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July 12, 2002

Rosemary C. Smith, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice 2002-9

Dear Ms. Smith:

These comments are submitted on behalf of the Campaign and Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving Federal campaign finance laws. They address proposed rules to reorganize current 11 CFR 100.7 and 100.8 (hereinafter, the "reorganization rules") - which set forth the definitions of "contribution" and "expenditure" and the exceptions to those terms.

The Campaign and Media Legal Center commends the Federal Election Commission (FEC) for its interest in reorganizing the definitions of "contribution" and "expenditure." We support the objective of making these definitions, and the accompanying exceptions, easier to locate and read. At the same time, we have concerns about the procedure for achieving this reorganization. Furthermore, changes should be made to the draft reorganization rules to fully conform them to the Commission's final rules implementing the party and candidate soft money provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA).

I. Process

The Notice of Proposed Rulemaking (NPRM) to reorganize 11 CFR 100.7 and 100.8 was published in the Federal Register preceding the completion of a separate FEC rulemaking to implement the party and candidate soft money provisions of BCRA. Recognizing that the Commission would adopt final BCRA party and candidate soft money rules before completing the reorganization rulemaking, the reorganization NPRM indicated that changes in the definitions of "contribution" or "expenditure" necessitated by the final soft money rules would be incorporated to the final reorganization rules. Indeed, as indicated

below, amendments to the proposed reorganization rules are necessary to ensure their consistency with the final soft money rules.

Because the Commission published the reorganization NPRM prior to completion of the soft money rulemaking, interested observers will not have the opportunity to submit written comments reacting to proposed language to fully conform the reorganization rules to the soft money rules. While our written comments can and will point out areas in which we perceive a need for conforming the proposed reorganization rules to the soft money rules,^{*} this is not an adequate substitute for having an opportunity to respond to complete draft reorganization rules. For example, the Commission may – in its draft final reorganization rules – propose revisions to achieve consistency with the final soft money rules that were not cited in our comments. At a minimum, the commentary process would be more focused and, presumably, of greater use to the Commission were interested observers able to respond to a complete set of initial proposals in a given area.

II. Changes to the Proposed Rules

The proposed reorganization rules are in part conformed to the final party and candidate soft money rules. Specifically, proposed 11 CFR 100.84 and 100.144 cross-reference new 11 CFR 300.35 to describe the circumstances in which donations to and payments made by state, local or district party committees for office buildings do not constitute a “contribution” or “expenditure.” Additional changes are needed, however, to ensure the full conformity of these rules to the final soft money rules.

In particular, given the enactment of BCRA and the adoption of the final soft money rules, the references to allocation in proposed 11 CFR 100.80, 100.87, 100.88, 100.89, 100.140, 100.147, 100.148 and 100.149 -- which re-state existing language -- have become problematic.

BCRA and the final soft money rules changed the prevailing practice of “time-space” allocation between hard and soft money funds of state and local party “exempt activities” relating to Federal and non-Federal elections. With respect to such “exempt activities” that constitute “Federal election activity” (*see* 2 U.S.C. §431[20]), they require either 100 percent hard money financing or use of a tightly controlled mix of hard money and limited “Levin funds.”

^{*} While the regulatory definitions of “contribution” and “expenditure” should be consistent with any soft money regulations found elsewhere in Title 11 of the Code of Federal Regulations, nothing in this letter should be interpreted to suggest that the Campaign and Media Legal Center agrees with the final soft money rules adopted by the Commission. In fact, we believe that those regulations depart from the text and intent of BCRA in a number of respects, including but not limited to their provisions relating to state party financing of activities that affect Federal elections. Thus, our comments here urge conformity between the discussion of “exempt activities” in the reorganization rules and the treatment of such activities in the soft money rules (as regards allocation in particular) as a matter of proper regulatory form – and because the current references to allocation in the proposed reorganization rules might be taken to suggest that state parties could use unlimited soft money donations in financing certain electioneering activities in circumstances where this would in fact be forbidden by not only BCRA but even the imperfect FEC soft money rules.

However, the current references to allocation in 11 CFR 100.80, 100.87, 100.89, 100.140, 100.147 and 100.149 (defining state and local party "exempt activities") typically contain language to the effect of, "The payment of the portion of such costs allocable to Federal candidates must be made from funds subject to the limitations and prohibitions of the Act." This language might be read to suggest that some form of hard money/soft money allocation would be permissible for state, district or local party committee activities that must in fact be financed exclusively with hard money. Along these lines, it does not distinguish between two different types of state, local or district party committee allocation: allocation between hard money and soft money funds, and allocation between hard money and Levin funds (the latter of which is required insofar as allocation is permissible for "Federal election activity").

We strongly believe that the allocation language contained in the provisions defining state and local party "exempt activities" should be clarified to avoid any conclusion that allocation between hard money and soft money funds, or allocation at all, would be permissible when they are not. Likewise, language relating to allocation in proposed 11 CFR 100.88 and 100.148 – which deal with payments by candidates for volunteer campaign materials that refer to Federal candidates – should be consistent with the provisions throughout 11 CFR Part 300 (arising out of BCRA) that impose new and increased restrictions on the sources and amounts of funding used by candidates to finance electioneering activities.

In the reorganization NPRM, the Commission raised the possibility that it might change the word "allocation" or any of its derivatives in the sections cited above to "attribution." On its own, it is not evident what such a change would accomplish. Absent accompanying revisions, it would result in language in each such section to the effect of, "The payment of the portion of such costs *attributable* to Federal candidates must be made from funds subject to the limitations and prohibitions of the Act." This language might still be read to convey the idea that hard money/soft money allocation is always permissible for "exempt activities" relating to Federal and non-Federal elections, which is not in fact the case. As indicated above, the Commission should ensure that discussion of the "exempt activities" is fully and clearly consistent with the final soft money rules.

Thank you in advance for your consideration of these comments. Again, we appreciate the Commission's interest in revising the definitions of "contribution" and "expenditure," along with the accompanying exceptions, and hope that these comments will be useful during the course of its work on this issue.

Sincerely,

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