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August 22, 2002

By Electronic Mail

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

Re: Comments on Notice 2002-13: Electioneering Communications

Dear Ms. Dinh:

I am writing on behalf of Common Cause and Democracy 21 to provide comments in response to the Commission's Notice of Proposed Rulemaking, published at 67 Fed. Reg. 51131 (August 7, 2002), to implement the so-called "Snowe-Jeffords" provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), Title IIA, relating to "electioneering communications."

Both Common Cause and Democracy 21 supported the enactment of the BCRA. I request the opportunity to testify, on behalf of both organizations, at the hearing to be held by the Commission on these rules. Because of commitments made prior to the Commission's recent alteration of the schedule for this rulemaking, I request that the testimony for Common Cause and Democracy 21 be set for August 29, 2002, although I could be available on the afternoon of August 28, 2002 if necessary.

Overview

The Commission's Title IIA regulations should be grounded on both the language of the statute and the clear congressional purpose in enacting this section of the BCRA. Congress was well aware of the loophole in the Federal Election Campaign Act (FECA) that had opened because of the proliferation of sham "issue" ads. These ads were making a mockery out of section 441b, a bedrock provision of the FECA, which for almost a century had banned the use of corporate, and for almost a half century, the use of labor union, treasury funds to make expenditures for the purpose of influencing federal elections. Senator Snowe, a chief sponsor of the Title IIA provision, addressed the intent of this section of the law:

> I have spoken of the exploding phenomenon of the so-called issue advertising in elections. That phenomenon continues unchecked and will continue unchecked if we turn a blind eye to reality. I am talking about broadcast advertisements that are influencing our Federal elections, in the overwhelming number of instances designed to influence our Federal elections, and yet no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning. These are broadcast ads on television and on radio that masquerade as informational or educational but are really stealth advocacy ads for or against candidates.
>
> Cong.Rec. S2455 (March 19, 2001)

The "express advocacy" test was formulated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), to draw a bright line between campaign ads, which are subject to FECA regulation, and issue ads, which are not. The Court developed and applied this test only for when the speaker "is an individual other than a candidate or a group other than a political committee." 424 U.S. at 79. Expenditures by candidates and political committees do not require a bright line test, the Court reasoned, because their speech "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

The application of the "express advocacy" test to outside groups has led to the widespread practice of corporate and union money being used to fund radio and television ads that are broadcast right before an election, that are targeted to a candidate's electorate, that name specific federal candidates, and that blatantly support or oppose those candidates by praising or attacking them, or their opponents. Such ads are, in fact, campaign ads, yet they carefully skirt the application of the section 441b prohibition by eschewing the use of certain "magic word" terms like "vote for" or "vote against."

This loophole has amounted to a functional repeal of the ban on corporate and union spending to influence federal elections. Congress determined in the BCRA to close this loophole, and in so doing, to restore vitality to the important protections provided by the section 441b ban on the spending of corporate and union funds in connection with Federal elections.

Congress acted, however, with an awareness of the constitutional issues surrounding the "express advocacy" question. As Senator Jeffords, the other chief sponsor of Title IIA, said on the Senate floor:

> We took great care in crafting our language to avoid violating the important principles in the First Amendment to our Constitution. In reviewing the cases, limiting corporate and union spending and requiring disclosure have been areas that the Supreme Court has been most tolerant of regulation....We also worked to make our requirements sufficiently clear and narrow to overcome unconstitutional claims of vagueness and overbreadth.
>
> Cong.Rec. S3033 (March 28, 2001).

The Supreme Court in *Buckley* struck down a "for the purpose of influencing" test in a related FECA provision, and then in *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986), struck down the section 441b "in connection with" test, because of First Amendment concerns about vagueness in the application of both those tests to outside groups. In order to save section 441b from invalidation, the Court substituted the "express advocacy" test it crafted in *Buckley* for the original congressional language. The Court did not say, either in *Buckley* or in *MCFL*, that this test is the *only* constitutionally permissible test, or that Congress would be forbidden from substituting a different, but equally clear, test to mark the line between issue discussion and campaign ads.

In enacting the BCRA, Congress followed precisely this path, and chose to draw a different, but equally precise, line to separate issue ads, which are not subject to regulation under the campaign finance laws, from campaign ads, which clearly and constitutionally are. Congress crafted a "time frame" test, which includes any ad that (i) is broadcast, (ii) refers to a clearly identified Federal candidate, (iii) runs within 30 days of a primary or 60 days of a general election, and (iv) is "targeted" to the electorate of the candidate mentioned. Such ads are subject to regulations specified in Title IIA, including a ban on the use of corporate and union money to fund such ads.

As the Commission knows, multiple plaintiffs are currently challenging the constitutionality of the "time frame" test enacted by Congress in Title IIA. The Commission is defending the statute in court, and for purposes of this rulemaking should, consistent with its litigating position, assume the constitutionality of the Title IIA provisions.

The Commission's task in this rulemaking is to enact regulations that best give effect to the congressional objective in Title IIA to close the sham issue ad loophole, and to ensure that corporate and union money cannot directly or indirectly be used to fund broadcast ads that fall within the time frame test.

Part 100 – Definitions

We agree with the approach in the proposed regulations, discussed at page 51132 of the Federal Register notice, not to issue rules to implement the "backup" definition of "electioneering communication" that is contained in section 434(f)(3)(A)(ii) of the statute. Since this provision, first enacted in the Senate as an amendment offered by Senator Specter, by its terms takes effect only if the primary "time frame" definition in subsection (A)(i) is declared unconstitutional "by final judicial decision," the backup provision has no current legal effect, and may never have any. Thus, implementing regulations at this time are both unnecessary and premature and, as the Commission notes, would likely be confusing as well.

Section 100.19. We agree with the position taken in proposed 100.19(f) that a 24-hour report of an electioneering communication is timely filed when "received" by the appropriate filing officer. This parallels the similar treatment of 24-hour independent expenditure reports set forth in 100.19(d). We also agree that the provision should be applied to a period of 24 contiguous hours, even if the period begins or ends on a weekend.

Definition of "electioneering communication"

Section 100.29(a). This section sets forth the definition of an "electioneering communication," and is therefore critical to the implementation of Title IIA. In general, we agree with the definition in the proposed section 100.29.

In particular, we agree with the approach that an "electioneering communication" is "made," as that term is used in section 434(f)(3)(A)(II) of the BCRA, when it is "publicly distributed," as proposed in section 100.29(a)(1)(ii) of the regulation.

We support the Commission's clarification of the statutory language concerning the application of the "targeting" requirement to the presidential primary election process. Nothing in the BCRA suggests that Congress intended nationwide application of Title IIA to ads which mention the name of a presidential candidate within 30 days of a primary election in any state. Rather, consistency with the treatment of congressional elections suggests that the "targeting" requirement of Title IIA should be read to apply only to ads run in a state within 30 days of the primary election in that particular state.

Of the two alternatives proposed by the Commission, we support adoption of Alternative 1-A, which provides that an "electioneering communication" is "targeted" when it can be received by 50,000 or more persons in a state where a primary election is being held, and is distributed in that state within 30 days before the primary election in that state, or can be received by 50,000 persons anywhere in the United States within 30 days of the national nominating convention of that candidate's party. We think this treatment of the issue embodies congressional intent to focus the application of Title IIA only proximate to an election, and only in those jurisdictions where the election is being held. We urge the Commission to incorporate this rule for presidential primaries into its final regulations.

We note that the commentary poses the question of whether Title IIA should apply at all to presidential primary elections, "given that candidates can only be nominated" at a national party convention, not in a primary election. This question is based on a highly artificial reading of the statute. The targeting language of Title IIA provides that an "electioneering communication" is made if it is broadcast "30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate..." Section 434(f)(3)(A)(II)(bb).

The punctuation of the provision makes clear that the phrase "that has authority to nominate a candidate" modifies only the term "convention or caucus of a political party," not the term "primary or preference election." Thus it is a plainly erroneous reading of the statute to contend that since primary elections do not "nominate" a candidate, they are not included within the subclause (bb) definition. Further, there is no indication whatsoever in the legislative history that Congress intended Title IIA not to apply at all to presidential primary elections. The Commission should reject this reading.

Section 100.29(b)(1). We support the definition of "refers to a clearly identified candidate" in proposed section 100.29(b)(1). We agree that the best approach is to adopt the Commission's longstanding definition of "clearly identified candidate" contained in 11 C.F.R. 100.17.

Section 100.29(b)(2). Although we generally agree with the definition of "broadcast, cable or satellite communication" in proposed section 100.29(b)(2), we do not think it is necessary or appropriate for the definition to automatically exclude Low Power FM Radio, Low Power Television or Citizens Ban Radio. Simply, there is no statutory basis in the BCRA to support any such exclusions. The Title IIA provisions apply plainly to "any" broadcast, cable or satellite communication – a definition which clearly encompasses the media which the rules propose to exclude.

The fact that these forms of broadcast media may have limited coverage is best addressed by the targeting provisions of Title IIA. In other words, if these low power media do not reach 50,000 persons, then any ad run on these media would not, by definition, be treated as an "electioneering communication." Conversely, if these low power media do reach 50,000 persons within a district or state, then they should be included as a form of "broadcast" communication, and to fail to do so would potentially open a loophole in the coverage of the Title IIA provisions. Accordingly, we ask the Commission to revise section 100.29(b)(2) to delete the low power exclusions contained therein.

Section 100.29(b)(3). We agree with the proposed definition of "targeted to the relevant electorate," subject to our comment above concerning the application of this concept to the presidential primary elections. We agree with the Commission's commentary that notes a communication is "targeted" if it is received by 50,000 or more persons in a district or state, even if it is received by more than that number outside the district or state.

Section 100.29(b)(4). As noted above, we support the approach taken in Alternative 1-A to address the presidential primary issue in the context of 100.29(b)(1)(iv), rather than in this section, for the reasons state above.

Section 100.29(b)(5). We agree with the approach taken in the proposed regulations that the Federal Communications Commission (FCC), in conjunction with the FEC, should establish a publicly available website that lists the number of individuals who receive the broadcast signals of each broadcaster and cablecaster, by state and by congressional district. This on-line database should allow for an easy "look-up" system so that a potential sponsor of an ad can readily determine whether the ad to be run on a particular broadcast station or cable outlet would reach 50,000 or more persons in a given state or CD. Reliance on that information should be, as the proposed regulation states, a "complete defense" on this question.

To the extent that the FCC does not currently maintain information necessary to compile the database required by the regulation, the FCC should require broadcasters, cablecasters and satellite operators to provide such data to it under the authority Congress provided in section 201(b) of the BCRA.

The "aggregation" issues discussed in the commentary are important. We support an approach that would apply the "50,000 person" test on a per-outlet/per airing basis. In other words, a communication would meet this threshold test only if it is aired on a broadcast outlet that, by the FCC data, reaches 50,000 persons in the relevant state or district for that one airing. Thus, if the same ad is aired twice on a broadcast station that reaches 40,000 persons in the district, it would not meet this test because each airing fails to reach the threshold. So too, if the same ad is aired on two broadcast stations, each of which reaches 40,000 persons in the district, it would also not meet this test because the ad was not aired on at least one broadcast outlet that in itself reaches 50,000 persons in the district. An ad, however, that is broadcast over a network of broadcast outlets, or distributed on a cable system of multiple stations, would require aggregation of the individuals reached by all of the broadcast outlets on the network or cable stations in the system.

We believe that the size of broadcast markets, as a practical matter, minimizes the possibility of "gaming" the 50,000 person requirement. As the commentary notes, "Theoretically, one ad could be distributed via several small outlets, each of which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons in the relevant area." 67 Fed.Reg. 51133. But we also agree that, "[p]ractically, the size of radio and television audiences may eliminate this concern." *Id.* Given that the concern is largely theoretical, we do not urge the Commission to make its rules unnecessarily complicated and cumbersome to administer by providing for aggregation of identical or similar ads, whether run simultaneously or not.

Although the term "person" is defined in the FECA to include entities as well as individuals, we believe the commonsense application of this term to the Title IIA provisions should include only "individuals." We agree with the approach taken by the commentary that "person" should be defined for this purpose as "natural persons residing in a given jurisdiction,

regardless of their citizenship status or whether they are of voting age." 67 Fed.Reg. 51133. Any other approach would be almost impossible to administer. The Commission should make this definition clear in the regulation.

Section 100.29(b)(6). We agree with the proposed definition of "publicly distributed."

Exclusions from the definition of "electioneering communication"

Section 100.29(c)(1). We agree that the definition of "electioneering communication" should exclude communications distributed by means other than broadcast, cable or satellite radio or television station, such as print media, billboards and telephones.

We do not, however, agree that webcasts should automatically be excluded from this definition. As developments in technology increasingly merge broadcasting with the Internet, the Commission should retain the flexibility to treat as broadcasting the dissemination of a communication via the Internet where there is no practical or functional distinction between broadcasting and Internet dissemination. Although this would not encompass many applications of the Internet, such as e-mail or the creation of a web page, it potentially would include other Internet capabilities, such as webcasts or video streaming. The flat exemption for the Internet proposed in the regulation is too broad-brush a treatment of this issue, which requires a more particularized approach.

Section 100.29(c)(2). We agree with the proposed "news story" exception in the proposed regulation. The regulation tracks the statutory language of the BCRA, section 434(f)(3)(B)(i), which in turn is based on the longstanding FECA exclusion from the definition of "expenditure" in section 431(9)(B)(i). We agree, also, with the broader coverage in the proposed regulation for news stories distributed through any "broadcast, cable or satellite television or radio station," instead of limiting the exception just to "broadcast" stations.

Section 100.29(c)(3). Section 434(f)(3)(B)(ii) of the BCRA excludes from the definition of "electioneering communication" any communication "which constitutes an expenditure or independent expenditure under this Act..." The Commission proposes two alternatives for implementing this provision.

We agree with the approach taken in Alternative 2-A, which most closely tracks the statutory language. We support this alternative on the assumption that when a disbursement by any entity – whether a federal political committee or not – constitutes an "expenditure" under FECA, then it is subject to the hard money funding requirements and reporting requirements of the FECA. As such, only federally permissible funds could be spent for such an ad, and the funds would be subject to normal FECA disclosure requirements.

To the extent there is any question about this, we suggest that the regulation be clarified to limit the exclusion to cover only those communications that "constitute an expenditure or an independent expenditure where only funds subject to the contribution limits, source prohibitions and reporting requirements of this Act are used to pay for the communication."

As the Commission notes, Alternative 2-A would eliminate duplicative reporting, in that any disbursement for what would otherwise constitute an "electioneering communication" that is in fact an "expenditure" under FECA, and thus already subject to FECA reporting requirements, would be excluded from the definition of "electioneering communication" and therefore not subject to the additional Title IIA reporting requirements imposed on "electioneering communications." We think this result is consistent with both the language of the statutory exclusion in section (B)(ii), and with the primary intent of this provision, which was to ensure regulatory coverage over spending on certain ads which, prior to the BCRA, have been made outside the scope of the FECA.

Finally, we agree that communications by authorized Federal candidate committees should not be subject to the Title IIA requirements. As the commentary notes, "all expenditures of authorized committees are, by definition, for the purpose of influencing the candidate's election to Federal office." 67 Fed.Reg. 51135. We read this to mean that the Commission is taking the position that an authorized candidate committee cannot as a matter of law make a disbursement which is outside the hard money requirements and reporting obligations of the FECA. If this is correct, then we see no reason to subject candidate committees to the additional reporting obligations of Title IIA.

Section 100.29(c)(4). We agree with the proposed exception based on section 434(f)(3)(B)(iii).

Sections 100.29(c)(5) and (6). These sections raise one of the most important issues presented by the rulemaking – whether and how the Commission should craft a "lobbying"-related exception to the definition of "electioneering communication."

The Commission's authority to do so arguably arises under section 434(f)(3)(B)(iv) of the statute, which exempts from the definition of electioneering communication:

> ...any other communication exempted under such regulations as the Commision 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).

Section 301(20)(A)(iii) of the BCRA, in turn, describes a public communication which refers to a Federal candidate "and that promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

Representative Shays, in discussing clause (iv) on the House floor, noted that:

> ...it is possible that there could be some communications that will fall within this definition [of electioneering communication] even though they are plainly and

> unquestionably not related to the 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.
>
> Cong.Rec. H410-11 (Feb. 13, 2002).
> (emphasis added)

Rep. Shays further characterized the permissible scope of clause (iv) exemptions as applying to "specific categories of speech where it is clear that such communications are made in a manner that is neutral in nature, wholly unrelated to an election, and cannot be used to promote or attack any federal candidates." *Id.* at 411. Senators McCain and Feingold, during subsequent Senate consideration of the bill, both specifically concurred in Rep. Shays' description of clause (iv). Cong.Rec. S2143 (March 20, 2002)(describing clause (iv) as providing the FEC with authority to exempt communications "that are clearly not related to an election and do not promote or attack candidates.")

This explanation of clause (iv) reinforces the narrow scope of the Commission's "limited" authority under this provision -- it applies only to matters which "plainly and unquestionably" are "wholly unrelated" to an election.

The clause (iv) authority of the Commission to craft regulatory exceptions to the definition of "electioneering communications" thus has two principal constraints.

First, any such exception must be "appropriate," and "consistent" with the requirements of the underlying definition of "electioneering communication" – in other words, the regulatory exception must not undermine the bright-line test that Congress crafted for definition itself. The point of Title IIA is to subject certain ads to regulation as campaign ads based on a clear, precise and objective test that will survive constitutional scrutiny for vagueness. Thus, any clause (iv) exception must adhere to standards as clearly defined as those in the underlying test.

Second, any clause (iv) exception promulgated by the Commission must not exempt public communications which "promote, support, attack or oppose" a federal candidate. Such communications fall within the scope of section 301(20)(A)(iii) of the FECA and therefore are, by definition, outside the scope of the Commission's clause (iv) authority.

It is our view that the Title IIA provisions are constitutional as enacted, and thus do not require any regulatory exceptions in order to survive judicial scrutiny. But within the two important parameters discussed above, the Commission has limited discretion to promulgate "appropriate" exceptions.

The Commission should approach the task of crafting clause (iv) exemptions narrowly and carefully. It should not view clause (iv) as a license to rewrite Title IIA, or as an invitation to solve every possible problem that might be generated by the application of Title IIA. The

Commission should invoke its clause (iv) authority only where there is a real and substantial case that Title IIA will apply in instances that are clearly inappropriate, where a clear exception can be written, and most importantly, where the exception itself will not be overbroad by exempting not only those ads that can legitimately be excepted, but also ads that do support or oppose a Federal candidate and thus should be included in Title IIA. Any such overbroad exemption promulgated by the Commission will open the door to a loophole in Title IIA, and is in excess of the Commission's clause (iv) authority.

Further, since it is predictable that efforts will be made to expand and abuse the scope of any exemption written by the Commission, any such exemption must be drafted carefully enough to withstand the creativity that we anticipate will be exercised in an effort to evade the Title IIA protections.

Notwithstanding these important constraints, the effort to draft an appropriate and narrow exclusion for "lobbying" communications is not inconsistent with the purpose of Title IIA.

But the various exceptions for this purpose proposed by the Commission do not adhere to the constraints on the Commission's clause (iv) authority. For that reason, we do not support any of the clause (iv) alternatives proposed.

Proposed section 100.29(c)(5) provides an exception for a communication which refers to a bill or law "by its popular name where that name includes the name of a Federal candidate..." There are two problems with this proposal. First, there is no objectively defined standard of what constitutes the "popular name" of a bill or law. While this determination is relatively easy to make in some cases because of common usage – e.g., the "McCain-Feingold bill" – in many other cases it would be both difficult to determine and subject to abuse. The name of any Federal officeholder could be associated with any popular or unpopular bill (or legislative act) on the theory that it constitutes a "popular" name. Thus, ads might talk about "the Lott tax cut" or the "Daschle death tax" and even if there was no other mention of a Federal candidate, the ad could clearly be crafted to promote or oppose the candidate mentioned in the context of the supposedly "popular name" of a bill or law.

Second, even if the Commission were to solve this problem by narrowly defining a set of criteria for determining the "popular name" of a bill, the discussion of that name could nonetheless be subject to abuse in the way the bill is discussed, so that negative discussion in the ad becomes an attack not on the bill, but on the candidate whose name is associated with the bill. Further, under the proposed exclusion, this could be done long after the bill invoked by popular name had been enacted. In this case, where the matter is no longer even pending before Congress, it is clear that the broadcast ad has no lobbying purpose, and the potential abuse would be even more patent.

Thus, an ad run in Arizona during a future reelection campaign by Senator McCain might repeatedly attack "the McCain-Feingold law" as trampling on the constitutional rights of the viewers. Even though the ad references a legitimate "popular name" of a law, and makes no other reference to a candidate, the ad could very well be – and given that the law is already

enacted, most likely would be – a candidate attack ad rather than any lobbying effort or other discussion of public policy. As such, the ad should be treated as an "electioneering communication," and to except it from that definition would not be "consistent" with the statute, and would accordingly be outside the Commission's clause (iv) authority.

In proposed section 100.29(c)(6), the Commission sets forth four alternatives for a "lobbying" exception to the definition of "electioneering communication." While we believe that an "appropriate" exception to cover a purely lobbying communication can be drawn, none of the proposed alternatives does so with sufficient safeguards against opening a loophole in the statute that would be subject to great abuse.

Alternative 3-A suffers from a potential problem of vagueness in directly imposing a "promote, support, attack or oppose" test on members of the public. While such a test meets constitutional standards for Title I purposes where it is imposed on political parties and other political committees whose activities "are, by definition, campaign related," *see Buckley* at 79, the test in this instance would be imposed on entities other than political committees, and may raise issues of vagueness. Although Congress incorporated the "promote, support" standard in setting forth the Commission's clause (iv) authority under Title IIA, it is the task of the Commission to draft appropriate exceptions under clause (iv) that, in application on the public, maintain a bright-line, non-vague standard. This alternative does not do so.

Alternative 3-C is plainly insufficient. It would exempt from the definition of "electioneering communication" any ad that refers to a public policy matter so long as the ad contains a phone number or other contact information for a federal officeholder. In so doing, it would describe – and thus exempt – virtually every ad that Congress intended Title IIA to cover. This Alternative would completely undermine the congressional effort to address the problem of sham issue ads. It is flatly inconsistent with the statutory language of clause (iv) and is clearly outside the scope of the Commission's authority.

Alternatives 3-B and 3-D similarly do not adhere to the constraints on the Commission's clause (iv) authority. The standard set forth in Alternative 3-B that a reference to a candidate be no more than a "brief suggestion" is not sufficiently precise. And the facial distinction in Alternative 3-D between candidates who are incumbent officeholders and those who are not may raise other constitutional issues.

Further, in both Alternatives, references to the candidate's party can be used as an effective proxy for references to the candidate himself, and as a means to promote or attack the candidate. An ad that rails against "Democrats who support big government bloat and waste," and then says "Call Congressman Jones and tell him to vote against big government," complies with the criteria of Alternative D, but can certainly be viewed as an attack on Congressman Jones.

However, with the intent of achieving the same goal as the Commission's proposed alternative exemptions, we suggest the following language, which incorporates elements of the Commission's proposals:

Electioneering communication does not include any communication that:

***

(6) (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.

The proposed exemption meets the two fundamental criteria for the Commission's clause (iv) authority. First, the basic rule set forth in paragraph (A) establishes a bright line test for application of the exemption, using clear standards in clauses (i) through (iv), that are amplified by the qualifications set forth in paragraph (B). And second, the proposed rule sufficiently guards against exempting communications that would "promote, support, attack or oppose" a candidate.

We submit that this proposed exception properly balances the competing concerns in crafting clause (iv) exemptions. It allows a narrow category of communications that are aimed at a specific non-campaign purpose to accomplish that purpose, while protecting against the possibility that sham communications that are in fact campaign ads could continue to escape Title IIA coverage under the exception. If the Commission is to adopt a clause (iv) exception for lobbying communications, we urge it to use the language suggested above.

Section 100.29(c)(7). This provision proposes to create an exception for ads by state candidates or associations of state candidates that mention a Federal candidate "if such mention of a Federal candidate is merely incidental to the candidacy" of the state candidate or candidates.

As drafted, the proposed exception is backwards. If anything, the mention of the Federal candidate should be incidental to the candidacy of the Federal candidate, not to the state candidate. For instance, this exception would allow a state candidate to run an ad that primarily praises a Federal candidate, on the theory that the mention and support of the Federal candidate is only "incidental" to the state candidate's campaign. As such, this proposed exception is clearly inconsistent with Title IIA and should not be adopted.

Further, this proposal aims to solve a problem for state candidates already addressed by the BCRA. Title I provides that state candidates may not spend soft money for ads "described in section 301(20)(A)(iii)" – i.e., public communications that promote, support, attack or oppose a Federal candidate. Section 441i(f)(1). Thus, state candidates are already permitted to spend non-federal funds on ads which mention Federal candidates so long as they do not "promote, support, attack or oppose" the Federal candidate.

And indeed, this is the proper scope of any possible exception from Title IIA as well – which allows the Commission under clause (iv) to promulgate an exception only if the ad would not be "described in section 301(20)(A)(iii)," i.e., promote or support a Federal candidate.

Thus, insofar as state candidates run ads that mention Federal candidates, the treatment of their public communications in Title I and Title IIA is consistent -- defined in both instances by whether the ads promote or support a Federal candidate. Any clause (iv) exception promulgated by the Commission should reflect this consistency.

Accordingly, if any broadcast ad run by a state candidate right before an election mentions a Federal candidate and supports or opposes that Federal candidate, Title I would require the state candidate to use hard money for the ad and to report the expenditure. Title IIA would properly treat that ad as an "electioneering communication" if it otherwise meets the Title IIA criteria.

On the other hand, if a state candidate ad mentions a Federal candidate without supporting or opposing the candidate, Title I allows those ads to be funded with non-federal funds. Technically, the ad would be an "electioneering communication" if it meets the Title IIA standards. But because clause (iv) gives authority to the Commission to exempt ads which do not "promote or support" Federal candidates, the Commission could exempt such ads by state candidates – but only such ads -- from Title IIA.

Thus, any exception to Title IIA for state candidates should include only ads which do not promote, support, attack or oppose Federal candidates. No other exception to Title IIA for ads by state candidates is needed, and no broader exception is permitted.

Finally, in response to a suggestion made in the commentary, we do not support any blanket exemption from the definition of "electioneering communication" for public service announcements. A *per se* and unbounded exemption for PSA ads featuring candidates right before an election carries with it a high risk for abuse. Such ads can showcase candidates in a favorable light speaking on a popular issue, and thereby assist their campaigns. An exemption for PSA ads would be within the Commission's authority only if it is narrowly and carefully crafted to ensure that it would not permit any ads which could support or oppose a candidate's election.

Part 104 – Reporting Requirements

Section 104.5. We agree with this proposed rule, and its application of the Title IIA reporting requirement to "every person" who makes an electioneering communication.

We agree with the commentary that, as noted above, the BCRA excludes any FECA "expenditure" from the definition of "electioneering communication." Section 434(f)(3)(B)(ii). Thus, a federal political committee making (and reporting) "expenditures" will not be subject to duplicative reporting under Title IIA, since those expenditures will not be considered to be "electioneering communications." As the commentary notes, "political committees will not be required to report their expenditures as electioneering communications." 67 Fed.Reg. 51140.

In response to a question raised by the commentary, we do not believe that the Commission should propose a different rule for a Federal candidate's authorized committee. Since "expenditures" by Federal candidates are already subject to FECA reporting, and since those expenditures are exempt from the definition of "electioneering communication," there is no statutory basis in the BCRA.

A similar rationale should apply to state and local party committees. If an ad run by such a committee refers to a Federal candidate and is an "expenditure" under the FECA – and therefore subject to FECA reporting – the ad is exempt from the definition of "electioneering communication," and therefore not subject to Title IIA reporting. Otherwise, the ad should be subject to the Title IIA requirements as an "electioneering communication."

In either event, there is no basis to provide state party committees with a *per se* exemption from the definition of "person" in the section 104.5 reporting requirement. To the extent state parties make "expenditures," they are and should be subject to FECA reporting. To the extent – if any – that state parties make "electioneering communications," (i.e., broadcast ads that mention Federal candidates but are not otherwise "expenditures"), they are and should be subject to Title IIA reporting. To the extent state parties make neither "expenditures" or "electioneering communications," Title IIA imposes no new reporting requirements on them.

Section 104.19. The proposed regulation in section 104.19(a)(1) tracks the statutory language for the definition of "disclosure date." Section 434(f)(4)(A). We disagree, however, with a description of this language in the commentary that suggests this provision should be read to mean that disclosure is not triggered until an aggregate amount of $10,000 has been spent on either "producing" an ad or "airing" an ad, but not the aggregate of both. The clear meaning of the statute is that once an aggregate of $10,000 has been spent on either producing or airing the ad, the threshold has been reached, and the disclosure requirement is triggered.

In response to the hypothetical in the commentary, this means that if Person K pays $7,000 to produce an ad, and then spends an additional $7,000 to air the ad, he would have triggered the $10,000 aggregate threshold and accordingly be required to report all $14,000 in disbursements.

This interpretation is consistent with the clear intent of Title IIA to maximize reporting on money spent for electioneering communications, once the $10,000 threshold is crossed. Under the alternative view, an entity could spend $9,000 on producing an electioneering communication, and an additional $9,000 on airing it, and escape all disclosure requirement. This approach makes no sense under the language of Title IIA, which triggers reporting when "the direct costs of producing and airing" an electioneering communication are "in an aggregate amount in excess of $10,000..." Section 434(f)(1).

Another question posed in the commentary is whether disclosure should be triggered prior to the airing of an electioneering communication. Since a broadcast advertisement becomes an "electioneering communication" if – and only if – it is aired in the primary or general pre-election window, this key fact may not be ascertainable unless and until the ad is actually aired. Even if a sponsor prepares an ad with the intent of airing it in the window, the ad may never be broadcast in that period. Instead, if the sponsor's plan change, the ad might air before the window, or not at all. In either case, it would never ripen into an "electioneering communication," and thus never trigger the Title IIA reporting obligation. For this reason, the reporting requirement should be triggered by the actual airing of an ad within the appropriate pre-election window.

Once an ad is aired and thus becomes an electioneering communication, however, all prior costs associated with the production or airing of the ad (i.e., any pre-paid disbursement or pending contract to make a disbursement, *see* section 434(f)(5)) must be reported, even if the cost was incurred or paid prior to the window.

We agree with the language of proposed section 104.19(A)(2), which provides a non-exhaustive list of "direct costs" to be reported.

In proposed section 104.19(b)(2), neither of the suggested alternatives complies with the statute. Section 434(f)(2)(A) of the BCRA requires identification of the person making the expenditure and "of any person sharing or exercising direction or control *over the activities* of such person..." (emphasis added). Neither Alternative 4-A or 4-B captures this phrase, and they instead require identification of a person exercising control over either the "electioneering communication activities" (Alternative 4-A), or over the "contents, timing, duration..." of the electioneering communication. (Alternative 4-B).

The statutory test is a broader one than set forth in either Alternative. A person could exercise control over the general "activities" of an entity making an electioneering communication, even though he does not control the electioneering communication itself. In such a case, the statute requires disclosure of the person, but neither of the proposed regulations does so. The regulation should be modified to capture the broader statutory scope.

For proposed section 104.19(b)(5), Alternative 5-B is preferable, although both alternatives require disclosure of both the election referred to in the electioneering communication and the candidate referred to, as required by the statute. *See* section

434(f)(2)(D). Alternative 5-B states these requirements more clearly and in a more direct fashion than Alternative 5-A.

Although proposed sections 104.19(b)(6) and (7) reflect the statutory provisions of section 434(f)(2)(E) and (F), there is no basis to limit their application to "qualified nonprofit corporations," as the proposed regulation does. It is true that so-called "*MCFL* corporations" could make the election to establish a segregated bank account provided in subsection (b)(5), but any other unincorporated entity – i.e., an unincorporated section 527 committee, for instance -- would have the same right. The regulations should be broadened to apply to any entity that can make electioneering communications.

Proposed section 104.19(c) appears to exempt *MCFL* corporations from recordkeeping requirements for electioneering communications. Because such *MCFL* corporations are required to report their electioneering communications, *see* proposed section 114.10(e)(2)(ii), these entities should also be required to maintain the records necessary to support their reports.

Part 105 – Document Filing

Section 105.2. We agree that all Title IIA reports should be filed with the Commission.

Part 114 – Corporate and Labor Organization Activity

The Commission's discussion of the effect of the Wellstone Amendment on the Title IIA provisions is, in our view, not accurate. The commentary says that the Wellstone Amendment "substantially modified" section 441b(c)(2) of the statute, which provided that section 501(c)(4) corporations and section 527(e)(1) entities ("political organizations") could spend their corporate funds for electioneering communications, subject to certain restrictions.

In fact, the Wellstone Amendment, section 441b(c)(6), functionally repealed subsection (c)(2) in its entirety.

It did so because the Wellstone Amendment is drafted to provide, in effect, that subsection (c)(2) – relating to activities by section 501(c)(4) and section 527 entities – "shall not apply" in all of those cases, and only those cases, in which subsection (c)(2) is otherwise applicable. In other words, although the Wellstone Amendment did not formally repeal subsection (c)(2), it rendered it a nullity.

We do not believe that the Commission should construe the Wellstone Amendment as leaving in effect any portion of subsection (c)(2), for instance, as it relates to presidential and vice-presidential elections. Although the Wellstone Amendment was drafted to exclude from its scope references to presidential and vice presidential candidates, section 441b(c)(6)(B), that was done simply to parallel the same treatment of such candidates in section 434(f)(3)(A)(III), the underlying definition of the term "electioneering communication." To the extent that the Commission proposes to construe presidential primary elections to be subject to a targeting

requirement for purposes of the definition of "electioneering communication," it should also construe the Wellstone Amendment to apply to such targeted communications.

We agree with the discussion in the commentary that the Title IIA provisions do not purport to overrule the Supreme Court's decision in *MCFL*, and should not be read to do so by the Commission. The *MCFL* decision interprets section 441b of the FECA as a whole. To the extent that Title IIA expands the scope of section 441b to encompass electioneering communications as well as express advocacy communications, section 441b is nonetheless still subject to the Court's interpretation in *MCFL* that appropriately qualified non-profit corporations are not subject to the ban. The Wellstone Amendment has no effect on this reading. Further, Senator McCain made clear during Senate consideration of the bill, post-Wellstone, that the legislation does not overrule *MCFL*:

> 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.
>
> Cong.Rec. S2141 (March 20, 2002)

The bottom line is that, as a result of the Wellstone Amendment, section 501(c)(4) corporations and incorporated section 527 entities are treated no differently than any for-profit corporation for purposes of Title IIA, but because of *MCFL*, appropriately qualified non-profit corporations – a small subset of all section 501(c)(4) corporations – may spend their corporate funds for electioneering communications, just as they may for independent expenditures. We agree with the Commission's discussion in the commentary that its proposed regulation "would ban only electioneering communications by incorporated section 501(c)(4) organizations that do not meet the 11 C.F.R. 114.10 conditions." 67 Fed.Reg. 51138.

Section 114.2. We agree with this language of proposed section 114.2, which prohibits corporations and labor unions from making payments for electioneering communications to those outside their restricted classes. As explained above, the exclusion from this rule for *MCFL* corporations is appropriate.

Section 114.10. This section, in subsection 114.10(d)(2), appropriately reflects the exclusion for *MCFL* corporations from the ban on the spending of corporate treasury funds for electioneering communications. Subsection 114.10(e) appropriately provides parallel certification requirements for *MCFL* corporations making either independent expenditures or electioneering communications. We assume that the FEC Form 9, on which the certification will be made for eligibility to make electioneering communications, will require a statement that the

corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5), as required for independent expenditures.

However, the proposed section requires an *MCFL* corporation to make a certification of eligibility only once it spends $10,000 or more on electioneering communications. While this amount does trigger the reporting requirement under Title IIA, *no* corporation can spend *any* amount of corporate funds on an electioneering communication unless it is a qualified *MCFL* entity. Thus, an *MCFL* corporation should be required to file an appropriate eligibility certification at a much lower threshold amount, such as $250, to establish its right to spend *any* corporate funds on electioneering communications, even if full reporting of those communications is not required unless and until it spends an aggregate of $10,000.

In other words, it would be a violation of section 441b(b)(2), as amended by the BCRA, for a non-*MCFL* corporation to spend any amount on an electioneering communication, even if that amount never reached the reporting threshold of $10,000. Conversely, an *MCFL* corporation can spend its funds on electioneering communications only if it establishes it is qualified to do so, even if its spending never reaches the $10,000 threshold amount.

Subsection 114.10(h) permits but does not require an *MCFL* corporation to establish a segregated bank account for purposes of making electioneering communications, and reporting only the receipts of $1,000 or more into that account, as permitted by section 434(f)(2)(E) of the BCRA. We note that non-corporate entities other than *MCFL* corporations that make electioneering communications have a similar right, and we do not read this proposed section as providing otherwise.

Section 114.14. This section implements the important Title IIA requirement that funds from corporations or labor unions cannot be used "directly or indirectly" to pay for any of the costs of an electioneering communication. Section 441b(c)(3)(A).

The commentary cites "certain cases" that have interpreted *MCFL* to allow an incorporated section 501(c)(4) organization to accept a *de minimis* amount of corporate or union funds without losing its status as a qualified non-profit corporation eligible to make independent expenditures. We agree with the rule discussed in the commentary that no *de minimis* amount of corporate or union funding is consistent with *MCFL* status, a position that is supported as well by the language of the Supreme Court opinion in that case. *E.g.*, 479 U.S. at 264.

We agree with the commentary that nothing in Title IIA prohibits corporations or labor unions from paying for electioneering communications out of the federal accounts of their separate segregated funds. Indeed, it was the intent of Congress that electioneering communications should be funded with such "hard money" funds. Senator Feingold noted on the Senate floor that the Snowe-Jeffords provision:

> ...provides that for-profit corporations and labor unions cannot make electioneering communications using their treasury funds. If they want to run TV

> ads mentioning candidates close to the election, they must use voluntary contributions to their political action committees...
>
> We are merely saying through this provision that that actual public support, shown by voluntary contributions to a PAC, must be present when corporations and unions want to run ads mentioning candidates near in time to an election.
>
> Cong.Rec. S3072 (March 29, 2001)

This same point was subsequently reiterated by Senator McCain:

> Under the bill, corporations and labor unions could no longer spend soft money on broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office during the 60 days before a general election and the 30 days before a primary, and that are targeted to that candidate's electorate. These entities could, however, use their PACs to finance such ads. This will ensure that corporate and labor campaign ads proximate to Federal elections, like other campaign ads, are paid for with limited contributions from individuals and that such spending is fully disclosed.
>
> Cong.Rec. S2141 (March 20, 2002)
> (emphasis added)

We also agree with the language of proposed section 114.14(c), which lists certain disbursements by corporations – such as for salaries or interest – where the subsequent use of such funds for electioneering communications would not constitute "indirect" corporate funding, in violation of section 441b.

In section 114.14(d), the Commission proposes that persons who receive funds from corporations be required to demonstrate "through a reasonable accounting method" that no such funds were used to pay for an electioneering communication. This is a key protection to make certain that corporate funds cannot be funneled through a conduit to flow impermissibly into electioneering communications. Under these circumstances, a standard of a "reasonable accounting method" is not sufficient to protect against a scheme to evade the prohibition on direct or indirect corporate or union funding. We urge the Commission to adopt a higher standard of accounting than "reasonable" methods to ensure that the most stringent protection against evasion is built into the Commission's regulations.

Because the BCRA prohibits corporations and unions from "directly or indirectly" funding "any amount" of an electioneering communication, section 441b(c)(3)(A), we do not believe it is permissible for a corporation or labor union to set up a non-federal account into which it accepts unlimited individual donations, and then use that money to pay for electioneering communications. Although the establishment of that kind of segregated account was initially permitted for section 501(c)(4) corporations, *see* section 441b(c)(2), it was never

permitted for other corporations, and the permission even for section 501(c)(4) corporations was repealed by the Wellstone Amendment.

Thus, it would be contrary to the language of the statute, and to congressional intent, to allow any corporation or labor union to set up, operate or control an account, or to establish a political committee that has a non-federal account, which receives unlimited donations from individuals used to make electioneering communications. Such an account would constitute "direct or indirect" corporate funding of electioneering communications, in violation of section 441b(c)(3)(A).

We appreciate the opportunity to comment on these proposed Title IIA regulations.

Respectfully submitted,

/s/ Donald J. Simon

Donald J. Simon