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• Comments:

Please see attached
Comments on proposed
rules, 67 Fed. Reg. 51131

Ballot Initiative Strategy Center

August 21, 2002

Via E-Mail (Electioneering@fec.gov) and Facsimile (202-2193923)

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

Re: Notice of Proposed Rulemaking—Electioneering Communications

Dear Ms. Dinh:

The Ballot Initiative Strategy Center ("BISC") is pleased to submit these comments on the Commission's proposed rules, 67 Fed. Reg. 51131 (Aug. 7, 2002), regarding the treatment of so-called "electioneering communications" under the Bipartisan Campaign Reform Act of 2002, P.L. 107-155.

BISC is a nonprofit advocacy organization that educates the public about ballot initiatives; promotes the use of ballot initiatives as a significant tool for achieving expression of popular will in our democracy; trains and assists individuals and organizations in sponsoring and campaigning for ballot measures; and monitors the use and success of various ballot measures in the states.

Under BCRA, an "electioneering communication" is defined to include any broadcast, cable or satellite communication that "refers to" a clearly identified candidate for Federal office; is made within 60 days of a general election or 30 days of a primary; and, as to candidates for the Congress, is "targeted to the relevant electorate." BCRA section 201, adding new section 434(f)(3)(A) to the Federal Election Campaign Act of 1971, as amended ("FECA").

New section 434(f)(3)(B)(iv) of the Federal Election Campaign Act (FECA), as added by section 201 of BCRA, authorizes the Commission to exempt any communication by regulation, except for a communication which otherwise meets the definition of "electioneering communication" and promotes, supports, attacks or opposes a candidate for federal office.

The Commission has invited comment on whether there should be exemptions, among other things, for "communications that refer to a clearly identified candidate but that promote...a ballot initiative, or a referendum." 67 Fed. Reg. at 51136. BISC strongly supports inclusion of such an exemption in the regulations, and believes that such an exemption should be expanded to include communications that oppose, as well as those that promote, a ballot initiative.

As the Supreme Court has recognized, disbursements made for the purpose of promoting or opposing a ballot initiative or referendum represent "the type of speech indispensable to decisionmaking in a democracy" and are therefore entitled to the highest degree of First Amendment protection. First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). Therefore, any limitation placed on the content of a communication by a ballot initiative committee should be defined as narrowly as possible, to achieve the purpose of the limitation while protecting this type of speech.

A federal officeholder who is a candidate for re-election may be a significant figure in sponsoring a ballot initiative or referendum, and may be closely linked with in the mind of the electorate. A state or local official, or prominent citizen or activist, who has sponsored a ballot initiative may be running for federal office in the same primary or general election in which the ballot measure will be voted upon. In some of these cases, the initiative may be so closely identified with a federal candidate as to be popularly known by his or her name.

In these circumstances, any reference to a federal candidate in a broadcast communication would be incidental to the promotion of or opposition to the ballot measure. Thus, an organization supporting or opposing a ballot measure should be able to run a broadcast communication referring to a federal candidate, as long as the communication does not promote, support, attack or oppose that candidate, or any other federal candidate.

BISC believes that the most efficient way to cover this issue would be to add ballot committees to proposed section 100.29(c)(7) in Alternative 3-D. The language would then read:

“(7) Refers to a clearly identified Federal candidate in a public communication by a candidate for State or local office, individual holding State or local office, association or similar group of candidates for State or local office or of individuals holding State or local office, or a ballot initiative or referendum committee registered as a political committee under state law, if such mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office, or to the promotion of or opposition to a ballot measure, initiative or referendum.”

Such an approach would ensure that ballot measure committees remain free to refer incidentally to federal candidates in the course of promoting or opposing such a measure, without influencing any election to federal office.

BISC requests an opportunity to testify before the Commission at the hearing to be held on August 28-19.

Thank you for your consideration of these comments.

Sincerely yours,

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