American Federation of Labor and Congress of Industrial Organizations

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August 29, 2002

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

Re: Notice of Proposed Rulemaking, "Electioneering Communications," 67 Fed. Reg. 51131 (August 7, 2002)

Dear Ms. Dinh:

These comments are submitted in response to the above-referenced Notice of Proposed Rulemaking ("NPRM") on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the national federation of 66 national and international unions representing over 13 million working men and women throughout the nation. These comments address selected aspects of the NPRM that most directly implicate the rights and obligations of labor organizations and their members. We begin with three general observations.

First, in submitting these comments, the AFL-CIO does not concede that any of the proposed regulations we address, or the provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") underlying the proposed regulations, are constitutional; indeed, as the Commission is aware, the AFL-CIO and its federal political committee, AFL-CIO COPE PCC, have filed a civil action in the United States District Court for the District of Columbia challenging the constitutionality of a number of provisions of the BCRA, including several that relate to this NPRM. While the AFL-CIO welcomes some of the proposals, we do not concede that, even if adopted in final form, these regulations will, individually or collectively, save the constitutionality of Title II of BCRA either wholly or in part.

Second, in submitting these comments we do not necessarily contend that the language of the BCRA itself confers authority on the Commission to make some of the regulatory choices it proposes or that we suggest. That language is in critical respects rigid and unforgiving.

Although we discuss the statutory language in a number of instances, our comments otherwise do not necesarily assume that Congress has created or preserved particular regulatory space within which the Commission may act, irrespective of whether that language is constitutional.

In this regard, we acknowledge and appreciate the Commission's interest in comments concerning its statutory, as distinct from constitutional, authority under the BCRA. In its rulemaking deliberations, the Commission does have authority, and even a duty, to "construe its statutory mandate in the light of federal constitutional principles." Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 629 (1986). That authority may be limited, however, by unambiguous statutory language, see Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984), even if that language is of doubtful constitutional validity. As the Commission does in several places in the explanatory portion of the NPRM, in its explanation of its final regulations the Commission should explicate its constitutional considerations, its analysis of the scope of discretion afforded by the language of the BCRA, and how and why these influenced its regulatory determinations.

Thirds, our declination to comment on any proposed regulation does not signify either endorsement of or opposition to it.

Our comments generally follow the order of the proposed regulations.

I. Who May Make Electioneering Communications

Exception for Qualified Nonprofit Corporations

Noting that the language of BCRA "may go further than allowed" by the Supreme Court's decision in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)(*"MCFL"*), the Commission proposes to include an exception to the ban on corporate electioneering communications for section 501(c)(4) organizations that satisfy the characteristics of so-called qualified nonprofit corporations at 11 C.F.R. § 114.10. The AFL-CIO agrees that this provision is necessary in order to preserve, at least in part, the constitutionality of Title II of the BCRA. We believe, however, that the proposed regulation is too narrow in one important respect that could also bear on the BCRA's constitutionality.

Although the current definition of "qualified nonprofit corporation" is limited to organizations exempt from federal taxation under section 501(c)(4) of the Internal Revenue Code ("IRC"), see 11 C.F.R. § 114.10(c)(5), there is no basis for this limitation in the language or reasoning of the *MCFL* decision, and it is particularly inappropriate as applied to groups that wish to engage in electioneering communications. While many advocacy organizations are exempt under IRS § 501(c)(4), some such groups are organized under IRC §§ 501(c)(3), 501(c)(5), 501(c)(6) or 527 because of a number of tax advantages available under those provisions. Insofar as these incorporated organizations do not use corporate or union funds to conduct electioneering communications, which they cannot do by reason of the BCRA's prohibition of such expenditures, they are equally entitled to disseminate such communications to the public since they are in all other respects identical to IRC § 501(c)(4) corporations and

meet all of the other requirements of the regulations. At least with respect to electioneering communications, if not independent expenditures, the exception for *MCFL* groups should extend to these tax-exempt organizations as well.

The AFL-CIO also disagrees with the suggestion in the NPRM that, contrary to the decisions of several federal courts, "even if an organization accepted only a *de minimis* amount of corporate or labor organization funds, it is nevertheless barred under 2 U.S.C. § 441b from making an electioneering communication." 67 Fed. Reg. at 51138. While it is true, as pointed out in the NPRM, that 2 U.S.C. § 441b(c)(2) provides that certain organizations may only use funds provided by individuals, and not corporations or unions, to support electioneering communications, this is a separate question from whether an organization which receives a *de minimis* amount of corporation or union funds may engage in electioneering communications at all. The latter question is resolved favorably by *MCFL* and subsequent cases in order to preserve the constitutionality of the statute. See, e.g., FEC v. National Rifle Association, 254 F. 3d 173, 192-93 (D.C. Cir. 2001); North Carolina Right to Life, Inc. v. Bartlett, 168 F. 3d 705, 714 (4th Cir. 1999); FEC v. General Education Fund, Inc., 65 F. 3d 285, 292 (2d Cir. 1995); Day v. Holahan, 34 F. 3d 1356, 1363-65 (8th Cir. 1994). That interpretation should be controlling with respect to the proposed regulation.

Snowe-Jeffords and Wellstone Amendments

The NPRM correctly points out that the plain language of the Wellstone Amendment, 2 U.S.C. § 441b(c)(6), may be read to leave in place the exception in the Snowe-Jeffords Amendment, 2 U.S.C. § 441b(b)(2), to the extent that Snowe-Jeffords allows corporations organized under sections 501(c)(4) and 527 of the Internal Revenue Code to make electioneering communications referring to Presidential and Vice-Presidential candidates, but not to House and Senate candidates, as long as these groups use funds that do not come from prohibited sources. 67 Fed. Reg. at 51137. This is the only interpretation of the Wellstone Amendment which would not render the Snowe-Jeffords Amendment a nullity, and it would be consistent with the fact that the Snowe-Jeffords language was left in the statute following adoption of the Wellstone Amendment. This interpretation would also serve partially to correct the omission of incorporated 527 organizations from the definition of a qualified nonprofit corporation, an omission which, as discussed in the previous section of these comments, has no basis in the *MCFL* decision itself and which makes even less sense where electioneering communications, rather than independent expenditures, are involved.

Affiliated Organizations

The Commission seeks comments on whether there is any section in the BCRA that would "prevent an entity prohibited from making an electioneering communication from being affiliated with an entity that is permitted to make electioneering communications, provided that the permissible entity received no prohibited funds from the prohibited entity." 67 Fed. Reg. at 51137. Since the NPRM does not state what is intended by the term "affiliated," we assume for purposes of these comments that it refers to organizations that have, to an extent to be defined, common directors, officers, or members or other characteristics similar to those set forth in 11

C.F.R. § 100.5(g) (defining "Affiliated Committee")

The AFL-CIO believes that there is no provision of the BCRA that prohibits an affiliated entity from making electioneering communications, and that it would be improper for the Commission to engraft such a limitation into the prohibition on corporate and union electioneering communications. The BCRA is the product of a long deliberative process in Congress which resulted in numerous political compromises, in part at least because of the protected nature of the communications being regulated. In these circumstances, and given the constitutional cloud over the Title II provisions at issue, it is especially inappropriate for the Commission to consider unilaterally imposing restrictions that are not required by the statutory language. Here, Congress expressly determined that corporate and union *funds* may not be used by any person to make electioneering communications, see 2 U.S.C. § 441b(c)(1), but it stopped short of prohibiting "affiliated" organizations from using funds from individuals to make electioneering communications.

Congress' declination to extend the prohibition to reach affiliated organizations should not be regarded as an oversight - - not that the Commission could "correct" it if it were - - in view of the fact that the Federal Election Campaign Act and the Commission's current regulations expressly address the issue of "affiliated" entities. See 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 100.5(g). Moreover, elsewhere in the BCRA Congress expressly included provisions addressing closely related entities. See, e.g., 2 U.S.C. § 323(d) (extending prohibitions on certain party fundraising activities to reach "an entity that is directly or indirectly established, financed, maintained, or controlled by any" party committee or its agent). The absence of similarly broad language in the provisions relating to electioneering communications can only be interpreted as limiting the Commission's authority to prohibit electioneering communications by affiliated organizations, however defined.

II. Definition of Electioneering Communication

Definition of Covered Elections

The Commission proposes to incorporate the current definitions of "general election," "primary election," "runoff election," "caucus or convention," and "special election" set forth at 11 C.F.R. § 100.2, with one clarification as to "special" and "runoff" elections. 67 Fed. Reg. at 51132. This approach is highly problematic in a number of key respects that especially underscore the troubling practical complexities that inhere in Title II, and that warrant considerable care and specificity in any regulations in order to afford the necessary bright-line guidance to those regulated.

First, the Commission would apply the BCRA's restrictions on electioneering communications to any election which has authority to nominate a candidate for an office being sought by the candidate referred to in the communication, even though that candidate is *not* a candidate in the particular election in question. Under this provision, a communication aired within 30 days of the Green Party or Reform Party convention would be prohibited if it mentions the name of anyone who is seeking the Democratic or Republican (or another minor

party) nomination for the House or Senate, even though the candidates for the major party nominations are not seeking the nomination of the Green or Reform parties, and even where those parties may have no intention of nominating any candidate for the House or Senate but clearly have the "authority" to do so, as 2 U.S.C. § 434(f)(3)(A)(ii)(bb) provides. The Commission should alleviate the substantial facial overbreadth of the BCRA caused by this provision by restricting the definition of "election" to include only elections in which the candidate referred to in the communication is actually running.

Second, the definition of "election" in 11 C.F.R. § 100.2(a) includes elections in which a candidate appears "whether opposed or unopposed." While including elections in which a candidate is unopposed may be consistent with other provisions of FECA to which this definition applies, in the context of restrictions on electioneering communications which prohibit or limit the exercise of protected speech in significant ways, no legitimate purpose is served by applying the term to elections in which a candidate runs unopposed, and the Commission should so write the regulation.

Third, the current regulations do not define the statutory term "preference election," which also appears in proposed 11 C.F.R. 100.29(a)(1)(ii). While 11 C.F.R. § 100.2(c)(2) defines the term "primary election" to include "an election which is held for the expression of a preference for the nomination of persons for election to the office of President of the United States," it is unclear whether the term "preference election" as used in the proposed regulation is intended to be broader and, if so, to what events it applies. This should be clarified.

Fourth, under 11 C.F.R. § 100.2(c)(4), with respect to individuals seeking a federal office as independent candidates, or without nomination by a major party, the primary election is considered to occur on one of the three different dates "at the choice of the candidate." These dates are (i) the date prescribed by applicable State law as the last day to qualify for a position on the general election ballot, (ii) the date of the last major party primary election, caucus, or convention in that State, or (iii) in the case of non-major parties, the date of the nomination by that party. Incorporation of these alternative definitions adds further unwarranted and constitutionally suspect uncertainty to the scope of the BCRA's restrictions on electioneering communications because persons who wish to make electioneering communications may not know what that "choice" is, yet they somehow must conduct their affairs in accordance with that choice. Moreover, members of the public are not likely to have notice of the dates on which non-major parties have scheduled their nominating conventions.

In order to avoid these difficulties and to narrow the reach of the statute, the Commission should provide that for purposes of 11 C.F.R. § 100.29, with respect to individuals seeking federal office as independent candidates, or without nomination by a major party, the primary election is considered to be the date of the last major party primary election, caucus, or convention in that State.

Fifth, 11 C.F.R. § 100.2(f) defines the term "caucus or convention" as one that has the authority to "select a nominee" for federal office on behalf of a party. Proposed 11 C.F.R. § 100.29(a)(1)(ii), however, refers to a convention or caucus of a political party that has authority

"to nominate a candidate." It is unclear, first, whether these somewhat different formulations are intended to indicate a substantive difference in meaning and, second, whether proposed 11 C.F.R. § 100.29(a)(1)(ii) is meant to reach precinct, county, district and regional caucuses or conventions that select delegates to the statewide caucus or convention at which a party's nominee is selected, or whether it is intended only to reach the final stage in this process. As discussed below, the Commission should also clarify whether a "caucus or convention" triggers a 30-day blackout period in states where some candidates receiving votes at the convention may still have to run in a primary.

Sixth, the commission should clarify whether the blackout period begins thirty days before the *opening* of a national party convention or thirty days before the date on which the convention will nominate the candidate, which may be several days later in the case of the Democratic and Republican party conventions and, for other national parties, as the Reform Party experience in 2000 reflects, could be many days later. See AO 2000-6 (nominee selected by telephone, mail and e-mail ballots submitted throughout month of July and announced at national convention in August.)

Definition of "Targeted to the Relevant Electorate"

The Commission seeks comments as to how to measure, and where to obtain the data concerning, the number of persons a communication reaches so as to determine whether the communication is targeted to the relevant electorate. 67 Fed. Reg. at 51133. The AFL-CIO is unable to respond to the technical aspects of these questions, including, for example, what signal measurement should be using in determining how many people a broadcast signal reaches, or how one determines if a broadcast station's signal could potentially reach 50,000 persons in a particular district or state, or how to avoid double counting where a broadcast station's signal is carried by cable or satellite. We strongly believe, however, that the Commission must answer these questions, as well as others raised in the NPRM, in order give clear guidance to the regulated community regarding the meaning of the BCRA's restrictions on electioneering communications.

We also strongly agree with the Commission that there must be an accessible and authoritative source of information regarding the number of persons reached by specific broadcast outlets that persons should be able to rely upon in conducting their affairs and in defending against any charge of a violation. The Commission is surely right that "[t]hose who wish to make communications that meet the timing and medium requirements of the electioneering communication definition, must be able to easily determine whether the radio or television stations cable systems, or satellite on which they wish to publicly distribute their communications will reach 50,000 or more persons in the State or congressional district in which the candidate mentioned in the communication is running for office." 67 Fed. Reg. at 51134. *Indeed, the AFL-CIO believes that the absence of this information in a readily available format adds significantly to the unconstitutionality of Title II of the BCRA as enacted, and we urge the Commission to announce that it will exercise its prosecutorial discretion not to entertain complaints of violations of the electioneering communications provisions until the technical issues are resolved and the necessary targeting information is available as proposed in the*

NPRM. Cf. e.g., Fieger v. Thomas, 74 F. 3d 740, 749 (6th Cir. 1996) (even if a board of professional responsibility could not declare a bar disciplinary rule unconstitutional, it could "refuse to enforce it or, perhaps, narrowly construe it").

The Commission proposes to apply the term "person" for purposes of the electioneering communications provisions to include "natural persons residing in a given jurisdiction, regardless of their citizenship status or whether they are of voting age." 67 Fed. Reg. at 51133. But having embarked on trying to identify a sensible and relevant subset of the "persons" otherwise defined in FECA, see 2 U.S.C. § 431(11), the proposal over-inclusively misses the mark. The BCRA's usage of "person" here occurs in the context of "targeted to the relevant electorate." The BCRA nowhere defines "electorate," so resort to common sense and any dictionary leads to the conclusion that the only relevant persons are natural persons who are entitled to vote -- that is, resident citizens of voting age. Given the evident purposes of the electioneering communications provisions, Congress had and could have no interest in the effects of such communications on other individuals, such as infants and resident aliens.

We recommend, therefore, that the technical tasks assigned to the Commission and the FCC include, through appropriate consultation with census and election authorities, the gathering of data sufficient to determine with reliable precision the geographic presence of "persons" in the "electorate," as we recommend those terms be construed.

The Commission also asks for comment concerning whether, if it cannot be determined whether a particular communication will reach 50,000 or more persons in a relevant district or state, it should be "presumed" that the communication reaches fewer or more than 50,000 persons. 67 Fed. Reg. at 51133. We believe that this would be highly inappropriate. Under the enforcement provisions of FECA set forth in 2 U.S.C. § 437g and the Due Process Clause of the Fifth Amendment, the Commission has the burden of proving the existence of a violation in order to proceed with an enforcement action. If the Commission is unable to demonstrate, after an appropriate complaint and investigation, that every element of an "electioneering communication" was present, it must dismiss the matter. In the absence of evidence, a "presumption" that a communication reaches a specific number of persons simply has no basis in law: if more than 50,000 is presumed, the burden of proof is wrongly shifted to the investigated party; and, no "presumption" of less can ever arise, for the investigation simply must end with a finding of no probable cause.

Finally, the Commission asks a number of questions regarding how the 50,000-recipient threshold should be determined, particularly whether the regulations should require aggregation of recipients of the same advertisement from multiple outlets and, if so, whether the regulations should aggregate substantially similar ads for this purpose. 67 Fed. Reg. at 51133. With respect to these and similar questions, the BCRA defines "electioneering communication" so as to apply the threshold separately to *each* "communication." See 2 U.S.C. § 434(f)(3)(C) ("... *a* communication ... is 'targeted to the relevant electorate' if *the* communication can be received by 50,000 or more persons.") (emphasis added). There is no suggestion in the statute that two or more *separate* communications may be aggregated in order to determine whether the 50,000 threshold has been reached. Thus, if the identical ad runs five times on the same station having a

potential audience of 10,000 people, the threshold would not be reached. Similarly, if the same ad runs on two stations, even if simultaneously, each having an audience of 25,000, the threshold would not be reached. And, if, in either example, the two ads were not identical, the threshold would not be reached because the ads would not be the same "communication" on the basis of their content alone.

Application of Targeting Requirement to Presidential and Other Primary Elections

The NPRM correctly recognizes that under the plain language of 2 U.S.C. § 434(f)(3) a communication referring to a clearly identified candidate for President that meets the BCRA's timing and medium requirements, and that does not fall within any of the statutory exceptions, is considered an electioneering communication if it is aired within 30 days of a primary or other selection procedure taking place anywhere in the United States. 67 Fed. Reg. at 51134. In order to avoid the "sweeping impact" of this interpretation, the Commission has proposed two alternative formulations and has asked for comments on a third. Since the first two options set forth in the NPRM appear to have no support in the statutory language, and because they would not sufficiently narrow the scope of the ban on "electioneering communications," the AFL-CIO does not believe that these proposals can be adopted. The third option has only arguable support in the language of the statute but would narrow the prohibition in a significant and somewhat more constitutionally palatable way.

Under Alternative 1-A, in the case of a communication referring to a candidate for nomination for President, a communication would be considered an "electioneering communication" if it could be received by 50,000 or more persons in a State where a primary election, as defined in 11 C.F.R. § 9032.7, is being held within 30 days of when the communication is aired, or if it could be received by 50,000 or more persons anywhere in the United States within 30 days before the national nominating convention. There does not appear to be any support for this proposal in the language of the BCRA, which, as recognized in the NPRM, contains no targeting requirement for communications referring to Presidential and Vice Presidential candidates. Yet a targeting limitation for presidential primaries and caucuses analogous to that for House and senate primaries makes evident practical sense and would reduce constitutional exposure.

Furthermore, since the NPRM takes the position that under the targeting rules for House and Senate elections, a communication that could also be received by large numbers of persons outside the relevant State or district would still be considered a targeted communication as long as 50,000 persons in the relevant area could also receive it, this proposal would continue to restrict many communications that reach persons in states where no primary is taking place or where the primary has already taken place.

Under Alternative 1-B, the definition of "electioneering communication" would include a communication that referred to a clearly identified candidate for President or Vice-President if it were distributed within 30 days before a primary election, preference election, or convention or caucus of a political party, and it could be received by 50,000 or more persons within the State holding such election, convention or caucus. As with Alternative 1-A, it is difficult to square

this proposal with the language of the statute, however more sensible the proposal may be in comparison with the statute.

If the Commission adopts this proposal, however, the proposed regulation should be amended to clarify when an individual becomes a candidate for Vice President, particularly whether an individual will become a candidate at the time that the Presidential nominee or putative nominee announces his or her choice of a running mate, even if this announcement is made well before the national party convention, or whether the individual only becomes a candidate for Vice President when his or her name is placed in nomination at the convention.

The proposed regulation should also be amended to clarify the status of independent candidates. We suggest in this respect that the date of the last primary of a major party be designated as the date on which the nomination of an independent candidate will be deemed to take place in every state, even where under state law an independent candidate must submit his or her nominating petitions on different dates in each state that frequently occur prior to that date.

Under the third alternative as to which comments are sought, the electioneering communication restrictions would only apply to communications made within 30 days before a party's national convention (and 60 days before the general election). 67 Fed. Reg. at 51135. This proposal too is difficult to square with the statute, whose use of commas at 2 U.S.C. § 434(f)(3)(A)(II)(bb), and whose general definition of "election" at 2 U.S.C. § 431(I)(D) appear to distinguish primaries and caucuses from "a convention or caucus of a political party that has authority to nominate a candidate" for the office of President and Vice-President. But as a practical matter, while this approach would still cause blackout periods for 30 days before each major and minor party event that has authority to nominate a candidate for President or Vice President, it would be far better than the "sweeping impact" of an interpretation under which every primary and caucus triggers a 30-day blackout.

If the Commission adopts the third approach to narrowing the potentially overbroad reach of the electioneering communications prohibition in connection with Presidential elections, it should take the same approach with respect to elections for the House and Senate, for which the statute is also substantially overbroad. Thus, under the statutory language and proposed 11 C.F.R. § 100.29(a)(1)(ii), in states where party nominations are made through a multi-stage process, such as through local conventions, followed by a state convention, followed by a primary election for the top vote-getters at the state convention, for each party in the state there would be two or more nominating events for which the 30-day blackout would be in effect unless, as in the case of Presidential elections, the Commission were to limit the definition of electioneering communications only to those nominating events of a party at which the final selection of the party's nominee is made.

"Broadcast, Cable or Satellite Communication"

The Commission asks what means of dissemination may qualify as electioneering communications. The statute is explicit that only "broadcast, cable and satellite" transmissions are covered, but regulatory emphasis of that fact would have the salutary impact of relieving

some popular confusion over the matter.

By the same token, we believe the Commission should exclude communications over the internet, including archived transmissions of broadcasts, for many of the reasons we have previously expressed in comments and testimony concerning the commission's ongoing rulemaking concerning the Internet under the unamended FECA. Both the text of the BCRA and its legislative history make clear that the exclusive focus of the electioneering communications provisions was on broadcast media, and the Commission should venture no further.

Alternative Definition of "Electioneering Communication"

2 U.S.C. § 434(f)(3)(A)(ii) provides an alternative definition of "electioneering communication," which would take effect in the event the primary definition in section 434(f)(3)((A)(i) is held to be constitutionally insufficient by final judicial decision. The Commission has not proposed regulations to implement the alternative definition at this time because "[p]roposing two definitions for the same term, one to take effect only after the other may be held invalid, could be confusing to those who are affected by this new law." 67 Fed. Reg. at 51132.

We disagree with the Commission's proposal in this regard. It is not uncommon for regulations to be promulgated with a future effective date -- indeed, as Congress directed in the BCRA itself, the Commission's recently promulgated Title I regulations will not take effect until November 6 -- and we see no reason why this will be more confusing to the regulated community than in other similar instances (or more confusing than so much else that's in the NPRM, for that matter).

More importantly, promulgation of regulations to implement the alternative definition of "electioneering communication" is important at this time in order to ensure that these regulations will be in effect as early as possible during the next federal election cycle, if the Supreme Court does act to set aside the primary definition but sustains the alternative definition. Under the litigation schedule set by the District Court in *McConnell v. FEC* and consolidated cases, the Supreme Court is unlikely to decide the constitutionality of Title II before June 2003; and a decision might not issue until later in 2003 or early 2004. If the Court strikes down the primary definition but upholds the alternative definition, the 2004 cycle would be well underway before the Commission even began the process of developing and publishing proposed regulations, receiving comments, holding a public hearing, publishing a final regulation, and submitting it to Congress for its review under 2 U.S.C. § 438(d). This timetable would be especially problematic because, unlike the primary definition, the alternative definition is not limited to particular time periods but applies *throughout the entire election cycle irrespective of the timing of elections*. If this should occur, the regulated community could be left without any guidance as to the meaning of the alternative definition for a significant portion of the 2004 election cycle.

In addition, while the AFL-CIO strongly believes that the Supreme Court should and will decide the constitutionality of the alternative definition itself if it strikes down the primary definition, there is a possibility that the Court could refuse to reach the constitutionality of the

alternative definition until the Commission takes the opportunity to clarify its meaning in regulations. If this occurs, the regulated community could be forced to operate throughout the entire 2004 election cycle without a final judicial determination of the constitutionality of the alternative definition or the Commission's implementing regulations, a situation which would only cause confusion and uncertainty and interfere significantly with the Commission's own enforcement efforts.

Exception for Popular Names and Similar References

Proposed 11 C.F.R. § 100.29(c)(5) would except from the definition of electioneering communication a communication that "refers to a bill or law by its popular name where that name includes the name of a Federal candidate, provided that the popular name is the sole reference made to a Federal candidate." 67 Fed. Reg. at 51136, 51145. The AFL-CIO agrees that such an exception is necessary and within the Commission's authority pursuant to 2 U.S.C. § 434(f)(3)(B)(iv). However, we believe that the exception proposed should be amended in a number of respects.

First, a better formulation would say: "Refers to a bill or law by a popular name that includes the name of a Federal candidate, and the communication otherwise is not an electioneering communication." This would eliminate the unnecessary implication in the proposal that there can only be one such reference, and it would harmonize the exception with others that might be promulgated.

Second, the exception should not be limited to a "bill or law," but should include amendments, treaties, ballot measures, public policies, and commissions or other public bodies such as congressional committees For example, communications that include a reference to the "Wellstone amendment," "Thompson Committee," "Kennedy Commission" or "Bush War on Terrorism" as the only reference or references to a federal candidate should not be restricted any more than a communication that refers to the "McCain-Feingold" bill.

Third, the term "popular name" should be defined in order to avoid any question about how to determine whether reference to a bill or law has that status. The definition should consider a "popular name" to include, in the case of a bill, law, amendment, treaty or ballot measure, any reference that includes the name of one of its sponsors in a formulation that the named sponsor or another sponsor has publicly used, or -- and with respect to a public policy or policy proposal -- that has been used in a communication by a media communication within the meaning of 2 U.S.C. § 434(f)(3)(B)(i). This definition should further include, in the case of a commission or committee, any reference that includes the name of its chair or ranking member. Finally, the exception should also encompass other references to a candidate's role in connection with legislation or executive matters, such as references to the candidate as the "sponsor" or "author" of a bill or law.

Exception for Candidate Debates or Forums and Other Similar Events

In accordance with 2 U.S.C. § 434(f)(3)(B)(iii), the Commission proposes an exception to

the restrictions on electioneering communications for any communication that "constitutes a candidate debate or forum conducted pursuant to 11 C.F.R. 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum." 67 Fed. Reg. at 51136, 51145. We believe that this language is unduly and unnecessarily restrictive insofar as it defines the statutory term "candidate debate or forum" by reference to the Commission's regulations at 11 C.F.R. § 110.13, rather than, as indicated in the statutory provision underlying this regulation, by reference to regulations promulgated pursuant to this rulemaking which may and should be broader than the existing regulation.

11 C.F.R. § 110.13 includes a number of qualifications and restrictions that serve no purpose in the context of the BCRA's restrictions on electioneering communications and which will narrow the kinds of communications falling within the statutory exception. Thus, the current regulation requires that candidate debates may only be sponsored by nonprofit organizations described in 26 U.S.C. §§ 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties. 11 C.F.R. § 110.13(a). Many entities that do not fit within this regulation sponsor candidate debates, and they should be permitted to broadcast communications relating to these events even though they mention the name of one or more federal candidates; and, the current regulation itself problematically includes the terms "support" or "oppose," which defy clear definition.

Furthermore, to qualify as a "debate" under the regulation, an event must "include at least two candidates," 11 C.F.R. § 110.13(b)(1), a condition that the Commission has interpreted to mean that both major candidates must appear at the same time in a "traditional" debate format. See AO 1986-37. Since the statutory exception applies to a candidate "forum" as well as to a candidate "debate," it is presumably intended to be broader than the narrow definition of debate used by the Commission for other purposes. It is also important to note that the Internal Revenue Service permits §501(c)(3) and (c)(4) organizations to sponsor candidate forums and similar voter education events that do not satisfy the traditional debate format required by the FEC. See Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 74-574, 1974-2 C.B. 160. There is no legitimate reason why the sponsors of these events should be prohibited from announcing them to the public without violating the BCRA.

Finally, although the statutory exception is limited to candidate debates and forums, there are numerous other instances in which federal candidates may make lawful appearances before groups that should be allowed to advertise these events. For example, it has long been the Commission's position that federal officials and other well-known persons who are currently federal candidates may make non-campaign-related appearances before unions, corporations and other groups without triggering a FECA violation. See, e.g., AO 1996-11, 1994-15, 1992-6, 1992-5, 1984-13. Under the authority granted to it in 2 U.S.C. § 434(f)(3)(B)(iv), the Commission should expand the proposed regulation to include announcements of any other public appearance by a federal candidate.

Exception for Communications Devoted to Urging Support or Opposition to Pending Legislation or Other Matters.

The NPRM includes four alternative versions of an exception from the restrictions on electioneering communications for communications "devoted to urging support for or opposition to particular pending legislation or other matters." 67 Fed. Reg. at 51136. We agree that the final regulations must include such a provision if the statutory restrictions are not to remain unconstitutionally overbroad in one of its most important respects. However, we believe that each of the proposed alternative exceptions is deficient in a number of material respects.

With respect to all alternatives, we believe the predicate formulation should say: "that includes a recommendation or request that the candidate take any action concerning" an included matter (the scope of which we address below) "and the communication is not otherwise an electioneering communication." That is because the words "support" and "opposition" are too imprecise, unless they mean to "support" or "oppose" the passage, adoption or enactment of something; and, in any event, they are under-inclusive, as there are other relevant forms of action, such as amendment or any number of parliamentary options We also suggest that the term "included" is far preferable to "devoted" or "devoted exclusively," since a communication properly might also include another message that does not entail an electioneering communication. The notion of "devoted" also fails to identify specific language or other factors which may contribute to this determination and it does not indicate whether factors external to the communication itself would be considered in determining how a communication is "devoted."

Alternative 3-A would exempt a communication that "is devoted exclusively to urging support for or opposition to particular pending legislation or executive matters, where the communication only requests recipients to contact a specific Member of Congress or public official, without promoting, supporting, attacking or opposing the candidate, or indicating the candidate's past or current position on the legislation." 67 Fed. Reg. at 51145. In addition to the defects just discussed, this proposal contains very significant flaws.

First, the use of the formulation "promoting, supporting, attacking or opposing" is constitutionally highly suspect on vagueness grounds. On that point it is very significant that the BCRA's principal sponsors now concede that these terms fail to provide the necessary "bright line test" and "should not be imported directly into an exemption that will apply to corporation, unions and membership organizations," Comments of Senators McCain, Feingold, Snowe and Jeffords and Representatives Meehan and Shays at 8 (Aug. 23, 2002), although they have declined to explain why these terms nonetheless appear in the BCRA with blanket reach.

This proposal also raises questions as to what is meant by "pending" legislation. Is legislation pending, for example, if Congress has recessed for the election season but is expected to take up a bill or other legislative matter when it reconvenes after an election or in the next session of Congress? There is also no reason why the exception should be limited to communications about legislation and executive matters; it should also include, at a minimum, policy issues that are capable of redress by legislation or executive action. Similarly, there is no legitimate reason why the exception should not apply where pertinent legislation has not yet been introduced.

As importantly, the fact that a communication would be disqualified from the exception if it indicates a candidate's position with respect to legislation means that many legitimate lobbying and similar communications would continue to be prohibited under the BCRA. It makes little sense to preclude a communication that urges the public to contact a particular legislator about legislation from also informing the public about the candidate's position on the legislation or on a policy matter reflected in the legislation.

Alternative 3-B would exempt a communication that "concerns only a pending legislative or executive matter, and the only reference to a Federal candidate is a brief suggestion that he or she be contacted and urged to take a particular position on the matter, and there is no reference to the candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting." 67 Fed. Reg. at 51145. While this proposal relies on the language of the communication itself and eschews the problematically subjective "devoted" and "promotes, supports, attacks or opposes" formulations, Alternative 3-B includes the same problems as Alternative 3-A insofar as it applies only to communications that concern "pending" legislation and other matters, and insofar as it similarly prohibits the communication from including a statement of the candidate's "position." And, Alternative 3-B likewise precludes any reference to a candidate's "record." For the same reasons why a communication should be able to refer to a candidate's "position," it should be able to refer to a candidate's "record."

Alternative 3-B also adds a degree of unnecessary uncertainty by allowing only a "brief suggestion" that the candidate be contacted and urged to take a particular position. Most broadcast communications are very short, so under a common sense view all content is "brief"; and, if brevity here means length relative to the length of the overall broadcast, this is a comparison the Commission should not willingly undertake to create and enforce, and it serves no public purpose whatsoever.

Alternative 3-C would exempt a communication that does not contain express advocacy, 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 action; and 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. 67 Fed. Reg. at 51145. This proposal does not require the subjective determinations included in Alternative 3-A, does not prohibit a reference to the candidate's position or record on the matter, and is broader than Alternative 3-D with respect to the types of matters that may be referenced in the communication. But it should not be necessary to include a phone number or similar means of reaching the candidate in order to qualify for this exemption.

Alternative 3-D would exempt a communication that urges support of or opposition to any legislation, resolution, institutional action, or any policy proposal and only refers to contacting a clearly identified candidate who is an incumbent legislator to urge such legislator to support or oppose the matter, without referring to any of the legislator's past or present positions. 67 Fed. Reg. at 51145. In addition to sharing many of the weaknesses already identified in Alternatives 3-A and 3-B, this proposal unreasonably limits the candidates who may be

referenced in the communication to incumbent legislators. One of the legitimate functions performed by "electioneering communications" is the urging of even a non-incumbent candidate to support a particular piece of legislation or to take a position on a particular public policy issue so that if the candidate wins the election, he or she will be committed on the matter. There is no legitimate reason for excluding such communications from the proposed exception.

Exception for Public Service and Other Similar Communications

The Commission has also asked whether there should be exemptions for communications that refer to a clearly identified candidate but that promote local tourism, or a ballot initiative or referendum, or for communications that are public service announcements or that promote a candidate's business or professional practice. 67 Fed. Reg. at 51136. We believe that each of these reflects how the electioneering communications restrictions of BCRA are unconstitutionally overbroad and, therefore, we strongly recommend its inclusion in the exemptions. By the same token, at least the following communications also should be exempted: communications promoting statewide tourism; communications promoting a state or locality as an attractive place to establish a business or to raise a family; communications soliciting contributions to charitable organizations (to the extent permitted under Title I of the BCRA); communications urging participation in health or social service programs; and communications urging other actions of a non-electoral nature, such as limiting the use of water in times of shortage or evacuating an area subject to flooding or other disaster.

Application of 2 U.S.C. § 431(20)(A)(iii)

The Commission seeks comments on whether any of the exemptions should be limited to communications that do not "promote", "support", "attack," or "oppose" any clearly identified candidate, as set forth in 2 U.S.C. § 431(20)(A)(iii). 67 Fed. Reg. at 51136. We do not believe that such a condition would be proper with respect to any exemption which appears in the statute without any such qualifying language. Moreover, even as to exemptions created by the Commission under the authority of 2 U.S.C. § 434(f)(3)((B)(iv), which does state that an exemption must comply with 2 U.S.C. § 431(20)(A)(iii), the statute can be read as requiring only that the Commission make a determination in its rulemaking process that the exemption would not tend to protect communications that promote, support, attack, or oppose candidates. For the same reasons described earlier, and for the reasons now expressed by the BCRA's principal sponsors, any exemptions should eschew this problematic requirement.

III. Scope of the Ban on Union and Corporate Electioneering Communications.

Liability of Individuals and Other Recipients of Corporate and Union Funds

Under proposed 11 C.F.R. § 114.14(b), no person who accepts funds given, disbursed, donated or otherwise provided by a corporation or labor organization may use those funds to pay for an electioneering communication, or to provide those funds to any person who would subsequently use those funds to pay for all or part of the costs of an electioneering

communication. 67 Fed. Reg. at 51139. This approach is unduly restrictive, and the Commission's reasons for expanding the statutory prohibitions imposing civil and criminal liability to any person who makes corporate or union funds to support electioneering communications simply lacks statutory support.

First, the Commission's suggestion that imposing liability on recipients of corporate and union funds is "similar to the ban on contributions made in the name of another," 67 Fed. Reg. at 51139, ignores the fact that Congress itself created the latter kind of liability in 2 U.S.C. § 441f, but not the former kind in the BCRA. Furthermore, it stretches credulity to argue that an individual who uses corporate or union funds to make an electioneering communication is making a contribution in the name of another.

Second, the Commission's reliance on 2 U.S.C. § 441b(c)(3)(A) is misplaced. That provision merely provides that an electioneering communication shall be treated as made by a corporation or labor organization if a corporation or union "directly or indirectly disburses any amount for any of the costs of the communication." At most this language, reasonably understood, precludes a union or corporation from earmarking money for, or conditioning a transfer of money to another person upon, the making of an electioneering communication. Absent these elements, in the situation posed by the proposed regulation the corporation or union that donates funds to a person does not "directly or indirectly" disburse any amount for any of the costs of the communication; rather, all disbursements would be made solely by the person making the communication using its own funds. Although proposed 11 C.F.R. § 114.14(c) somewhat alleviates the problem, it proceeds from the false premise that all money received is tainted unless so excepted, rather than taking the suggested approach that focuses on the conduct of the actual regulated entities, namely, corporations and unions.

We are also concerned that proposed 11 C.F.R. § 114.14(b), when taken with proposed 11 C.F.R. § 114.14(d), would impose liability where an individual or group uses union or corporate funds inadvertantly for an electioneering communication. Proposed 11 C.F.R. § 114.14(d) imposes an obligation on any person receiving funds from a corporation or labor organization "to demonstrate through a reasonable accounting method" that no such funds were used to pay for any portion of an electioneering communication. Many individuals and unincorporated entities may have difficulty in meeting this vague standard, thereby putting them at risk of civil and criminal penalties which have no basis in the statute.

Contributor Liability

The Commission also seeks comment on whether a corporation or labor organization could be held civilly and criminal liable "in instances where their contributions were not intended to be used for electioneering communications but the recipient used them for that purpose regardless of the contributors' intent." 67 Fed. Reg. at 51139. The NPRM cites no statutory support for such an expansion of liability under Title II, and there is in fact nothing in the BCRA to support it. Thus, proposed 11 C.F.R. § 114.14(a) provides, consistently with the BCRA, that no corporation or union may give, disburse, donate or otherwise provide funds, "the purpose of which is to pay for an electioneering communication." See 2 U.S.C. § 441b(c)(3)(A)

(communications are treated as made by a corporation or labor organization where the corporation or labor organization "directly or indirectly disburses" funds for this purpose).

As discussed above, it is reasonable to construe these provisions as prohibiting a corporation or labor organization from earmarking funds given to another organization to be used for electioneering communications; but it is unreasonable in the extreme to rely on this provision in the absence of an express suggestion, request or agreement that the corporation's or union's funds will be used in this manner. Thus, a corporation or labor organization should not be held liable under the BCRA where it makes a contribution to another organization without any direction that the funds be used to make an electioneering communication.

With respect to all the liability issues just discussed, the Commission's proposal threatens to chill the ordinary relationships, financial and otherwise, between unions and corporations on the one hand, ans other entities on the other, and interfere with donations to tax-exempt organizations and other financial transactions that regularly occur without regard to elections and the considerations that underlie the BCRA.

IV. Reporting of Electioneering Communications

Filing of Reports Before Communications Are Aired

Under 2 U.S.C. § 434(f)(1), every person who makes disbursements for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year must file a statement with the Commission within 24 hours of each "disclosure date." "Disclosure date" for this purpose is defined in the statute as the date "by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000." 2 U.S.C. § 434(f)(4). Finally, the statute provides at 2 U.S.C. § 434(f)(5) that "a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." The Commission correctly indicates that these provisions, if taken literally, raise a number of policy and constitutional concerns, 67 Fed. Reg. at 51141, and it therefore suggests that the statute be construed so as to avoid them.

Specifically, the Commission points out that if reports must be filed when disbursements first exceed the $10,000 threshold - - which could in some instances be when contracts are executed to make expenditures in this amount rather than when the expenditures are actually made - - it is possible that reports will have to be filed before it is clear that a communication will meet the definition of electioneering communication or even whether a communication will be made at all, thereby leading to "speculative and even inaccurate reporting." Id. The Commission further points out that "there could be constitutional issues with compelling disclosure of potential electioneering communications before they are finalized and aired, particularly when such disclosure could force reporting entities to divulge confidential strategic and political information, and could force them to report information, under penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communication." Id.

We strongly agree with these observations and add that, particularly in light of the potential for inaccurate reporting, there is no substantial or other interest to be served by requiring reports to be made days, weeks or months before electioneering communications are aired or planned to be aired. Accordingly, we agree that the date of actual airing is the earliest possible disclosure date, and note that even the BCRA's principal sponsor concede that this is the best approach to implementing the act. Comments of Sen. McCain et al. at 13.

Reportable Direct Costs

The Commission correctly states that reportable direct costs of producing or airing electioneering communications would not include the cost of polling to determine the contents of communications or whether to create or air the communication, and that such costs also would not include the cost of a focus group or other polling to determine the effectiveness of the communication. 67 Fed. Reg. at 51140-41. This is the only possible construction of the statutory language, which limits reporting to the "direct costs of producing and airing" the communications, 2 U.S.C. § 434(f)(1), since polling and focus groups are not part of the production or airing of a communication and frequently may be performed by separate vendors. In light of 2 U.S.C. § 437f(b) (providing that any rule of law that is not stated in the statute may be proposed by the Commission only as a rule or regulation pursuant to procedures established under FECA), and in order to avoid uncertainty about these points, we urge the Commission to include these provisions in the final regulations.

We also urge the Commission to include a provision making clear that "direct costs" of producing and airing electioneering communications do not include staff time and overhead expenditures of the sponsoring organization. Cf. 2 U.S.C. § 431(9)(B)(iii) (requiring unions, membership organizations and corporations to file reports of "costs...directly attributable" to express advocacy communications to their respective restricted classes that exceed $2,000).

Other Reportable Information

Under 2 U.S.C. § 434(f)(2)(A), the 24-hour statements for electioneering communications must include, *inter alia*, the identification "of the person making the disbursement [for electioneering communications] and "of any person sharing or exercising direction or control over the activities of" the person making the disbursement. Alternative 4-A set forth in the NPRM, 67 Fed. Reg. at 51146, which merely tracks the statutory language, does not provide adequate guidance to the regulated community because it fails to make clear (i) whether "the person making the disbursement" refers to the sponsoring organization and not to the individual within the organization who authorized the expenditure or signed the check; (ii) whether the "person sharing or exercising direction or control over the activities of" an organization includes persons internal to the sponsoring organization as well as external to it (for example, does the regulation refer to the officers and directors of an organization, to the organization's chief executive officer, its director of media, its political director, or all of them?); (iii) what is meant by "direction and control" in either situation; and (iv) whether direction and control must be reported if it exists only with respect to the electioneering communication itself or to all of the organization's "activities."

The Commission's current earmarking regulation, 11 C.F.R. § 100.6(d), does not provide sufficient guidance in this regard, because it does not explain the meaning of the term "direction and control," but merely states the consequences where such "direction and control" exists; and, the Advisory Opinions cited in the NPRM are limited to donee/conduit situations and similarly provide no guidance as to who within an organization should be deemed to exercise direction and control over its activities (assuming, of course, that persons subject to the reporting requirements will even be aware of these opinions).

The "direction and control" concept entails particular issues for labor organizations (and some other membership organizations). Unions are democratic organizations whose officers are elected by the members or, in the case of national and international unions, either by the members directly or by convention delegates who are themselves directly elected by the members. Members routinely approve the actions of their officers at membership meetings and in special votes. Obviously, it would be unreasonable and very likely unconstitutional for the BCRA to require unions to file their membership lists. And, more generally, a definition of the term that captured anyone who exercised direction or control, however defined, over *any* activity of the reporting organization would be inappropriate and burdensome and serve no apparent statutory purpose. Moreover, unions are often affiliated in a structure with mixed elements of hierarchy and autonomy, yet it would serve no purpose to list any or all affiliates for that reason. We submit that the best approach to this question is to specify that the "activities" as to which the "direction and control" apply are the activities involved in the creation and dissemination of the electioneering communication that triggers the reporting requirement itself. Alternative 4-B properly focuses on this connection, but it is deficient with respect to the other issues raised above.

Especially given the fact that 24-hour statements must be filed under penalty of perjury, it is essential that the Commission provide fair notice to the regulated community of what information must be provided.

Under 2 U.S.C. § 434(f)(2)(C), 24-hour statements must include the amount of each disbursement of greater than $200 during the period covered by the report and the identification of the person to whom the disbursement was made. We assume that the disbursements referred to are disbursements for electioneering communications and not all disbursements by the reporting entity during the period, but this should be clarified in the final regulation to avoid any confusion.

Finally, with respect to proposed regulation 11 C.F.R. § 104.19(b)(5), implementing 2 U.S.C. § 434(f)(2)(D), we believe that Alternative 5-B is superior to Alternative 5-A, which merely tracks the vague language of the statute, because it does not require persons submitting reports to determine which, if any, elections the communications "pertain," rather than which elections an individual was a candidate in, an objective fact which can easily be ascertained and as to which there can be no dispute. As discussed above, the principal difficulty created by this part of the statute is that many persons will not know whether an individual will be a candidate at the time that they are required to report under the literal language of 2 U.S.C. § 434(f), unless the Commission only requires 24-hour reports to be filed after a communication is actually aired.

Conclusion

The AFL-CIO appreciates the opportunity to submit these comments.

Yours truly,

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