Congress of the United States
Washington, DC 20515

August 23, 2002

VIA FAX and E-MAIL

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2002-13

Dear Ms. Dinh:

We appreciate the opportunity to comment on the Commission's proposed rules to implement Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "Act"), issued as Notice 2002-13, and published in the Federal Register at 67 Fed. Reg. 51131 (August 7, 2002). We do not request to testify at the public hearings scheduled for August 28 or 29, but have endeavored to file these comments well in advance of the due date so that the Commission and witnesses at the hearings will be able to discuss them.

Congress's purpose in enacting Title II was very clear. The proliferation of "sham issue ads" in the elections of 1996, 1998, and 2000 made plain the shortcomings of the current FECA as interpreted by the Commission and the courts. A significant amount of election-related activity was being paid for with corporate and union treasury funds in violation of the spirit, if not the letter, of the law. In that respect, the electioneering communications provision of Title II, sometimes referred to as the Snowe-Jeffords amendment, was closely related in purpose to the soft money provisions of Title I. Both aimed to close loopholes that had developed in 2 U.S.C. § 441b.

We are well aware, as is the Commission, that the constitutionality of these provisions is being challenged. In fact, we are working with the Commission to defend the statute in court. Congress crafted the Title II provision with careful attention to constitutional requirements, and the Supreme Court will soon rule in this case. In the meantime, the Commission's duty is to implement Title II consistent with its text and intent. To fulfill that duty, it must maintain the "bright line" quality of the definition of electioneering communications and avoid promulgating exemptions from the definition that would once again allow corporate and union funds to be used

to finance the kinds of ads that Congress has determined seek to influence elections, not legislation.

As discussed in our detailed comments, the Commission has limited statutory authority to promulgate such exemptions for categories of ads that "plainly and unquestionably" are "wholly unrelated" to an election. *See* Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). Most of the potential exemptions contained in the proposed rules are not a proper use of that authority. We urge the Commission to act very carefully in this area, and if it determines that an exemption for what might be called "true issue ads" is needed, to give strong consideration to the exemption that we propose in our comments.

In that connection, we urge the Commission to require any additional proposed exemptions or other amendments to the rules that any Commissioner may sponsor to be made available to the public at least 48 hours prior to their being considered by the Commission in open session. That will allow interested parties to express additional views prior to the Commission voting on the amendments.

Attached please find our specific comments on the proposed regulations and our answers to certain questions the Commission raised in the commentary to the proposed rules. We look forward to continuing to work with the Commission throughout this rulemaking process to ensure that the implementation of BCRA is consistent with the clear statutory language in the Act and our intent as authors of the legislation.

Sincerely,

John McCain
United States Senate

Christopher Shays
Member of Congress

Russell D. Feingold
United States Senate

Marty Meehan
Member of Congress

Olympia Snowe
United States Senate

James Jeffords
United States Senate

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords

Proposed 11 CFR § 100.19, File, filed, or filing (2 U.S.C. § 434(a))

We agree that 24-hour statements of electioneering communications should be filed by fax or e-mail and that they must be received within 24 hours of the disclosure date, as reflected in proposed new section 100.19(f). We also agree that the term "24 hours" should mean 24 contiguous hours as is currently the case under the Commission's rules for the reporting of independent expenditures. Since one of the main purposes of Title II of BCRA is to increase disclosure of election-related activity beyond those activities that fit the narrow definition of independent expenditures, in general, reporting for electioneering communications should be analogous to reporting for independent expenditures.

Proposed 11 CFR § 100.29, Electioneering Communication

This section is the heart of the Title II regulations. In the comments that follow, we address the proposed rules and some of the questions raised in the Commission's commentary. We agree with the Commission's proposal not to promulgate regulations at this time based on the alternative statutory definition contained in 2 U.S.C. § 434(f)(3)(A)(ii).

§ 100.29(a)

We agree that the crucial fact in determining whether a communication is "made" within 60 days of a general election or 30 days of a primary election is when the communication is broadcast or aired. We therefore support the use of the term "publicly distributed" in subsection (a)(1)(ii) of the proposed rules.

We agree with the special definitions of runoff elections and special elections contained in proposed 11 CFR § 100.29(a)(2). We note that under section 402(a)(4) of BCRA, Title II of BCRA does not apply to any runoff or special election resulting from the 2002 general election.

§ 100.29(b)

We agree with the use of the Commission's existing rules concerning the term "clearly identified candidate" in proposed 11 CFR § 100.29(b)(1).

Proposed 11 CFR § 100.29(b)(2) appropriately interprets electioneering communications to include only radio and television communications. A *per se* exemption for satellite radio, Low Power FM Radio, Low Power TV, or CB radio, however, is not permitted by the statutory language. To the extent these media reach fewer than 50,000 people, communications that use them will not be considered electioneering communications because of the statutory targeting requirement of 2 U.S.C. § 434(f)(3)(A)(i)(III).

We agree that the electioneering communications provisions of BCRA should apply in presidential primary elections only to communications targeted to the electorate that will be voting in a presidential primary within the next 30 days. Alternative 1-A should be used because the statutory language is clear that the provisions apply within 30 days of the presidential nominating conventions. Furthermore, the final rules must not exempt entirely electioneering communications relating to presidential primaries. In 2 U.S.C. § 434(f)(3)(A)(II)(bb), "that has authority to nominate a candidate" modifies the term "convention or caucus," not "a primary or preference election." Thus, a complete exemption for presidential primaries would be plainly inconsistent with the statute.

We support the Commission's effort to work with the Federal Communications Commission ("FCC") to develop a publicly accessible database available that will allow organizations to determine if their communications will reach a large enough segment of the electorate to meet the targeting requirement of the definition of electioneering communications. We believe that the Commission and the FCC have the authority to obtain from broadcast, satellite, or cable companies whatever information is necessary to develop and maintain such a database. Some of the information that such companies maintain in order to set prices for advertising time can probably be used for this additional purpose. We agree that once such a database is available and approved by the Commission, organizations should be able to rely on it and be legally protected from complaints that their communications have been targeted to the relevant electorate.

The threshold of 50,000 persons was chosen to make sure that only communications broadcast to a substantial number of people voting in the election in which the candidate mentioned in the broadcast was participating would be considered electioneering communications. Ads broadcast primarily in Jurisdiction A should not be considered electioneering communications simply because they mention a candidate who is running for election in Jurisdiction B and the broadcast outlet's signal can be received by a small number of people in Jurisdiction B. We agree with the Commission's recommendation that the term "person" be construed to mean a natural person residing in a given jurisdiction, regardless of citizenship or age. The choice of this construction of the statutory term should also make it easier to compile a reliable database.

The determination of whether a communication is targeted to the relevant electorate should generally be made on an outlet by outlet and broadcast by broadcast basis. Thus, an advertisement run simultaneously on two outlets which can be received by 50,000 or more persons only in the aggregate would not be considered targeted to the relevant electorate. Similarly, an advertisement run a number of times during a single day on one outlet that has an audience of only 40,000 persons would not meet the targeting requirement. However, if an ad is purchased on a network or similar entity and shown on a number of different stations or cable systems simultaneously, the markets of those stations or cable systems should be aggregated for purpose of the targeting requirement.

§ 100.29(c)

The exemption from the definition of electioneering communication contained in proposed

11 CFR § 100.29(c)(1) largely conforms to BCRA. Communications through print media, billboards, mailings, and telephone, are plainly not electioneering communications under BCRA.

We disagree, however, with a blanket exemption for "communications over the Internet." Some Internet communications, such as private e-mail communications or conventional websites should clearly not be considered electioneering communications. The Commission should leave open the possibility, however, of including communications that are, or may be in the future, the functional equivalent of radio and television broadcasts. For example, as the commentary suggests, simultaneous webcasts of radio or television programs should be included. A per se exemption for communications using "the Internet" from the definition of electioneering communications is therefore not appropriate. We note, however, that the treatment of the Internet in implementing this statutory term should differ from its treatment in rules dealing with the definition of "public communication," which has a broader statutory meaning than electioneering communication.

We also agree with the exemption contained in proposed 11 CFR § 100.29(c)(2), which tracks the news story exemption in 2 U.S.C. § 434(f)(3)(B)(i). The Commission is correct to use the broader term in this exemption, "broadcast, satellite, or cable communication." The term "broadcast station" in the statutory exemption was not meant to have a narrower meaning. It would also be acceptable merely to repeat the existing media exemption

We support the exemption contained in proposed 11 CFR § 100.29(c)(3), Alternative 2-A, with one clarification. The exemption tracks the statutory language. Congress intended in that provision to exempt expenditures already subject to reporting requirements similar to those imposed on electioneering communications. The assumption was that expenditures and independent expenditures are paid for with hard money and are subject to disclosure requirements under the current FECA. The Commission should clarify that communications qualify for the exemption in 11 CFR § 100.29(c)(3) only under those conditions.

Title II of BCRA was mainly concerned with election-related disbursements that avoided regulation under the FECA. We agree that this exemption will avoid duplicate reporting by entities, including candidate committees, that are spending hard money on what would otherwise be electioneering communications.

We agree with the exemption contained in proposed 11 CFR § 100.29(c)(4), which tracks the statutory exemption contained in BCRA.

The exemptions contained in proposed 11 CFR §§ 100.29(c)(5), (6), and (7) are proposed pursuant to the Commission's statutory authority to propose additional exemptions that are consistent with the definition of electioneering communications and do not exempt communications that promote, support, attack, or oppose a clearly identified Federal candidate. Rep. Shays discussed the purpose of this authority, and its limitations, on the floor of the House:

> The definition of "electioneering communication"is a bright line test covering all

broadcast, satellite and cable communications that refer to a clearly identified federal candidate and that are made within the immediate pre-election period of 60 days before a general election or 30 days before a primary. But it is possible that there could be some communications that will fall within this definition even though they are plainly and unquestionably not related to the election.

Section 201(3)(B)(iv) was added to the bill to provide 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.

For instance, if a church that regularly broadcasts its religious services does so in the pre-election period and mentions in passing and as part of its service the name of an elected official who is also a candidate, and the Commission can reasonably conclude that the routine and incidental mention of the official does not promote his candidacy, the Commission could promulgate a rule to exempt that type of communication from the definition of "electioneering communications." There could be other examples where the Commission could conclude that the broadcast communication in the immediate pre-election period does not in any way promote or support any candidate, or oppose his opponent.

Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays).

It is crucial to note that the purpose of this authority was to allow the Commission to exempt communications that "plainly and unquestionably" are "wholly unrelated" to an election and do not "in any way" support or oppose a candidate. In addition, any exemption that applies to entities other than parties and candidates must preserve the "bright line" quality of the original provision. Congress specifically crafted a bright-line test to give clear guidance to entities that are not necessarily political actors. An exemption that creates uncertainty about whether a communication will be covered by the law undermines that crucial aspect of the definition of electioneering communication.

Thus, while the Commission has statutory authority to promulgate additional exemptions, the authority provides limited discretion and is not a license to rewrite the statute. Any proposed exemption that is subject to abuse or provides a potential loophole through which an organization can circumvent the clear intent of Congress in enacting Title II would be inconsistent with the Commission's statutory authority in 2 U.S.C. § 434(f)(3)(B)(iv). Furthermore, we are skeptical of any broad exemption created to cover a theoretical problem, in the absence of a strong evidentiary basis that such ads have been run in the past and that an exemption would present no opportunity for abuse.

The example cited by Rep. Shays on the House floor suggests that the Commission should require real evidence from entities whose communications would otherwise be covered by the definition of electioneering communication before creating an exemption. For example, while

the issues of Public Service Announcements and ads created by 501(c)(3) charities were raised during the drafting of Title II, Congress did not create statutory exemptions for these types of ads. Before doing so, the Commission must be convinced that such ads have been run in the past during the preelection windows and that exempting them will not create opportunities for evasion of the statute.

Proposed 11 CFR § 100.29(c)(5) deals with communications that refer to a popular name of legislation that includes a candidate's name. That example of the use of a reference to a clearly identified candidate came up frequently in our deliberations over the drafting of Title II. The difficulty with crafting such an exemption, however, is the uncertainty of what constitutes a "popular name" of legislation. "McCain-Feingold," "Tauzin-Dingell," and "Kennedy-Kassebaum" are examples with which many Americans are familiar, and do refer to specific bills. But what about "the Gore tax," "the Dole/Gingrich budget," or "the "Bush-Morella energy plan"? While the exemption may be intended to exempt grassroots lobbying ads on specific bills within the 30 and 60 day windows, it will be undoubtedly be used by political advertising strategists to design attack ads that evade the law. Indeed, a notorious sham issue ad run by the Democratic National Committee during the 1996 Presidential campaign would qualify with only minor alterations:

> Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare $270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of $1,500 a year for the first two years of college, most community colleges free. Help adults go back to school. The President's plan protects our values.

Cong. Rec. S10416 (Oct. 6, 1997) (statement of Sen. Carl Levin). Change "The President" and "President Clinton" to "the Democrats" in this ad, and the only reference to a candidate in this ad would be the "Dole/Gingrich budget." Is that a popular name of a bill? The Commission must not exempt an ad like this from the definition of electioneering communication.

It is important to note that Title II would affect the use of popular names for bills only in a very small percentage of districts or states. An ad urging a vote against the McCain-Feingold bill during a year when both Senators are up for reelection, for example, could be run using corporate or union funds in 48 out of 50 states (the exceptions being Arizona and Wisconsin), even during the last 60 days of an election cycle. Furthermore, in those two states during the pre-election periods, there are many alternative ways to refer to a pending bill without using the sponsors' names. The exemption in 11 CFR 100.29(c)(5) should not be included in the final rules.

The alternative exemptions contained in proposed 11 CFR § 100.29(c)(6), are described as permitting issue advertising that truly has a legislative rather than electoral purpose to be run during the 30 day and 60 day windows. Empirical studies suggest that the number of "true issue ads" that actually run during the 30 and 60 day periods prior to an election is exceedingly small. Thus, the exemption addresses more of a theoretical problem than a real world need. An

exemption of this kind is not necessary for Title II to operate fairly and effectively. Nonetheless, the Commission has authority to promulgate such an exemption, if it can craft a bright line exemption that is consistent with the overall intent of Title II, and if the ads exempted are "plainly and unquestionably" "wholly unrelated" to an election.

None of the alternatives contained in the proposed rules meets that test. We will discuss why each of the alternatives is unsatisfactory, and then propose an alternative that we believe is consistent with the intent of the provision and the Commission's narrow authority under 2 U.S.C. § 434(f)(3)(b)(iv).

Alternative 3-A is objectionable because it undermines the bright line test that Congress chose for the definition of electioneering communication. Congress specifically chose not to use a subjective test for this particular provision because entities that are not political committees must be able to easily tell whether their communications will be covered. A bright line test is easy to follow and administer. Therefore, while the statutory terms "promote, support, attack, or oppose" are appropriately used in determining what ads a state party committee can run using soft money under Title I of BCRA, they should not be imported directly into an exemption that will apply to corporations, unions, and membership organizations. Congress has empowered the Commission to promulgate exemptions, as long as ads that "promote, support, attack or oppose" a Federal candidate are not exempted. But to use those exact terms in an exemption that would be potentially applicable to ads created by entities that are not political committees would be inconsistent with the goal of crafting bright line rules and would therefore undercut the overall thrust of Title II.

The alternative that is most plainly *the worst* of those contained in the proposed rules is Alternative 3-C. This alternative would exempt virtually all of the sham issue ads that led Congress to enact Title II of BCRA. Those that do not qualify for the exemption because they do not contain a phone number or other way to contact the candidate who is mentioned in the ad, could easily be revised in order to qualify. Consider the following advertisement run by the League of Conservation Voters just before the 1996 election in Rep. Greg Ganske's district:

> It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and give him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

Cong. Rec. S10416 (Oct. 6, 1997) (statement of Sen. Carl Levin). With the addition of a number to call Rep. Ganske, this ad would qualify for the exemption in Alternative 3-C. Given that this particular advertisement and others like it were noted as the reason for enacting the Title II provision, the Commission must not choose Alternative 3-C. Indeed, it is clearly not within the Commission's statutory authority to promulgate this Alternative.

Alternative 3-D is susceptible to the same criticism, although it at least limits the exemption to ads mentioning incumbent legislators, presumably on the theory that true issue ads do not mention challengers who cannot vote on an issue in Congress. If adopted, however, this alternative would provide a roadmap for evading the definition of electioneering communication. Consider the following ad that was run against an incumbent Republican Member of Congress during the 1996 campaign:

> They've worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Congressman Creamens voted five times to cut their Medicare. Even their nursing home care. To pay for a $16,892 tax break he voted to give to the wealthy. Congressman Creamens, it's not your money to give away. Don't cut their Medicare. They earned it.'

Cong. Rec. S10416 (Oct. 6, 1997) (statement of Sen. Carl Levin). This ad would not qualify for Alternative 3-D because it mentions Rep. Cremean's votes on the Medicare issue. But what if the ad said the following?:

> They've worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Republicans in Congress voted five times to cut their Medicare. Even their nursing home care. To pay for a $16,892 tax break they voted to give to the wealthy. Call Congressman Cremeans, and tell him: "Don't cut their Medicare. They earned it."

This ad probably would qualify for Alternative 3-D. Yet it is clearly the type of phony issue ad that Congress intended to bring within the federal election laws when it enacted Title II of BCRA.

Alternative 3-B attempts to reduce the possibility that the exemption can be used to insulate attack ads from Title II. Using the term "pending legislative or executive matter," it attempts to increase the chances that the purpose of the communication is to affect legislation that is truly coming to a vote. Still, virtually any public policy issue can be framed in terms of a pending bill or executive proposal, since all bills are pending until the end of a Congress. And most attack ads could without too much difficulty be recast to qualify for Alternative 3-B.

For example, the reworked Cremeans ads discussed above would come close to qualifying and could almost certainly qualify with a little more editing. Consider also, the following ad, run by the Citizens' Flag Alliance during the 1996 campaign and also cited by proponents of Title II as a sham issue ad:

> Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative Richard Durbin today. Ask him why he voted against the Flag Protection Amendment. Against the values we hold dear. The Constitutional Amendment to safeguard our flags, because America's values are worth protecting.'

Cong. Rec. S10416 (Oct. 6, 1997) (statement of Sen. Carl Levin).

This ad would not qualify for the exemption contained in Alternative 3-B because it indicates that then-Rep. Durbin voted against the Flag Protection Amendment and it does more than ask him to take a position on the Amendment.

But the following revised Durbin ad almost certainly would qualify, even though a constitutional amendment to prohibit flag desecration had passed in the House in 1995:

> Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Most Democrats vote against the Flag Protection Amendment, against the values we hold dear. Call Representative Richard Durbin today. Tell him to support the Flag Protection Amendment. The Constitutional Amendment to safeguard our flags, because America's values are worth protecting.'

As the discussion above makes clear, there are two significant problems with these alternatives. The first is that political parties can easily be used as a proxy for the candidate in order to make comments about the candidate's views and positions. The second is that allowing the use of the candidate's name in a communication that runs within the 30 or 60 day window makes it almost impossible to assure that the communication "plainly and unquestionably" is "wholly unrelated" to an election. We therefore propose the following exemption for the Commission's consideration:

> The term "electioneering communication" does not include any communication that:
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> (x)(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.
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> (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.

This formulation allows individuals and entities concerned about legislation to run true issue ads

with a legislative objective and a request to contact an elected official during the 30 or 60 day windows. Permitting the use of "Your Congressman" and similar expressions that clearly identify the person or persons to be contacted, but continuing to prohibit the use of a candidate's name makes it less likely that the exemption will used to accomplish an electoral objective. This proposal also guards against critiques of a political party being used as a proxy for attacking a candidate. This exemption would be an appropriate use of the Commission's authority under 2 U.S.C. § 434(f)(3)(B)(iv). We do not think it is useful to try to distinguish between communications that discuss a general issue as opposed to a particular piece of legislation.

We are concerned that the term "merely incidental to the candidacy of one or more individuals for state or local office" contained in the proposed exemption described in 11 CFR § 100.29(c)(7) is vague and subject to abuse. Even the example given in the commentary – an ad that mentions that a candidate supports the President's education policy – might not qualify if the President's education policy is a central issue in the campaign.

More fundamentally, there is no need for this particular exemption because the purpose of Title II was to regulate electioneering communications by political actors other than state candidates. The use of corporate and union money by state candidates (and state parties as well) is instead addressed in Title I of BCRA. State candidates and parties are prohibited from making public communications (not just radio and television advertisements) using soft money that refer to a clearly identified Federal candidate and promote, support, attack or oppose that Federal candidate. *See* 2 U.S.C. §§ 323(b)(1), (f)(1), and 301(20)(A)(iii). To create an exemption under the authority of 2 U.S.C. § 434(f)(3)(B)(iv) for communications that include an incidental reference to a Federal candidate would imply that all such communications do not promote, support, attack, or oppose a Federal candidate. We can easily envision an advertisement that includes what some might view as an incidental reference to a Federal candidate that nonetheless supports or opposes that candidate. Take for example, the following ad:

> Throughout my career I have opposed increasing taxes at every turn. I will never raise taxes as your Governor. I strongly oppose Senator X's plan to cut federal taxes and will do everything I can to fight that excessive plan, which would put pressure on state governments to raise your taxes.

The Commission's proposed exemption is therefore both too broad and too narrow. We propose the following alternative, which should apply both to state candidates and state parties:

> The term "electioneering communication" does not include any communication that:
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> ****
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> (x) Is paid for by a State, district, or local committee of a political party, a candidate for State or local office, or an individual holding State or local office and does not promote, support, attack, or oppose a clearly identified candidate for Federal office.

This proposed exemption is consistent with the Commission's authority under 2 U.S.C. § 434(f)(3)(b)(iv). In contrast to Alternative 3-A, this exemption applies only to state parties or

candidates. The statutory terms "promote, support, attack, or oppose" are used in Title I to circumscribe the kinds of ads mentioning federal candidates that these entities can run. Therefore, it is appropriate to use these terms in an exemption that covers only these inherently electoral entities.

The exemption serves the purposes of BCRA by not requiring reporting by State or local candidates or party committees of advertisements that Title I permits to be paid for with soft money. The combination of the Title I prohibitions and this exemption will mean that if a state party or candidate runs an ad that mentions a Federal candidate it must either use hard money, in which case the ad would be an expenditure and not an electioneering communication, or the ad cannot promote, support, attack, or oppose the Federal candidate, in which case it qualifies for this exemption. That effectively takes state candidates and parties out of the Title II prohibitions and reporting requirements, which is consistent with the purposes of BCRA.

Proposed 11 CFR § 104.5, Filing Dates

We agree with this proposed regulation. Per se exemptions from the reporting requirement are not necessary because the exemptions for communications that constitute expenditures will eliminate any possibility that Federal candidates will have to separately file reports of their electioneering communications. Similarly, the exemption we propose above for state and local party committees will eliminate duplicative reporting in most cases for those committees.

Proposed 11 CFR § 104.19, Reporting Electioneering Communications

As a threshold matter, we wish to comment on the Commission's discussion in the commentary on whether political committees and candidate committees should be required to report disbursements for electioneering communications. Title II was directed primarily at entities and organizations that were not heretofore reporting their election-related activities under the FECA. Congress did not intend to change the timing or content of reporting by candidate committees or other Federal political committees.

As discussed, state and local party committees and candidates will generally have no need to do separate Title II reporting, if they are given an exemption for ads that do not promote, support, attack or oppose Federal candidates, along the lines that we propose above. These committees are prohibited under Title I of BCRA from using soft money to run electioneering communications that promote, support, attack or oppose Federal candidates. To the extent they run ads that mention Federal candidates in the 30 or 60 pre-election periods, they will either be using hard money, or the ads will not promote, support, attack or oppose a Federal candidate. Only if state parties run ads that promote, support, attack, or oppose a Federal candidate but do not report them as expenditures under the FECA would they have to file electioneering communication reports.

Since all spending on broadcast ads by Federal candidates are expenditures, they will not need to file separate Title II reports.

The statutory language requires the conclusion reflected in proposed 11 CFR § 104.19(a)(1) that the trigger for disclosure is when a person makes disbursements or contracts to disburse funds in excess of $10,000 for the direct costs of producing *or* airing electioneering communications. 2 U.S.C. § 434(f)(1). To be perfectly clear, using the example included in the commentary, if Person K pays $7,000 to produce a communication and $7,000 to air the advertisement, Person K would be required to report within 24 hours the aggregate costs of producing and airing the communication – $14,000.

We agree with proposed 11 CFR § 104.19(a)(2) concerning examples of disbursements that are to be included in the costs of producing or airing an electioneering communication.

We also agree with the commentary that it may be difficult to determine whether a communication is targeted to the relevant electorate before it is aired, and we recognize the concern over requiring disclosure in advance of a communication being aired. Reporting should therefore be required within 24 hours of when the electioneering communication is first aired. This is consistent with the statutory language because "disclosure date" is defined as the first date by which a person has made disbursements for the direct costs of producing or airing *electioneering communications* aggregating in excess of $10,000." 2 U.S.C. § 434(f)(4). It is possible to determine whether an ad is actually an electioneering communication and must be reported only once it is aired.

If, however, a single disbursement or contract to make a disbursement is made to allow the airing of an electioneering communication over a certain period of time, the entire amount of the disbursement should be reported after the first time the ad is aired. While disbursements made outside of the 30 and 60 day pre-election periods may very well be included in the reports required by this section, such reports will only be filed during those periods because they will be filed only after the electioneering communications are aired, and the definition of electioneering communications only covers communications aired during those periods.

We agree with the contents of the electioneering reports contained in proposed 11 CFR §§ 104.19(b)(1), (3), (4), and (8). Neither Alternative 4-A nor Alternative 4-B for 11 CFR § 104.19(b)(2), however, is consistent with BCRA. The statute requires "any person sharing or exercising direction or control over the activities of [the person making the expenditure]" to be identified. This covers a broader group of people than those who exercise direction or control over the electioneering communications themselves. Because of the experience in the 1996 and 1998 elections of sham issue ads being run by newly created organizations with no public track record or established organizational reputation, the purpose of this provision was to make sure that people having significant roles in the organization making electioneering communications would be identified. Both of the Commission's alternatives fail to carry out that purpose.

Alternative 5-B is preferable to Alternative 5-A because, as noted in the commentary, it is easier to follow. In addition, the definition of electioneering communication requires that the communication mention a clearly identified Federal candidate, so those filing the reports will

know the identity of the Federal candidates referred to in the communication, especially once the communication is aired.

With respect to proposed 11 CFR §§ 104.19(b)(6) and (7), we agree that because 501(c)(4) corporations are generally prohibited from making electioneering communications using treasury funds, these reporting provisions will apply to qualified nonprofit corporations, but not other 501(c)(4)'s. However, unincorporated "527 entities" are also permitted to make electioneering communications. Therefore 11 CFR §§ 104.19(b)(6) and (7) should not be limited to qualified nonprofit corporations. Any person filing reports should be required to report contributors if it receives contributions.

It is unnecessary for all contributions dating back to the beginning of the calendar year to be reported on successive electioneering communications reports. The alternative proposed in the commentary, allowing filers to report "to-date" totals along with the itemization of new funds contributed since the last report, is acceptable.

Proposed 11 CFR § 105.2, Place of filing, etc.

We agree with proposed 11 CFR § 105.2.

Proposed 11 CFR § 114.2, Prohibitions on contributions and expenditures

We agree with proposed 11 CFR § 114.2, which reflects BCRA's prohibition of corporations and labor unions paying for electioneering communications with their treasury funds. We agree that that prohibition does not apply to communications made only to the restricted class of employees or members. We also agree that in order for the provision to comply with the Supreme Court's ruling in the *MCFL* case, the prohibition should not apply to qualified nonprofit corporations as provided in 11 CFR § 114.10.

Proposed 11 CFR § 114.10, Nonprofit corporations exempt from the prohibition on independent expenditures and electioneering communications

We generally agree with the revisions proposed 11 CFR § 114.10 to incorporate references to electioneering communications. We agree with the approach of providing separate procedures for qualifying for the exemption from the prohibition on corporations making electioneering communications. We note that the proposed new procedures in 11 CFR § 114.10(e)(1)(ii) do not include an option for qualifying by letter but instead require that the exemption be claimed as part of filing new FEC Form 9. That form must require applicants for the exemption to certify that they have the characteristics specified in 11 CFR § 114.10(c)(1)-(5).

Furthermore, it would be improper to require this certification only once an organization has spent over $10,000 on electioneering communications. $10,000 is the amount that triggers reporting of electioneering communications under BCRA. But any amount of spending by a corporation on electioneering communications is illegal unless the corporation is a qualified

nonprofit corporation. Therefore, corporations that wish to be considered qualified nonprofit corporations for purposes of making electioneering communications should certify that they have the necessary characteristics when they have spent $250, the same amount as triggers this responsibility for corporations wishing to make independent expenditures.

We agree that qualified nonprofit corporations should be permitted to establish a segregated bank account as authorized in proposed 11 CFR § 114.10(h), in order to make the reports required under proposed 11 CFR § 114.19(b)(6). We note again that qualified nonprofit corporations are not the only entities that might want to set up such segregated bank accounts.

We agree with the Commission's interpretation of BCRA that entities that accept any corporate or labor union funds, even a minimal amount, should be barred from making electioneering communications. That interpretation is consistent with the Supreme Court's decision in *MCFL*. Nothing in BCRA or its legislative history suggests a contrary intent. Therefore, nonprofit corporations that accept even minimal corporate contributions cannot qualify for an exemption from that prohibition.

Proposed 11 CFR § 114.14, Further restrictions on the use of corporate and labor organization funds for electioneering communications

Proposed 11 CFR § 114.14 implements BCRA's prohibition of the use of corporate and labor union treasury funds to pay for electioneering communications. We agree that BCRA does not prohibit corporations or unions from using their separate segregated funds to pay for electioneering communications. Indeed, Congress specifically contemplated that such funds would be used to pay for electioneering communications. *See, e.g.*, Cong. Rec. S3072 (Mar. 29, 2001) (statement of Sen. Feingold) ("If they want to run TV ads mentioning candidates close to the election, [corporations and unions] must use voluntary contributions to their political action committees"). In response to the Commission's inquiry in the commentary, we believe that contributor liability should be imposed if the contributor knew or should have known that the contribution would be used for electioneering communications.

The same standard should apply in implementing 11 CFR § 114.14(a). In other words, if a corporation or labor organization knows or should know that funds it is giving to another person will be used for electioneering communications, then it has violated Title II of BCRA.

Proposed paragraph 11 CFR § 114.14(c) is a reasonable list of funds that originate with corporations or unions but that have become personal funds by the time they are used. In the absence of the applicability of one of these exceptions, the Commission should require a demonstration that corporate or union funds have not been used to fund an electioneering communication. The Commission should insist on a high level of certainty in any accounting method used to make this demonstration in order to implement this core prohibition of Title II.

We agree with the interpretation of BCRA in the commentary that funds provided to political committees for the purpose of making electioneering communications should be considered

contributions, but that funds provided to entities that are not political committees are not contributions and do not in themselves trigger political committee status. To the extent an entity that is not a political committee legally accepts contributions for the purpose of making electioneering communications, those contributions are not subject to federal contribution limits. We also agree that funds provided to national, state, or local political party committees for the purpose of making electioneering communications should be considered contributions to those committees.

While it is theoretically true that funds provided to non-Federal accounts of separate segregated funds for electioneering communications would not be subject to federal contribution limits, such non-Federal accounts could not make electioneering communications even with solely individual donations without violating 2 U.S.C. § 441b(b)(2). A disbursement made by a non-Federal account set up or controlled by a corporation or labor union is a direct or indirect disbursement of funds by an entity described in 2 U.S.C. § 441b(a) and is therefore prohibited. As a result of the Wellstone amendment, there is no exception to this prohibition except for qualified nonprofit corporations. An individual making a contribution of any amount to such a non-Federal account, knowing that it is to be used for an electioneering communication would also be violating the law.

The "Special Operating Rules" of 2 U.S.C. § 441b(c)(3) make very clear Congress's intent that corporations and unions not be able to circumvent Title II of BCRA. If corporations or unions, or PACs set up by those entities, can merely set up a separate account or fund to receive donations to make electioneering communications, Congress's intent will be thwarted. The Commission must implement these provisions faithfully.