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: Electioneering Communications

Dear Ms. Dinh:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit the attached comments on the Notice of Proposed Rulemaking to implement Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), published at 67 *Fed. Reg.* 51131 (August 7, 2002).

In order to be as helpful as possible, Lawrence Noble, Executive Director of CRP, and Paul Sanford, Director of FEC Watch, request an opportunity to testify at the hearing. Due to other commitments, we would prefer to testify on Thursday, August 29. If necessary, we can testify on August 28, but will not be available after 4:00 p.m. on that day.

Respectfully submitted,

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
Director
FEC Watch

Attachment

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BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2002-13

ELECTIONEERING COMMUNICATIONS

Comments of FEC Watch and the Center for Responsive Politics

I. Introduction

FEC Watch and the Center for Responsive Politics submit these comments in response to the Notice of Proposed Rulemaking to implement Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). FEC Watch is a project of the Center For Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

II. Comments

This comment generally follows the organizational structure of the narrative portion of the NPRM. Topics about which we have no comment have been omitted.

A. What Is An Electioneering Communication?

1. General Definition

The proposed general definition is consistent with BCRA. Substituting the phrase "publicly distributed" for the word "made" adds clarity and precision. We urge the Commission to include this phrase in the final rule.

We support the proposal to use a definition of "clearly identified candidate" that is based on the definition in the current regulations.

We also support the Commission's proposal to defer promulgation of an alternative definition of electioneering communication.

2. Definition of broadcast, cable or satellite communication

The Commission's proposed list of media that should be included in the definition of electioneering communication is generally consistent with BCRA.

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As we have previously stated, we do not believe Internet communications should be *per se* exempt from the application of BCRA. However, the exclusion of web casts from the definition of broadcast, cable or satellite communication in Title II of BCRA is consistent with the rules implementing Title I, which exclude the Internet from the definition of "public communication" in 11 CFR 100.26.

The NPRM seeks comments on the exclusion of satellite radio, low power FM and low power television from the definition of broadcast, cable or satellite communications. We recommend that these services not be excluded. From a technological standpoint, these systems are virtually identical to standard broadcast systems. Low power stations are identical to their full power siblings except for their transmitter power levels, *i.e.*, how "loudly" their signals are transmitted. Satellite radio services use different frequencies and cover a wider area than an FM radio station, but these differences are largely invisible to listeners. Otherwise, the nature of the broadcasts is the same.[1] Thus, there is no basis for distinguishing these systems from standard broadcast services.

If the purpose of this proposal is to exclude services that reach small audiences, no *per se* exclusion for low power and satellite services is needed to achieve this goal. Under the general definition, communications that do not reach 50,000 people in the identified candidate's district or state will not be electioneering communications. This will exclude services with small audiences from the coverage of Title II.

For these reasons, we recommend that low power and satellite services be included in the definition of broadcast, cable or satellite communication.

3. Targeting

Construing the term "person" for purposes of the targeting limitation as those natural persons residing in a jurisdiction regardless of citizenship status or voting age is consistent with BCRA. We expect this will be the easiest way to measure whether a communication is targeted, since the most readily available census information will likely be the number of natural persons living in a geographic area.

We support the Commission's proposal to create a searchable database of congressional districts and broadcast outlets for determining whether communications are targeted. The FCC should use its authority under section 201(b) of BCRA to require stations to identify the Congressional districts and states in which they reach 50,000 people. The station's grade B contour could be used as the standard for a station's coverage area.

[1] In some respects, satellite radio services resemble the high power AM "clear channel" stations that were once the cornerstone of the broadcast industry, some of which could be heard throughout the U.S. during nighttime hours.

The Commission's list of what should be included in the database may need to be expanded to include network programming providers. While these providers do not broadcast directly themselves, they do sell advertisements during their programs that local affiliates are required to broadcast along with the program. Because these advertisements are being simultaneously disseminated by all of the network's affiliates, the relevant "coverage area" for such a communication would be the network's coverage area, rather than the local affiliate's coverage area. By including networks in the database, users would be able to determine whether disseminating a communication via a network broadcast would cause the communication to be an electioneering communication.

The NPRM also raises the issue of whether audiences should be aggregated in determining targeting. Generally, we believe audience size should be determined on a per-transmission basis. Under this approach, the audiences of all the stations that simultaneously transmit a communication would be aggregated to determine whether the 50,000 person threshold has been exceeded. Thus, when a communication is distributed via a network of stations and is simultaneously transmitted by all the affiliates, the audiences of all the affiliates would be aggregated. In contrast, multiple transmissions of a single communication, whether through a single outlet or several outlets, should be treated as separate communications. As a result, the audiences of multiple transmissions of the same communication should not be aggregated to determine whether the communication is targeted to 50,000 persons.

We also support the Commission's proposal to treat the database of stations and Congressional districts as the definitive evidence of whether a communication is targeted. However, the Commission should have a procedure through which the public could seek review and modification of the determinations made in the database.

4. Presidential primaries

Limiting the electioneering communication definition's application to presidential primary candidates is consistent with the overall intent of BCRA. Of the two alternative approaches set out in the NPRM, we prefer the approach used in Alternative 1-B. However, we believe it should be revised to include communications anywhere in the U.S. during the 30 days prior to a national nominating convention. These communications should be considered publicly distributed within 30 days of the convention for purposes of the electioneering communication definition.

We do not believe BCRA can reasonably be interpreted as applying to Presidential and Vice Presidential primary candidates only during the 30 days before the national nominating convention, as is suggested in the narrative portion of the NPRM. This proposal is apparently based on a reading of section 434(f)(3)(II)(bb) that treats the phrase "that has authority to nominate a candidate" as modifying the phrase "primary or preference election." This is an incorrect reading of the statutory language. The phrase "that has authority to nominate a candidate" modifies the phrase "a convention or caucus of a political party." The phrase "primary or preference election"

is unmodified, and as a result, all primary and preference elections are within the electioneering communications definition, regardless of whether they have the authority to nominate a candidate.

B. Exemptions from Electioneering Communications

1. Expenditures and independent expenditures

The NPRM correctly notes that the purpose of section 434(f)(3)(B)(ii) is to avoid duplicative and potentially conflicting reporting requirements. The notice seeks comments on alternative versions of section 100.29(c)(3), which implements this exception.

One of the primary purposes of Title II of BCRA is to ensure more complete disclosure of electioneering communications. Therefore, given the choice between a disclosure scheme that is in most instances complete but is occasionally duplicative, and a disclosure scheme that is not duplicative but also is not complete, we would urge the Commission to choose the former. We believe such a scheme is preferable even though it would occasionally require persons making electioneering communications to disclose those communications more than once.

For these reasons, we recommend that the Commission craft section 100.29(c)(3) as narrowly as is necessary to avoid extensive duplication of reporting requirements, or to avoid conflicting reporting requirements. We believe alternative 2-B achieves this goal. We urge the Commission to include alternative 2-B in the final rules.

2. Communications that refer to the popular name of legislation

In evaluating the need for exemptions from the definition of electioneering communication, it is important to keep in mind that the scope of the activity regulated in Title II of BCRA is already narrowly drawn. For example, without any further exemptions, Title II would only limit communications that refer to the "McCain-Feingold bill" if those communications are disseminated in the states of Arizona and Wisconsin during the 30 or 60 days prior to elections in which Senators McCain or Feingold will be on the ballot. In effect, this is ninety days out of every six-year Senate term in two of the fifty states. In this example, Title II would not limit communications disseminated in the two states during the other 2102 days of the six-year cycle. Furthermore, Title II would never limit dissemination of the communication in other states.

In the case of the "Shays-Meehan bill," Title II would limit a communication that refers to the bill for 90 days out of every two-year election cycle. However, these limits would only apply to a communication disseminated in Congressman Shays and Congressman Meehan's Congressional districts. The limits would not apply to the communication anywhere outside those two districts. Nor would Title II limit communications that contain references to "campaign finance reform," "the Bipartisan

Campaign Reform Act," "soft money," or any other reference to the subject matter of the legislation, so long as the Congressmen's names are not mentioned.

Because of the narrow impact of Title II and the alternative ways that references to legislation may be communicated without identifying Federal candidates, we believe the proposed exemption in section 100.29(c)(5) is not needed.

In addition, we believe it will be difficult for the Commission determine whether a particular reference is a reference to the popular name of a bill or law. While some references will be readily verifiable, such as McCain-Feingold or Tauzin-Dingell, others such as "the Dole/Gingrich budget" will not. This ambiguity will make it difficult for the Commission to distinguish genuine grass roots lobbying ads from a carefully crafted attack ads directed at an incumbent officeholder. This would provide an avenue for the dissemination of the type of sham issue ads that Title II was intended to limit.

For these reasons, we recommend that the Commission not include section 100.29(c)(5) in the final rules.

3. Communications urging support for or opposition to legislation

The scope of the exemption for communications urging support for or opposition to legislation is crucial to the electioneering communications rules. This exemption must be narrowly crafted to ensure that it does not completely undermine Title II of BCRA. Again, it is important to keep in mind that, because of the time and targeting components of electioneering communication definition, Title II affects only a narrow range of communications.

Of the four alternatives, we believe version B is most consistent with BCRA. However, some additional elements would help to ensure that this exemption remains limited. We have prepared a revised version of this exemption, which reads as follows:

(c) *Electioneering communication* does not include any communication that:

* * *

(6) (i) Contains the following elements:

(A) The communication is devoted exclusively to a pending legislative or executive branch matter;

(B) The communication's only reference to a clearly identified Federal candidate is a statement urging the public to contact that Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter; and

(ii) Does not contain any of the following elements:

(A) Any reference to any political party, including the candidate's political party;

(B) Any reference to the candidate's record or position on any issue; or

(C) Any reference to the candidate's character, qualifications or fitness for office or to the candidate's election or candidacy.

We strongly recommend against adoption of alternative 3-C because it uses the express advocacy standard that Congress intended to supersede by passing BCRA. We also believe that using phone numbers, mail addresses or e-mail addresses as one of the criteria for the exemption will invite attempts to use these elements to inoculate communications from BCRA's coverage.

4. Communications by state and local officeholders

Under proposed section 100.29(c)(7), communications by state and local candidates and officeholders that mention a Federal candidate would be excluded from the definition of electioneering communications if the reference to the Federal candidate is "merely incidental" to the state or local candidacy.

This exemption is too broad and should be modified. As written, the exemption would allow a state or local candidate to run ads that praise or criticize a Federal candidate, so long as the ads were "merely incidental" to the state or local candidacy. This would be inconsistent with section 434(f)(3(B)(iv), which says that the exemptions in section 100.29(c) may not exclude from the definition of electioneering communications any communication that promotes, supports, attacks or opposes a clearly identified Federal candidate. *See* 2 U.S.C. § 431(20)(A)(iii), BCRA Title I, section 101(b).

Section 100.29(c)(7) should be limited to communications that do not promote, support, attack or oppose clearly identified Federal candidate. Limited in this manner, the exemption could be extended to communications by state and local party committees. This would be consistent with the limitations on the use of nonfederal funds imposed by Title I of BCRA.

5. Public service announcements

The narrative portion of the NPRM seeks comments on whether public service announcements should be exempt from the definition of electioneering communication. A blanket exemption for public service announcements is overly broad and would create a significant incentive for the creation of sham public service announcements that refer to a Federal candidate or in which a Federal candidate makes an appearance, ostensibly in some other role. A blanket exception would allow these ads to be disseminated without regard to the electioneering communications provisions of BCRA. For these reasons, we recommend against including this exemption in the final rules.

6. Business and professional advertisements

The narrative portion of the NPRM seeks comments on whether advertisements for a candidate's business or professional practice should be exempt from the definition

of electioneering communications. An exception along these lines is appropriate, since the rules might otherwise require a business whose name includes the name of a candidate to, in effect, stop all advertising during the 30 and 60 day periods.

However, this exemption should be narrowly drawn. It should apply only when the name of the candidate is being used as part of the name of the business or professional entity. Furthermore, a communication that uses a candidate's name in this manner should only be exempt if it promotes the products or services provided by the business entity. Finally, the communication should be exempt only if the candidate does not appear in the communication. Ads in which candidate appears should be treated as electioneering communications.

Written in this manner, the exemption would allow a business to continue advertising using the candidate's name during the periods before an election. The candidate would be precluded from appearing in the advertisement, but only during the 30 and 60 day pre-election periods.

7. Unpaid communications

A blanket exemption for unpaid communications would allow corporations that operate broadcast or cable stations to broadcast ads that refer to clearly identified candidates during the 30 and 60 day periods, so long as they do not charge the candidate or the candidate's opponent for the airtime. This would be inconsistent with BCRA.

The disclosure requirements contain a $10,000 threshold beneath which persons making electioneering communications are not required to disclose their communications. This threshold minimizes the impact of Title II on persons who make electioneering communications that involve little or no cost.

8. Programs on public access channels

A complete exemption for programs disseminated on public access channels would allow corporations and labor organizations to produce public access programs that are essentially infomercials for or against a Federal candidate. These programs could discuss a candidate's accomplishments during the 30 and 60 day periods, and would be permissible so long as they do not expressly advocate the election or defeat of a candidate. Such an exemption would be plainly inconsistent with BCRA.

Furthermore, a public access exemption is unnecessary because other provisions of the rules provide adequate safeguards for public access programs. Entities that produce news magazine programs will be covered by the news story exemption. Programs that urge viewers to contact Federal officeholders about a legislative matter may be covered by section 100.29(c)(6). In addition, programs that are not covered by any of these exemptions are still subject to a $10,000 disclosure threshold. Many public access shows are produced for less than $10,000.

C. Who May Make Electioneering Communications?

1. Affiliated entities

The NPRM asks whether BCRA prevents an entity that is prohibited from making or funding electioneering communications (a "prohibited entity") from being affiliated with an entity that is permitted to make or fund electioneering communications (a "permitted entity"), provided that the permitted entity receives no prohibited funds from the prohibited entity.

Under section 441b(c)(3)(A), an electioneering communication is considered made by any entity which "directly or indirectly disburses any amount" for the cost of the communication. We interpret this to mean that a permitted entity may not receive any funds or financial support from a prohibited entity if the permitted entity intends to make electioneering communications.

2. Funds received by corporations that later change form

The NPRM asks whether a 501(c)(4) or 527 organization that changes from a corporation to a limited liability company or other entity should be able to use donations received while incorporated for electioneering communications.

Donations received while the entity was a corporation should be considered corporate funds. Under section § 441b(c)(2), electioneering communications can only be "paid for exclusively by funds provided by individuals." Thus, the entity may not use these funds for electioneering communications, even if the entity has changed form. Corporations that change form should be required to raise new funds to pay for electioneering communications.

D. Who May Not Make Electioneering Communications?

1. Application of Wellstone amendment to Presidential candidates

The NPRM sets forth an alternative interpretation of the Wellstone amendment that, according to the Notice, would result in the Wellstone amendment not applying to communications that refer to Presidential and Vice Presidential candidates. The Notice asks whether this interpretation is correct, and whether electioneering communications about Presidential and Vice Presidential candidates should be defined as not targeted communications for purposes of the Wellstone amendment.

The alternative interpretation set out in the NPRM is an incorrect interpretation of section 441b(c)(6)(B). The first clause of this provision is global in that it encompasses all electioneering communications distributed through the listed media. The second part of this section is properly interpreted to mean that, for a subset of this universe (communications that refer to a candidate for an office other than President or Vice

President), the section only covers communications that are targeted to the relevant electorate. The section covers all communications that mention candidates for President or Vice President.

2. Permissible level of corporate and labor organization contributions

As the Commission recognizes, Congress has enacted a law that prohibits the indirect use of funds from corporations and labor organizations for electioneering communications, and requires other entities that make electioneering communications to use funds from individuals for that purpose. The Commission should issue rules to implement this prohibition as enacted. The Commission does not have the authority to write a *de minimis* exception into the rules based on its belief that the statute as written is unconstitutional. Only the courts may pass on the constitutionality of legislation enacted by Congress.

In addition, we note that while some courts have adopted a *de minimis* rule for corporate funding of MCFL corporations, there have been no rulings regarding the necessity of such a rule for entities that make electioneering communications. Moreover, even the Supreme Court's original decision in *FEC v. MCFL*, 479 U.S. 238 (1986) did not contemplate such an exception. Rather, the Supreme Court said that the exemption from section 441b applies to a corporation that "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *Id.* at 264. Therefore, the Commission should enforce the rules regarding the funding of electioneering communications as written by Congress.

3. Certification of qualified nonprofit corporations

We urge the Commission to incorporate the necessary requirements regarding certifications of qualified nonprofit corporation status into the regulations and require corporations to certify their status based on those regulations.

If the rules were to allow organizations to certify their eligibility based on court decisions rather than the regulations, each certification the Commission receives could mean something different, depending upon the submitting organization's particular interpretation of a court case. The Commission should establish policies that treat all organizations identically.

We also believe the inherent differences between court opinions and regulations argue against allowing organizations to certify based on a court decision. In most instances, court decisions are based on the specific factual situations presented in the case. In contrast, notice and comment rulemaking allows an agency to consider a broader range of issues and factual situations, and to formulate rules that serve the statutory purposes in all of those situations. As a result, agency rules inevitably provide more useful guidance to a regulated entity than a court opinion.

For these reasons, we urge the Commission to revise section 114.10 as needed, and require corporations to certify their qualified nonprofit corporation status according to the revised regulation.

4. Establishing purpose and contributor liability

The NPRM seeks comments on how purpose should be established in the context of the prohibition on indirect use of corporate and labor organization funds for electioneering communications in section 114.14.

A corporation or labor organization should be held liable for funding electioneering communications if it gives funds to another entity and specifically directs the recipient to use the funds for electioneering communications, or suggests that the recipient use the funds for that purpose. The corporation or labor organization should also be liable if it provides funds to another entity under circumstances where it knows or should know that the funds will be used for electioneering communications, *i.e.*, willful blindness.

These standards should also apply to other contributors. Thus, if a contributor provides funds that are later used for electioneering communications, and the contributor knew or should have known that the funds would be used for that purpose, the contributor should be responsible for the communication along with the recipient. However, if the contributor did not know, and the circumstances were not such that the contributor should have known, the contributor should not be held responsible for the communication.

E. Status of amounts given for electioneering communications

Overall, the Commission's approach for the treatment of amounts given to political committees and non-committee entities is consistent with BCRA and FECA.

The NPRM raises the issue of whether funds given to the nonfederal account of a PAC for electioneering communications should be subject to the contribution limits. Generally, amounts given to the nonfederal account of a PAC are not subject to the contribution limits. However, section 441b(c)(3)(A) prohibits a corporation or labor organization from "directly or indirectly disburs[ing] any amount for any of the costs" of an electioneering communication." This includes amounts disbursed by the nonfederal account of a corporation or labor organization's separate segregated fund. Therefore, the nonfederal accounts of separate segregated funds are prohibited from making electioneering communications.

In contrast, section 441b(c)(3)(A) has no effect on nonconnected committees, since these committees have no connected organization. Consequently, the nonfederal account of a nonconnected committee may make electioneering communications. However, the rules should require nonconnected committees to be able to demonstrate,

using generally accepted accounting principles, that all funds used for electioneering communications came from individual donations.

F. Reporting

1. Candidate committees

The narrative portion of the NPRM seeks comment on whether the exemption for expenditures should be eliminated when a candidate committee makes an expenditure for an electioneering communication.

Section 434(f)(6) states "any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act." We interpret this to mean that Congress intended to add the electioneering communications reporting requirements to pre-existing reporting requirements imposed by the FECA. Therefore, we believe that candidate committees should be required to disclose electioneering communications that exceed $10,000.

2. State and local party committees

For the reasons stated above, we recommend that the Commission revise section 100.29(c)(7) to exempt state and local party committee communications that do not promote, support, attack or oppose a Federal candidate from the definition of electioneering communication. Such an exemption will relieve state and local party committees from the electioneering communications disclosure requirements in many circumstances.

In contrast, the Commission should not completely exempt state and local party committees from the definition of "person" for purposes of Title II disclosure. When a state or local party committee makes a disbursement that supports or opposes a Federal candidate but is not an expenditure, the committee should be required to report that disbursement as an electioneering communication. If state and local party committees are exempt from "person," these disclosures would not be required.

3. Responsibility for reporting electioneering communications

The custodian of records for an organization or an officer of the organization should be responsible for filing electioneering communication reports.

4. Costs to be counted toward the disclosure threshold

We urge the Commission to require aggregation of the costs of producing and the costs of airing an electioneering communication. Under this approach, the reporting obligation would attach when the aggregate costs of producing and airing an electioneering communication exceed $10,000.

The list of direct costs should be nonexhaustive, since there will be costs associated with an electioneering communication that the Commission has not anticipated.

5. Triggering event for disclosure

The NPRM seeks comments on the issue of whether the reporting requirements should be formulated in a way that requires disclosure of an electioneering communication prior to dissemination.

We recognize that requiring disclosure prior to dissemination may raise difficult issues. However, section 434(f)(5) states that "[f]or purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." Thus, the statute specifically contemplates disclosure prior to payment where the spender enters into a contract to make a future payment. In most instances this disclosure obligation would also attach prior to dissemination of the communication, since the contract is usually agreed to prior to dissemination.

However, the disclosure requirements could be formulated in a way that implements section 434(f)(5) but does not raise the issues associated with pre-dissemination disclosure. The rules could require a person who contracts to make an electioneering communication to disclose the contract at the time it is made, but not require the person to identify the candidate who will be referred to in the communication at that time. Later, when the communication is publicly disseminated, the person would be required to disclose the communication with the candidate identification, perhaps referencing back to the initial disclosure of the contract.

For political committees that make electioneering communications, the Commission's recently issued Independent Expenditure Reporting rules may provide a useful model. 67 *Fed. Reg.* 12834 (March 20, 2002). Those rules require political committees that pay the production and distribution costs of an independent expenditure in one reporting period but do not publicly disseminate it until a later reporting period to use a two-step reporting process. *Id.* at 12837. First, the committee reports the disbursements for the production and distribution costs on Schedule B in the reporting period when the disbursements are made. Later, when the independent expenditure is publicly disseminated, the committee submits a Schedule E disclosing the independent expenditure and referencing the earlier Schedule B transaction. The Commission could require the same two-step reporting process for political committees that make electioneering communications.

For non-committee persons who make electioneering communications, the Commission could devise a similar mechanism using Form 9. At the time of the initial disbursement or contract to make a disbursement, the person would be required to disclose the information in paragraphs (A), (B), (C), (E) and (F) of section 434(f)(2), but would not be required to disclose the information in paragraph (D). Later, when the

communication is publicly disseminated, the person would submit another Form 9 that refers back to the earlier submission and discloses the paragraph (D) information. Form 9 could be designed in a way that facilitates this process.

6. Limiting reporting to the 30 and 60 day periods

The NPRM seeks comment on whether it should limit reporting of electioneering communications to only the 30 days before a primary or the 60 days before a general election. While the NPRM does not indicate the exact form this proposal would take, it appears to be inconsistent with BCRA. As explained above, section 434(f)(5) treats contracts to make disbursements for electioneering communications as disbursements. Thus, the obligation to disclose, in some form, attaches at the time the contract is made. In many instances, these contracts will be made prior to the start of the 30 and 60 day periods. Limiting reporting to the 30 and 60 day periods would effectively negate section 434(f)(5). Therefore, we urge the Commission not to adopt this proposal in the final rules.

7. Direction or control

As we interpret the NPRM, the Commission is considering three alternatives for determining whether a person has exercised direction or control over a person making electioneering communications:

a. Using the earmarking regulations and the advisory opinions interpreting those regulations, which appear to establish a three-part test for direction or control. Under this test, persons exercise direction or control when they determine whether contribution should be made, and if so, the recipient, amount and timing of the contribution.
b. Use the soft money rules' definition of "to direct," *i.e.*, to ask a person who has expressed an intention to make a contribution to make that contribution.
c. Limiting direction or control to influence over certain aspects of an electioneering communication, specifically: contents, timing, frequency, duration or intended audience, or the specific media outlet used.

We believe direction or control should be broadly defined for purposes of electioneering communication disclosure. Therefore, we recommend that the Commission take into account a person's influence over all of the following determinations:

a. Whether to make an electioneering communication;
b. Which Federal candidate to identify;
c. How much will be spent;
d. The contents of the communication;
e. The timing;
f. The frequency;

g. The duration and/or intended audience of the communication; and
h. The specific media outlet used.

Regarding the second of the two alternatives described above, it is not clear how the definition of "to direct" could be adapted for the purposes of electioneering communications disclosure. If the Commission is proposing to define direction or control as "ask[ing] a person who has expressed an intent to make a contribution, donation, or transfer of funds . . . to make that contribution, donation or transfer of funds," we agree that this should be considered direction or control, but other types of influence should also be considered direction or control. We recommend that influence over the determinations listed above be included in the definition.

8. Identification of candidates

We believe alternative 5-B of section 104.19(b)(5) is easier to read and is consistent with section 434(f)(2)(D) of BCRA. We recommend that the Commission use this version in the final rules.

9. Itemization of receipts

The NPRM raises the issue of whether the rules should require every electioneering communication report to include itemization of all receipts since the beginning of the previous calendar year, even if they have previously been reported. The Notice suggests an alternative approach that would require itemization of funds received since the last report, similar to current Schedule A.

From a practical standpoint, limiting the itemization requirement to those funds received since the last report would be preferable. However, section 434(f)(2)(3) explicitly requires cumulative reporting retroactive to the beginning of the previous calendar year. While this may be unnecessarily duplicative, the Commission does not appear to have the authority to alter this requirement.

III. Conclusion

FEC Watch hopes that these comments are useful to the Commission as it attempts to formulate policies implementing Title II of BCRA. As indicated in our cover memo, Lawrence M. Noble and Paul Sanford would like to testify at the Commission's hearings on the Electioneering Communication NPRM.