and amount to a content-based restriction on speech.

*b. Objective standards*

The disclaimer regulations should retain the "objective" standards long used for determining whether the disclaimer is of a "sufficient type size" or "clear and conspicuous." Proposals that would base the type size on a percentage or fraction of the communication's message would be difficult for regulated persons and organizations to apply. Today, the FCC sets forth clear specifications for disclaimers – television spots, for example, must contain a disclaimer in letters equal to at least four percent of the screen height (twenty scan lines) and be on the air for at least four seconds. To deviate for such objective standards, and instead tie disclaimer size to the size of other parts of the spot would be unworkable – any size specifications ought to be same, regardless of the content of the ad.

If the Commission believes that current disclaimers are not large enough or that viewers are somehow missing the disclaimer, the answer may be to require a larger disclaimer, perhaps 25 scan lines, and perhaps limiting color choice to black or white, to ensure that it does not blend in. We agree that safe harbors are in order, but again, this ought to be based on some objective minimal specification, not a sliding scale linked to the body of the communication. Also, the safe harbors should not be an exhaustive list, and allow for some flexibility.

Next, we ask that the Commission be mindful of the distinction between candidate spots and coordinated expenditures. Although sometimes synonymous, many times they are not. The party committee produces many coordinated expenditures, and although the campaign has input, such an expenditure cannot in anyway be characterized as the functional equivalent of a contribution. The point is that coordinated expenditure disclaimers are cumbersome enough, and we ask that the Commission not impose additional requirements that are not otherwise mandated by the BCRA.

Finally, the Commission has asked for comments on whether or not the term "communication" should have the same meaning as "public communication." The simple answer is that telephone calls should not be subject to the disclaimer regulations. The process of utilizing phone backs is complicated – each state seems to have a slightly different law regarding the subject, rendering it a complicated maze for the unwary. Some states prohibit taped calls, other allow them. Some states allow taped calls, so long a live called places the call. Such laws already serve as a deterrent to abuse, and adding disclaimer requirements will only serve as a deterrent to using phones as a communication tool, thus chilling otherwise protected speech.

**2. Fraudulent Misrepresentation**

The BCRA adds a new section, prohibiting a person from fraudulently misrepresenting that the person is acting for or on behalf of a Federal candidate or political party. We agree with the Commission proposal combining the pre-BCRA fraudulent misrepresentation regulation (the "dirty tricks" provision). Although certainly not an everyday occurrence, persons or organizations do from time to time claim to be a party committee or a campaign committee so as to raise funds, and it is an uphill battle attempting to police such matters. Such a change is particularly helpful, given our prior comments on the definition of "agent."

**3. Personal Use**

We also agree with the Commission's general position that there is no need to change the current regulations concerning the personal use of campaign funds. After all, as the Commission notes in its explanatory comments, one of the BCRA's principal sponsors contended that "the provision is intended to codify the FEC's current regulations on the use of campaign funds for personal expenses." Our position is that the existing regulations work well and that additional tinkering is unnecessary.

Thank you for your attention to this matter. We ask that we be permitted to testify before the Commission.

Respectfully submitted,

Donald F. McGahn II