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July 12, 2002

BY ELECTRONIC TRANSMISSION; ORIGINAL BY HAND

Rosemary C. Smith, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Notice 2002-9

Dear Ms. Smith:

I am writing on behalf of Common Cause and Democracy 21 to comment on Notice 2002-9, "Reorganization of Regulations on 'Contribution' and 'Expenditure'," published on June 14, 2002. The Notice of Proposed Rulemaking provides for new regulatory provisions that set forth the definitions of (and exclusions from) the terms "contribution," 11 C.F.R. §100.7, and "expenditure," 11 CFR §100.8.

Our comments focus on two points, one procedural and one substantive, but both in the context of the Commission's parallel rulemaking, recently completed on June 25, 2002, implementing Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA).

1. The Commission should provide notice and the opportunity for additional comment on any changes to the proposed Part 100 definitions required by the recently adopted BCRA soft money rules. The Commission has instituted this Part 100 rulemaking prematurely, and should start again, but this time it should reflect in its proposed Part 100 rules the changes that are required either by the BCRA or by the Title I rules promulgated by the Commission pursuant to BCRA.¹

¹ For reasons stated in our comments submitted to the Commission in the course of the Title I BCRA rulemaking, Common Cause and Democracy 21 strongly disagree in several respects with the final Title I rules adopted by the Commission. By stating that the Part 100 rules should be conformed to the Title I rules, we mean to imply no agreement with the rules as adopted. Nonetheless, BCRA itself, as well as certain provisions of the final Title I rules, require conforming changes to the allocation language in the proposed Part 100 rules.

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Instead, the Commission is proceeding in a backwards fashion that leaves the public guessing as to how the Sections 100.7 and 100.8 definitions will be coordinated with the new BCRA rules, and accordingly without opportunity to comment on what could be important changes to the current regulations.

As you know, the Commission instituted its Title I rulemaking under BCRA by publication of an NPRM on May 20, 2002. That NPRM contained numerous issues of great importance to the implementation of the soft money ban in Title I of the BCRA, including the treatment of "exempt activities" as defined in Part 100, and how "allocation" of mixed federal and non-federal expenses would be addressed, an issue also reflected in Part 100.

On June 14, just eleven days before the deadline for promulgation of the Title I regulations, and just eight days before the Commission actually voted to adopt its final Title I rules, the Commission then published this NPRM "reorganizing" the Part 100 definitions of "contribution" and "expenditure."

Under normal circumstances, such a mere reorganization and re-statement of existing regulations would be unlikely to have substantive impact or to cause controversy.

But, as this NPRM itself recognizes, the adoption of the final soft money regulations "may affect the substance in the definitions of 'contribution' and 'expenditure.'" 67 Fed. Reg. 40882. As the NRPM states, "The issues [in the soft money rulemaking] concerning 'exempt activity' by State and local parties and the definition of 'Federal election activity' may directly impact on the definitions of 'contribution' and 'expenditure.'" *Id.* (emphasis added). Indeed, the NPRM then lists eight separate sections of its proposed Part 100 rule where "it is possible" that changes will be required as a result of the final Title I regulations. *Id.*

What the Commission intends to do, however, is totally inappropriate as a matter of rulemaking procedure. The NPRM states that "if" the final rules adopted in the soft money rulemaking "require substantively amending the current definitions of 'contribution' and 'expenditure', the amendment to the text of the regulations will be incorporated in the final rules arising from this reorganization rulemaking." *Id.* (emphasis added).

There will, however, be no notice and opportunity for public comment on these substantive changes to the Part 100 rules. Instead, after the opportunity for public comment in this rulemaking is closed, the Commission intends to draft, consider and adopt any changes to the Part 100 definitions that it deems necessary to conform to its recently adopted soft money rules.

This procedure violates the Commission's obligation to provide the opportunity for notice and comment in its rulemaking, and is also without justification. It clearly would have been better for the Commission to wait a mere 11 days – until it had adopted the final BCRA soft money rules – before publishing this Part 100 NPRM. The Commission then could have

published for notice and public comment whatever actual changes it proposes to make to the definitions of "contribution" and "expenditure" in light of the new soft money rules.

At this point, there is no alternative but to start this rulemaking again. If the Commission is intending to make substantive changes to the Part 100 definitions based on the final rules adopted under Title I of BCRA, it should publish those changes as new proposed rules, and provide the opportunity for public comment on them. Based on whatever comment it then receives, the Commission should at that time adopt a final Part 100 rule that incorporates the necessary changes arising from the BCRA rules.

But the Commission should not simply incorporate such changes into the final rule at this time, where there has been no opportunity for the public to comment on them, and where the Commission has not given adequate notice of the specific changes it intends to make.

2. **The Part 100 regulations should correctly reflect changes to the law made by the BCRA.** As the NPRM itself recognizes, the enactment of BCRA does affect the definitions of "contribution" and "expenditure." The Commission should ensure that the impact of the BCRA is correctly reflected in the new Part 100 rules.

In the proposed rules as published, the Commission several times simply re-states existing language relating to the payment of allocated costs by candidates and political parties. E.g. 11 C.F.R. §§100.80, 100.87, 100.88, 100.89, 100.140, 100.47, 100.148, 100.49 (proposed). In each case, that language provides that the payment of certain costs for voter activities "allocable to Federal candidates must be made from funds subject to the limitations and prohibitions of the Act."

This same language in existing Commission regulations has been a foundation of the longstanding soft money allocation system. A key purpose of the BCRA was to end that system. E.g. Cong. Rec. H409 (Feb. 13, 2002) (remarks of Rep. Shays) ("[T]hese allocation rules have proven wholly inadequate to guard against the use of soft money to influence federal campaigns").

For that reason, the BCRA makes substantial changes to the allocation system. National parties will no longer be permitted to raise or spend soft money, 2 U.S.C. 441i(a)(1), and accordingly will have to pay the entire costs for such activities with funds "subject to the limitations and prohibitions of the Act." State parties will have to use either hard money, or a mixture of hard money and Levin funds, to pay for "Federal election activities," *id.* at 441i(b)(1), (2), including some so-called "exempt" activities, as defined in the BCRA and the Commission's Title I regulations.

In both cases, it is inaccurate for the Part 100 regulations to continue to provide that only costs "allocable to Federal candidates" must be paid for with hard money. At best, this misrepresents core changes enacted by BCRA. At worst, this language might be mis-read to provide authority for state parties to continue the practice of using allocated hard and soft money

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funds to pay for activities, such as voter registration, that BCRA now requires to be funded entirely with hard money, or with a mixture of hard money and Levin funds, as "federal election activities."

3. **Conclusion.** The Commission should propose new language for the Part 100 regulations to conform those provisions to the BCRA, and to the Title I rules recently promulgated to implement the BCRA. The Commission should publish the new language for notice and comment, and adopt final Part 100 regulations only after receiving and considering public comment on specific proposed changes to conform the Part 100 provisions to the BCRA.

Sincerely,

A handwritten signature in dark ink, appearing to read "Donald J. Simon", with a long horizontal flourish extending to the right.

Donald J. Simon
Counsel for Common Cause and
Democracy 21