Association of
State Democratic
Chairs

Joe Carmichael
President

May 29, 2002

Via E-Mail and Hand Delivery

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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money

Dear Ms. Smith:

These comments are submitted on behalf of the Association of State Democratic Chairs ("ASDC") in response to the Commission's above-referenced Notice of Proposed Rulemaking, 67 Fed. Reg. 35654 (May 20, 2002), proposing regulations to implement certain provisions of the Federal Election Campaign Act of 1971 as amended ("FECA"), as further amended by the Bipartisan Campaign Reform Act of 2002, P.L. 107-55 ("BCRA").

The ASDC is an organization consisting of the chairs and vice-chairs of the state Democratic Party committees of the 50 states, the District of Columbia and U.S. territories. The ASDC itself is a Federal political committee registered and reporting to the Commission. The ASDC elects its own executive committee and officers. The ASDC supports efforts to strengthen the role and capabilities of state and local Democratic party organizations through advocating their interests with the national party committees, before regulators and the Congress, and through training, workshops and other activities.

The ASDC welcomes the opportunity to comment on these proposed regulations which are of such critical importance to the future operation of state and local party committees. We believe the Commission and its Office of General Counsel have done an

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outstanding job, under very difficult circumstances, in identifying and analyzing the many issues that the Commission will be forced to confront in promulgating the Title I regulations that BCRA requires the Commission to issue very quickly. The state Democratic Parties are most appreciative of the extraordinary effort devoted to the draft regulations, in particular, by the Office of General Counsel.

The ASDC requests an opportunity to testify, through counsel, at the hearing on the proposed rules to be held before the Commission on June 4 and 5, 2002.

I. Background

A. The Role of State and Local Parties

BCRA inherently and necessarily has a different impact on state and local party committees than it does on national party committees and other types of organizations. State and local parties are creatures of state law. Many states provide by statute for the creation and operation of state and local party committees, and for the election of their officers. In many states, too, state party committees are empowered to nominate and place on the general election ballot their party's candidates for state and local office, in some cases through party conventions.

The principal function of state and local party committees is to elect candidates to state and local office, including statewide offices and state legislative seats.

In spending funds for these functions and for their ongoing operations, state and local parties are, of course, required to raise and spend funds in accordance with applicable state laws. As the Commission is well aware, despite the superficial and misleading appellation of "soft money," these laws vary widely, from states in which state law permits contributions only from individuals and only up to $1,000 per year, much tighter than Federal law (e.g.,West Virginia, Rhode Island) to states that allow contributions in unlimited amounts, or amounts greater than those permitted by FECA, from sources including sources prohibited under FECA.

The state and local parties play a critical role in the Democratic Party's efforts to organize and communicate with voters on behalf of the Democratic ticket. In the last 15-20 years, much of the Democratic Party's voter contact and field activities have been carried out through "coordinated campaigns," projects of the state parties in which the state party carries out, on behalf of the entire Democratic ticket, the core functions of voter registration, identification of voters likely to vote Democratic and turning out voters on election day. Typically Federal, state and local candidates and their representatives work together to raise the necessary funds for the state Democratic party to carry out these activities, and plan the activities themselves, which are undertaken with a combination of paid staff and volunteers.

The state parties play a significant role in the process of nominating the Democratic Party's candidate for president of the U.S. Each state party is charged with

the development and implementation of plans for the allocation and selection of delegates to the Democratic National Convention. These plans must conform to national party rules, but vary widely from state to state. In 2000, thirteen state parties allocated delegate positions among presidential candidates, and selected delegates to fill those positions, through a caucus/convention system. Typically in such systems grassroots activists at the precinct or county level meet to elect delegates to a county or district convention, and that series of party meetings elects delegates to a state convention which in turn elects delegates to the national convention and, in some cases, state party officers and/or members of the Democratic National Committee. Many other states use party meetings or conventions to determine who will serve as delegates to fill positions allocated among presidential candidates through a primary system.

Many of the remaining state parties hold state conventions every election year to elect party officers or endorse candidates for state office. In many states, thousands of volunteer Democratic Party activists participate in the caucus/convention systems.

The state parties have an important role in the governance of the national party, the Democratic National Committee ("DNC"), which is the governing body of the Democratic Party of the United States. Under the Charter of the DNC, each state party chair and vice chair automatically serve as members of the DNC (Charter of the Democratic Party of the United States, Article Three, Section 2(a)), and the remaining elected members from that state are elected by the state party. Id. Article Three, Section 3. Currently, thirteen state party chairs or vice-chairs serve on the Executive Committee of the DNC, having been elected by their regional caucuses in accordance with the DNC bylaws or otherwise appointed to the Executive Committee. The President of the ASDC is a state party chair or vice chair and he or she automatically serves, by virtue of that position, as one of the five national vice-chairs of the DNC (id. Article Three, Section 1(e))—one of the nine national officer positions of the DNC (chairman, five vice chairs, secretary, treasurer and national finance chair). Id.

State parties are characteristically ill-equipped to comply with the complex, burdensome regulatory schemes imposed by current law, let alone the hugely more burdensome regulations called for by BCRA. Fully 35% of the Democratic State Parties have three or fewer full time staff. At least 38 of the state parties have no full time accountant or comptroller. The majority of state party chairs are volunteers who have other jobs. Virtually all other state party officers are volunteers who have other jobs.

B. The Commission's Task in Implementing Title I

The state Democratic Parties strongly believe that many provisions of BCRA criminalize ordinary aspects of political organization and communication at the grassroots level and will thereby make it impossible for state and local party committees to carry out their core functions. The state Democratic Parties further believe that there is no governmental interest at all that could justify many of these criminal prohibitions. The California Democratic Party has raised some of these issues in its suit, brought together with the California Republican Party and a number of other plaintiffs, including

local party committees, challenging the constitutionality of a number of provisions of BCRA. See Complaint, California Democratic Party et al. v. Federal Election Commission et al., Case No. 1:02CV00875 (CKK) (D.D.C., filed May 7, 2002).

The ASDC understands that the Commission is obligated to implement the BCRA as enacted and has no power at all to rule on the constitutionality of any provision of the law. The Commission does, however, have not merely the power but the inherent obligation to issue regulations that will construe and implement the statute in a way least likely to raise constitutional concerns. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 574-77 (1988)(no deference due to agency construction that raises constitutional problems).

Further, the Commission's own attorneys have represented to the three-judge Court hearing the consolidated challenges that the Commission's decisions with respect to the regulations may obviate certain of the constitutional issues. For example, at the scheduling conference held on April 23, 2002 in McConnell v. FEC, Case. No. CV-02-582, government attorney Shannen Coffin stated that "the point is that there are nuances here that we believe that the regulations will, in fact, be able to clarify, and because there are vagueness challenges in this case, we think that, in waiting for the regulations is the advisable approach here." (Scheduling Conference, April 23, 2002, Transcript at 43). Similarly, Commission attorney Stephen Hershkowitz represented to the Court that there "are a number of issues that in fact I think this court might want to consider as a preliminary matter, whether or not they are even ripe for this court to hear, . . . where the [C]ommission hasn't even written a rule yet and plaintiffs are complaining that that rule is going to be unconstitutional." (Id. at 62).

Accordingly, the ASDC urges the Commission to interpret and implement BCRA in a way that is least likely to create an infringement of the constitutional rights of the state and local party committees.

II. Comments on Proposed Regulations

The following specific comments follow the order in which the proposed new regulations appear in the NPRM.

Definitions

1. Proposed definition of "Federal election activity"

The NPRM raises the question of how "voter identification" should be defined for purposes of the terms "Federal election activity." We believe that "voter identification" should be defined to include only activity that involves actual contact of voters, by phone, in person or otherwise, to determine their likelihood of voting generally or their likelihood of voting for a specific Federal candidate. In particular, the term "voter identification" should not include the expenditure of funds merely for the acquisition or enhancement of a list of voters, as well as the acquisition of publicly available

demographic information regarding those voters, which is part of the fundamental infrastructure of a state or local party organization and should therefore be treated as an administrative expense.

Nor should "voter identification" include contacting registered voters to determine their party affiliation or preference. In many states, voters do not register by party. Simply to create a list of party adherents, then—similar to the basic list of registered voters in states which do provide for registration by party—requires state and local parties to contact voters to determine their affiliation. Including such contacts in the scope of "voter identification" would create an indefensible distinction between the way such expenses are paid for by state and local parties in states which provide for registration by party, and state which do not. In other words, if such contacts were included as "voter identification," then acquisition of party affiliation information would be treated as an administrative expense in states with party registration, but in states without registration by party, state and local parties would be required to pay for acquisition of this basic information 100% with Federal contributions or with a combination of Federal funds and highly-restricted "Levin Amendment" contributions.

For these reasons, the proposed definition of Federal election activity, 11 C.F.R. §100.24(a)(2)(i), should be amended by deleting all the material after the word "determine" and replacing that language with "preference for or views regarding a Federal candidate or likelihood of voting."

The NPRM raises the question of whether voter identification should be read in conjunction with get out the vote such that it reaches only those activities designed to identify voters for GOTV purposes. BCRA uses "voter identification" and "get out the vote" as distinct terms. We believe that "voter identification" should be limited to voter contact for the specific purposes suggested above and that "get out the vote" should refer to actual communications with voters for the purpose of encouraging them to vote on election day.

The NPRM offers the example of an activity designed solely to identify supporters of a gubernatorial candidate. Such activity should never be considered "Federal election activity," regardless of timing or other factors, assuming there is no other content to the communication. To the contrary, state and local parties are required, under state law, to pay for such communications 100% with funds subject to the requirements of applicable state law. See discussion of section 100.24(b) below.

Proposed section 100.24(a)(2)(iii) includes, as an example of GOTV activity, the distribution of slate cards, sample ballots, palm cards, etc. We do not believe that any such materials referring to candidates should ever be regarded as "GOTV" activity. If such materials are a public communication, as defined by new FECA section 301(22), which refers to any Federal candidate, and promotes or supports that candidate, then it is a "Federal election activity" under new FECA section 301(20)(A)(iii) regardless of other content, or other factors. Even if such a public communication refers to both Federal

candidates and state and local candidates, and promotes or supports any Federal candidate, then likewise it must be treated as a "Federal election activity."

If such materials do not qualify as a "public communication" as defined in new section 301(22), then their costs should continue to be allocated between Federal and non-Federal funds in accordance with the Commission's regulations, by amending new section 300.33 to allow for the allocation of slate cards between Federal and non-Federal funds. A communication that promotes a party without mentioning candidates is defined by BCRA as a "generic campaign activity," which makes it "Federal election activity." Sample ballots, palm cards, etc. which refer only to state or local candidates are clearly excluded from the definition of "Federal election activity" under new FECA section 301(20)(B)(iv) and their costs must be paid for 100% with state-regulated funds.

For these reasons, the reference to slate cards, palm cards, sample ballots or other printed listings of candidates should be removed from proposed section 100.24(a)(2)(iii).

The NPRM questions whether slate cards and sample ballots that qualify as exempt activities under 2 U.S.C. §431(8)(b)(v) should be treated as "Federal election activities." The answer is no. Activities that qualify under these exemptions should not be treated as "Federal election activity." Such activities are exempted from the definitions of "contribution" and "expenditure" under FECA. The BCRA does not repeal or amend these exemptions. The purpose of these exemptions was to encourage the undertaking of grassroots volunteer activities by political parties on behalf of both Federal and non-Federal candidates. The applicability of these exemptions is already subject to a number of conditions to effectuate this purpose; for example, none of the exemptions covers broadcast communications. To federalize such grassroots activities would be inconsistent with the purpose of the exemptions. Thus the costs of such slate cards and sample ballots, and other exempt activities, should be allocated between Federal and regular non-Federal funds on a time/space basis as prescribed in the Commission's current regulations.

The NPRM asks whether there should be a defined time period that distinguishes "voter identification" and GOTV activities. It is the view of the ASDC that each of these definitions should be determined by the content of the communication, and that the timing of the communication should not be relevant. To be sure, the process of voter identification has value to a party committee that helps identify future members, as well as future donors to the committee. Voter identification is most valuable to a party committee when undertaken in proximity to an election since people are more apt to define their own political beliefs when they are confronted with voting options. Accordingly, the ability of a state party to accurately identify its long term members and supporters are most valuable during a period when the identification is undertaken in close proximity to an election.

As a general matter, the ASDC believes that the NPRM incorrectly assumes that all exempt activities, as described in 11 C.F.R. §§ 100.8(b)(10), (16) & (18), are by

definition "Federal election activity." For the reasons set forth above, exempt grassroots activities should not be treated as Federal election activity.

The NPRM raises the question of the period of time during which a Federal candidate should be deemed to be on the ballot for purposes of interpreting language found in new FECA section 301(20)(A)(ii). Thus, the Commission is attempting to discern whether activities otherwise described in this subsection should be exempted from the definition of "Federal election activity" if undertaken during certain time periods before an election. It appears that the NPRM needlessly complicates this particular question. Any attempt to create a process that attempts to discern when a candidate is eligible to appear on the ballot, actually appears on the ballot, or can no longer qualify for the ballot will create a system that will be impossible for the regulated community to follow, or for the Commission to enforce. Therefore, the Commission should create a fair and uniform date for the applicability of this section. The ASDC believes that such activities should be considered "Federal election activity" if they are undertaken on January 1 of the Federal election year or later.

The listing in proposed section 100.24(b) of activities that are excluded from the definition of "Federal election activity", and which may be paid for 100% with non-Federal funds, appears basically to track the language of BCRA. The NPRM, however, suggests that a "public communication" that expressly advocates the election or defeat of a state or local candidate, without any other content, could be transformed into GOTV and thus into "Federal election activity" depending on when such activity is conducted or on other factors or content, e.g., "a telephone bank on the day before an election..., where GOTV phone calls are made to over 500 voters where the calls only refer to a State or local candidate...."

We do not believe such activity could ever be considered "Federal election activity," under any circumstances. Perhaps a phone call urging people to get out to vote for "Democratic candidates" or the Democratic ticket, and referring specifically to state and local candidates, could be considered generic or GOTV activity. A phone call that says merely, "Get out to vote tomorrow for Smith for Governor" cannot possibly, under our Constitution, our Federal system and our system of state campaign finance laws, be considered a "Federal election activity" to be paid for exclusively with Federally-regulated funds or a combination of such funds and highly-restricted "Levin Amendment" contributions.

2. Definition of "generic campaign activity"

The ASDC supports the proposed interpretation of "generic campaign activity" to apply to special elections. The language of the regulations should make this interpretation explicit. The NPRM asks for comment as to which exempt activities should apply to the definition of "generic campaign activity." Since exempt activities, by definition, reference a clearly identified Federal candidate, there appears to be no applicability of "exempt activities" to the definition of "generic campaign activity."

3. Definition of "public communication"

The NPRM raises the question of whether the definition of "public communication" should include communications provided through the use of world wide web sites, widely distributed electronic mail or other uses of the internet. It is our understanding that the sponsors of the legislation intended that such communications are to be excluded from the scope of "public communication."

4. Definition of "mass mailing"

ASDC supports the proposed regulation.

5. Definition of "telephone bank"

ASDC supports the proposed regulation.

6. Proposed 11 C.F.R. 300.2 Definitions

A. Definition of "agent"

Because of the important interrelationships between the governing structures of the national, state and local Democratic party committees, the definitions of "officer," "agent" and "acting on behalf of" are critically important. In this regard, it appears that the NPRM has conflated several distinct concepts which should be addressed separately and distinctly in the regulations.

(a) Application of prohibition to individual officers and agents

The first question is when particular restrictions on a party organization should be applied to individuals because they are "officers" or "agents" of that organization. For example, what persons associated with a national party committee are personally forbidden, under criminal penalty, from raising any non-Federal funds, for anything, for purposes of new FECA section 323(a)? What persons associated with a state or local party are personally forbidden under new FECA section 323(d), under criminal penalty, from raising funds for a nonprofit organization that engages in "Federal election activity," e.g., nonpartisan voter registration? The issue here is the question of an individual's liability for his or her own actions.

The plain language of BCRA requires that, to be liable, an individual must meet two tests. First, the individual must be an "agent" of the party organization at issue. Second, the individual must be "acting on behalf of" that party organization.

With respect to the definition of "agent," we believe the Commission should utilize the current, well-established definition set forth in its regulations, 11 C.F.R. §109.1(b)(5).

With respect to the definition of "acting on behalf of," such term should apply only if the individual is acting on behalf of the party committee with respect to the activity that is forbidden to the party committee itself. Here, the proposed regulation, §300.2(b), provides a useful standard: a person is "acting on behalf of" a party organization only if he or she has actual express oral or written authority, to act on behalf of that organization, with respect to the particular activity that is forbidden to the party organization itself.

We would propose that, to clarify these issues, section 300.2(b) be revised to add a new definition as follows:

> "Acting on behalf of" an entity with respect to a particular prohibited or restricted activity means to have actual express oral or written authority to undertaken that activity for that entity, in the form or instructions, either oral or written, from an authorized official of that entity.

Presumably it is the intent of BCRA that an officer of an organization is, likewise, subject to a prohibition or restriction only when he or she is acting on behalf of that organization with respect to the restricted activity. For example, as noted, the president of ASDC—who is a state party chair—is also a national vice chair of the DNC. Is he restricted from raising non-Federal funds for his own state party? To make clear that he is not so restricted, the regulation should provide that an individual will be treated as an officer of an organization with respect to a prohibited activity only when he or she is acting on behalf of the organization with respect to that activity. The Commission should therefore clarify that the term "acting on behalf of" qualifies both officers and agents.

(b) Vicarious liability

The NPRM also raises the completely separate and distinct question of when a party organization has violated a particular restriction or prohibition because of the actions of an agent—in other words, the issue of the organization's vicarious liability for the actions of an individual associated with that organization.

This question should be resolved in the same way as the issue of individual liability. That is, an organization should be held liable for the acts of an individual in violation of a particular prohibition, only when that individual had actual authority to undertake such acts; responsible officials of the organization had actual knowledge that the individual was representing herself as acting on behalf of the organization, i.e., as having such authority; and the acts undertaken are intended to benefit the organization.

B. Definition of "directly or indirectly establish, finance, maintain or control"

The NPRM has greatly over-complicated the proposed definition of "establish, finance, maintain or control." The term is adequately defined in the affiliation rule of the Commission's current regulation, 11 C.F.R. §100.5(g)(4). The current regulation has

been applied in a number of enforcement proceedings and cases, and the meaning of the regulations is relatively well-established and well-understood. Accordingly, the new regulation should simply provide that an entity is "directly or indirectly established, financed, maintained or controlled" by a parent entity if it is affiliated with that parent entity, as defined in section 100.5(g)(4) of the Commission's rules, on or after the effective date of BCRA, i.e., November 6, 2002.

The proposed regulation, section 300.2(c), by contrast, would utilize a number of impossibly vague and complex concepts to determine whether an entity has been "established, financed, maintained or controlled" by a parent entity. For example, the proposed regulation would call for the Commission to determine whether one entity worked to establish another entity "alone or in combination with others"—an essentially meaningless phrase. Proposed 11 C.F.R. §300.2(c)(1)(ii). Similarly, the Commission would be called upon to figure out if the alleged sponsoring entity provided a "significant" amount of the second entity's funding "at any point in the entity's existence," based on consideration of three completely subjective factors, any one of which could be arbitrarily deemed to be dispositive, and any one of which could be examined in any time period ranging from three hours to a century. Id. §300.2(c)(1)(iii).

The approach of the proposed regulation is an invitation for mass confusion and endless investigation. The Commission should instead adopt the well-established approach of the existing affiliation rule, and simply apply it to the circumstances of the entities in question at whatever point, after the BCRA comes into effect, the alleged relationship becomes relevant.

C. Definition of "donation"

The ASDC generally supports the proposed definition of "donation." As the NPRM notes, there are other activities that have been recognized through the Commission's advisory opinion process as exempt from the definition of "contribution" that should also be made, in these new regulations, exempt from the definition of "donation" as well. Such activities would include, for example funding of redistricting litigation and election recounts and contests, and payment of civil FEC penalties, by a state or local party committee. With respect to the NPRM's request for comments regarding any specific exclusions from the definition of "donation," the Commission could simply add a sentence at the end of proposed section 300.2(e) that states:

"Nothing in this subsection shall preclude a party committee from receiving anything of value that is specifically exempted from the definitions of contribution in 11 CFR 100.7(b) or expenditure in 11 CFR 100.8(b)."

Thus, all of the current regulatory exemptions should be available to party committees. The Commission should not pick and choose which exemptions are, and are not, applicable to party committees. In that regard, it should be noted that the NPRM did not suggest that the provision of legal and accounting costs, found at 11 CFR § 100.7(b)(14). It should be noted that, now, more than ever, party committees must be

afforded the opportunity to avail themselves of the highest quality representation and accounting services in connection with FEC compliance matters.

D. Definition of "Levin funds" and "Levin accounts"

First, the Levin Amendment should be interpreted to permit the spending of Levin funds on non-Federal activity, as contemplated by the proposed definition. Nothing in BCRA or its legislative history would suggest any contrary interpretation.

Second, although it would seem generally prudent for state and local parties to establish separate "Levin accounts," imposing such a requirement in the regulations would be problematic. Establishment of multiple accounts for non-Federal funds may be prohibited by the laws of certain states. For example, Wisconsin election law prohibits a committee from establishing more than one single depository account. See Wisconsin Statutes Annotated 11.14(1). Furthermore, several state party committees are required, under state law, to maintain multiple non-Federal accounts, each with their own prohibitions and limitations, as well as permissible uses. Examples of such states include New York, Maryland, South Carolina, Texas, California and Washington. Thus, each of these states may be required to establish multiple Levin accounts to properly segregate funds under state law. They will then be required to determine the interrelation of state law and the permissible uses of Levin funds to determine which account to make transfers from for particular expenditures. Needless to say, this will be a dauntless task for affected state party committees. For these reasons, the establishment of separate Levin accounts should be optional.

E. Definition of "promote or support or attack or oppose"

The term "promote, support or attack or oppose" is constitutionally vague and overbroad. The FEC has failed to supply a constitutionally valid limiting construction. The proposed definition itself is beyond any formulation that has been approved by any court and will not likely withstand constitutional scrutiny. Accordingly, ASDC does believe the definition is too broad.

F. Definition of "to solicit or direct"

Proposed section 300.2(m) would define a forbidden solicitation or direction to include any request, suggestion or recommendation to make a contribution or donation, "including through a conduit or intermediary." The vagueness of the terms "request, suggest and recommend" is an invitation for endless investigations by the Commission of conversations between and among party officials, workers, volunteers, etc. which would clearly violate the freedom of association of party committees by forcing such individuals to choose and consider carefully every word they say to their party colleagues. The term "solicit" must be limited to an explicit request that an individual or entity make a contribution. To the extent that the NPRM requests clarification as to whether the term "direct" should be limited to the definition of "conduit or intermediary" as defined in the Commission's regulations at section 110.6(b)(2), the ASDC supports such a formulation.

As the NPRM suggests, the definition should set forth examples of activity that will not be treated as "to solicit or direct." Such examples should include the passive providing of information in response to an unsolicited request for information and comments made to a public gathering regarding an organization. Any listing of examples should indicate that the examples are not exclusive, i.e., that "examples include but are not limited to...."

State, District and Local Party Committee, and Organizations

1. Proposed Revisions to 11 C.F.R. §100.14

The phrase "as determined by the Commission" should be deleted from the definition of district or local committee in proposed section 100.14(c). As the NPRM suggests, "the key criterion for determining status as a district or local party committee" should be state law or party bylaws; these are objective criteria and there should be no discretion left to the Commission to decide whether a particular organization is or is not a local party committee.

2. Proposed Revisions to 11 C.F.R. 106.5

As noted above under the discussion of "Federal election activity," the NPRM confuses the relationship of "Federal election activity" with "exempt activities," and ignores a category of activity which still requires allocation of costs on a time/space basis.

Any material or communication which mentions a Federal candidate is potentially a "public communication," as defined in BCRA, new 2 U.S.C. §431(22). If such material or communication is a "public communication," and is not an exempt activity, the costs must be paid 100% from Federal funds; there is no allocation at all, and no permissible use of Levin funds. If such activity constitutes an exempt activity under 11 C.F.R. §§100.8(b)(10), (16) or (18), then, as noted above, it should not constitute Federal election activity. The costs of such activity should continue to be allocated between Federal and regular (non-Levin) non-Federal funds on a time/space basis, as under the Commission's current regulations.

3. Proposed 11 C.F.R. 300.30 Accounts

The question of whether state and local party committees should be required to maintain separate Levin amendment accounts is addressed above.

The proposed regulations, at section 300.30(b)(2), would provide that a state or local committee could deposit into its Levin account only donations specifically designated by the donor for the Levin account or donations from donors who have been informed that donations will be subject to the special donation limitations and prohibitions of the Levin account provisions of BCRA. ASDC strongly objects to this

requirement. These restrictions have no basis whatsoever in the language of BCRA or in its legislative history. To the contrary, the legislative history makes clear that the Levin amendment was intended to allow state and local parties to use regular non-Federal donations, as permitted by state law, but only up to $10,000 per donor, in combination with Federal funds for the purposes of voter registration and GOTV.

The Levin amendment imposes very explicit restrictions on the way such non-Federal donations can be raised. None of these restrictions refers to any special language that has to be used in the solicitation by the state or local party. It would be utterly inconsistent with the intent of the amendment to require that state parties jump through hoops not even mentioned in the statute, in order to receive Levin funds.

Proposed section 300.30(b)(2) should therefore be deleted. Proposed section 300.30(b)(4)(iii), referring to the solicitation conditions, should also be deleted.

It should also be noted that, by using the term account, in the singular form, in proposed sections 300.2(f) and 300.30(a)(7), the Commission may be implying that a state or local party committee may only maintain a single Federal account. Thus, the committee should clarify that state and local party committees may maintain more than one Federal bank account, and that such accounts maintained by a single committee may transfer funds freely among those Federal accounts.

4. Proposed 11 C.F.R. 300.31 Receipt of Levin Funds

First, it is clearly the intent of the sponsors of BCRA that state, district and local committees of the same political party are not considered to be affiliated for purposes of applying the $10,000 donation limitation in new FECA section 323(b)(2)(B)(iii). The statement of Representative Chris Shays (R-Ct), cited in the NPRM, 148 Cong. Rec. H410 (Feb. 13, 2002), could not be clearer.

Second, the proposed regulations do not provide sufficient clarity as to what activities by state or local parties constitute "joint fundraising" for purposes of the restriction set forth in proposed section 300.31(f). The legislative history indicates that this restriction is intended to be limited to specific joint fundraising events sponsored by more than one state or local party committee. Rep. Shays stated that, "joint fundraisers between state committees or state and local committees are not permitted. . . . The joint fundraising prohibition will prevent a single fundraiser for multiple state and local party committees." 148 Cong. Rec. H410 (Feb. 13, 2002). It is clear, then, that the statutory restriction was not intended to prohibit state and local parties from assisting each other in raising Levin contributions, other than through a joint fundraising event, albeit no Levin contributions may be actually transferred from any state or local party to another.

Accordingly, proposed section 300.31(f) should be revised to read "....a State, district or local committee of a political party must not raised Levin funds by means of a joint fundraising event held in accordance with 11 C.F.R. §102.17, with any other State, district or local committee of any political party....." Thus, we believe that the restriction

applies only if two conditions are met: the activity must be undertaken pursuant to a joint fundraising agreement in accordance with Commission rules and the funds are raised at a single event.

5. Proposed 11 C.F.R. 300.32 Expenditures and Disbursements

The NPRM raises the very important issue of the exact requirements applicable to local party committees under BCRA. The proposed regulations would provide that local committees that do not qualify as political committees must nevertheless use Federal funds for Federal election activity. The ASDC supports this requirement. However, it must also be made clear that a local committee that does not otherwise qualify as a "political committee" under current law (2 U.S.C. §431(4)) is not required to register or file reports with the Commission. See discussion of proposed section 300.36 below.

With respect to proposed section 300.32(a)(3), the Commission's proposed regulation is overly broad. This subsection is being included in the regulations pursuant to section 323(c) of BCRA. However, the Commission's approach misstates the statute by providing that a state party committee may not use Federal funds for any fundraising in which Federal funds are raised. However, section 323(c), by its explicit terms, only applies for funds raised for "Federal election activity." To be sure, not every Federal dollar is used for "Federal election activity" and there are other expenditures of Federal funds that do not fall within its scope. Accordingly, a state party committee could hold a fundraising event in which it raises Federal funds (that are not used for "Federal election activity") and non-Federal (non-Levin) funds. Under such circumstances, a state committee should continue to be permitted to allocate the expenses for such an event utilizing the funds received method described in section 106.5(f). Accordingly, the term "Federal activities" in section 300.32(a)(3) should be revised to read "Federal election activity." Furthermore, the Commission should add a new section that clarifies that the funds received method should be utilized for fundraising where the funds raised at that event or program are not used for "Federal election activity."

The ASDC supports the inclusion of proposed section 300.32(b)(2) which allows Levin funds to be used for any lawful purpose under state law.

6. Proposed 11 C.F.R. 300.33 Allocation of Expenses

This proposed regulation raises the important issue of how state and local parties should pay for administrative costs that are not defined as "Federal election activity" and are not included in the list of items specifically excluded in 2 U.S.C. §431(20)(B). As the NPRM notes, because BCRA requires Federal election activities, as defined, to be paid 100% with Federal funds, "significant amounts of activity that were once allocable will have to be paid for exclusively with Federal funds." To the extent BCRA does not treat categories of expenses as being sufficiently linked to Federal elections to be treated as "Federal election activity," state and local parties should have the choice of allocating such expenses between their Federal and regular non-Federal accounts (as proposed in the NPRM), or paying such expenses entirely with non-Federal funds.

This should include the salaries of employees who spend less than 25% of their time in a particular month on activities in connection with a Federal election. This should also include the costs of voter registration activity undertaken more than 120 days before an election.

With respect to the specific language of the proposed regulation, first, section 300.33(a)(1) misstates the statutory provision regarding salaries of state and local party employees. New 2 U.S.C. §431(20)(A)(iv) refers to an employee of a state or local party "who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election" (emphasis added). Significantly, the statute does not use the phrase "Federal election activity." The difference in phraseology cannot be assumed to be meaningless. The phrase, "in connection with" a Federal election is used elsewhere in FECA and has a defined meaning requiring that an activity expressly advocate the election or defeat of a Federal candidate or otherwise result in a direct in-kind contribution to a specific Federal candidate. Proposed section 300.33(a)(1) should be revised to delete the phrase "Federal election activity" and replace it with "activities in connection with a Federal election."

Further, for the reasons stated above, section 300.33(a)(1) should be revised to provide that salaries of employees who spend less than 25% of their time can be allocated or paid for entirely with non-Federal funds. In addition, the Commission should provide a procedure by which a state or local party can adjust its initial allocation of the time expected to be spent by an employee, when an employee's salary is paid in advance and the actual time spent by the employee on various activities may not be known until the end of the month.

Second, the NPRM seeks comments on whether the proposed regulations should require that state and local party committees document the time spent by their employees to justify the decisions as to the accounts from which their salaries are paid. The first two alternatives are not practical. To require employees of state and local party committees, most of which have a handful of employees at most, to keep time sheets like lawyers or accountants would be absurdly burdensome. To require employees to certify in writing the percentage or amount of time spent on activities in connection with a Federal election would be equally impractical. The third alternative, requiring a responsible party official to keep a tally sheet for all employees, is more reasonable. However, parties should be afforded the opportunity to utilize any reasonable method to document the time spent by their employees. Accordingly, the Commission should not by regulation require a particular method of documenting the time spent by employees on activities in connection with a Federal election.

Third, as noted above, state and local party committees should be able to pay for those administrative costs which are not defined as Federal election activity, entirely with non-Federal funds, or to allocate such expenses, at the discretion of the state or local party.

Fourth, to the extent any allocation of administrative expenses is required or permitted, and for purposes of allocating Levin activities between Federal funds and Levin funds, the Commission must determine the minimum appropriate percentage of such expenses to be paid from Federal funds. The Commission proposes a fixed formula to be applied in all states, depending only on whether the cycle is a presidential cycle and whether a Senate candidate appears on the ballot. The ASDC supports this approach, which will greatly simplify the allocation process for state and local party committees.

Fifth, the ASDC supports proposed section 300.33(b)(5), which would permit expenses for voter identification, generic campaign activity and GOTV, undertaken during a period in which no Federal candidate is on the ballot, to be paid for entirely with non-Federal funds. Indeed, for the reasons stated above, every state and local party committee should be able to undertake voter identification and generic campaign activity entirely with non-Federal funds, during the calendar year prior to a Federal election year.

Finally, the ASDC believes that, for purposes of allocation, fundraising costs should be deemed to include only those expenses directly associated with a particular fundraising event or program. Consistent with A.O. 1992-2, party committees should also be afforded discretion to treat the costs of fundraising staff either as fundraising expenses or as administrative expenses. Further, party committees should be able to pay costs related to raising funds only for non-Federal activity, entirely from a non-Federal account.

7. Conforming Amendments to 11 C.F.R. 104.10 and 106.1

The ASDC supports the proposed amendments to section 104.10.

With respect to the proposed amendments to section 106.1, as stated above, exempt activities should not be considered Federal election activity. In addition, not every activity that mentions a clearly identified Federal candidate is required, in any event, under BCRA, to be paid for exclusively with Federal funds. Materials and communications that reference both Federal and non-Federal candidates, but are not "public communications" and do not otherwise meet the definition of Federal election activity, should continue to be subject to allocation based on time/space as under the Commission's current regulations.

Furthermore, the costs of non-communicative activities that result in an in-kind contribution to both federal and non-federal candidates should also continue to be allocable between Federal and non-Federal accounts. For example, the costs of a poll that is paid for by a party committee and then shared with and allocated between a Federal and non-Federal candidate, in accordance with section 106.4 of the Commission's current regulations, should be allocated between the party's Federal and non-Federal accounts.

8. Proposed 11 C.F.R. 300.34 Transfers

The ASDC believes that the various restrictions on transfers of Levin funds, and the restriction on transfer of "hard" money between national, state and local parties for use in combination with Levin funds, are all unconstitutional. For this reason, the ASDC opposes all of proposed section 300.34.

In the event that the Commission believes it is compelled, at this juncture, to implement the restrictions of the use of funds "provided" to a state or local party by a national party or other state or local party, as that term is used in new FECA section 323(b)(2)(A)(iv), the term "provide" should be defined to refer only to funds that are earmarked for use in combination with Levin funds. See MUR 3204.

9. Proposed 11 C.F.R. 300.35 Office Buildings

A. Application of State Law

The ASDC supports proposed subparagraphs (a) and (b)(1) of section 300.35. These provisions accurately reflect the intent of the state party office building provisions.

New subparagraph (b)(2) would provide that Federal law would not preempt or supercede any state law that purports to prohibit or limit the source of funds for a state or local party office building. The implication of this provision is that state and local parties would be forbidden from paying for an office building using 100% Federal funds, if state law imposed limitations or prohibitions inconsistent with Federal law. There is no support in the language or history of BCRA for this provision. The manifest intent of the building fund provision of BCRA, new 2 U.S.C. §453(b), was simply to allow state and local parties to pay for their office facilities entirely with non-Federal funds. Section 453(b) itself states explicitly that "a state or local committee of a political party may, subject to state law, use exclusively funds that are not subject to the prohibitions, limitations and reporting requirements of the Act...." (emphasis added). Thus, state and local parties are clearly permitted, but are not required, to use non-Federal funds for office facilities.

B. Definition of "purchase or construction of an office building"

The purposes for which party committee building funds may be disbursed have been addressed comprehensively in the Commission's advisory opinions. See e.g., A.O.'s 2001-12, 2001-01 and 1998-7. The NPRM suggests that, because new section 453(b) refers to an "office building," rather than to "office facility," this provision was somehow intended to narrow the existing class of expenditures for which building fund contributions may be used. In our view, the issue may be moot because state and local party committees should be able to use 100% non-Federal funds for any administrative expenses not defined as Federal election activity.

In any event, the NPRM's suggestion that new section 453(b) was intended to narrow the scope of the building fund exemption for state or local party committees, is

utterly baseless. The legislative history of this provision clearly demonstrates that the opposite is the case—that Congress clearly and unambiguously intended that building funds be permitted to be used by state and local parties as set forth in the Commission's advisory opinions.

The McCain-Feingold bill as passed by the Senate eliminated the building fund exemption for national and state parties. The bill did provide, however, in new FECA section 301(20)(b), as added by section 101(a) of the bill, that "Federal election activity" would specifically not include "the cost of constructing or purchasing an office facility or equipment for a State, district or local committee" (emphasis added). Thus it is indisputable that the intent of the McCain-Feingold bill was to allow state and local parties to use 100% non-Federal funds, as permitted by state law, for office facilities and equipment.

This exact same language was included in the Shays-Meehan bill as re-introduced by the sponsors in February 2002, as H.R. 2356. In addition, the Shays-Meehan bill included a transition provision for national party committees to enable such committees to continue to spend building fund contributions raised prior to the effective date of the new law.

On the morning of the final day of debate, a Republican-sponsored amendment, Amendment No. 25, was introduced to eliminate the national party transition provision. On the morning of February 13, this amendment, ultimately offered by Rep. Jack Kingston (R-Ga.), was listed as a "poison pill" by the sponsors of the legislation, and on a sheet circulated to Members of the House by Common Cause. Notwithstanding this public position, in the middle of the night of February 13, the "reform" organizations secretly told Republican Members that they could vote for this particular amendment if desired, to appease the Republican House leadership, without being criticized by the "reformers" for opposing the bill. As a result, all but two Republican Members of the House voted for the amendment. The debate on the amendment makes clear that the only thing even these Members thought they were voting on was the elimination of the national party transition provision. See 148 Cong. Rec. H455-59 (Feb. 13, 2002).

Many Members later realized that the Kingston Amendment had also eliminated the language, quoted above, explicitly allowing state parties to use 100% non-Federal funds for the purchase of an office facility or equipment. After H.R. 2356 passed the House, Senator Mitch McConnell (R-Ky) proposed a number of technical amendments, including an amendment to reverse the Kingston Amendment. Senator John McCain (R-Ariz), prepared a detailed written response to Senator McConnell's proposals. With respect to the building fund provision, Senator McCain wrote as follows:

> The [McConnell] proposal has two parts. One is a substantive change, the other is not. The substantive change would allow the national parties to spend their excess soft money on buildings without any time limitation. The non-substantive portion of the proposal would make clear that state party building funds are governed solely by state law.

> A provision allowing the national parties to spend their excess soft money on building was included in the House bill that went to the floor. It was vigorously attacked by the Republican leadership in the House, which claimed that it was a special advantage for the DNC. The provision was stripped from the bill by an amendment on the House floor that was overwhelmingly supported by Republicans. The Senate bill contained no special exemptions for national party buildings.
>
> There is nothing in the House-passed bill that regulates state party building funds. This concern can be addressed in a floor colloquy, or a separate technical corrections bill if there is one. (emphasis added).

It is clear, then that the sole intent of section 453(b) was simply to restore the pre-Kingston amendment status quo as to state party building funds. That makes perfect sense since the sponsors had at all times accepted and endorsed the language of McCain-Feingold allowing use of entirely non-Federal funds for state and local party office facilities and equipment.

Similarly, in a colloquy between Senator Fred Thompson (R-Tenn.) and Senator Russ Feingold (D-Wisc.) during final Senate consideration of H.R. 2356, Senator Feingold stated simply that "the bill does not... regulate State or local party expenditures of non-Federal donations received in accordance with State law on purchasing or constructing a State or local party office building." 148 Cong. Rec. S2143-44 (March 20, 2002). Again, the manifest intent of the sponsors was to restore the pre-Kingston Amendment status quo under Shays-Meehan.

Nothing in the history of BCRA suggests any intention whatsoever to narrow the scope of the building fund exemption for state or local parties. When Congress intended to reverse an existing FEC interpretation, it did not hesitate to do so explicitly. See, e.g., BCRA section 214(b)(repealing FEC regulation defining "coordination"). Accordingly, ASDC strongly opposes adoption of any of the language of proposed section 300.35(c). All of paragraph (c) should be deleted.

Finally, the Commission seeks comments as to whether a party committee should be permitted to rent space in its party headquarters to state and local candidates. Such activity clearly should be permitted, regardless of the sources of the funds used by the state or local party to purchase the office building in the first instance.

C. Transitional Provisions for State Party Building Fund or Facility Account

We strongly oppose new section 300.35(e), which could instantly criminalize, on November 6, the possession by state parties of contributions in their building funds that had been lawfully raised under the building fund exemption in effect prior to that date, but which could not be lawfully raised under state law. Such a regulation would be

unconstitutional. Further, by contrast with the express (albeit indefensible) Congressional decision to require national party committees to expend all monies in their building funds prior to November 6, Congress did not enact any such provision with respect to state parties. Accordingly, subsection (c) should be eliminated.

10. Proposed 11 C.F.R. 300.36 Reporting Federal Election Activity; Recordkeeping

Proposed subparagraph (a)(1) of new section 300.36 would provide that district and local committees that have not qualified as "political committees" would not be subject to BCRA reporting requirements, but would be required to demonstrate that they had sufficient Federal funds on hand to pay the required Federal portion of the costs of Federal election activity. The ASDC supports this provision.

Proposed subparagraph (a)(2), however, would provide that the Federal portion of any payment by local or district committee for Federal election activity would constitute an "expenditure" under FECA, even if such activity does not reference any Federal candidate. The effect of this new provision is to rewrite section 301(4)(C) of FECA, which governs the circumstances under which any local or district committee of a party is deemed to be a "political committee" and thus required to register and file reports with the Commission.

In A.O. 1999-4, the Commission ruled that only disbursements that influence a specific Federal election count towards the dollar thresholds set forth in section 301(4)(C) of FECA. Thus, the mere expenditure by a local committee for generic activity would not trigger "political committee" status. By contrast, under proposed section 300.36(a)(2) of the new regulations, a local committee spending as little as $1,001 on generic voter registration activity—without ever spending a penny on any communication referencing a Federal candidate—would be required to register and file reports as a Federal "political committee."

The effect of this new rule would be to impose Federal "political committee" status on thousands of local and district committees not currently required to register or file reports with the Commission. There is nothing in the language or history of BCRA to suggest that the Congress intended such a result. Further, the Commission itself has effectively acknowledged, in the language of proposed 300.36(a)(1), that Congress did not intend first-dollar disclosure of funds disbursed for Federal election activity by local and district party committees.

In addition, the NPRM requests comments on the applicability of the new reporting requirements imposed under this section to the $50,000 threshold for electronic filing. As a practical matter, the Federal portion of receipts and expenditures disclosed pursuant to this section will also be disclosed on the party committee's regularly filed reports. Accordingly, the Commission need not include funds disclosed under this section in determining whether a committee has met the $50,000 threshold for electronic filing. Of course, to the extent that at a committee has already qualified for mandatory

electronic filing, it would not appear unduly burdensome to require such a committee to file these monthly reports electronically as well.

The ASDC strongly opposes any requirement that Federal receipts for Levin activity be disclosed. Although it may be readily apparent which non-Federal receipts are used for Levin activity, Federal receipts will be used fungibly for multiple purposes. Since state and local parties will not isolate specific Federal funds for Levin activity, it is impractical to require such party committees separately to disclose such Federal receipts on the monthly reports required by this section.

Finally, just as local party committees should be subject to FECA registration and reporting requirements only if they are "political committees," so too associations of state and local elected officials should not be required to register or report merely because they undertake Federal election activity, unless such an association independently qualifies as a Federal "political committee."

11. Proposed 104.17 Reporting of Allocable Expenses by Party Committees

Proposed new section 104.17(a) assumes that all payments on behalf of both Federal and non-Federal clearly identified candidates must be made exclusively with Federal funds. As noted above, however, that assumption is incorrect. Communications on behalf of both Federal and non-Federal candidates that are not "public communications," and are not otherwise defined as Federal election activity, should continue to be subject to allocation between Federal and non-Federal funds.

Generally, the ASDC notes that the Commission is contemplating the use, in several instances in the rulemaking, of unique identifying codes that would require detailed descriptions of various activities. Under the Commission's current reporting requirements, unique identifying codes are utilized to distinguish between activities that have different allocation ratios. The Commission appears to be unnecessarily extending the use of identifying codes to activities that share the same allocation ratio. Therefore, due to the several additional burdens placed upon state and local party committees under the BCRA, the ASDC fails to see the utility in requiring additional recordkeeping and reporting requirements that are not necessary to distinguish between different classes of allocable activity.

12. Proposed 11 C.F.R. 300.37 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations

Proposed section 300.37, prohibiting state and local parties from donating to or fundraising for certain tax-exempt organizations, mirrors the regulations set out in proposed section 300.11 imposing the same restrictions on national parties.

Section 300.37 would use the term "501(c) organization that makes expenditures or disbursements in connection with a Federal election" as defined in proposed new

section 300.2(a). Under this broad definition, a state or local party would be prohibited from soliciting funds for or donating to any nonprofit organization that "[f]inances voter registration at any time" or "[ma]kes expenditures or disbursements for Federal election activity." As noted in the discussion of proposed section 300.11, no time frame is provided.

The prohibitions, in combination with the definition, are clearly too broad. Under sections 300.37 and 300.2(a), for example, a church or synagogue that had put in its newsletter, anytime in the last 10, 20 or 50 years, a statement urging members to vote as a matter of civic duty, or to register to vote as a civic duty, would be treated as a 501(c) organization that makes expenditures or disbursements in connection with a Federal election. To be sure, a volunteer state or local party officer who raises money for such a church would not violate the law if and to the extent she is not "acting on behalf of" the state or local party. But if such an officer causes her local party, say, in New York, to donate $30,000 to a September 11 fund established by that same church, on behalf of the local party, that officer has committed a felony punishable by up to five years imprisonment.

It is therefore imperative that a safe harbor provision be provided, as suggested in the NPRM, for state and local parties that enables them, by taking certain actions, to determine that an organization does not engage in Federal election activity. As suggested in the NPRM, if a state or local party committee obtains a nonprofit organizations application for tax-exempt status of Form 990 and determines from such materials that the organization has not reported making, and was not organized to make, disbursements for Federal election activity, the party committee should be able to determine, conclusively, that such party committee (and its officers, agents, etc.) can contribute to or raise funds for the organization.

In discussing proposed section 300.37, the NPRM requests comments on whether state and local party committees should be able to donate or raise funds for state PACs, i.e., section 527 organizations that are State-registered political action committees supporting only non-Federal candidates. The ASDC supports interpreting the term "political committee" to permit such activity by state and local party committees.

Federal Candidates and Officeholders

As the NPRM notes, while BCRA prohibits a Federal candidate or officeholder from raising any non-Federal funds for any party committee, the law provides an exemption allowing such candidates and officeholders to attend, speak or appear as a featured guest at a State, district or local party fundraising event, even if non-Federal funds or Levin are raised at such an event.

The NPRM seeks comments on whether the fundraising event provision is a total exemption from the general solicitation ban, or whether, instead, there should be some restriction on what Federal candidates or officeholders do and/or say at such events to ensure that they do not solicit any funds. Proposed section 300.64 provides that a Federal

candidate or officeholder "shall not solicit, receive, direct, transfer, or spend funds or participate in any other fundraising aspect of any such event," but does not define what it means to "participate" in an "fundraising aspect" of the event.

First, in answer to the Commission's specific questions, the language of the BCRA exemption, allowing a Federal officeholder or candidate to be a "featured guest" clearly contemplates permitting reference to such officeholders and candidates in invitation materials for the event and allowing a party committee to honor such individuals at the event.

Second, any attempt to restrict or prohibit what Federal officeholders and candidates say or do at such events would literally put the Commission in the position of policing speech. Can the Federal officeholder or candidate say positive things about the work of the party committee, implicitly suggesting (but not saying expressly) that the party deserves financial support? Can the Federal officeholder or candidate work a rope line or receiving line at the event where he or she might thank an individual donor for supporting the party? Can he shake hands, but not say anything?

Clearly it is impractical and undesirable for the Commission to attempt to create a detailed scheme of regulation of speech and conduct of Federal candidates and officeholders at state and local party events. And if such a scheme were created, how would it be enforced? Is the Commission going to a new domestic surveillance program of monitoring all state and local party fundraising events to ensure that no Federal candidate or officeholder crosses any of these lines, by speech or conduct? Will state and local parties have to file videotapes of their events together with their disclosure reports?

To raise these questions is to answer them. Federal candidates and officeholders must be able to attend and speak and act freely at state and local party events, without restriction or regulation.

Respectfully submitted,

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