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August 21, 2002

**VIA E-MAIL**

Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**RE: Notice 2002-13**

Dear Ms. Dinh:

These comments are submitted on behalf of The Campaign and Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving federal campaign finance laws. They address the Federal Election Commission's Notice of Proposed Rulemaking published at 67 Fed. Reg. 51131 (August 7, 2002), containing draft regulations to implement certain sections of the Bipartisan Campaign Reform Act of 2002 (BCRA) relating to "electioneering communications."

In addition to submitting these comments, the Legal Center respectfully requests that Glen Shor, Associate Legal Counsel, be afforded the opportunity to testify on its behalf during the Commission's electioneering communications hearings on August 28th and 29th. Due to other commitments made prior to the Commission's decision to change the date of the electioneering communications hearings from September 24th and 25th to the current dates, Trevor Potter, General Counsel, will not be present to testify.

**General Comments**

BCRA's provisions relating to "electioneering communications" are a core component of the law's endeavor to restore integrity and transparency to the federal campaign finance system, in a manner thoroughly consistent with U.S. Supreme Court precedents.

These particular provisions have often been misunderstood or mischaracterized as creating some sort of a "blackout period" for, or "ban" on, advertisements mentioning federal candidates proximate to their elections and targeted at their electorates.

In fact, under BCRA, any individual, corporation, union, non-profit organization, political party, or other entity can say whatever they wish to, whenever they wish to. The new campaign finance law's electioneering communications provisions address only corporate and union methods of financing certain advertisements mentioning federal candidates proximate to their elections and the need for disclosure when an individual or entity finances such advertisements.

In this respect, BCRA seeks to restore effect to federal campaign finance laws requiring corporations and unions to finance their federal campaign advertisements with hard money contributed to their political actions committees rather than with soft money from their treasuries (2 U.S.C. 441b), and requiring individuals and other entities to report their independent spending on such advertisements (2 U.S.C. 434(c)).

Prohibiting the use of corporate and labor treasury funds for campaign advertisements is thoroughly constitutional. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a non-profit corporation wished to spend its treasury funds on a newspaper advertisement in support of an identified candidate for state office. Michigan law prohibits corporations from using their treasury funds for advertisements in assistance of, or in opposition to, the nomination or election of a candidate. The U.S. Supreme Court rejected the non-profit's constitutional challenge to Michigan law, holding that this restriction on corporate expenditures was narrowly tailored to serve the state's compelling interest in preventing corruption. The Court explained that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" affords corporations "'an unfair advantage in the political marketplace'" – which the state could constitutionally remedy by requiring corporations to use only contributions voluntarily made to a separate, expressly political fund for these purposes. *Id.* at 660 (in part quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986) ("*MCFL*")). The Court has indicated similar concern with labor treasury expenditures, citing the need to "avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *See United States v. United Auto Workers*, 352 U.S. 567, 585 (1957).

Federal campaign finance law in this area has essentially been deleted, however, due to narrow interpretation of the "express advocacy" test enunciated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court confronted language in the Federal Election Campaign Act (FECA) defining what constitutes an "independent expenditure" subject to the source restrictions and disclosure requirements of federal campaign finance law. While upholding those requirements, the Court held that the language defining "independent expenditure" was unconstitutionally vague and overbroad. To preserve the applicability of the restrictions and disclosure requirements, the Court supplied its own, bright-line definition for these provisions: an independent expenditure was deemed "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. In a footnote, the Court elaborated that such "express advocacy" could include the use of such words as "vote for," "vote against" and "support" or "oppose" – which have since become known as the "magic words." *Id.* at 44 n.52.

Political parties, corporations, and unions have interpreted the "express advocacy" test to permit them to spend soft money (including corporate and union treasury funds) on advertisements with the intent and effect of electing or defeating identified federal candidates, so long as the advertisements do not contain such "magic words" as "vote for" or "vote against." In the case of non-party advertisements to this effect, disclosure requirements have likewise been averted by sidestepping "magic words."

For example, under the pretense that it was addressing "issues" rather than engaging in electioneering, a non-profit corporation (set up as a shell entity to anonymously influence federal elections) was able to spend undisclosed, unregulated soft money to finance the following advertisement broadcast in Montana a few days before a federal election, targeting a congressional candidate named Bill Yellowtail:

> "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments-then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

U.S. Senate Committee on Governmental Affairs, Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaigns, S. Rep. No. 105-167, at 6304-05 (1998). This is but one example of what is now a hundred million dollar enterprise of funneling corporate and union treasury money into campaign advertisements, operating entirely outside the scope of federal campaign finance law. Clearly, political activity subsequent to the *Buckley* decision has revealed that the "express advocacy" test for determining what constitutes a campaign advertisement is, at least under prevailing narrow interpretations, dramatically underinclusive. The consequence has been the functional repeal of source prohibitions and disclosure requirements designed to ensure the integrity and transparency of federal elections.

Nothing in the *Buckley* decision, however, precludes Congress from amending FECA in order to draw a more accurate line between campaign advertisements and issue discussion than has been set by narrow interpretations of the "express advocacy" test. Here, the lesson of *Buckley* is simply that, in doing so, Congress must avoid both substantial overbreadth and vagueness.

We strongly believe that the electioneering communications provisions of BCRA – addressed in detail in the following comments – carefully navigate constitutional shoals in providing a more accurate test for distinguishing between campaign advertisements and issue discussion. Along these lines, the Commission is among the parties defending the electioneering provisions in ongoing constitutional litigation in the U.S. District Court for the District of Columbia. As such, during the course of this rulemaking, we urge that the Commission assume the constitutionality of these provisions and fully effectuate

Congress's intent of restoring force to laws long the books addressing the financing of campaign advertisements.

**Part 100**

Alternative Definition of "Electioneering Communications"

We support the Commission's decision not to propose regulations to implement the alternative statutory definition of "electioneering communication" contained in 2 U.S.C. 434(f)(3)(A)(ii) at this time. The issuance of regulations at this time to implement that definition would be premature, given that BCRA gives it effect only "if [the 60/30 day test] is held to be constitutionally insufficient by final judicial decision . . ." No such final judicial decision has been rendered on the 60/30 day test.

Proposed 11 CFR 100.19

We support the Commission's proposal to require that 24-hour electioneering communications statements be received by the Commission with 24 hours of the disclosure date (as opposed to merely "filed" within that 24-hour window). This is consistent with the treatment of required 24-hour reports for independent expenditures. Furthermore, we agree with the Commission's prevailing interpretation of "24 hours" to constitute 24 contiguous hours even if the time period begins or ends on a weekend or holiday.

Proposed 11 CFR 100.29(a)

*(a)(1)(ii)*: We support the Commission's proposal to consider a communication to have been "made" at the time of its public distribution, for purposes of determining whether certain communications are "made" within 60 or 30 days of particular elections. *See* 2 U.S.C. 434(f)(3)(A)(i)(II).

*(a)(i)(iv)*: We support the Commission's proposal in Alternative 1-A to clarify that "electioneering communications" include communications referring to a clearly identified candidate for President or Vice-President that are publicly distributed within 30 days of a particular state's primary election and can be received by 50,000 or more persons *in that state* – but not communications referring to such candidates that are publicly distributed *anywhere* within 30 days of *any* primary. This is consistent with the treatment of electioneering communications referring to House and Senate candidates and the broader logic in treating advertisements mentioning federal candidates proximate to elections as electioneering in nature.

Alternative 1-A is the correct approach. Though Alternative 1-B (which appears in 11 CFR 100.29(b)(4)) would adequately address the concern about application to communications publicly distributed in states not holding primary elections at the time, it covers communications referring to candidates for President or Vice-President within 30 days of national nominating conventions only in the states where such conventions are

held. The national nominating convention is a national event involving significant participation from representatives of all 50 states. As such, Alternative 1-A's coverage of communications publicly distributed within 30 days of a national nominating convention that "can be received by 50,000 or more persons anywhere in the United States" better comports with the intent of BCRA.

In response to the Commission's request for comment on the issue, we strongly oppose interpreting BCRA's electioneering communications provisions to cover communications mentioning Presidential and Vice-Presidential candidates only if 30 days before a national nominating convention or 60 days before a general election (and not if within 30 days of primaries, as discussed above). 2 U.S.C. 434(f)(3)(A)(II)(bb) covers communications made within "30 days before a primary or preference election, or convention or caucus of a political party that has the authority to nominate a candidate, for the office sought by the candidate." It is clear that the language, "that has the authority to nominate a candidate," modifies "convention or caucus of a political party" and not "primary or preference election" (which is set off by a comma).

*(a)(2)*: We support the Commission's treatment of "special elections" and "runoff elections" as primary elections if held to nominate a candidate and "general elections" if held to elect a candidate (only for the purposes of proposed 11 CFR 100.29).

Proposed 11 CFR 100.29(b)

*(b)(1)*: We support the Commission's decision to interpret "clearly identified candidate" consistently with the language of the current rule in 11 CFR 100.17. This means that references to "Your Congressman," "Your Senator," "the President," and similar formulations constitute references to a "clearly identified candidate for Federal office" under BCRA's electioneering communications provisions. 2 U.S.C. 434(f)(3)(A)(I).

*(b)(2)*: We urge that the draft's carve-out from the definition of "broadcast, cable, or satellite communication" for communications publicly distributed exclusively by Low Power FM Radio, Low Power Television, or Citizens Band Radio be deleted. No such carve-out appears in the statute, and there is no indication that Congress intended or anticipated it. We note that communications through these media will not be "electioneering communications" if, among other things, they cannot be received by 50,000 or more persons constituting the identified candidate's electorate.

*(b)(3)&(5)*: We agree that a communication that can also be received by large numbers of persons outside the identified candidate's congressional district or state would nonetheless constitute a targeted communication if it can also be received by 50,000 in such district or state.

We strongly support the creation of a database to be accessible on or from the website of the Federal Communications Commission (FCC) that would enable those interested in making communications mentioning federal candidates proximate to elections to determine how many persons in a given state or congressional district could receive a

communication transmitted through a particular broadcast station, cable system, or satellite system. The Federal Election Commission should indeed provide a link to the FCC database from its own website. If the FCC database is properly constructed, reliance on such a website should serve as definitive evidence of whether a communication could have been received by 50,000 or more persons in a state or congressional district (and likewise, a complete defense on that particular issue).

With respect to the construction of such a website and the implementation of the targeting requirement, we agree that BCRA's policies are best served by counting only natural persons residing in a given jurisdiction (regardless of their citizenship status or age) towards the 50,000 person threshold. To the extent not otherwise readily available to or otherwise secured by the FCC, the agency has the authority to require broadcast, cable and satellite providers to provide it with all information necessary to determine the number and location of persons capable of receiving communications distributed through such media.

The Commission should assess whether a communication can reach 50,000 or more persons in a congressional district or state on a per outlet, per airing basis (*i.e.*, the unit for scrutiny would be a discrete airing or simultaneous airings over a single outlet, rather than an aggregation of simultaneous airings over various outlets or of truly staggered airings over a single outlet). Thus, for example, a broadcast, cable or satellite communication referring to a Senate candidate, and aired through two separate outlets that could each be received by completely distinct groupings of 40,000 people in his or her state (but no one else in the state), would not be targeted to that candidate's relevant electorate under 2 U.S.C. 434(f)(3)(C). Opportunities for abuse and gaming are likely mitigated by the fact that, as a practical matter, the size of audiences for individual broadcast, cable and satellite systems will exceed 50,000 persons in most congressional districts and states. However, we note that if an advertisement is aired through a single network or cable system on multiple stations simultaneously, aggregation of distinct audiences in a congressional district or state (depending on whether the communication mentioned a House candidate or a Senate/Presidential primary candidate) would be appropriate.

Proposed 11 CFR 100.29(c)

*(c)(2)*: We support the Commission's decision to apply the news story, commentary, or editorial exception to such communications transmitted over cable or satellite outlets as well as broadcast outlets. This is consistent with the intent of BCRA and matches the scope of the definition of "electioneering communications."

*(c)(3)*: We prefer the language of Alternative 2-A, which more closely matches the statutory language of 2 U.S.C. 434(f)(3)(B)(ii). However, our preference in this regard is strongly conditioned on appropriate interpretation of Alternative 2-A. In this respect, Alternative 2-B, which would cover only certain "reportable" candidate-specific expenditures, flags an important issue: what if entities attempt to avoid the coverage of the electioneering communications provisions by characterizing spending on such

communications as "expenditures," but do not report such spending to the Commission? For example, an unincorporated 527 organization may finance "electioneering communications" but insist that its disbursements in this regard are "expenditures" and thus not covered by the provisions in question. However, it may not be otherwise disclosing that spending to the Commission, for under the Commission's "major purpose test," even entities that engage in excess of $1,000 of "expenditures" may not in all cases trigger federal political committee status. Likewise, if such spending does not contain "express advocacy," it will not meet the statutory definition of an "independent expenditure" and thus will not be subject to the reporting requirements for "independent expenditures."

BCRA's exception for "expenditures or independent expenditures" was not motivated by a desire to allow entities to avoid any and all reporting of spending on electioneering communications. Rather, the overall intent of the electioneering communications provisions suggests that this exception exists to avoid duplicative reporting in the case of hard money "expenditures or independent expenditures" already disclosed to the Commission under pre-existing FECA reporting requirements. As such, it would be appropriate to adopt Alternative 2-A only insofar as "an expenditure or independent expenditure" is interpreted here to cover hard money "expenditures or independent expenditures" subject to pre-existing FECA reporting requirements.

The Commission notes in its commentary accompanying the draft rules that all expenditures of authorized committees are, by definition, for the purpose of influencing the candidate's election to federal office (and thus are "expenditures" under the statute). Given that spending on electioneering communications by federal candidates' or officeholders' authorized campaign committees are "expenditures" financed with hard money and subject to pre-existing FECA reporting requirements, it is appropriate to conclude that such spending is not covered by BCRA's electioneering communications provisions. Of course, this analysis rests on the important understanding that federal candidate committees cannot make disbursements of funds other than hard money.

*(c)(4)*: We agree with the Commission's iteration of this exception for communications that constitute candidate debates or forums conducted pursuant to 11 CFR 110.13, or that solely promote such debates or forums and are made by or on behalf of the sponsor. This closely tracks the statutory language of 2 U.S.C. 434(f)(3)(B)(iii).

*(c)(5)*: We strongly oppose this exception. The Commission cites as authority for the promulgation of this exception (as well as the exceptions contained in proposed 11 CFR 100.29(c)(6) and (c)(7)) the language of 2 U.S.C. 434(f)(3)(B)(iv), which excludes from the definition of "electioneering communications" "any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii)." In turn, section 301(20)(A)(iii) of BCRA (2 U.S.C. 431(20)(A)(iii)) covers "public communications" referring to a clearly identified federal candidate which "promote or

support a candidate for that office, or attack or oppose a candidate for that office" (not limited to express advocacy).

In affording this authority to the Commission, Congress emphasized the high bar to its exercise. As Congressman Shays indicated with respect to this provision during House debate on February 13, 2002:

> ". . . [I]t is possible that there could be some communications that will fall within this ['electioneering communications'] definition even though they are *plainly and unquestionably not related to an election.*"
>
> Section 201(3)(B)(iv) was added to the bill to provide the Commission with some limited discretion in administering the statute so that it can issue regulations to exempt such communications from the definition of 'electioneering communications' because they are *wholly unrelated to an election* . . . [encompassing] examples where the Commission could conclude that the broadcast communication in the immediate pre-elect period *does not in any way promote or support any candidate, or oppose his opponent.*"

148 CONG REC. H410-411 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (emphasis added). It is clear that Congress did not want exceptions promulgated under this authority that could "in any way" promote, support, attack, or oppose a federal candidate. Likewise, the statutory language indicates that that the Commission may promulgate exceptions only "to ensure appropriate implementation of [the paragraph defining 'electioneering communications']." This compels the Commission to be sensitive to the rationale and real-world developments underlying the adoption of the electioneering communications provisions and adhere to constitutional requirements.

This proposed exception exceeds the authority of the Commission. Indeed, it exempts advertisements that clearly support, promote, attack or oppose federal candidates. For example, it would have exempted the following hypothetical advertisement, if it were aired in Congressman John Dingell's (D-MI) Congressional District within days of his primary or general election:

> "The Dingell-Norwood bill is a trial lawyer's dream. They get their cut, and what do patients get? Under Dingell-Norwood: higher health care costs, lawyer's fees, and less research into cures. Dingell-Norwood: a Lawyer's Bill of Rights; a patient's worst nightmare."

This advertisement clearly attacks or opposes Congressman Dingell. As such, the Commission may not exempt any such advertisement from the "electioneering communications" definition. Indeed, the Commission's proposed exception here may cut much more broadly – because the concept of a bill's "popular name" is potentially quite expansive (indeed, the lack of clarity as to the meaning of "popular name" may run afoul

of the Supreme Court's demand for bright-line guidance for non-party and non-candidate entities).

It is difficult to avoid the conclusion that any exception for communications closely proximate to federal elections mentioning a federal candidate in referring to a bill's popular name will be exploited by campaign strategists to craft campaign advertisements. Accordingly, an exception for such advertisements will inevitably exceed the authority of 2 U.S.C. 434(f)(3)(B)(iv). However, it is notable that communications naming federal candidates in reciting the supposed popular names of legislation will not constitute "electioneering communications" to the extent they are distributed outside the named candidates' congressional districts or states. Accordingly, corporations and unions could use their treasury funds to finance the airing of the "Dingell-Norwood" advertisement discussed above in 433 congressional districts at any time during an election cycle, and indeed in 435 congressional districts outside of the 60/30 day window. Likewise, they could use their federal PACs to finance its airing in Congressman Dingell's or Congressman Norwood's congressional districts closely proximate to federal elections. Finally, we note that there are typically a number of ways to describe a particular piece of legislation in a manner recognizable to the public, many of which will not include the name of a federal candidate and thus would not trigger the electioneering communications requirements in their own right.

*(c)(6)*: The commentary accompanying the draft rules describes Alternatives 3-A, 3-B, 3-C, and 3-D as exemptions for communications "devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue." We believe that the "electioneering communications" test stands on solid constitutional and policy grounds. Nonetheless, we are amenable to the prospect of an exception addressing certain lobbying communications in a manner consistent with the constraints on the Commission's authority in this area and with constitutional requirements.

In reviewing the exceptions proposed by the Commission, we regretfully conclude that all must be rejected in their current form. However, the language that we propose below would provide a constitutionally valid and statutorily permitted exemption for certain advertisements.

By reiterating the "promote, support, attack or oppose" standard, Alternative 3-A fails to provide the exacting bright-line guidance likely required by the Supreme Court as to when public communications by non-party, non-candidate entities are subject to federal campaign finance law's funding source prohibitions and reporting requirements. While the "promote, support, attack or oppose" language meets constitutional standards for informing inherently electioneering entities (*i.e.*, parties and candidates) as to the nature of proscribed conduct, the Commission must be mindful that this particular exception would apply to the conduct of individuals, corporations, unions, and unincorporated organizations.

Alternative 3-C is clearly beyond the Commission's statutory authority under 2 U.S.C. 434(f)(3)(B)(iv), as it would exempt advertisements that patently promote, support, attack or oppose clearly identified federal candidates. As a practical matter, under this exception, the only alteration to the prevailing sham issue advertisement phenomenon would be the newly consistent mention of a specific means of contacting the exalted or savaged federal candidate.

Alternatives 3-B and 3-D are likewise problematic. Both would exempt the following hypothetical advertisement, if it were aired in Illinois Congressman Lane Evans's (D-IL) congressional district at the height of an election campaign:

> "Some Democrats in Washington are doing the bidding of the union bosses -- again. Those Democrats won't let workers keep their paychecks. Thanks to them, workers have to pay for big labor's political consultants instead of their kids' educations. Workers need paycheck protection – not pandering to union bosses. Call Lane Evans, and tell him, 'Don't let the union bosses have their way. Stand up for paycheck protection.'"

It is at least apparent that the ability to mention and characterize a political party results in the unauthorized exemption of advertisements that promote or attack candidates. Moreover, the distinction drawn in Alternative 3-D between incumbents and challengers may present constitutional complexities. However, a carefully and narrowly drafted exception for an advertisement that discusses solely a legislative or executive matter and culminates with a request that viewers "Call your Member of Congress" and ask him or her to take a position on the matter is both within the Commission's authority and of sufficient clarity to pass constitutional muster. The omission of the candidate's name safeguards against candidate promotion or opposition.

Accordingly, we suggest the following language for an exception:

> An electioneering communication does not include any communication that:
>
> (A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any

issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

We emphasize again that if a corporation or union wishes to name a federal candidate in a broadcast, cable or satellite communication that is targeted to the candidate's electorate and aired proximate to federal elections, BCRA does not in any way preclude them from doing so. Rather, in that circumstance, they would simply have to finance such communications with hard money contributed to their federal political action committees. As noted by the Commission, corporations and unions could likewise spend their treasury funds on communications at any time that name federal candidates and appear in print media or on billboards, and may indeed engage in unlimited "express advocacy" to their memberships. Individuals could spend unlimited amounts of their personal funds on communications mentioning federal candidates proximate to federal elections (with disclosure). In short, the Commission should keep high in mind the carefully targeted and narrow nature of the basic electioneering communications rule in considering the need for and breadth of any exemption promulgated under 2 U.S.C. 434(f)(3)(B)(iv).

*(c)(7)*: This proposed exception must be rejected. It is unclear precisely what is meant by the command that reference to a federal candidate be no more than "merely incidental to the candidacy of one or more individuals for State or local office." Along these lines, we do not perceive any nexus between this proposed exemption and the Commission's authority to exempt *only* advertisements that do not in any way "promote, support, attack, or oppose" the identified federal candidate.

We anticipate it will be argued that this exception would enable state or local candidates to make brief mention of federal candidates in promoting their own candidacies for state or local office through broadcast, cable or satellite communications. To the extent this is true, this exception would cover the following hypothetical advertisement that would be aired by a gubernatorial candidate in the fall of 2004:

> "Reducing your taxes. Cutting wasteful spending. Protecting America from terrorists. Punishing corporate criminals. That's the Republican way. Like President Bush, I'm working for a strong defense and a strong economy. And I'd be thankful for your support on Election Day."

It is indisputable that this advertisement promotes President Bush – indeed, on the very eve of the President's own election. As such, the exception permitting it exceeds the Commission's authority. Furthermore, any use of non-federal funds by the state or local candidate for such an advertisement would violate 2 U.S.C. 441i(f)(1), which requires such candidates to spend exclusively hard money on public communications that promote, support, attack or oppose clearly identified federal candidates.

Contrary to suggestions that we have heard, state laws addressing the amounts that can be contributed to state or local candidates are not adequate safeguards against a shift in the soft money sham issue advertisement phenomenon from state parties to state candidates. In some states, limits on contributions to state candidates are extremely lax. In other

states, they are simply non-existent. For example, in California, there are no limits on what an individual, business or labor union can contribute to a state candidate. The current Governor of California has accordingly raised over $50 million during the current gubernatorial campaign, including certain contributions from individuals in excess of $100,000. Jeffrey L. Rabin, *Political Gold Medal; Davis Tops $50 Million*, L.A. TIMES, July 17, 2002, at 7. Protection against this serious threat of abuse requires proper implementation of BCRA's prohibition on soft money spending by state or local candidates on public communications that promote, support, attack or oppose clearly identified federal candidates.

We do recognize that the electioneering communications provisions are – absent some use of the exception authority – slightly broader in their applicability to certain state or local candidate advertisements referring also to federal candidates proximate to elections than is 2 U.S.C. 441i(f)(1). Indeed, the same problem at least theoretically applies to certain state or local party advertisements referring to federal candidates proximate to elections. We see no indication that this was intended by Congress.

This inconsistency can be resolved under the statute, however. The Commission may, under 2 U.S.C. 434(f)(3)(B)(iv), promulgate an exception from the definition of "electioneering communications" for communications paid for by a state, local, or district party committee, a candidate for state or local office, or an individual holding state or local office that do not promote, support, attack or oppose any clearly identified candidate for federal office. This would at least harmonize the scope of the relevant soft money provisions and the electioneering communications provisions – though we note that, in light of the soft money provisions, only hard money subject to the limitations, prohibitions, and reporting requirements of the Act could be used to finance state or local party or candidate advertisements that promote, support, attack or oppose clearly identified federal candidates. Furthermore, as discussed above with respect to proposed 11 CFR 100.29(c)(3), state or local party or candidate hard money spending that constitutes "expenditures or independent expenditures" subject to pre-existing FECA reporting requirements would not be considered an "electioneering communication."

In this particular exception, the iteration of the "promote, support, attack or oppose" standard would be constitutionally sound for precisely the same reason it was appropriate to employ that standard in Title I of BCRA. *Buckley v. Valeo* established the express advocacy standard only with respect to non-party, non-candidate entities. The Court found no vagueness problems regarding the expenditures of candidates and political committees (which include political parties), noting that such spending is "by definition, campaign-related." 424 U.S. 1, 79 (1976).

The Commission also inquires whether there should be an exception for communications that refer to a clearly identified candidate but are public service announcements. We oppose any *per se* exception for public service announcements, which would be a significant invitation for abuse. One could readily envision gauzy public service announcements (with the production costs potentially financed by corporations) featuring federal candidates imparting "helpful reminders" to voters on matters ranging from

avoiding lead paint to reading to children before bedtime. Clearly, these advertisements can promote federal candidates.

**Part 104**

In response to a question posed by the commentary accompanying the draft rules, we oppose eliminating the exemption for "expenditures" when the authorized committee of a candidate makes an expenditure for a communication that refers to that candidate or the candidate's opponent. As the Commission indicated earlier, the disbursements of authorized committees are by definition "expenditures" subject to pre-existing FECA reporting requirements and are thus carved out of the "electioneering communications" definition. This avoids duplicative reporting in the case of authorized committees. Indeed, as indicated in the discussion of proposed 11 CFR 100.29(c)(3), hard money "expenditures or independent expenditures" subject to pre-existing FECA reporting requirements are not "electioneering communications" in any instance. Thus, federal political committees and state and local party committees will not have to report under 2 U.S.C. 434(f) their hard money "expenditures or independent expenditures" subject to pre-existing FECA reporting requirements.

Proposed 11 CFR 104.5

We agree with this proposed regulation, which states the filing deadlines for 24-hour statements of electioneering communications and appropriately cross-references proposed 11 CFR 104.19.

Proposed 11 CFR 104.19

*(a)(1)*: Proposed 11 CFR 104.19(a)(1) provides that every person who makes disbursements or contracts to disburse funds for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 in a calendar year triggers the reporting threshold of 2 U.S.C. 434(f)(1). We interpret this to mean that if an entity spends $7,000 to produce an electioneering communication and $7,000 to air the communication, it would trigger the BCRA electioneering communications reporting requirements for that calendar year. This interpretation correctly reflects the statute – whose separate references to "aggregate amount in excess of $10,000" and "aggregating in excess of $10,000" clearly suggest that production and airing costs are to be combined. *See* 2 U.S.C. 434(f)(1)&(4). However, we are uncertain as to how the Commission interprets the language of 104.19(a)(1). Indeed, we are concerned with the statement in the commentary characterizing the reporting threshold as "when the direct costs of *either* producing or arising electioneering communications exceed $10,000. . ." (emphasis added).

This leads to another question posed by the Commission: when precisely is the disclosure date? The statute defines the initial disclosure date as "the first date during any calendar year 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). The Commission asks whether entities spending funds on a communication in advance of its airing as an "electioneering communication" must disclose that spending within 24 hours of exceeding the $10,000 threshold – even though this precedes airing of the communication.

The Commission does point out legitimate concerns and complexities regarding such an advance disclosure requirement. The complexities center on the fact that it is difficult to know with much certainty whether a communication constitutes an "electioneering communication" until the time of its airing – given that "electioneering communications" status depends not merely on the content of the communication but also the timing of and audience for its airing. Even the existence of a contract to air the communication or pre-payment of broadcast costs is not in this particular instance a strong guarantee that the communication will ultimately constitute an "electioneering communication." What if, due to movement in the polls, the airing of a communication originally intended to be disseminated as an "electioneering communication" is accelerated to prior to the 60/30 day window? What if an organization incurs costs to produce multiple potential "electioneering communications," only never to air some or even all of them?

Ultimately, it is spending or contracting to spend on what are in fact "electioneering communications" that triggers disclosure requirements under this section of BCRA. Accordingly, we believe it would be appropriate under the statute for the Commission to conclude that the disclosure date occurs only upon the actual airing of an "electioneering communication." Upon that occasion, previous disbursements for the direct costs of production or airing of the electioneering communication, as well as amounts obligated under all existing contracts relating to the direct costs of production or airing of that communication, would have to be disclosed within 24 hours.

*(a)(2)*: We agree that the Commission should retain the flexibility to identify other costs not specifically listed in proposed 11 CFR 104.19(a)(2) as direct costs of producing or airing electioneering communications. As such, we support its decision to consider the specified costs a non-exhaustive list.

*(b)*: We support proposed 11 CFR 104.19(b)(1), (3) , (4) and (8). However, neither option under 104.19(b)(2) correctly reflects the operative provision of BCRA. Alternatives 4-A and 4-B both require identification of any person sharing or exercising direction or control only over the electioneering communications activities of the person or entity. However, 2 U.S.C. 434(f)(2)(A) requires identification of "any person sharing or exercising direction or control over *the activities of* [the person making the disbursement on an electioneering communication]." (emphasis added). The statute thus is not limited to requiring disclosure of those involved in directing or controlling the entity's "electioneering communications" activities. Rather, it seeks identification of those involved in directing or controlling "the activities" of the entity. This is an important distinction. The statutory language mandates disclosure as to who is truly calling the shots at an organization financing electioneering communications, however the entity may structure responsibilities relating to the communications themselves. Congress's choice is understandable, and there is no reason to depart from it.

Furthermore, in assessing the concept of "direction" or control" for these purposes, the definitions of "direct" contained in the final party and candidate soft money rules and existing earmarking regulations are inapposite. "Direction" or "control" here should be interpreted broadly, to facilitate fulfillment of the strong public interest in comprehensive and meaningful disclosure.

We prefer Alternative 5-B to 5-A in proposed 11 CFR 104.19(b)(5). It is possible that some organizations will deny that their electioneering communications "pertain" to elections. This situation would be avoided by requiring individuals or entities financing electioneering communications simply to identify the candidates referred to in the communication and the elections in which they are candidates, as is provided for under Alternative 5-B.

The contributor disclosure requirements and options offered under proposed 11 CFR 104.19(b)(6) and (7) should not be limited to so-called *MCFL* corporations falling under the definition of 11 CFR 114.10(h). It should also be available to any "person" capable of financing electioneering communications.

There is no reason to exclude *MCFL* corporations which make electioneering communications from BCRA recordkeeping requirements (as provided under 104.19(c)).

**Part 105**

Proposed 11 CFR 105.2

We support the proposed revisions to 11 CFR 105.2, which would ensure that persons who make electioneering communications that refer to Senate candidates report to the Commission rather than to the Secretary of the Senate.

**Part 114**

At one point in its commentary, the Commission lists "incorporated 501(c)(4)'s and 527's, as long as they meet certain requirements" as among the personas or entities it believes may make electioneering communications.

However, in its subsequent commentary on the impact of the Wellstone amendment on the Snowe-Jeffords provision, the Commission indicates that "the result of the Wellstone amendment is that any corporations whatever, including incorporated 501(c)(4) organizations and 527 organizations, are prohibited from making electioneering communications," except (as noted in the next paragraph of the commentary) for incorporated 501(c)(4) organizations that meet the conditions for qualifying as *MCFL* groups (see discussion of 11 CFR 114.10).

The latter explanation is correct. The Wellstone Amendment (see 2 U.S.C. 441b(c)(6)) completely vitiated any effect of 2 U.S.C. 441b(c)(2) (the provision originally authored by Senators Snowe and Jeffords, allowing incorporated 501(c)(4) and 527 organizations

to fund electioneering communications from bank accounts to which only individuals could contribute, though in potentially unlimited amounts). The only limit to the full applicability of the Wellstone Amendment to *all* incorporated 501(c)(4) and 527 organizations is the *MCFL* decision's exception from 2 U.S.C. 441b for a narrow subset of incorporated 501(c)(4)'s. BCRA's sponsors clearly considered and intended the Wellstone Amendment to exist in harmony with *MCFL*. As Senator McCain indicated on the Senate floor on March 20, 2002, during final consideration of BCRA:

> "The legislation does not purport in any way, shape or form to overrule or change the Supreme Court's construction of the Federal Election Campaign Act in MCFL. Just as an MCFL-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an MCFL-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.' Nothing in the bill purports to change MCFL."

148 CONG. REC. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Along these lines, the prohibition on the disbursement of treasury funds by incorporated 501(c)(4) organizations (except *MCFL* organizations) and incorporated 527 organizations ultimately applies to "electioneering communications" as defined in 2 U.S.C. 434(f)(3) – the same definition that triggers disclosure requirements and potentially source prohibitions in the case of other individuals or entities. Specifically, the Wellstone Amendment sweeps into the coverage of 2 U.S.C. 441b spending by incorporated 501(c)(4) and 527 organizations on "electioneering communications" as defined in 2 U.S.C. 434(f)(3) that are "distributed from a television or radio broadcast station or provider or cable or satellite television service" (*see* 2 U.S.C. 434(f)(3)(A)) and targeted to the relevant electorate except in the case of communications referring to Presidential and Vice-Presidential candidates (*see* 2 U.S.C. 434(f)(3)(A)(iii)). Thus, with respect to the Wellstone Amendment's coverage of certain communications, the match to 2 U.S.C. 434(f)(3) as a whole is evident. As the Commission correctly intends, under 2 U.S.C. 434(f)(3), to subject presidential primary advertisements to a targeting requirement, it should construe the Wellstone Amendment's scope similarly.

In summary, unions and corporations (including incorporated 501(c)(4) and 527 organizations) may not spend their treasury funds on "electioneering communications" as defined in proposed 11 CFR 100.29 (consistent with our commentary on that section above). The only exception to this rule for corporations is that provided for a narrow subset of 501(c)(4) organizations under *MCFL*.

Proposed 11 CFR 114.2

We support the revision of 11 CFR 114.2, which indicates that the *MCFL* exception also applies to electioneering communications as well as independent expenditures.

Proposed 11 CFR 114.10

We support the revision of 11 CFR 114.10(d). We strongly support the concept of having a certification requirement for corporate entities that seek to fund "electioneering communications" with their treasury funds under the *MCFL* exception. However, we oppose setting the certification threshold at $10,000 – considerably higher than the $250 certification threshold for *MCFL* status in the case of corporate entities financing independent expenditures. The Commission is correct that $10,000 is the spending threshold for triggering electioneering communications disclosure requirements under BCRA. However, this should not dictate the *MCFL* certification threshold – which serves the distinct and important purpose of helping the Commission assess compliance with 2 U.S.C. 441b and the limited exception thereto established by the *MCFL* decision. A $10,000 certification threshold would make sense only if a corporation could spend $10,000 of its treasury funds on electioneering communications *before* encountering the prohibition of 2 U.S.C. 441b – which is clearly not the case.

We support proposed 11 CFR 114.10(h), which allows *MCFL* organizations to avoid having to disclose all of their donors under the electioneering communications reporting requirements by establishing a separate bank account for financing these communications. In turn, only the individuals whose donations were deposited in such account would potentially be identified as contributors under electioneering communications reporting.

An incorporated entity may not receive a *de minimis* amount of corporate or union funds and still qualify for the *MCFL* exception for purposes of using its treasury funds to finance electioneering communications. We note that the Supreme Court deemed an "essential feature" of an *MCFL* organization the fact that it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *MCFL* at 264.

Proposed 11 CFR 114.14

Proposed 11 CFR 114.14 seeks to implement the prohibitions of 2 U.S.C. 441b(b)(2), 2 U.S.C. 441b(c)(1) and 2 U.S.C. 441b(c)(3)(A). Specifically, corporations and unions may not directly or indirectly disburse their treasury funds for electioneering communications, and other persons may not use corporate or labor treasury funds for such communications.

Congress intended that corporations and unions finance electioneering communications solely through the federal accounts of their separated segregated funds (see the comments of Senator Wellstone cited below). 2 U.S.C. 441b(c)(1) and (c)(3)(A) – including the prohibition on "indirect" corporate and labor spending on electioneering communications -- are designed to foreclose evasion. Given the likelihood of schemes to evade a reinvigorated 2 U.S.C. 441b, it is particularly important that the Commission give full effect to these provisions.

The Commission inquires as to what factors should be used to determine that the purpose element of proposed 11 CFR 114.14(a) has been met. We believe that this element is satisfied when the corporation or union intends that the funds it gives, disburses, donates, or otherwise provides pay for an electioneering communication, or knows or should know that such funds will pay for an electioneering communication.

Likewise, the purpose element of 11 CFR 114.14(b)(2) would be satisfied when the entity intends that the corporate or labor funds it provides to any person be used to defray any of the costs of an electioneering communication, or when it knows or should know that the corporate or labor funds it provides to any person will be used to defray any of the costs of an electioneering communication.

To enable enforcement of these provisions the Commission requires in proposed 11 CFR 114.14(d) that a person demonstrate "through a reasonable accounting method" that no corporate or labor funds were used to pay any portion of an electioneering communication. Given Congress's specific insistence on preventing corporate or labor treasury funds from being used for electioneering communications and the strong likelihood of schemes to evade this prohibition, we believe that a more specific and stringent accounting method should be required in this instance.

We support proposed 11 CFR 114.14(c), which essentially describes the circumstances where treasury funds disbursed by corporations or unions would not be foreclosed from use on electioneering communications. For example, if a corporation pays a salary to an employee for bona fide employment, that employee will not run afoul of 2 U.S.C. 441b if he or she subsequently uses those funds for electioneering communications.

To fully implement the statute – which prevents both "direct" and "indirect" corporate or labor spending on electioneering communications -- corporations and unions must be prohibited from setting up, operating, or controlling unincorporated accounts that are not federal political committees (*e.g.*, a non-federal account of a separate segregated fund, or some other 527 organization that is not a federal political committee) which receive unlimited donations from individuals and then spend those donations on electioneering communications.

Congress clearly did not consider unincorporated non-federal accounts of corporations and unions to be vehicles for spending on electioneering communications. The Wellstone Amendment vitiated the Snowe-Jeffords language permitting incorporated 501(c)(4) and 527 organizations to use separately maintained, unlimited donations from individuals to finance electioneering communications. The amendment was expressly premised on the idea that all corporations and unions – except for incorporated 501(c)(4) organizations falling under the *MCFL* exception – would have to finance electioneering communications solely through limited donations from limited sources to their federal political action committees. As Senator Wellstone explained on the Senate floor on March 26, 2001:

> ". . . [U]nder this bill, only corporations and unions may not spend funds from their treasury or soft money for this purpose. *If a corporation or union wishes to run electioneering communications, they must use a PAC with contributions regulated by Federal law to do so.* The point is, they have to do it with hard money . . . [My amendment] says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads."

148 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (statement of Senator Wellstone) (emphasis added). The Commission should take guidance from the legislative history of the electioneering communications provisions to ensure that the prohibition on "indirect" corporate and labor financing of electioneering communications is implemented to its full extent, preventing these organizations from setting up, operating, or controlling unincorporated non-federal accounts that spend large donations from individuals on electioneering communications.

Thank you in advance for your consideration of these comments. The Campaign and Media Legal Center looks forward to working with the Commission during the course of this rulemaking and, along those lines, would greatly appreciate its extending Glen Shor the opportunity to testify on August 28th or 29th.

Sincerely,

/s/

**Glen Shor**
**Associate Legal Counsel**
**The Campaign and Media Legal Center**