Larry Gold <lgold@aflcio.org> on 05/29/2002 07:42:29 PM

To: BCRAsoftmon@FEC
cc:

Subject: NPRM

I submit the attached comments on behalf of the AFL-CIO. Thank you.

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 - RSmith 5-29-02

May 29, 2002

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: NPRM, "Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money," 67 Fed. Reg. 35654 (May 20, 2002)

Dear Ms. Smith:

These comments are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the national federation of 66 national and international unions representing over 13 million working men and women throughout the nation. The AFL-CIO appreciates the opportunity to submit comments on the first set of proposed rules to be issued by the Commission under the Bipartisan Campaign Reform Act ("BCRA") of 2002, and requests the opportunity to testify, through undersigned counsel, at the hearings to be conducted on June 4 and 5.

The AFL-CIO addresses below selected aspects of this initial NPRM, focusing on the portions that implicate the rights and obligations of labor organizations either because the proposed regulations directly apply to those organizations or because the statutory language that is defined or otherwise applied in the proposed regulations may control or influence the Commission's subsequent rulemakings concerning other provisions of the BCRA that pertain to labor organization rights and obligations, such as various provisions of BCRA Title II. Our declination here to comment on any proposed regulation or portion thereof does not signify either endorsement of or opposition to it.

In submitting these comments, the AFL-CIO does not concede that any of the proposed regulations we address, or the statutory provisions underlying them, are constitutional; indeed, as

the Commission is aware, the AFL-CIO and its federal political committee, AFL-CIO COPE-PCC, have filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of numerous BCRA provisions, including several that are implicated by this initial rulemaking. Nonetheless, we recognize that the Commission, even as it is defending the constitutionality of the statute in court, has been directed by Congress to undertake this and other rulemakings under a specific timetable, and that it must comply with that directive. Except as otherwise noted, our comments generally assume, for purposes of this regulatory process, that the applicable provisions of the BCRA will survive judicial challenge and so the Commission's regulations will govern the rights and obligations of the AFL-CIO and other labor organizations.

Proposed Section 100.24, "Federal Election Activity"

The regulations should include a clear temporal definition of when "voter identification, get-out-the-vote activity, or generic campaign activity" are "conducted in connection with an election in which a candidate for Federal office appears on the ballot." We agree with the Commission that "Congress clearly intended to establish certain periods of time in which a federal candidate is not deemed to be on the ballot." 67 Fed. Reg. at 35656. Predicating the commencement of this period on when any individual becomes a "candidate" within the meaning of 2 U.S.C. § 431(2) would render the provision meaningless as a practical matter, for such status is almost always attained by at least one candidate, the incumbent, immediately or soon after the conclusion of the preceding election cycle. A point in time that balances applicable considerations would be January 1 of each federal election year in order to provide uniform and reasonable application of this provision; or, the period could commence when any candidate qualifies to appear on the ballot under applicable state law, which would provide a uniform standard, if not a uniform date, and also be consistent with the statutory language.

The definition of "voter identification" in proposed Section 100.24(a)(2)(i) should include only efforts to identify voter *intent*, that is, whether or not particular voters intend to vote for a particular Federal candidate or political party. The term should not cover the creation and maintenance of a voter file as such (or even the ascertainment of whether or not an individual is likely to vote irrespective of the voter's candidate or party preferences). So construed, the regulation would define the term to include only "efforts to determine voter preference for a specific candidate for Federal office or a political party in the election." This definition of "voter identification" does not subordinate the concept to "get-out-the-vote activity" or "generic campaign activity" but instead distinguishes them together, consistently, as aspects of conduct aimed at achieving particular electoral results rather than conduct that acquires information that is potentially equally useful for partisan, non-partisan or other purposes.

The regulation should also specify that efforts to identify voter inclinations with respect

to state or local candidates are exempt from the definition of "Federal election activity," inasmuch as the statutory definition applies only to activities inclusive of a Federal election, even where there is also activity inclusive of a state or local election, and does *not* cover activities that relate *solely* to state and local elections.

With respect to "voter identification," "get-out-the-vote activity," "generic campaign activity" and "voter registration activity" within 120 days of a Federal election, we support inclusion of a "de minimis" exemption, a concept that the Commission has embraced in other contexts, such as in connection with express advocacy communications by unions and corporations that reach some individuals beyond their respective restricted classes. Such an exemption would save political behavior and advocacy and Commission enforcement from notions of strict liability and recognizes practical considerations while remaining faithful to underlying statutory goals.

Proposed Section 100.25, "Generic Campaign Activity"

New 2 U.S.C. § 431(21) defines "generic campaign activity" to mean "a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." The proposed regulation would expand this definition to include activities that "oppose" a political party or a candidate or non-Federal candidate. This proposal exceeds the Commission's authority. Leaving aside the constitutional concerns addressed below, the Act, as now amended, contains the phrase "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office" in both the definition of "federal election activity" at 2 U.S.C. § 431(20)(A)(iii) and in the "fallback" definition of "electioneering communication" at 2 U.S.C. § 434(f)(3)(A)(ii). In contrast, the newly added definition of "generic campaign activity" utilizes only one of these four new statutory terms. It must be assumed that Congress made these choices intentionally, however difficult it may be to fathom the rationale underlying that choice. It must also be assumed that Congress intended each of these four terms to convey a distinct meaning that excludes, at least in part, each of the other terms. Absent a syntactical, contextual or similarly plain explanation for not limiting the interpretation of 2 U.S.C. § 431(21) to the term "promote", the Commission is not free to amend that definition by importing an additional statutory term, let alone picking and choosing from the three terms that the BCRA otherwise couples with that term.

Proposed Section 100.26, "Public Communication"

As drafted, proposed Section 100.26 repeats verbatim new 2 U.S.C. § 431(22). The Commission asks whether or not this definition should refer also to the Internet. The Commission, in advisory opinions and in proposed regulations elsewhere, has treated publicly accessible Internet material as a "general public political communication" under the Act. Whether or not doing so comports with the Act remains an open question, and Congress was silent with respect to the distinct status of the Internet in enacting the BCRA. Rather, Congress defined "public communication" using a formulation closely similar to that in 2 U.S.C.

§ 441d(a), which establishes the disclaimer obligations for communications that include express advocacy or solicitations of contributions. Accordingly, this regulation should reflect only the categories of communications in 2 U.S.C. §431(22).

Proposed Section 300.2(b), "Agent"

The word "agent" appears in numerous places in new 2 U.S.C. § 441i: subsections (a)(2); (b)(1); (b)(2)(B)(iv)(III); (b)(2)(C)(ii); (d); and (e)(1). We concur with the Commission's proposal to limit "agency" for purposes of these provisions to individuals who have "actual express oral or written authority to act on behalf of" an individual or entity regulated by Title I. Given the breadth of the activities prohibited or regulated by Title I, the potential criminal enforcement of each, and the multiple capacities in which various individuals who are "agents" of TitleI-regulated individuals and entities customarily operate, the term "agent" must be confined to persons who act in a particular instance on behalf of one of those individuals or entities. And, the same limitation should be applied to the term"officer" - - that is, a person should be deemed to be acting as an officer only when acting in that capacity on behalf of the regulated individual or entity, not when acting in another capacity.

These qualifications are necessary because national, state and local party and candidate committees routinely involve as officers or agents individuals who otherwise are employed by or act on behalf of other entities, including labor organizations, other membership organizations and corporations. In those other capacities these individuals may engage in conduct that, if engaged in on behalf of one of the entities regulated by Title I, could subject them to its prohibitions and restrictions. In order to preserve civic participation in political parties and candidate campaigns, the concept of "officer" and "agent" under Title I must be carefully circumscribed.

For these reasons, the AFL-CIO recommends that the proposed definition of "agent" include the following text at the end of it: "for the specific activity that he or she is to engage in for the candidate or committee," and that the regulation explicitly recognize that an "officer" is covered also only when so acting. These revisions would also have the salutary effects of avoiding the undue ensnarement of volunteers who are loosely affiliated with a campaign or party and the undue rendering of Title I-regulated individuals and entities responsible for volunteer activities not undertaken with actual express oral or written authority.

The Commission asks whether or not the presence or absence of the phrase "acting on behalf of" after the word "agent" in different portions of Title I warrants variable treatment of the term. We do not believe so. The variable uses can be explained by their syntactical context, and the same definition and application described above - - which carry out the limiting language "acting on behalf of" - - should be applied wherever the term "officer" or "agent" appears.

Proposed Section 300.2(c), "Directly or Indirectly Established, Maintained, Financed, or Controlled"

The AFL-CIO is concerned with the proposed definition of this phrase, which appears in

new 2 U.S.C. §§ 441i(a)(2), (b)(1), (d) and (e)(1), insofar as it may inform the Commission's definition of the unmodified phrase "established, financed, maintained, or controlled" in new 2 U.S.C. § 441i(b)(2)(B)(iii), which provides that "no person (including any person established, financed, maintained or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year . . . ."

The BCRA does not define this phrase, either as modified by "directly or indirectly" or as not so modified, and neither the proposed regulation nor the Commission's explanation of its proposal addresses the meaning of the phrase absent the modifier. The phrase "established or financed or maintained or controlled" currently appears in 2 U.S.C. § 441b(a)(5), the provision of the Act concerning the affiliation of political committees for purposes of applying the statutory limits on their contributions, and this phrase is currently implemented by the ten "circumstantial factors" set forth in 11 C.F.R. § 100.5(g)(4)(ii). Although proposed 11 C.F.R. § 300.2(c)(1)(i) incorporates current Section 100.5(g) in its entirety, the proposed regulation also alternatively lists a substantial variety of other factors as independently sufficient to satisfy the phrase as it appears throughout Title I with the "directly or indirectly" modifier. If these alternative factors are intended to carry out that modifier, that intent should be clear - - although even if that is the intent, these factors are confusing and reach far more broadly than the Act can reasonably be read.

If these alternative factors are intended also to apply to the unmodified phrase as it appears in new 2 U.S.C. § 441b(2)(B)(iii), then the Commission should not adopt it in its final regulations both because it is confusing and overly broad and because it contradicts 11 C.F.R. §100.5(g)(4)(ii).

See also the discussion of proposed 11 C.F.R. § 300.31, below.

Proposed Section 300.2(e), "Donation"

We concur with both the Commission's definition of "donation" and its suggestion that it be revised to exempt matters that are now exempt from the statutory term "contribution". There is nothing to demonstrate that the BCRA repeals those exemptions.

Proposed Sections 300.2(h), "Levin Account" and 300.2(i), "Levin Funds"

In order to provide greater clarity for those whose conduct will be affected by these provisions, we suggest that the Commission use a functionally descriptive term, such as "specially allocated", rather than the name of their legislative sponsor.

Proposed Section 300.2(l), "Promote, Support, Attack, or Oppose"

As noted earlier, these four new statutory terms appear together in both Title I and Title II. In enacting them while explicitly eschewing their limitation to express advocacy, Congress has flatly contradicted Buckley v. Valeo, 424 U.S. 1 (1976). The Commission asks "what

definition is most likely to survive constitutional scrutiny." 67 Fed. Reg. at 35660. In light of Buckley, it appears that Congress has assigned an impossible task to the Commission. We add only that the proposed regulation exacerbates - - if that is possible - - the unavoidable First Amendment breach by incorporating language from the oft-invalidated 11 C.F.R. §100.22(b) and by devising a new formulation, in proposed §300.2(l)(1)(ii), that appears neither in the BCRA nor the current regulations and whose meaning is likewise constitutionally infirm. Although we acknowledge that proposed §300.2(l)(2) limits the new statutory terms, and any such limitations move in the right direction, no limitation that leaves these terms reaching more broadly than express advocacy can suffice under Buckley.

Proposed Section 300.2(m), "To Solicit or Direct"

The AFL-CIO concurs with the proposed definition, and particularly endorses its express acknowledgment that the mere provision of information or guidance as to applicable legal requirements does not fall within the statutory language.

Proposed Section 300.31, "Receipt of Levin Funds"

The AFL-CIO concurs with proposed subsections (a), (b) and (c), and particularly urges the Commission to retain subsection (c), which acknowledges that the BCRA does not supersede state law that delineates lawful and unlawful sources of funds that will now be treated under the new "Levin" category. We also concur with the proposed acknowledgment in subsection (d) that state, district and local committees are not aggregated for purposes of the $10,000-per-source limitation, for that conclusion carries out the text and intent of the BCRA, and specifically the legislative compromise that produced the so-called Levin Amendment.

With respect to the donor side of the equation, the $10,000 limit applies to any "person (including any person established, financed, maintained, or controlled by such person)." 2 U.S.C. § 431(11) defines "person" to include "an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons." This language requires analysis in each instance as to whether the relationship between persons, or their political committees, satisfies any of these four factors. Accordingly, the Commission may not apply or incorporate the entirety of 11 C.F.R. § 100.5(g) to the "persons" that may donate so-called Levin funds, but only the "circumstantial factors" set forth at 11 C.F.R. § 100.5(g)(4).

Yours truly,

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