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VIA ELECTRONIC MAIL

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

Re: Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

Dear Mr. Vergelli:

On behalf of Perkins Coie LLP ("Perkins Coie"), I write to comment on the Commission's proposed rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 55,348 (Aug. 29, 2002).

The most important objectives the Commission faces in this rulemaking are to interpret the Bipartisan Campaign Reform Act of 2002 ("BCRA") in a way that remains faithful to the legal positions that Congress carefully deliberated and established when it drafted BCRA, and to provide the regulated community with the clearest guidance possible as to how to comply with this new regulatory regime. To these ends, I offer the following observations:

First, recognizing that Congress's passage of BCRA and the ensuing rulemaking have required, and will continue to require, the Commission to define and implement a remarkable number of new terms, we urge the Commission not to conflate separate concepts in its admirable attempt to promote "consistent use of terminology." Notice regarding Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 55,348, 55,349 (Aug. 29, 2002). Specifically, the Commission seeks comment as to whether the term "communication," which is used in BCRA and the Commission's proposed rules to explain the subject of the disclaimer requirement, see Bipartisan Campaign Reform

Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81 (2002) (to be codified at 2 U.S.C. § 441d(a)); 67 Fed. Reg. at 55,354 (to be codified at 11 C.F.R. § 110.11), should have the same scope as the term "public communication," defined as a component of the term "Federal election activity," see Pub. L. No. 107-155, § 101; see also Final Rules for Excessive and Prohibited Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,110, 49,111 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300). Notice, 67 Fed. Reg. at 55,349. These two terms should not have the same scope, as to give them the same definitions would be to conflate and confuse two separate concepts that Congress established to meet two distinct purposes.

In BCRA, Congress used the term "public communication" to refer to one of a number of specifically enumerated activities that state, district, and local committees carry out for which these committees generally may not use nonfederal funds. See Pub. L. No. 107-155, § 101; see also Final Rules, 67 Fed. Reg. at 49,110, 49,111. By contrast, "communication" appears in BCRA's disclaimer provision as the general term encompassing an exclusive number of specifically named types of political messages that are subject to BCRA's disclaimer requirement. Pub. L. No. 107-155, § 311; Notice, 67 Fed. Reg. at 55,354.

Importing another section of BCRA, or a broader regulatory provision the Commission has adopted in a rulemaking on an entirely unrelated subject, into BCRA's disclaimer requirement would ignore the deliberative choice and intent of Congress to include in the disclaimer provision only those communications that Congress actually named. The Commission has recognized in this very rulemaking the paramount importance of giving effect to Congress's actual language. See Notice, 67 Fed. Reg. at 55,349 (recognizing that BCRA's disclaimer provision applies to a "mailing," which is not the same as the "mass mailing" that is part of BCRA's definition of "public communications"). Further, the appearance of similar phrases in BCRA to summarize the respective definitions of "public communication" and "communication" does not indicate congressional intent to include elements of one term in the definition of the other. See Final Rules, 67 Fed. Reg. at 49,072 (excluding the internet from the term "public communication" in part because "[g]eneral language following a listing of specific terms . . . does not evidence Congressional intent to include a separate and distinct term that is not listed. . . .").

Second, the Commission should aim, in drafting its disclaimer requirements, to provide guidance that will be as simple to understand and as efficient to comply with

as possible, while still giving full effect to Congress's language and intent. Candidate committees, party committees, and other political committees nationwide print and circulate a large number of invitations, solicitations, announcements, and other messages during the course of an election cycle. The institution of "safe harbors" for the determination of print disclaimers, both in printed communications and in those appearing on radio and television, will help guide political committee employees as to how to comply with the regulations fully and efficiently. Accordingly, with regard to the "sufficient type size" that would make a disclaimer "clearly readable," as required by BCRA, Pub. L. No. 107-155, § 311, Perkins Coie supports a "safe harbor" that would require the disclaimer to be at least as large as the smallest type size in the communication. Notice, 67 Fed. Reg. at 55,350.

Perkins Coie also supports maintaining the "safe harbor" for written disclaimers appearing on television communications, found currently at 11 C.F.R. § 110.11(a)(5)(iii). The regulation currently in force establishes that a written disclaimer appearing in a television communication must be "clear and conspicuous," and establishes that it will meet this requirement if it appears in letters "equal to or greater than four (4) percent of the vertical picture height." 11 C.F.R. § 110.11(a)(5)(iii). BCRA and the Commission's proposed rules also require television communications to contain a "clearly readable" written disclaimer at the end of the communication. Pub. L. No. 107-155, § 311; Notice, 67 Fed. Reg. at 55,355. The Commission's proposed regulation continues the practice of requiring these disclaimers to be "clear and conspicuous," Notice, 67 Fed. Reg. at 55,355, yet eliminates the "safe harbor" provision as to print size. The regulated community is accustomed to the "safe harbor" provision, and maintaining it as one of the elements of a "clearly readable" written disclaimer would facilitate easier, more uniform compliance throughout the regulated community.

In the interest of making compliance with the new regulations as uncomplicated as possible, Perkins Coie opposes the Commission's suggestion that BCRA's requirement of color contrast for the disclaimer on a printed communication, Pub. L. No. 170-155, § 311, "should be related to the color contrast of the core message text." Notice, 67 Fed. Reg. at 55,350. Any provision requiring such would be contrary to the language of BCRA. BCRA specifically requires color contrast "between the background and the printed statement"; it does not anywhere refer to color contrast between the disclaimer and the main text of the message. Pub. L. No.

170-155, § 311. As a practical matter, requiring candidates and political committees to pay for multi-colored printing will significantly, and in some cases prohibitively, increase the expense of Constitutionally-protected political communications.

Perkins Coie also opposes the Commission's proposal to define "reasonable degree of color contrast" further with regard to both printed and television communications. Notice, 67 Fed. Reg. at 55,350, 55,351. As the Commission realizes at least with respect to television communications, implementing a new definition for color contrast would unnecessarily "add significant complexity to the regulations." Notice, 67 Fed. Reg. at 55,351.

Third, should national party committees pay for political communications, they each will be subject to the statutory and regulatory provisions applicable to communications paid for by other persons and not authorized by a candidate, to be codified at 2 U.S.C. § 441d(d)(2) and 11 C.F.R. § 110.11(c)(4). See Pub. L. No. 107-155, § 311; Notice, 67 Fed. Reg. at 55,355. BCRA requires such radio and television communications to include a specific audio statement in which a representative of the payor identifies the name of the person paying for the communication. Pub. L. No. 107-155, § 311. Perkins Coie opposes the Commission's suggestion that the regulation specify who may make this audio statement. Notice, 67 Fed. Reg. at 55,351. Such a specific requirement would far exceed the scope of BCRA, which requires only that a "representative of the political committee or other person" make the statement, and does not add any further requirement as to the identity of that representative. Pub. L. No. 107-155, § 311.

Fourth, the Commission seeks comment regarding its proposed rules interpreting BCRA's "personal use" provision, Pub. L. No. 107-155, § 301, to be codified at 2 U.S.C. § 439a. Notice, 67 Fed. Reg. at 55,353. Specifically, the Commission asks whether the current provisions at 11 C.F.R. §§ 113.1(e) and 113.2, addressing excess campaign funds, should remain intact in light of the new BCRA provision, which does not frame unlawful personal use of campaign funds in terms of "excess campaign funds." Id. Perkins Coie supports leaving these provisions as they are, as we agree with the Commission's interpretation that Congress, in drafting BCRA, did not intend to eliminate the candidates' discretion to use excess funds for lawful purposes, including those enumerated at 11 C.F.R. § 113.2.

Finally, the Commission seeks comment as to whether, in drafting the new "personal use" provisions, Congress intended to disallow a candidate who is also a federal officeholder the use of campaign funds for office-related travel that is not campaign related, such as a fact-finding trip. Notice, 67 Fed. Reg. at 55,353. Such travel may be lawfully paid for with excess campaign funds, as it is encompassed in BCRA's provision enumerating specific permitted uses, see Pub. L. No. 107-155, § 301 ("A contribution accepted by a candidate . . . may be used by the candidate or individual . . . for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office" . . .). Perkins Coie believes that Congress did not intend to either limit or ban an officeholder's ability to use campaign funds for these trips; nor do we believe Congress intended that non-vacation, non-campaign-related travel should be evaluated on a case-by-case basis.

We again appreciate the opportunity to comment on these matters.

Very truly yours,

Robert F. Bauer
Perkins Coie LLP