Paul Sanford <psanford@crp.org> on 05/29/2002 07:00:03 PM

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Subject: Comments on Soft Money NPRM

Attached are the comments of FEC Watch and the Center for Responsive Politics on the FEC's NPRM implementing the Soft Money provisions of BCRA.

The document is attached in Microsoft Word and Portable Document formats.

 - softmoneycomment.doc

 - softmoneycomment.pdf

May 29, 2002

VIA E-MAIL

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2002-7: Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money

Dear Ms. Smith:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit these comments on the Notice of Proposed Rulemaking to implement Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), published at 67 Fed. Reg. 35654 (May 20, 2002).

With this NPRM, the Federal Election Commission (FEC) has embarked on a rulemaking project that is critical to the implementation of the first major revision of the campaign finance laws in over a quarter-century. The debates regarding the merits and constitutionality of the BCRA were often passionate and marked by widely divergent opinions. However, now that the debate has ended and the issue of the constitutionality of the law is in the hands of the courts, the FEC's job is to enact regulations that most effectively implement the law. In so doing, the Commission must remain focused on the touchstone of the legislation Congress enacted and President Bush signed: only money raised under the limits and prohibitions of the Federal campaign finance laws can be spent to influence Federal elections.

With this in mind, FEC Watch wishes to draw attention to several areas of particular concern in the NPRM, which are elaborated on more fully in the attached comments:

- First, the FEC's narrow definition of the term "agent" runs contrary to the commonly understood meaning of that term and will create a major loophole in the law by allowing persons held out to the public as representing a political party or candidate to continue to raise soft (non-Federal) money.

- Second, the FEC's proposed definition of "promote, support, attack or oppose" is little more than a partial reworking of a previously used definition of "express advocacy," despite the clear intent of Congress in BCRA to abandon that definition and use a broader, more inclusive phrase. Given the significance of the language used by Congress, the FEC should incorporate the language of the statute into the rules.

- Third, the FEC should reject the idea of exempting from the definition of "established, financed, maintained or controlled" entities established by the parties and candidates prior to the effective date of the BCRA. Otherwise, contrary to the intent of the statute, many of the very entities that were used by the parties and candidates to widen the soft money loophole will continue to thrive and spend soft money to influence Federal elections.

- Fourth, no activity that is now required to be paid for with a mixture of hard (Federal) and soft money under the current law should be allowed to be paid for with only soft money under BCRA. The FEC should reject the view that BCRA's requirement that exclusively Federal funds be used for some previously allocable expenses justifies allowing the use of exclusively non-Federal funds for other previously allocable expenses. This view runs directly counter to the mandate of the BCRA and appears to reflect an attempt to limit the law's reach and effectiveness.

Our full comments on these and other subjects are fully set forth in the attached document. FEC Watch and CRP wish to be as helpful as possible to the FEC in this important undertaking. To this end, Lawrence Noble, Executive Director of CRP, and Paul Sanford, Director of FEC Watch, request an opportunity to testify at the hearing.

Respectfully submitted,

Larry Noble

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford

Paul Sanford
Director
FEC Watch

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2002-7

PROHIBITED AND EXCESSIVE CONTRIBUTIONS; NONFEDERAL FUNDS OR SOFT MONEY

Comments of FEC Watch and the Center for Responsive Politics

I Introduction

FEC Watch submits these comments in response to the Notice of Proposed Rulemaking to Implement Title I Of The Bipartisan Campaign Reform Act Of 2002 ("BCRA"). FEC Watch is a project of Center For Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

II. Comments

This comment generally follows the organizational structure of the narrative portion of the NPRM. Within each subject area (Definitions, National Party Committees, etc.) our comments are generally in numerical order by section. Provisions about which we have no particular comment have been omitted.

A. General Issues

FEC Watch has comments on one item that appears throughout the NPRM, and on two other general issues.

1. National Congressional committees

In various places, the rules use the phrases "national party congressional campaign committee," "national congressional campaign committee," and "national party congressional committee." The variations appear to be somewhat random. We recommend that these variations be explained or eliminated. We also note that while all three variations of this phrase will likely be understood to include both the congressional and senatorial campaign committees, it might be useful for the Commission to promulgate a definition of this phrase that explicitly includes both types of committees. This should eliminate any remaining ambiguity.

2. Use of the phrase "soft money"

We are understand the concerns expressed by Commissioner Thomas in Commission Agenda Document 02-36-B regarding the decision to avoid the use of the phrase "soft money." The phrase is used in BCRA, has long since established itself as a part of the campaign finance lexicon, and is generally understood by most of the regulated community.

We also generally understand the phrase "non-Federal funds" as referring to funds that do not comply with the prohibitions and limitations of the FECA. The phrase "soft money" also refers to funds that do not comply with the prohibitions and limitations of the FECA. However, in the minds of some people, "soft money" also carries with it the connotation that the funds are being used to influence Federal elections. This connotation could be seen as limiting the definition of "soft money" to those non-Federal funds that are (impermissibly) used for Federal election influencing activities.

The purpose of BCRA is to prevent the use of non-Federal funds for expenses that have an impact on Federal elections. Generally, it does this in two ways: First, it flatly prohibits national party committees from receiving and spending funds that do not comply with the prohibitions and limitations of the Act. Second, it defines the phrases "federal election activity" and "Levin funds," and requires state, district and local party committees to use Federal funds or a combination of Federal funds and Levin funds for Federal election activities.

In order to ensure that BCRA achieves its goal of broadly preventing the use of prohibited and excessive contributions for Federal election influencing activity, the broadest definitional terms should be used, and narrowing connotations should be avoided.

For these reasons, we believe the rules should use the phrase "non-Federal funds" rather than "soft money" in most instances. However, we also believe the rules should explain that their purpose is to limit the use of soft money for activities that influence a Federal election. Thus, it would be useful for the rules to contain at least one use of the phrase "soft money," perhaps in a scope provision, to explain their overall purpose.

We also note that the phrase "non-Federal funds" is probably more technically correct, in the sense that if the rules are successful, there will be no more soft money, *i.e.*, no more use of prohibited and excessive contributions to influence Federal elections. However, non-Federal funds would still exist, and their use would obviously still be permissible for non-Federal election activities.

3. Convention and host committees

The Commission should issue rules addressing convention and host committees soon enough to ensure that BCRA applies to convention and host committee activities for the 2004 presidential election.

B. Definitions

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

Generally, the language of the proposed rule appears to be consistent with the statute.

1. Should voter identification for state and local candidates be Federal election activity?

Under BCRA, Federal election activity includes all voter identification activity that is "conducted in connection with an election in which a candidate for Federal office appears on the ballot." This includes all voter identification activity in the time period leading up to every regularly scheduled election held in an even-numbered year. The only exception should be for voter identification activities conducted in an odd-numbered year in a state that holds a non-Federal election in that odd-numbered year. *See* current 11 CFR 106.5(d)(2).

2. Should the rules allow a de minimis *level of Federal voter identification activity that would not be Federal election activity?*

A *de minimis* rule would be contrary to the plain language of the statute. Congress enacted BCRA to ensure that Federal election activities are funded entirely with hard dollars, and included voter identification in the definition of Federal election activity. There is no basis for excluding or disregarding a *de minimis* amount.

3. Should there be a limited time period during which voter identification activity would be considered Federal election activity?

No. BCRA uses a limited 120 day period for voter registration activity, but not for voter identification activity. With limited exception, voter identification activity influences federal elections regardless of when it is conducted. Thus, all voter identification should be treated as Federal election activity, except as noted above in states holding an election in an odd-numbered year.

4. Should voter identification be read with get-out-the-vote to limit the definition of Federal election activity to activities that identify voters for get-out-the-vote purposes?

This interpretation would be contrary to the plain language of the statute. Paragraph (ii) broadly defines voter identification, get-out-the-vote activity, and generic campaign activity as Federal election activity when it is conducted in connection with an election in which a candidate for Federal office appears on the ballot. Only a tortured reading of this provision would make the phrase get-out-the-vote activity modify the phrase voter identification. Moreover, this interpretation would be contrary to the intent of BCRA to broadly define Federal election activity.

5. Should nonpartisan get-out-the-vote activity be excluded from Federal election activity?

First, activity by party committees should never be considered nonpartisan, since party committees are inherently partisan entities. In addition, the provisions of the statute were broadly worded in order to ensure that all activity that influences a Federal election be paid for with Federally permissible funds. Even if nonpartisan, get-out-the-vote activity impacts a Federal election in the same manner that partisan get-out-the-vote activity impacts a Federal election by delivering more people to the polls. Thus, there is no basis for excluding "nonpartisan" get-out-the-vote activity. To do so would ignore reality and read a content standard into the statute where none exists.

6. Should printed slate cards, sample ballots and palm cards be get-out-the-vote activities or public communications?

Printed slate cards, sample ballots and palm cars could be considered either get-out-the-vote activity or public communications. In either case, they should be treated as Federal election activity. These materials generally promote or support candidates, usually by listing the only the favored candidate for each office or by highlighting the favored candidate for each office.

§ 100.26 Public communication (2 U.S.C. 431(22)).

The proposed rule is generally consistent with the statute.

1. Should public communications include public Internet sites, widely distributed email, or web casts?

The Commission has historically treated publicly available Internet sites and widely distributed e-mail as general public political advertising. The Commission should continue this policy, and may want to consider explicitly stating this in the definition of public communication. To do otherwise would carve out an exception for a widespread and growing form of political advertising.

§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).

The proposed rule is generally consistent with the statute.

1. Should the definition of generic campaign activity apply to special elections?

The proposed rules define generic campaign activity that promotes or opposes a political party but does not promote or oppose a Federal candidate or a non-Federal candidate. The narrative portion of the NPRM indicates that the Commission is proposing to allow state and local party committees to treat activity that promotes the party in connection with a special election as generic campaign activity. The effect of this policy would be that party committees would be able to allocate the costs of generic campaign activity between their Federal and Levin accounts.

However, as the Commission concluded in Advisory Opinion 1998-9, activities that urge voters to support a political party in a special election in which only one candidate from the party appears on the ballot are, in effect, candidate specific activities. As such, they fall outside the definition of generic campaign activity. The Commission should continue to apply this principal in implementing BCRA.

2. Should the exempt activity exclusions apply to generic campaign activity?

Section 100.7(b)(9) and 100.8(b)(10) exempt printed slate card, sample ballot, palm card or other printed listing of three or more candidates from the definitions of contribution and expenditure. By definition, these materials promote or support specific candidates. Therefore, they cannot be considered generic campaign activity.

Section 100.7(b)(15) and 100.8(b)(16) exempt campaign materials used in connection with volunteer activities on behalf of the party's nominees. These activities could be generic campaign activities if they promote a political party without naming any specific candidates or offices, *e.g.*, buttons and bumper stickers that say "vote Republican" or "vote Democrat." However, materials that name specific candidates would not be generic campaign activities. In addition, as discussed above, campaign materials distributed in connection with a special election would, in most instances, effectively identify specific candidates, and thus would not be generic campaign activities.

Section 100.7(b)(17) and 100.8(b)(18) exempt state and local party voter registration and GOTV drives on behalf of the party's Presidential and Vice Presidential candidates. These activities could, in theory, be generic campaign activities, but only if no specific candidates or offices are mentioned. Where the Presidential and Vice Presidential candidates or elections are mentioned, the activity would not qualify as generic campaign activity.

§ 100.27 Mass mailing (2 U.S.C. 431(23)).

This provision is generally consistent with the statute. However, the definition of mass mailing should include widely distributed e-mail. This will prevent disparate treatment of largely similar means of communication.

While the use of the "substantially similar" concept is appropriate, the regulation is too narrowly written because it may not treat letters that are customized in some way other than by personal biographical information as substantially similar. For example, if an organization sends letters that use the same overall template but insert a specific issue that is important to a particular recipient, such as abortion or gun control, the letters may not be substantially similar under this rule, even though the text is largely the same and the letters are all part of the same fundraising activity.

We recommend that the last sentence of this rule be revised so that it reads as an example of "substantially similar" rather than as the definition of "substantially similar." To accomplish this, the second sentence could be revised to read as follows:

> For purposes of this section, substantially similar includes but is not limited to communications that have been personalized to include the recipient's name, occupation, geographic location, important issue or similar types of individualization.

§ 100.28 Telephone bank (2 U.S.C. 431(24)).

We offer the same comment as with the definition of mass mailing. The regulation is too narrowly written because it may not treat phone calls in which the content is similar but for minor variations that relate to something other than the personal information of the recipient as substantially similar. For example, if an organization makes calls that use the same overall script but insert a specific issue that is important to a particular recipient, such as abortion or gun control, the calls may not be substantially similar under this rule, even though the script is largely the same and the calls are all part of the same fundraising activity.

We recommend that the last sentence of this rule be revised so that it reads as an example of "substantially similar" rather than as the definition of "substantially similar." To accomplish this, the second sentence could be revised to read as follows:

> For purposes of this section, substantially similar includes but is not limited to communications that have been personalized to include the recipient's name, occupation, geographic location, important issue or similar types of individualization.

§ 300.2 Definitions.

(a) Agent

Under the proposed rule only persons with actual express authority to act are agents. This is an extremely narrow definition of "agent" that would undermine the prohibitions and limitations in BCRA. For example, this definition would allow a principal such as a party committee to avoid responsibility for the unlawful actions of an agent even when the principal has implicitly granted the agent broad authority, such as by giving the agent the title of "fundraising director," "state chairman," or the like. Where a candidate or party committee bestows a title or position on a person that implies that the person is working on behalf of the committee, the candidate or party committee must be held liable for actions taken under color of that title or position.

In addition, the proposed rule should also make it clear that the principal cannot avoid responsibility for the actions of the agent in situations where the principal may have expressly granted the agent general authority to act on behalf of the principal but has not expressly granted the agent the authority to engage in the unlawful actions. The principal should be held responsible for the actions of the agent in both of these situations.

In order to accomplish this, the rule should be revised to encompass apparent authority. Black's Law Dictionary defines apparent authority as

> such authority as the principal knowingly or negligently permits the agent to assume, or which the principal holds the agent out to possessing. Such authority as he appears to have by reason of the actual authority which he has. Such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.

Black's Law Dictionary, 5th Ed., at 88 (citing cases). The Restatement of Agency defines apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to third persons." Restatement, Second, Agency § 8.

(b) Directly or indirectly established, financed, maintained or controlled

Overall, section 300.2 appears to be a good starting point for implementing this part of BCRA. However, we believe the scope language in paragraph (c) should be broadened to indicate that this provision also applies to the agents of State, district, or local party committees of a political party, Federal candidates, and Federal officeholders, and to organizations established by State, district, or local party committees of a political party, Federal candidates, and Federal officeholders. As revised, the scope language could read "[t]his paragraph applies to State, district, or

local committees of a political party, candidates, holders of Federal office, agents of these entities, and organizations established by these entities, which shall be referred to as "sponsors" in this paragraph."

Paragraph (c)(1)(iii) of the rule should be revised to clarify that raising money for an entity is a form of providing funding for the entity. Thus, if a sponsor raises money for an entity by soliciting donations for that entity from third parties, the sponsor has provided funds to the entity.

Paragraph (c)(1)(v) of the rule should also be revised to explicitly state that selecting the candidates (federal or non-Federal) or political parties to which the entity will make political contributions or donations is a form of setting policies for the making of expenditures or disbursements by the entity.

1. ***Is it proper to treat entities that are not affiliated as established, financed, maintained or controlled?***

Yes. As the NPRM notes, the contexts in which the term "directly or indirectly establish, finance, maintain and control" are used make it clear that Congress wanted to move beyond the current affiliation rules.

2. ***Should "alone or in combination with others" be limited to entities established by a sponsor after a given date?***

We urge the Commission to reject any form of grandfather clause for committees under this provision. Congress passed BCRA to close the soft money loophole. Creating an exception from this rule for already established groups would effectively prop the loophole open, and allow these groups to continue to raise soft money for use in Federal elections. This would undermine the central purposes of BCRA.

3. ***Should there be a de minimis exception to the "any funding" component of the rule?***

The rule already contains an implicit *de minimis* rule in that it uses three factors (magnitude, frequency/duration, and timing) to determine the significance of the sponsor's funding. No additional *de minimis* exception is needed.

4. ***Should "at any point" be replaced with time certain?***

No. The purposes of BCRA are best served by no temporal limitation.

(c) Donation

1. ***Should the rule exclude from "donation" those things that are excluded from "contribution" and "expenditure" under the current rules and advisory opinions?"***

The definition of donation should encompass everything that is not a Federal contribution or expenditure. Thus, it should include things that are excluded from "contribution" and "expenditure" under the current rules.

(d) Levin account

1. Should Levin accounts be required? Are they more or less burdensome than use of other non-Federal accounts, with reasonable accounting method?

Levin accounts should be required. The apparent willingness of some party committees to set up multiple non-Federal accounts under the current allocation rules is an indication that they do not regard these accounts as a significant burden, and in fact, may regard them as a useful way to maintain separation between their Federal and non-Federal funds.

In contrast, the task of administering a rule based on reasonable accounting methods would be incredibly difficult, since enforcement of the Levin limitations would effectively require the Commission to conduct an audit of every committee about which questions arise. Moreover, the Commission's experience with accounting methods has shown them to be fluid and subject to near constant reinterpretation, often with little reference to standard accounting principles. This leaves the regulated community and the public with no clear indication of what accounting methods will be accepted, which undermines enforcement of the rules.

Therefore, the Commission should require Levin accounts, and reject rules that rely on reasonable accounting methods.

(e) Promote, support, attack or oppose

The proposed definition of "promote, support, attack or oppose" contains a modified version of the express advocacy standard in 11 CFR 100.22. This definition is directly contrary to the language of section 101(b) of BCRA, which states that Federal election activity includes

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office **(regardless of whether the communication expressly advocates a vote for or against a candidate)**;

BCRA, section 101(b) (to be codified as 2 U.S.C. § 431(20)(A)(iii)) (emphasis added).

The phrase "promote, support, attack or oppose" is broader than the express advocacy standard in that it treats as Federal election activity any amounts spent on communications that speak positively or negatively about a clearly identified Federal candidate, even if they do not encourage the election or defeat that candidate. The Commission's proposal to narrow this phrase is contrary to the legislative intent.

The Commission has invited commenters to suggest a definition that will survive constitutional review. In considering this question, the Commission should bear in mind that the "promote, support, attack or oppose" language in BCRA applies to party committees, nearly all of which are political committees under the Act. Thus, the most relevant guidance on the constitutionality of this phrase is *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Supreme Court said "expenditures of candidates and of 'political committees' can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.* at 79. In contrast, the Court said the express advocacy standard applies to situations where "the maker of the expenditure is not within these categories." *Id.*

Since party committee expenditures are within the core area sought to be addressed by Congress, the narrowing construction set out it *Buckley* need not be applied. Thus, we urge the Commission to replace the express advocacy test in section 300.2(l) with the language of section 431(20)(A)(iii), as set out in section 101(b) of BCRA. There is no need for the Commission to attempt to further define in the regulations the language adopted by Congress, as the Commission is obligated to apply this definition of Federal election activity until the courts say otherwise.

(m) To solicit or direct

This paragraph is generally consistent with the letter and spirit of BCRA. For clarity purposes, we recommend rephrasing the last sentence to read something like "[m]erely providing information or guidance as to the requirements of applicable law is not a solicitation."

1. How should concept of "solicitation" apply to series of conversations that are not requests for contributions or donations individually?

The Commission should apply the definition of "to solicit or direct" to a single conversations or to a series of conversations, and if a series of conversations, when taken as a whole, request, suggest or recommend that another person make a contribution or donation, the conversations should be considered a solicitation. Otherwise, the restrictions and prohibitions on solicitations will be easily circumvented through the manipulation of conversations.

2. *Should passively providing information in response to an unsolicited request be excluded from definition?*

The rules should allow a party committee to respond to general requests for the names of sympathetic organizations by providing the names of such organizations. However, BCRA prohibits the party committee from actually suggesting that contributions be made to these organizations. Therefore, if the request is specifically for the names of groups to which contributions should be made, BCRA requires the party committee to refuse to provide that information.

C. National Party Committees – 11 CFR Part 300 Subpart A

§ 300.10 General prohibitions on raising and spending non-Federal funds (2 U.S.C. 441(i)(a) and (c)).

This section is generally consistent with BCRA. However, we have two comments.

First, this section (and many others) use the word "must" or the phrase "must not." Presumably, the Commission used this formulation in an effort to closely track the statutory language. However, most of the Commission's existing rules use the word "shall" or the phrase "shall not." While the desire to closely track the statutory language is laudable, using "shall not" would make the rules more consistent with the Commission's other regulations. Therefore, we recommend that the Commission use "shall" or "shall not" in the final rules. Similarly, the rules use a form of the word "spend" in some instances, while the current rules generally use the more formal term "disburse" or "disburses." Use of "disburse" in the final rules would harmonize them with the Commission's other regulations.

In addition, as mentioned above, we recommend promulgation of a rule that specifically states that the phrases "national party congressional campaign committee," "national congressional campaign committee," and "national party congressional committee" refer to both the Congressional and Senatorial campaign committees of each of the national parties.

Finally, we note that the heading of section 300.10 incorrectly cites section 441(i)(a) (emphasis added). This should be changed to 441i(a).

§ 300.11 Prohibitions on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. § 441i(d)) and § 300.50 Prohibited fundraising by national party committees (2 U.S.C. 441i(d))

These provisions are generally consistent with the statute.

1. ***Should the prohibition on solicitations for groups that make expenditures or disbursements in connection with Federal elections contain a temporal requirement? If so, what should it be? Also, should the rules provide guidance on how to determine if an organization falls within prohibition?***

In order to apply this prohibition in a fair manner, it would be permissible to include a temporal limit. This limit could allow solicitations for a group that has made no expenditures or disbursements in connection with Federal elections within the last six years.[1] However, the rules should also require the soliciting committee to obtain a certification from the recipient committee that it intends to make no expenditures or disbursements in connection with Federal elections for the next six years, subject to the penalties for perjury. This would ensure adequate segregation of funds.

§ 300.12 Transition rules.

1. ***Should the rules require a particular disposition of any funds remaining after retirement of outstanding debts and obligations under paragraph (a)? Disgorgement to United States Treasury? Donation to a charitable organization?***

The rules could require disgorgement to the United States Treasury, or donation to a charitable organization. However, if the Commission allows party committees to donate excess funds to a charitable organization, it should limit these donations to charitable organizations other than those described in section 300.11. Otherwise, party committees may use section 300.12 to donate funds to an organization that they are prohibited to make donations to under section 300.11.

This limitation could be accomplished by revising paragraph (e) to prohibit donations of excess non-Federal funds to the section 501(c) and 527 organizations described in 300.11(a).

§ 300.13 Reporting (2 U.S.C. §§ 431 note and 434(e)).

1. ***Should this rule require reporting by existing entities that currently are not required to report? If so, which ones?***

The rule should require reporting by the college committees of all the major political parties, since they are funded in large part by the national party committees.

[1] A specific time period of six years would be less ambiguous than three election cycles, because the length of the election cycle is different for house and senate candidates.

D. State, District and Local Party Committees and Organizations – 11 CFR Part 300 Subpart B

§ 100.14 State committee, subordinate committee, district, or local committee (2 U.S.C. 431(15)).

1. *Should these definitions be limited to committees that are part of the "official party structure?"*

The proposed rules would substantially undermine BCRA by allowing numerous state and local party committees that are not part of the official party structure to engage in Federal election activity using non-Federal funds, rather than Levin funds.

The definitions of State, subordinate, district and local party committees should include committees that are not part of the official structure. Thus, the "official" limitation should be deleted, either by deleting the word "official" or changing the phrase "and is responsible for" to "or is responsible for."

If the Commission decides to limit final rule to committees that are part of the official party structure, we recommend that this limitation only be applied to the state party committee. The definitions of subordinate, district and local committees should include committees regardless of whether they are part of the official party structure, as many of these committees are informal.

§ 106.5 Allocation of expenses between Federal and non-Federal activities by party committees.

1. *How do the exempt activities provisions of the FECA relate to the definition of Federal election activity? Are the exempt activities separate allocable categories of expenditures, or are they subsumed within the definition of Federal election activity?*

The definition of Levin account Federal election activity in BCRA is broadly worded. Federal election activities subsume all previously allocable expenses other than administrative expenses, fundraising expenses and voter registration outside the 120 day window. Thus, the exempt activities expenses referred to existing section 106.5(a)(2)(iii) are now Federal election activities under section 100.24(a).[2] In addition, most of the generic voter drive activities referred to in existing section 106.5(a)(2)(iv) are now generic campaign activity under section 100.25. These expenses must be allocated between the party committee's Federal and Levin accounts.

Fundraising expenses should be allocated between the party committee's three accounts using the funds received method, as discussed further below. Salaries for employees below 25%, including those that are 0%, should be allocated between the

[2] However, as will be explained further below, disbursements for these activities remain exempt from the definition of expenditure. As such, they do not count toward political committee status.

committee's Federal and non-Federal accounts using the fixed percentages discussed below.[3] Administrative costs should also be allocated between the committee's Federal and non-Federal accounts using the fixed percentages.

2. Is voter registration outside the 120 day period an example of remaining "exempt activities?"

Voter registration has an impact on Federal elections even when it occurs outside the 120 day period. Therefore, voter registration outside the 120 day period should be considered an allocable activity, and committees should be required to allocate the expenses of this activity between their Federal and non-Federal accounts using the fixed percentages.

3. Are grassroots materials distributed solely by volunteers exempt activities rather than Levin activity?

Congress specifically excl uded grass roots materials that name or depict only a candidate for State or local office" from the definition of Federal election activity. This suggests an intent to keep grass roots materials that mention Federal candidates within the definition of Federal election activity, and subject to the requirement that they be allocated between the committee's Federal account and its Levin account. This rule should be applied to materials distributed by volunteers.

§ 300.30 Accounts.

The rules correctly require all committees that intend to allocate disbursements for Federal election activity to have Levin accounts, including local committees. This is the minimum requirement needed for adequate transparency, and will likely be a useful aid to committees in keeping track of their allocated disbursements.

As discussed above, accounting procedures would likely be ineffective at ensuring compliance with the allocation requirements. We note that the Commission's prior policy of allowing party committees to use "any reasonable accounting method" resulted in confusion and nonstandard accounting practices.

2. Should allocation accounts be permitted? If so, should there be a second, Levin allocation account?

Allocation accounts should be permitted. If a party committee opts to use an allocation account, it should have a separate Levin allocation account.

3. Should the rules allow deposit of unsolicited and untraced contributions in a Federal account where the committee notifies the contributor that his or her contribution is subject to the prohibitions

[3] However, as will be explained below, the fixed percentages should be higher.

and limitations of the Act? Should the rules allow deposits into Levin accounts under similar circumstances?

The rules should clearly indicate that (1) notification of the contributor is required; (2) sending the notification does not relieve the committee of its obligation to screen impermissible contributions; and (3) the notice must give the contributor the option of requesting a refund or removal of the contribution from the committee's Federal account or Levin account.

4. ***If state parties have 3 accounts, what are their options when they receive a single check for an amount in excess of the limit on contributions to their Federal accounts? Are they permitted to deposit the check in their non-Federal account and transfer a portion of it to their Federal account? Or vice versa? Or, should contributors be required to write 2 or 3 checks?***

The Commission could allow committees to accept a single check and split that check into separate accounts, so long as the check contains a memo entry with instructions for how to divide the check, or is accompanied by a contemporaneous writing containing instructions on how to divide the check. The committee should be required to retain records of these memos or instructions for at least three years after receipt of the check.

§ 300.31 Receipt of Levin funds.

1. ***Should the current affiliation rules be used to determine whether an organization is established, financed, maintained or controlled by another entity?***

As discussed above, the phrase "established, financed, maintained or controlled" should be broader than the Commission's affiliation rules.

2. ***Should all state, district and local committees be disaffiliated for the purposes of this section?***

As Commissioner Thomas has noted, the disaffiliation of all local and district committees could result in the proliferation of small committees with separate contribution limits. This would undermine BCRA. Instead, the rules should contain a rebuttable presumption that all committees organized at the same political or geographic unit within a state are affiliated with one another. Thus, all precinct level party committees in a state would share a single contribution limit, all county level party committees in a state would share a single contribution limit, all congressional district party committees in a state would share a single contribution limit, etc.

Under this approach, a donor could make a $10,000 donation of Levin funds to a party committee at each geographic or political level, which would enable them to

provide significant support to the various parts of a party organization within a state. At the same time, it would limit the incentive for political parties to establish numerous small party committees at the street or neighborhood level within a single congressional district in order to flood the district with Levin funds.

The rebuttable presumption would enable two party committees at the same political or geographic level but in different congressional districts to make a showing to the Commission that they are unrelated to one another and are entitled to separate contribution limits.

The final rules should address three additional issues. First, the rule of disaffiliation, even as modified above, should not be absolute. Instead, the Commission should retain the ability to treat two committees as affiliated when they are subject any type of centralized control, and thus are, in effect, acting as a single committee.

Second, the disaffiliation rule should also yield in instances where a party committee is essentially directing donations of Levin funds to other party units. This is another way in which several party committees could be functioning, in effect, as a single committee.

Finally, paragraph (c) could be interpreted to allow party committees to accept Levin funds from foreign nationals, where permitted by state law. Clearly, BCRA was not intended to allow committees to receive Levin funds from these sources, which are prohibited from donating funds for any election. 2 U.S.C. § 441e. Therefore, the regulations should make clear that Levin accounts cannot accept donations from foreign nationals.

§ 300.32 Expenditures and disbursements.

1. ***Should the rules require the use of Federal funds for Levin account fundraising? Or, should the rules allow allocation of Levin acct fundraising costs between Federal and non-Federal accts using funds received method?***

The direct costs of fundraising should be allocated on a per activity basis using the funds received method. Committees should be required to assign unique identifying codes to each fundraising activity, and allocate the direct costs of each activity among their three accounts (federal, non-Federal and Levin) based of the composition of the funds received from each fundraising activity. As with the current allocation rules, committees would initially pay expenses from the Federal account, and would transfer funds from their non-Federal and Levin accounts to pay the respective portions of the fundraising expenses.

2. ***Should greater specificity be provided regarding the nature of fundraising costs?***

Yes. To accomplish this, the additional language of 106.5(a)(2)(ii) could be used.

3. ***Should the rules require local committees that are not Federal political committees to use Federal funds for Federal election activities?***

Yes. BCRA requires that all local committees, whether or not they are federal political committees, use federal funds for Federal election activities.

4. ***Does paragraph (d) run the risk of allowing committees to move money through non-Federal accounts without being subject to BCRA restrictions?***

Yes. Excluding disbursements that are "not directed . . . for the purpose of influencing a Federal election or for Federal election activity" from the definitions of expenditure and Federal election activity could create a major loophole in the regulatory scheme established by BCRA. Therefore, party committees should be required to treat disbursements that pay for expenditures or Federal election activity as such, regardless of whether they "direct" those disbursements for either of these purposes.

§ 300.33 Allocation.

1. ***How do Levin activities relate to "exempt activities" under current rules? Are some exempt activities still in the exempt category, rather than Federal election activity? Can some expenses still be allocated between Federal and non-Federal accts?***

As explained above, Levin account Federal election activities subsume all previously allocable expenses other than administrative expenses, fundraising expenses and voter registration outside the 120 day window. Thus, the exempt activities expenses referred to in existing section 106.5(a)(2)(iii) are now Federal election activities under section 100.24(a), and most of the generic voter drive activities referred to in existing section 106.5(a)(2)(iv) are now generic campaign activity under section 100.25. These expenses must be allocated between the party committee's Federal and Levin accounts.

Fundraising expenses should be allocated between the party committee's three accounts using the funds received method, as discussed above. Salaries for employees below 25%, including those that are 0%, should be allocated between the committee's Federal and non-Federal accounts using the fixed percentages discussed below.[4] Administrative costs should also be allocated between the committee's Federal and non-Federal accounts using the fixed percentages.

[4] However, as will be explained below, the fixed percentages should be higher.

2. Should state, district and local committees be allowed to pay the salaries of employees below 25% entirely with non-Federal funds?

No. They should be required to allocate these expenses between their Federal and non-Federal accounts using the fixed percentages. There is no justification for allowing the salaries of employees who undertake some Federal election activities to have all of their salary paid for with non-Federal funds, since BCRA requires that all Federal election activity be paid for with Federal funds.

3. What documentation should be required for salaries?

At a minimum, party officials should be required to keep monthly tally sheets for all employees. They should have the option of using daily or weekly accounting if they prefer.

4. Is the fixed percentage approach to allocation appropriate? Are the proposed formulas appropriate?

The fixed percentage method of allocation is appropriate and an improvement over the current allocation rules. However, the percentages should be set at a point that ensures that no non-Federal funds are used to pay for Federal election activity. Thus, instead of using the average of the percentages in the last election cycle, the rules should use the highest of the percentages. This will ensure that no non-Federal funds are used to influence Federal elections.

5. Which approach should be used for voter registration outside the 120 day pre-election period?

As discussed above, voter registration has an impact on Federal elections even when it occurs outside the 120 day period. Therefore, voter registration outside the 120 day period should be considered an allocable activity, and committees should allocate the expenses of this activity between their Federal and non-Federal accounts using the fixed percentages. The alternative approach in the narrative portion of the NPRM, under which committees would be allowed to pay 100% of the costs of voter registration outside the 120 day pre-election time period with non-Federal funds, would be contrary to BCRA, since all voter registration activity has some impact on Federal elections.

6. Should fundraising costs include a portion of a committee's overhead costs, or should it be limited to direct costs?

The Commission should continue to treat overhead as part of administrative expenses, and should limit the allocation of fundraising costs to direct costs.

7. Should the rules allow committees to pay the costs of raising non-Federal funds entirely from a non-Federal account?

No. As discussed above, fundraising costs should be allocated using the funds received method. If a particular fundraising activity raises only non-Federal funds, then the allocation rules would allow the committee to pay the costs of that particular activity with non-Federal funds. However, this result should be achieved through the funds received method of allocation, and not through a blanket rule.

§ 106.1 Allocation of expenses between candidates.

1. Should the rules require state, district and local party committees to use exclusively Federal funds for mixed Federal and non-Federal direct candidate support?

Section 323(b)(1) and (b)(2)(A) of the FECA, as added by section 101(a) of BCRA, require state, district and local party committees to use Federal funds or a combination of Federal funds and Levin funds for Federal election activity. Section 323(b)(2)(B) prohibits the use of Levin funds for expenses that involve a clearly identified Federal candidate. These provisions, when read in combination, require party committees to use exclusively Federal funds for mixed direct candidate support.

§ 300.35 Office buildings.

As discussed above in relation to section 300.31, the statutory provision could be read to allow foreign national contributions to party building funds, where permitted by state law. BCRA was not intended to allow party committees to use donations from foreign national to build party office buildings. We recommend that paragraph (a) of section 300.35 be revised to clearly prohibit these donations.

1. Does the change from "facility" to "building" indicate Congress intended to narrow the scope of the exemption?

Yes. It suggests that the term is limited in the manner described in paragraph (c)(1) of the proposed rule.

2. Should the definition of "building" include, rather than exclude, office equipment, machinery or furniture?

It should exclude these items.

3. Should payments for a long term lease with an option to buy be considered a purchase?

No. To avoid abuses, the Commission should establish a bright line rule that treats purchases as building fund expenses and leases as administrative expenses.

§ 300.36 Reporting Federal election activity; recordkeeping.

1. ***How should the $50,000 annual threshold for electronic filing be applied to receipts and disbursements for Federal election activity?***

Receipts and disbursements for Federal election activity should count toward the electronic filing threshold.

2. ***What reporting requirements should apply to an association or similar groups of candidates for, or holders of, state or local office?***

The reporting requirements should be determined by whether the group is a Federal political committee under the FECA. This should turn on the same political committee thresholds that apply to other groups.

3. ***Should payments of Federal funds for the costs of Federal election activity, or for the Federally allocated portion of the costs of Federal election activity, be an expenditure within the meaning of 11 CFR 100.8? Should they count towards political committee status?***

Generally, payments for Federal election activity should be considered expenditures that count toward the political committee thresholds. However, the exclusions from the expenditure definition for exempt activities and other expenses still exist. Consequently, while these expenses are Federal election activity for Levin account purposes, and must be fully disclosed, they do not count toward the political committee threshold.

Section 300.36 appears consistent with this interpretation, though the second sentence of paragraph (a)(2) and the last clause of paragraph (b)(1) may state the principal more broadly than necessary to achieve the desired purpose. It is worth noting that even exempt activities must be reported as disbursements under 100.8(b)(10), (16), and (18).

Finally, we note that section 300.36(a)(1) appears to require party committees that are not political committees to affirmatively demonstrate that they have sufficient Federal funds in all circumstances. This is probably not what the Commission intended.

§ 104.17 Reporting of allocable expenses by party committees.

1. ***Should the rules require state, district and local party committees to use exclusively Federal funds for mixed Federal and non-Federal direct candidate support?***

See discussion of section 106.1, above.

2. ***Would it be useful to require party committees to assign unique identifying codes to allocable activities? Should the these codes be required for exempt activities?***

Unique identifying codes are very useful in the disclosure process, and facilitate more accurate interpretation of disclosure data by the public. They should be utilized whenever possible.

§ 300.37 Prohibitions on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. § 441i(d)) and § 300.51 Prohibited fundraising by State, district, and local party committees (2 U.S.C. 441i(d)).

1. ***Should the rules prohibit state, district and local party committee fundraising for or donations to state PACs?***

Yes. Allowing this would be contrary to the letter and spirit of BCRA.

E. Other provisions

1. ***How should the speaker or featured guest provision be interpreted? Is it a total exemption from the general prohibition on Federal officeholder solicitation of non-Federal funds? Does "featured guest" mean state, district and local party committees may publicize the appearance of a Federal candidate or officeholder? May the candidate/officeholder be part of the host committee? May they be honored at the event?***

The FEC will have to interpret and apply section 441i(e)(2) in a variety of situations to effectuate the BCRA prohibition on candidates and Federal officeholders soliciting non-Federal funds, while recognizing that they can be featured guests at party fundraisers. While this may present some line-drawing problems, the regulations will only be able to address the matter broadly, while the Advisory Opinion process may be used to address many of the factual variations that arise. As a general matter, BCRA should be interpreted as allowing Federal officeholders to be the featured or honored guest at an event where non-Federal funds are raised, and to be mentioned in the invitation, but to prohibit the officeholder from soliciting funds in the invitation or signing the invitation if the invitation contains a solicitation.

§ 300.65 Exceptions for certain tax-exempt organizations.

1. ***Should the rules prohibit entities acting as candidate's agent or entities established, financed, maintained or controlled by a candidate from soliciting funds under the exception?***

The rules should not allow entities to soliciting funds under the exception to the solicitation prohibition, because the exception is specifically limited to individuals.

2. ***Should the rules address how to identify organizations for which contributions may permissibly be solicited?***

Section 300.65 should use the same principles as section 300.11. The rule should allow entities to solicit contributions for groups that have not engaged in any of the proscribed activities within the last six years. However, the soliciting entity should also be required to obtain a certification from the group on whose behalf it is soliciting contributions attesting to the group's intention to refrain from the proscribed activities for the next six years. This would ensure that the soliciting entity has not raised funds for a group that is conducting Federal election activity.

3. ***Should the rules address a Federal candidate or officeholder's responsibility when soliciting individuals for funds to be used for Federal election activity under the $20,000 provision? Should a candidate/ officeholder be required to tell a CEO that a solicitation seeks the CEO's personal funds?***

The rules should require candidates and officeholders to disclose that donations for Federal election activity are limited to $20,000 and must be made from an individual's personal funds. This will avoid confusion and help ensure that prohibited contributions are not made out of ignorance or misinformation.

§ 102.5 Organizations financing political activity in connection with Federal and non-Federal elections, other than through transfers and joint fundraisers.

Proposed section 102.5(a)(3) is the same as in the current rules. The first sentence of this paragraph states a rebuttable presumption that the Federal limits and prohibitions apply to solicitations that make reference to a Federal candidate or election. The last sentence of this paragraph states that the presumption "may be rebutted by demonstrating to the Commission that the funds were solicited with express notice that they would not be used for Federal election purposes."

This paragraph needs to be revised to incorporate the limitations on contributions by Federal candidates and officeholders in sections 441i(e)(1)(B) and (4)(B) of BCRA. These two provisions allow Federal candidates and officeholders to solicit funds for (1) elections that are not Federal elections, and (2) for certain types of Federal election activity, respectively. However, these solicitations are limited to $10,000 and $20,000, respectively, and may not be from prohibited sources.

Left unrevised, section 102.5(a)(3) could be read to allow Federal candidates and officeholders to seek donations that exceed these amounts or are from prohibited sources, so long as the solicitation provides express notice of a non-Federal purpose. This would violate the solicitation limits in BCRA.

We also urge the Commission to revise the rule so that it irrebuttably presumes that state, district and local party committee solicitations that refer to a Federal election are solicitations for either Federal funds or for Levin funds. Party committees should not be able to inoculate a solicitation that refers to Federal elections by including a statement that the funds sought are for a non-Federal purpose.

III. Conclusion

FEC Watch hopes that these comments are useful to the Commission as it attempts to formulate policies implementing this landmark legislation. As indicated in our cover memo, Lawrence M. Noble and Paul Sanford would like to testify at the Commission's hearings on the NPRM.