American Civil Liberties Union
National Headquarters
125 Broad Street
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August 29, 2002

Ms. Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Notice of Proposed Rulemaking 2002-13: Electioneering Communications

Dear Ms. Dinh:

The American Civil Liberties Union welcomes the opportunity to comment on the Commission's proposed regulations concerning Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), dealing with so-called "electioneering communications."

I. The First Amendment Framework

For 30 years, the ACLU has been in the forefront of those groups and individuals pointing to the substantial First Amendment problems posed by campaign finance regulations that purport to regulate speech and associational activities. See *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub.nom. Staats v. ACLU*, 422 U.S. 1030 (1975). The ACLU was centrally involved in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark campaign finance case. And today, the ACLU is one of the plaintiffs in *McConnell v. Federal Election Commission*, another landmark challenge to the constitutionality of the major provisions of the BCRA.

What has motivated the ACLU in all these challenges are two crucial First Amendment principles: The government does not get to decide how Americans choose to express their political views. And the government does not get to decide what political messages the American public is entitled to hear.

Title II of BCRA runs directly afoul of these two principles. It is an unalloyed and unprecedented effort to censor what is at the core of First Amendment's freedoms: political speech about public officials. The heart of that engine of censorship is the effort to ban - in the case of corporations and unions - and severely regulate - in the case of all other persons or entities, including individuals - election year speech which even mentions the name or otherwise refers to a politician. Condemning such speech by legislative fiat as "electioneering

communications" when contained in any broadcast, cable or satellite communication, Title II of the BCRA flagrantly contravenes more than a quarter century of unbroken Supreme Court and lower court precedent. In *Buckley v. Valeo*, for example, the Supreme Court held that the federal government could regulate spending for purposes of engaging in core political speech only when the speech "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44 (1976). By purporting to regulate spending for core political speech when such speech merely "refers to" a clearly identified Federal candidate, the BCRA ignores *Buckley*'s express holding, sweeps well beyond the permissible scope of regulation under the First Amendment, and criminalizes vast quantities of fully protected speech.

The Commission's task - to try to salvage and rehabilitate by regulation such a fundamentally-flawed Act of Congress - is not an enviable one. Whether or not various of the Commission's particular efforts to carve and prune the unconstitutional excesses from the statute are justified by the language and intent of the Congress, we are troubled by the very premise of permitting a regulatory agency to perform radical First Amendment surgery on a fatally-defective statute. First Amendment rights should no more be put at the mercy of agency regulations than be subject to the will or whim of the Congress. What the agency gives today by regulatory rule it can rescind tomorrow through the same mechanism. The safeguarding of First Amendment rights demands a firmer foundation. The proper measure of such rights should not be weighed and assessed by administrative agencies.

These serious concerns notwithstanding, it is obvious that to the extent the Commission's regulations implementing and enforcing the BCRA result in reducing the number of speakers and the amount of speech subject to the Act's unconstitutional restraints, First Amendment values and opportunities are served and enhanced. For that reason, we have set forth below our support for certain of the Commission's proposals which we think accomplish a net expansion of core First Amendment freedoms. However, we have also noted where we believe the Commission's efforts fall short of honoring First Amendment standards.

This utilitarian calculus should not obscure the underlying problems with this entire regulatory exercise. A government agency should not be in the business of weighing such questions as precisely how we should count the 50,000 people whose statistical presence will render citizen criticism of an incumbent politician a condemned "targeted" communication which can subject the speaker to criminal prosecution. Or the question of whether holding a Presidential primary election in Maine can trigger a gag order on groups or individuals who want to criticize the President of the United States in Montana. Or the question of whether a citizen who wants to run an ad on the radio criticizing his local Congressman has to file detailed, burdensome and intrusive disclosure reports with the government, under penalty of perjury, at the time he arranges for the broadcast of his speech - prior to the time he actually speaks - or not until the time it appears on the air. Or whether a group that wants to urge citizens to tell their Congressman to vote for (or against) the McCain-Feingold bill can do so free of fear of criminal sanction. Yet these are precisely the speech-destructive questions that the BCRA compels the Commission to try to answer.

II. Certain of the Commission's proposals curtailing the reach of the Act create a net gain For First Amendment freedoms and should be supported. Others fail to go as far as required to safeguard those freedoms.

A number of the Commission's proposals, arguably consonant with and authorized by the

often vague and imprecise language of BCRA, would reduce the First Amendment harms created by the Act.

In the course of opposing the passage of what became the BCRA, the ACLU and many other groups concerned with First Amendment freedoms, pointed to the incredible overbreadth in application of the various bills that would emerge as the BCRA because of the sweeping restraint of speech about government and politics that they embodied. The Commission's NPRM reflects some sensitivity to some of these various concerns. But even some of the provisions which would have the effect of curtailing the impermissible reach of BCRA fail to go as far as they might to temper or offset some of the Act's many constitutional infirmities.

1. Exclusion of the Internet from the definition of "broadcast, cable or satellite communication."

The Commission is to be praised for its proposal basically to exclude the Internet from the operation of the electioneering communication" restrictions. But the remaining Internet/broadcast overlap that would be subject to regulation (e.g. broadcasts that are simultaneously webcast or that are archived for future access) seems far removed from the main thrust of the Act's language and purpose. The legislative history is rife with examples of Senators and Representatives wanting to censor and control "negative" or "attack" ads run primarily on television during an election season. As the Commission itself notes, the legislative target was television and radio ads. As suspect as these legislative purposes are, they seem not at all to implicate whatever incidental broadcasting may occur via the Internet. It would be far better to have a clean and clear determination that the Internet remains the domain of free political speech where BCRA is concerned. As the Commission put it in clearly stating that regulation should be limited to television and radio: "All other types of communications, such as print media, billboards, telephones, and the Internet, would therefore *not* be considered electioneering communications." 67 Fed. Reg. 51133 (August 7, 2002).

2. Definition of "Targeted to the Relevant Electorate."

One of the triggers for Title II's application is a relevant communication made to a potential audience if it can be received by "more than 50,000 persons" The NPRM's almost Herculean effort to probe the various ways in which this critical statutory category might be understood and defined is yet another indication of the morass in to which BRCA submerges political speech. One point we would make is that the category should be interpreted to refer to persons who are eligible to vote, not to all persons regardless of age or membership in the electorate. The purpose of the statute is to regulate political communications not broadcasting demographics, so the definition of the targeted electorate should carry forward that concept. The fewer persons who can make up the 50,000 targeted audience, the more speech is safeguarded from the BCRA's operation.

3. Nationwide Presidential Broadcasting Ban.

One of the more deplorable possible reaches of the BCRA is the contention that the "electioneering communication" restrictions on speech about candidates seeking a Presidential nomination, would become operative 30 days before **any** Presidential primary held anywhere in the country. Such an interpretation, coupled with the 60-day blackout for general election commentary and criticism, would mean that there would be a virtual nationwide, year-round gag rule regime against such speech. Fortunately, the proposed regulations would avoid that

consequence by linking the speech to the primary, and applying Title II only to ads distributed to persons who can vote in a forthcoming primary in their state. (Alternative 1-B). Once again, this approach permits a much narrower possible ambit for the application of the statute, as the Commission specifically indicates. 67 Fed. Reg. 51135 (August 7, 2002).

4. Categorical exceptions for various forms of legislative and issue advocacy and criticism of public officials.

The Commission has proposed various exceptions from the definition of "electioneering communications" for different forms of issue advocacy and discussion even though the communication is broadcast and refers to incumbents who are political candidates. Once again, the Commission's concerns reflect those tendered by the ACLU and others during the legislative debates that the proposed BCRA was so broadly written that it would ensnare political speech far removed from any of the communications that prompted the law's enactment and essential to a democracy. Among the most prominent examples were that the law literally makes it a crime for groups to run ads criticizing the "McCain-Feingold bill" if either of its two principal sponsors are candidates for re-election. The Commission properly proposes to exclude such protected advocacy from the law's sweep.

Even here, however, the language of the Commission's alternate proposals reflects the suspect nature of its task. One proposal (Alternative 3-A) would exempt communications "devoted exclusively" to legislative advocacy so long as they did so without "indicating the candidate's past or current position on the legislation." Hardly the "uninhibited, robust, and wide-open" debate on public issues mandated and protected by the First Amendment. See *New York Times Co.v. Sullivan*, 376 U.S. 254, 270 (1964). Another proposal would privilege such communications if they contained only "a brief suggestion" that the legislator/candidate be contacted about the legislation, but contained "no reference to the candidate's record, position, statement, character, qualifications, or fitness for an office...." (Alternative 3-B). Regulations which would invite and require such subjective weighing and measuring of the content of political speech by a government agency, so that the agency can determine whether the speech may go forward unimpeded, ought to be anathema to our system of free expression under the First Amendment. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992).

In light of these concerns, perhaps the least constitutionally-objectionable definition of issue advocacy to be excluded from the BCRA operation, is contained in Alternative 3-C, which has the fewest subjective and vague phrases, allows the broadest criticism and commentary on legislative proposals, but still veers too far towards improperly compelling speech by requiring the advertisement contain an address or phone number to contact.* That micro-management

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*Alternative 3-C

(6)(i) Does not include express advocacy.

(ii) Refers to a specific piece of legislation or legislative proposal, either by formal name, popular name or bill number; or refers to a general public policy issue capable of redress by legislation or executive acton; and

(iii) Contains a phone number, toll free number, mail address, or electronic mail address, internet home page or other world wide web address for the person or entity that the ad urges the viewer or listener to contact.

dictating of free speech is not necessary to the only arguably recognized compelling governmental interest at play here, namely, permitting regulation of "express advocacy" of a candidate's election or defeat. Indeed, the members of the Commission should except from the reach of "electioneering communications" everything that does not involve such "express advocacy," for that is all that the Court has said may constitutionally be regulated.

5. The "*MCFL* exception."

The First Amendment does not permit the regulation of issue advocacy. The failure to adhere to this core constitutional principle represents the fundamental flaw of Title II of the BCRA. But, even on its own terms, the Wellstone Amendment is directly contrary to the Supreme Court's teaching in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), which upheld the First Amendment right of non-profit, ideological corporations to engage even in express advocacy, let alone speech that merely "refer[s] to" a political candidate. This "*MCFL* exception" to the FECA's prohibition on corporate and union express advocacy is a necessary safety valve to permit a wide variety of non-profit organizations to participate fully in the national debate on national issues. By prohibiting any such advocacy by non-profits, without exception, the Wellstone Amendment flies in the face of this guarantee. We therefore support, in principal, the Commission's attempt to clarify that "qualified" non-profits remain exempt from FECA's ban on express advocacy and now from its ban on "electioneering communications."

We are nevertheless troubled by several features of the Commission's proposal. First, the Commission should not preclude from the *MCFL* exemption organizations that accept a modest or incidental or de minimus amount of corporate or union support for their activities. Many cause organizations do so, but remain overwhelmingly supported by individual members and contributors who subscribe to the views and advocacy of the organization. Moreover, under the Snowe-Jeffords allowance of electioneering communications by non-profits and others, the funding of such speech itself must come only from individuals, so the possibility of such groups being used as corporate or union conduits is likewise de minimus.

Second, we are concerned that even with this change, the proposed *MCFL* exemption does not provide an adequate safe harbor for issue advocacy which, until the enactment of BCRA, was entirely free from FECA regulation. The Commission's current requirements for achieving *MCFL* status are extremely restrictive and difficult to satisfy. See 11 CFR Sec. 114.10. To simply overlay these restrictive rules onto organizations which do no more than merely refer to or mention a federal candidate in the course of privileged issue advocacy is to fail to take into account the overarching constitutional difference between express advocacy and other speech. Whether or not restrictive regulations to measure *MCFL* eligibility are appropriate where non-profits engage in express advocacy, when they engage in mere issue advocacy of the kind ensnared by Title II, the regulatory regime managing any exemption from coverage should be tailored to reflect the much weaker interests at stake.

Third, under the proposed regulations, groups can never know in advance whether their certification of qualified exempt status under *MCFL* will be accepted. They thus speak at their peril, which means they will not speak at all. As Justice Thurgood Marshall once observed: "[T]he value of a Sword of Damocles is that it hangs, not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974)(dissenting opinion). For this reason also, we submit that the Commission should propose separate rules and regulations governing the *MCFL* exemption in the far different setting of electioneering communications.

Finally, we believe that the Commission can and should reconsider its initial decision that the prohibitions of the Wellstone Amendment apply to speech referring to presidential candidates, as well as congressional candidates. In our view, the legislative maze created by the the Snowe-Jeffords and Wellstone Amendments does not foreclose that conclusion, which would at least help to mitigate (although hardly resolve) the unconstitutional censorship scheme imposed by the BCRA.

6. An "*SWP* exemption."

Ever since *Buckley*, it has been clear that even partisan political organizations and committees are nonetheless constitutionally entitled to exemption from any significant campaign finance disclosure requirements where such disclosure is reasonably likely to lead to hostility, threats, harassment and reprisals to the group and its members, supportors, contributors and even suppliers and vendors. 424 U.S. at 74. After having declared the constitutional basis for this exemption in *Buckley*, the Court in *Brown v.Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), applied this principle to hold that campaign finance disclosure laws cannot be applied to controversial political parties, even though those parties engage in core campaign and electoral activities. In recognizing such an "*SWP* exemption" the Court was applying principles of freedom of speech and association fashioned a generation earlier to protect civil rights organizations from official and community harassment. See NAACP v. Alabama, 357 U.S. 449 (1958). Thus, the Courts have declared, even where there is a compelling interest in disclosure by campaign and political committees generally, that interest is outweighed by the associational freedoms of controversial political groups.

We are aware of no Commission regulations in place to implement this "*SWP* exemption" the way there are rules in place, however questionable, to protect *MCFL* rights. We suggest that one byproduct of these proceedings should be to remedy this deficiency by consideration of procedures for an SWP exemption for political committees from normal FECA disclosure requirements.

No less important is recognition of an "SWP exemption" from the Title II disclosure requirements imposed on qualifying non-profit corporations, not to mention individuals, committees, associations and all other persons or entities which, under Title II, are permitted to engage in "electioneering communications" so long as the pay the price of giving up their anonymity or their associational privacy. Even where Snowe-Jeffords is applicable, non-profits that seek its exemption must nonetheless disclose contributors of more than $1,000 either to the communication or to the organization. Comparable disclosure requirements are imposed upon individuals and committees whose spending on electioneering communications exceeds the statutory thresholds. The disclosures required by Sec 201 are almost as onerous and burdensome as those required of regular political committees. In the case of controversial groups and organizations - ones that were they political committees might qualify for the *SWP* exemption - such threatened disclosure can have a deadly chilling effect on the group's advocacy. For just one example, supporters of a gay rights group engaged in advocacy on a gay rights bill in a conservative community might very well fear harassment and reprisals if their financial support were made public.

This danger is compounded exponentially by the fact that organizations and speakers that for 30 years have been assured by the courts that their issue advocacy would be constitutionally-immune from any governmental regulation, restriction and disclosure are now potentially subject

to all of those restraints, should Title II withstand constitutional challenge. Ever since 1972, the courts, almost with one voice, have ruled that the First Amendment compels complete immunity from government regulation for issue advocacy organizations. See *United States v. National Committee for Impeachment, supra*; *ACLU v. Jennings, supra*; *Buckley v. Valeo*, 519 F.2d 821, 843-44 (D.C. Cir. 1975)(en banc) (unanimously striking down a provision of FECA requiring reporting and disclosure by issue advocacy organizations); *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (only "express advocacy" may be subject to FECA regulation); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (upholding the right of corporations to engage in issue advocacy); *FEC v. Massachusetts Citizens for Life, Inc., supra.*

In the highly unlikely event that the Court would turn its back on these principles and uphold Title II, groups which would now become otherwise subject to Title II should be entitled to claim an "SWP exemption" from such disclosure and reporting requirements. In other words, even if Title II were found valid as to most entities and individuals who engaged in "electioneering communications," it still could not constitutionally be applied to ones that could meet an *SWP*-type test. The failure of Title II to include or recognize such an exemption poses no lesser constitutional deficit than its ignoring of the principles of *MCFL*. Just as the Commission has tried, though in a far too restrictive way, to remedy that deficit, it should also seek to remedy this one by proposing regulations which would exempt groups from regulation if they could make the appropriate showing.

7. **Disclosure as Prior Restraint and Compelled Speech.**

Finally, we are extremely troubled by the Commission's apparent intention to require the Title II immediate reporting and disclosure requirements to be triggered not merely by the broadcasting of "electioneering communications" but by the prior disbursements of funds for such possible future broadcasting, or even entering into a contract to disburse such funds.

Two features of this requirement are particularly onerous under settled First Amendment principles. First, the advance notification and reporting requirements can operate in the nature of a prior restraint, requiring the speaker to notify the government in advance of the speaker's identity, support and proposed speech. Outside of such distinguishable areas as parade permits, it is difficult to imagine any other area where political speech can be subject to a prior disclosure or review requirement. See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Second, the requirement that speech be disclosed to government even when it subsequently may not go forward or may be altered by the speaker before publication, operates as an impermissible form of compelled speech, requiring the speaker to speak when he chooses not to. *Wooley v. Maynard*, 430 U.S. 705 (1977); *McIntyre v. Ohio Elections Commission, supra.* It would almost be like requiring newspapers to lodge advance drafts of editorials with the government before publication.

These troubling constitutional difficulties can be avoided because the statutory language leaves ample room to provide that disclosure requirements are triggered only when and after broadcasting has occurred, and not before.

Conclusion

The ACLU submits that the Commission is to be praised for recognizing some of the First Amendment problems raised by Title II of the BCRA and trying to remedy those problems. In key respects, however, the proposals fall short and need to be strengthened in favor of the First

Amendment.

Respectfully submitted,

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