



AFSCME®

American Federation of State, County and Municipal Employees, AFL-CIO

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May 29, 2002

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

Re: Comments on Notice of Propose Rulemaking: Notice 2002 - 7
Prohibited and Excessive Contributions: Non-Federal Funds or Soft
Money

Dear Ms. Smith:

Enclosed for filing please find the comments of the American Federation of State, County and Municipal Employees, AFL-CIO on the above captioned matter. In an abundance of caution, I am e-mailing, faxing and forwarding by first class mail a copy of these comments.

Please feel free to call if you have any questions.

Sincerely,

Robert D. Lenhard
Rlenhard@afscme.org

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF THE
GENERAL COUNSEL

COMMENTS OF
THE AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
ON THE NOTICE OF PROPOSE RULEMAKING ON
PROHIBITED AND EXCESSIVE CONTRIBUTIONS; AND
NON-FEDERAL FUNDS OR SOFT MONEY

I. INTRODUCTION. Pursuant to Federal Election Commission Notice 2002-7, published in the Federal Register on May 20, 2002, the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) provides the following comments regarding the adoption of certain of the proposed regulations interpreting Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA).

II. REQUEST TO TESTIFY: AFSCME is NOT requesting to testify at the June 4 and June 5, 2002 hearing on the comments to Notice 2002-7.

III. COMMENTS

A. BACKGROUND. AFSCME is a labor union with approximately 1.3 million members. AFSCME's members are principally employed by State, county and municipal governments, though a significant number of the union's members are employed in the private sector, principally in health care. AFSCME has an affiliated political committee that is registered with the Federal Election Commission. AFSCME and its members are active in federal, State and local elections. AFSCME and/or its PAC make contributions to federal, State and local political parties and candidates as permitted by law.

B. The definition of an "agent," Proposed 11 CFR 300.2(b). Individuals who are "agents" of a party or federal candidate's campaign are bound by the same prohibitions as the party or campaign regarding soliciting, receiving, directing, transferring or spending nonfederal funds. 2 U.S.C. 323(a) & (e). *AFSCME: (i) supports the FEC's proposal that a candidate or political party can make an individual an agent only through "actual express oral or written authority"; and (ii) recommends*

the FEC further narrow the definition of an agent to include only acts the individual has been given specific authority to engage in.

AFSCME recommends that the proposed language in 11 CFR 300.2 be amended to read:

(b) *Agent* means any person who has actual express oral or written authority to act on behalf of a candidate, officeholder, or a national committee of a political party, or a State, district or local committee of a political party, or an entity directly or indirectly established, financed, maintained, or controlled by a party committee. An agent has actual authority if he or she has instructions, either oral or written, from the candidate or a committee official[.] *for the specific activity they are to engage in for the campaign or party.*

Unlike commercial activities, political campaigns rely extensively on the activities of volunteers to succeed. Candidates and campaigns are constantly trying to convince individuals to volunteer their time and energy to help. This is desirable and should be encouraged by these regulations. The active involvement of citizens in the political process is a sign of the health of a democracy.

(i) At the same time that an active pool of volunteers makes for a vibrant and healthy political system, volunteers are harder to supervise and manage than paid employees. The duration of their involvement in a campaign is often shorter than that of a full time employee in a commercial enterprise. The nature of a political campaign is one of chaotic activity and even paid staff usually work for only a short period of time. **In this context, the FEC has wisely chosen to require that agency be shown through "actual express oral or written authority" and not apparent authority.**

(ii) The significant role of volunteers and short-term paid staff means that agency should be limited to the tasks that individuals are specifically assigned. It is reasonably uncommon for an individual to play such a central role in the campaign that they would be considered an agent in all of their actions on behalf of a campaign. **The regulations should be clear that, to the degree a volunteer takes on a task or responsibility that makes him or her an "agent," that agency is limited to the task or function**

assigned and is not necessarily a general grant of agency. While a political party or campaign that has the active involvement of sophisticated legal counsel could achieve this end even without a change to the proposed regulation, the active involvement of sophisticated legal counsel is the exception, not the rule.

C. Federal Election Activities - The definition of voter identification. Proposed 11 CFR 100.24. *AFSCME recommends that the definition of voter identification be limited to telephone calls or canvassing, the purpose of which is to identify voters for other federal election activities, i.e., voter registration, GOTV or communications that refer to a clearly identified federal candidate. This could be achieved by amending proposed regulation, 11 CFR 100.24, as follows:*

11 CFR 100.24(a)(2)(i) Voter identification, including canvassing, and other activities for the purposes of voter registration, get-out-the-vote or public communications that refer to a clearly identified candidate and that are designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or political party; or...

In passing the BCRA, Congress drew all of the activities of the national political parties under federal law. The BCRA treated State and local parties very differently. Congress regulated four specific areas of State and local party activity. 2 U.S.C. 323(b). Congress limited the reach of two of these four new regulations by targeting activities that were expressly in support of a candidate for federal office (certain communication that mention a federal candidate, and staff time spent on a federal candidate's campaign): 2 U.S.C. 431 (20)(iii) and (iv). In the third, Congress limited the scope of the regulation by time (voter registration within 120 days of an election). 2 U.S.C. 431 (20)(i). It is the final of these four exceptions, which has a less clearly worded set of limitations, that the Commission must interpret here.

Congress limited the reach of its regulation of State and local parties' voter identification, get-out-the-vote and generic campaign activity to those instances in which the regulated activity was "conducted in connection with an election" in which a

federal candidate appears on the ballot. There are political activities that are not connected with an election that routinely involve gathering and analyzing data about whether particular individuals voted and how. Polling and focus groups are two examples. AFSCME is aware of nothing in the congressional record that reflects Congress intended to require State and local parties to use only federal "hard money" for polling in connection with state races. **The regulations should make clear that State or local party activities that are in "connection" with something other than an election, such as polling on issues, fundraising and the building and maintaining of membership files, can involve the purchase, collect, storage, sorting and use of data that includes records of whether a person is a voter or not and their voting history.** The FEC should also permit a "de minimis" level of voter identification.

D. Federal Election Activities - When does a public communication that refers to a clearly identified federal candidate "promote, support, attack or oppose" that candidate? Proposed 11 CFR 300.2(l). *AFSCME believes that Congress cannot regulate political speech that does not expressly advocate the election or defeat of a candidate or party.* AFSCME recognizes that the FEC may take the position that it is required to interpret the BCRA, even if there are profound questions as to the constitutionality of the statute. If so, *AFSCME (i) recommends the FEC delete from the proposed regulation the suggestion that an advertiser:ent could "unmistakably and unambiguously" encourage one type of action (which the ad does not mention) when the advertisement expressly encourages a second type of action (which the ad does mention), and (ii) supports the FEC permitting state and local candidates making certain limited references to federal candidates.*

The proposed regulation includes a subjective and potentially unconstitutional test that is not required by the BCRA. Proposed 11 CFR 300.2(l)(1)(ii). That proposed subsection provides that a communication promotes, supports, attacks or opposes a federal candidate if it "[u]nmistakably and unambiguously encourages action to elect or defeat a clearly identified candidate, even if it also encourages some other kind of

action." *Id.* Thus, the proposed regulation envisions the FEC could take the position that an advertisement "unambiguously" encourages the election or defeat of a candidate, even though the ad expressly advocates some other kind of action. This will be a very difficult standard to enforce fairly. It will also be a difficult standard to understand in application. This standard establishes a line between permitted speech and prohibited speech that is so vague that compliance is only assured if you steer well clear of the line. Finally, courts are unlikely to uphold this standard, so long as Buckley remains good law. Buckley v. Valeo, 424 U.S. 1 (1976).

The FEC should not adopt regulations that place an overly broad restraint on speech. Some of the problems with the proposed regulation could be resolved by ending the regulation at the word "candidate," i.e., "[u]nmistakably and unambiguously encourages action to elect or defeat a clearly identified candidate." While the regulation still prohibits speech that does not expressly advocate the election or defeat of an identifiable candidate (and thus to our eye is unconstitutional), at least this change will limit the constitutional problems in the regulation.

AFSCME also believes that these regulation will be improved if they exempt communications that are made in connection with a State race; and (a) mentions a federal candidate only in context of his or her endorsement of the State candidate; (b) mentions a federal candidate only in the context of another Federal, State or local candidate agreeing with or disagreeing with the Federal candidate's position on an issue or legislation; or (c) refers to a bill or law by its popular name where the name includes the name of a Federal candidate. Proposed 11 CFR 300.2(1)(2).

E. *Federal Election Activities - The definition of get-out-the-vote activities by State and local parties should be limited to election day.* By definition, the restriction should be limited to the costs associated with activities on election day.

F. Should State and local parties that want to raise money under the Levin Amendment be required to maintain a separate account for those funds? Proposed 11 CFR 102.5(b). *AFSCME believes (i) that that State and local party committees should be required to have a separate Levin account, but (ii) that State and local parties that*

make such expenditures and do not have such an account should be able to raise as a defense the claim that they have accounting practices to prove the independent nature of their Levin money. Thus, while failure to use a Levin account could constitute a violation of the regulations, the State or local party would still have the opportunity to prove that all the funds used to pay for federal election activity were raised from permitted sources, in permitted amounts and that the allocation formula were met. If successful, the State or local party could reduce the seriousness of the violation.

AFSCME believes that it will be difficult for many local party committees to comply with the Levin requirement of the BCRA, especially on election day. Compliance will be somewhat easier if the party maintains a separate account for Levin funds.

AFSCME recommends that the FEC treat the failure to comply with these rules with two levels of enforcement: violations established by the failure to have the appropriate structures in place (i.e., a separate bank account) and more serious violations for using inappropriate funds (i.e., contributions from a person in excess of \$10,000 or the failure to appropriately match federal and Levin funds). Thus, a State or local party which had failed to establish a separate "Levin account" could avoid the more serious type of violation by showing that it had used only permissible funds.

G. Federal Election Activities - Does the definition of federal election activity incorporate the exemption for certain grassroots activities that is found in the definition of a "contribution" and "expenditure"? Proposed 11 CFR 100.24(b)(4).
AFSCME: (i) supports the FEC excluding the costs of certain grassroots activities from the definition of a federal election activity; (ii) recommends that the regulations include other exceptions to the definition of a "contribution" and "expenditure;" and (iii) believes the proposed regulation should be amended to make clear that slate cards, sample ballots, palm cards or other printed listing of three or more candidates are not necessarily GOTV activity.

The BCRA did not amend the existing statutory exemption of certain grassroots activities from the definition of a contribution or expenditure. 2 U.S.C. 431(8) & (9). These include the cost of pins, bumper sticker, handbills, brochures, posters, party tabloids and yard signs, printed slate cards, sample ballots, palm cards, or other items

that listed three or more candidates, and voter registration and GOTV in conjunction with a presidential race.

(i) The proposed regulation would apply the statutory exception for the cost of pins, bumper sticker, handbills, brochures, posters, party tabloids and yard signs to the definition of a federal election activity. See, 2 U.S.C. 431(8)(b)(x) and 431(9)(viii) and 11 CFR 100.24(b)(4). **AFSCME agrees with the Commission's proposal in this respect.**

(ii) However, the proposed regulation does not include the statutory exception for printed slate cards, sample ballots, palm cards, or other items that listed three or more candidates to the definition of a federal election activity. 2 U.S.C. 431(8)(b)(v) & 431(9)(b)(iv). **The definition of a "donation" should incorporate this statutory exclusion.** See Section I below.

(iii) The proposed regulation should be amended to make clear that slate cards, sample ballots, palm cards or other printed listing of three or more candidates should be deleted from the list of GOTV activity. The FEC's current regulations treat these printed materials separately from GOTV. See, e.g., 11 CFR 100.7(b)(9) & 100.7(b)(17). These materials could be distributed long before election day and contain no reference to a federal candidate. In that context, they are voter information on who the candidates, and not a GOTV activity. **Thus, the timing of their distribution and not their format should define whether they are federal election activity.** *The amended regulations would read as follows:*

(iii) **Get-out-the-vote activity.** Examples of get-out-the-vote activity include transporting voters to the polls, contacting voters on election day [or shortly before] to encourage voting but without referring to any clearly identified candidate for Federal office, and distributing printed slate cards, sample ballots, palm cards, or other printed listing(s) of three or more candidates for any public office *on election day*;

11 CFR 100.24(b)(4) amended (bracketed language deleted and italicized language added.)

H. Regulations regarding the BCRA's prohibitions on national party committees raising money for 501(c) organizations that make expenditures or disbursements for federal elections. Proposed 11 CFR 300.11. *AFSCME recommends that the FEC adopt specific language that a national party committee could use when it makes a donation to a 501(c) organization that would serve as a safe harbor from prosecution.* As a matter of practice, AFSCME believes that wherever possible, the FEC should afford specific language that can be used as a safe harbor from prosecution absent evidence of an intent to violate the law. It does not seem appropriate to require a political party to conduct an individual investigation into each and every organization it wants to give money to. This is especially true considering that it is future acts and not past conduct that triggers a violation in this circumstance. **It should be sufficient that the party committee state to the 501(c) organization that the funds cannot be used for activities that would constitute an expenditure in a federal election.**

I. Should the definition of "donation" incorporate the existing exclusions found in the definition of a "contribution." Proposed 11 CFR 300.2(e). *AFSCME supports the FEC incorporating the exemptions for "contributions" into the definition of a "donation" in 11 CFR 300.2.* Congress adopted the word "donation," at approximately a dozen points in the BCRA. However, Congress gave little if any indication as to how that term was to be defined and what, if any way, it might be different than the word "contribution." In common usage, the terms are synonymous. See, The Merriam-Webster Thesaurus, Pocket Books edition, 1978, p. 172, "donation...syn alms, benefaction, beneficence, charity, contribution, offering" and p. 117, "contribution n syn see donation." The BCRA often uses the word in tandem with "contribution." To exclude the exemptions may create confusion or unintended consequences.

May 29, 2002