National Republican Congressional Committee

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General Counsel

August 21, 2002

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

Re: Comments to Proposed Rulemaking

Dear Ms. Dinh:

These comments on the Federal Election Commission's Proposed Rules relating to Electioneering Communications, are submitted by the National Republican Congressional Committee ("NRCC"). Established in 1866, the NRCC is composed of Republican Members of the United States House of Representatives, and concerns itself with the election of Republicans to House as well as other state and local offices.

We thank the Commission for moving swiftly on promulgating rules. The effective date of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") is fast approaching, and the regulated community needs guidance as to the precise contours of the ambiguous statute well prior to that date. Although the BCRA has been challenged in court, it appears as though that case is moving slowly, primarily due to the Government's dilatory tactics. Thus, swift Commission action is essential. The Commission's challenge is all the more difficult due to the ambiguity of the BCRA itself, the lack of legislative history and press coverage that borders on the ridiculous. Recall the numerous news stories that accompanied the last rulemaking. Those rules tracked the statute almost verbatim, yet there was a constant refrain that this constituted "loopholes." Inevitably, regardless of what the Commission does now, it will not receive favorable media coverage, and should not be deterred by that fact.

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Because of the scope, length and subject matter of the Proposed Regulations, and due to the limited resources of the NRCC, we will limit our comments to a few specific areas. Nor are we going to debate the constitutionality of the sections of the BCRA at issue, nor waive any constitutional arguments that we have. However, the notion that the Government can ban certain entities from sponsoring speech, simply because the speech is made on television within a certain number of days of a federal election, and mentions a federal elected official or candidate, is unconstitutional. Our view is that this and other fatal flaws cannot be cured by regulation. Despite this, however, we urge the Commission to be cognizant of the constitutional issues present, and pass regulations that are narrowly tailored, in the hopes that a court will uphold at least some portion of what the Commission promulgates.

To the extent the Commission deems it helpful, we ask to testify on the matter.

A. Presidential Primary Candidates

The expansive reading of 2 U.S.C. § 434(f)(3)(C) – that geographic location is irrelevant – is implausible, and certainly fraught with constitutional problems. We cannot locate anything in the legislative record that supports such an interpretation, or that Congress believed it was creating a nationwide blackout on ads mentioning a Presidential candidate for more than 240 days between mid-December of the year preceding the election and the election itself. On the contrary, giving the "reformers" the benefit of the doubt, their public statements focused on what they called "sham issue ads." Such ads, they contend, are issue ads that air around elections, and attempt to influence a particular election. Thus, insisting that there be some link between the ad and an election will not do violence to the BCRA, and such specificity would be consistent with the thrust of the so-called reformers' concerns. Certainly, although it would not cure the constitutional problems, a limitation would have less of an impact on First Amendment rights than a broad nationwide blackout.

The question then becomes what sort of limitation is appropriate. The Commission's various proposals, although thoughtful, are still too broad. This is best illustrated by way of an example. Say there is a piece of legislation before the U.S. House that represents the policy preference of the President. The opposing political party and outside advocacy groups oppose the President's plan for various reasons. One of the critical undecided votes is a Member in Massachusetts. The political party, outside groups and other interests each run ads that expressly mention the President, explain the President's plan, and why it is the wrong approach. The ads are run in Massachusetts, and are intended to influence the Massachusetts Member's thinking on the issue. The call to action urges the listener to call the Massachusetts Member and tell him to vote against the President's plan. All of this would seem perfectly reasonable, unless of course it was within 30 days of the New Hampshire primary. Then, this proposed rule could be triggered, as the ad in question would (1) be made within 30 days of the primary, and (2) would be transmitted to a sufficiently large audience in New Hampshire, due to the shared and overlapping media markets.

There are numerous variants of this example, all of which illustrate that the Commission's rule will inevitably limit speech beyond what is contemplated by the language of the BCRA. Perhaps it is possible to address the adjoining media market problem in the regulations. But even if that is possible, it still would not address the inevitable blackout of even traditional grassroots legislative advocacy that happens to mention a President who is seeking re-election, a Member of Congress running for President of the United States or the like. Imagine if a governor was running for President, and a state's primary happened to coincide with legislation reaching the governor's desk that certain groups, interests and political parties wished he would veto. If those groups and interests choose to do ads designed to gather support for a veto, how could they possibly convey that point without mentioning the governor? They could not, and any rules promulgated by the Commission ought to address such examples.

B. Reporting for Groups and Individuals

As an initial matter, a person's reporting of disbursements for electioneering communications should be required, if at all, only when the communication is aired. We agree with the three policy reasons suggested in the proposal. As a practical matter, to require reporting prior to airing will result in chaos and public confusion. It is not uncommon for a group to produce an ad, and even ship the ad to stations, but then for whatever reason, never air the ad, air a different ad instead, or the like. We cannot see how requiring reporting of such preparatory work before broadcast furthers the goals of the BCRA.

Moreover, pre-reporting is an unconstitutional prior restraint on speech. Courts have already held such pre-reporting to be unconstitutional. For example, the Pennsylvania Supreme Court struck down a similar provision over twenty years ago. Pennsylvania v. Wadzinski, 422 A.2d 124 (Pa. 1980). There, the provision at issue prohibited a candidate for public office from placing an advertisement referring to an opposing candidate without giving notice to the County Board of Elections. The court noted that the provision "operates to censor the content of primarily ideological communications or to suppress them altogether." *Id.* at 131. Unlike the law nullified by the Pennsylvania Supreme Court, the present BCRA regulation is far broader in scope and is not limited to candidates.

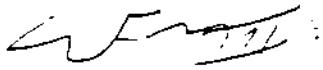
Another way to further streamline the process, and ensure that the public is getting accurate information, is to eliminate any duplicative filing. For example, the NRCC already reports all disbursements and expenditures. And we report independent expenditures within 24 hours when required. To impose additional reporting would probably mean we would be reporting what we already report. At some point, such duplicative reporting actually undercuts the goals of the BCRA, as it could lead to public confusion.

With respect to production costs, again the statute is not clear and internally inconsistent, leaving the Commission in an awkward position. All the alternatives proposed by the Commission are consistent with the BCRA, to the extent the BCRA is

internally consistent. Whether the rule is to report when either production or airing costs exceed $10,000, or to report only when such costs exceed $10,000 in the aggregate, may not have a practical distinction. What is important, though, is what constitutes a "production cost." It is abundantly clear what is involved in producing a television or radio ad – the proposal accurately addresses that. The list ought to be exhaustive. There is no justification to create a rule that calls for fact-intensive inquiries as to whether or not something is a production cost.

Thank you for your attention to this matter.

Respectfully submitted,



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