"Audrey L. Johnson" <ajohnson@SONOSKY.COM> on 05/29/2002 04:47:34 PM

Please respond to Donald Simon <DSimon@SONOSKY.COM>

To: BCRAsoftmon@FEC
cc:

Subject: Common Cause - Notice 2002-7

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May 29, 2002

By Electronic Mail;
Original by Messenger

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

Re:Comments on Notice 2002-7

Dear Ms. Smith:

I am enclosing comments of Common Cause and Democracy 21 in regard to the Commission's proposed rules implementing the provisions of the Bipartisan Campaign Reform Act of 2002 relating to soft money.

As indicated in the comments, Common Cause and Democracy 21 request the opportunity to testify at the Commission's hearing on these proposed regulations.

Sincerely,

45737.1

/s/ Donald J. Simon

Donald J. Simon

Enclosure

COMMENTS OF
COMMON CAUSE AND DEMOCRACY 21
Re:
NON-FEDERAL FUNDS OR SOFT MONEY

NOTICE 2002-7

May 29, 2002

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Counsel for
Common Cause and Democracy 21

These comments are submitted on behalf of Common Cause and Democracy 21 in response to the Commission's Notice of Proposed Rulemaking, published at 67 Fed. Reg. 35654 *et seq*. (May 20, 2002), to implement Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA), relating to the ban on "soft money."[1]

Both Common Cause and Democracy 21 supported the enactment of the BCRA. We request the opportunity to testify at the Commission's hearing on these proposed rules.

Summary

The regulations proposed by the Commission are in some important ways inconsistent with the BCRA and contain a number of critical flaws, that if carried forward into final rules will seriously undermine the ban on soft money enacted by Congress in the BCRA. The Commission must address and rectify these problems in promulgating its final regulations.

Further, there are a number of instances where the proposed regulations properly reflect the BCRA, but the Commission raises questions in its commentary

[1] We do not object to the use of the term "non-Federal funds" (in lieu of the term "soft money") in the regulations, to refer to funds which do not comply with the contribution limits, source prohibitions and reporting requirements of the FECA. Although, as Commissioner Thomas points out in his memorandum of May 8, 2002, "non-Federal funds" can be read to imply, erroneously, that the funds are spent for non-Federal purposes, we believe the regulations make clear that the term "non-Federal funds" refers to how the money is raised, not how it is spent.

as to whether the proposed rule should be weakened. In addition to fixing the flaws in some of its proposed rules, it is equally important that the Commission resist efforts to weaken other of the proposed rules in a way that would undermine the goal of the statute to ban soft money in Federal elections.

We call attention in particular to the following major problems with the proposed rules, each of which threatens to seriously undermine the BCRA by taking a position inconsistent with the statute:

- **The definition of "agent" is too narrow and will allow major circumvention of the BCRA.** Section 300.2(b) of the proposed regulations adopts a very narrow definition of the term "agent" that requires there to be evidence of both "actual" and "express" authority. Several key provisions of the BCRA ban the raising and spending of soft money by parties, candidates, officeholders – and their "agents." *See, e.g.*, 2 U.S.C. 441i(a)(2) (national parties), 441i(b)(1) (state parties), 441i(e)(1) (candidates and officeholders). A definition of "agents" that does not encompass implied and apparent agency authority will open the door to subversion of these key BCRA provisions through agents of parties and candidates operating in fact, but without "express" authorization.

- **The definition of "promote, support, attack or oppose" is fundamentally flawed and will undermine the statutory purpose.** Congress provided that public communications by state parties that "promote, support, attack or oppose" a federal candidate must be funded entirely with Federal funds. 2 U.S.C. 441i(b); 431(20)(A)(iii). And Congress explicitly stated that this is without regard to whether the ad contains "express advocacy." *Id.* Yet in proposed section 300.2(l), the Commission bases its definition of the "promote, support" standard on a variant of the definition of "express advocacy." By starting with the wrong model, the Commission's proposed definition is too narrow, and opens the door to state parties using soft money to pay for ads which promote or attack a Federal candidate, in direct contravention of the statute.

• **The Commission must ensure that entities "established, financed, maintained or controlled" by a candidate or party include existing entities, or else the law will be seriously undermined.** Just as the ban on raising or spending non-Federal funds covers national parties, state parties, candidates and their agents, so too it covers entities "directly or indirectly established, financed, maintained or controlled" by any of them. 2 U.S.C. 441i(a)(2)(national parties), 441i(b)(1)(state parties). As with the definition of "agent," including such entities is critical to making the ban on soft money work. It is important that the Commission include fundraising for an entity as an element of "financing" the entity. Further, the Commission is considering whether to "grandfather" entities established by the parties and candidates prior to the effective date of the BCRA. The BCRA was in part explicitly aimed at these existing groups, and "grandfathering" them would be exactly counter to the statute. Doing so would open the door for entities controlled by the parties and candidates to continue to spend soft money for Federal election purposes, contrary to the language and intent of the BCRA.

• **The Commission should define "solicit" to include the act of directing contributions to particular recipients.** The Commission must be clear that the definition of "solicit" encompasses not just suggesting to a person that he or she make a donation, but also where the donation should be directed. As currently proposed, the definition would cover the "solicitation" – *i.e.*, the request that a person donate, but not the "direction" *i.e.*, the request that the donation go to a particular recipient. This is inconsistent with the BCRA and would open the door to major evasions of the soft money ban by allowing party officials and candidates to continue to steer soft money to particular recipients.

• **The Commission must continue to require allocation of currently allocable activities even if they are not "Federal election activities."** Certain state party costs – such as administrative costs, costs of voter registration prior to 120 days before a Federal election, and salaries of party employees who spend less than 25 percent of their time on Federal activities – must be paid for under current law with an allocated mixture of hard and soft money. These costs do not fall within the definition of "Federal election activity" in the BCRA. 2 U.S.C. 431(20)(A). The Commission's proposed regulations, *see* sections 300.33(a)(1)

(salaries), (a)(2) (administrative costs), (b)(4) (voter registration), would allow state parties to pay for such costs entirely with soft money. This would be a dramatic weakening of current law that is contrary to the BCRA. Such costs should continue to be allocated between Federal and non-Federal funds, as they are under current law.

• **The Commission should not exempt "non-partisan" voter activities from the definition of "Federal election activities," particularly for activities by political parties.** The BCRA provides that voter registration activities conducted by a state party within 120 days of a Federal election are included within the definition of "Federal election activities," 2 U.S.C. 431(20)(A)(i), and accordingly must be funded with a mixture of hard money and Levin funds. Further, section 501(c) organizations which conduct such activities may not receive donations from party committees. 2 U.S.C. 441i(d). The Commission raises the question as to whether it should exempt from this definition "non-partisan" voter registration activities. Doing so is contrary to the language of the BCRA, and would keep open the door for transfers of soft money from state parties to supposedly non-partisan non-profit groups, an abuse that the BCRA ends, and would create the illogical assumption that state political parties could conduct "non-partisan" voter drives and could use soft money to pay for them.

Simply put, the Commission must ensure that its final regulations implementing the ban on soft money do not open loopholes in the BCRA, and thereby frustrate the effort of the BCRA to close those loopholes in the FECA opened by the Commission that created the soft money problem in the first instance.

1. Introduction

The drafting of regulations to implement Title I of the BCRA must be done in the context of both the language of law, and the intent and spirit of the legislation. The Commission must appreciate that the clearly articulated goal of

the Congress, as stated by the principal sponsors of the legislation, was to ban soft money from the Federal political process.

As Senator Feingold said, "The soft money ban is the centerpiece of this bill." Cong. Rec. 107th Cong. 1st. Sess. S2696 (March 22, 2001). Senator McCain echoed this point: "It is a key purpose of the bill to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." Cong. Rec. 107th Cong. 2d. Sess. S2139 (March 20, 2002).

In every way, the regulations written by the Commission must strive to fulfill this central and animating purpose of the BCRA.

In a floor statement on the day of final Senate passage of the bill, Senator Feingold took special note of this rulemaking proceeding:

> We will be similarly active in pressing the FEC to promulgate regulations that fulfill – that fulfill, not frustrate – the intent of Congress in passing this bill. The Senator from Arizona and I did not fight for six and a half years to pass these reforms only to see them undone by a hostile FEC. *The role of the FEC is to carry out the will of the Congress, to implement and enforce the law, not to undermine it.*
>
> I call on each of the Commissioners, regardless of political party or personal views on our reform effort, to be true to that role and to the oaths of office they took.
>
> Cong. Rec. 107th Cong. 2d. Sess. S2105 (March 20, 2002) (emphasis added)

In debate on the bill last year, Senator Feingold elaborated on the central goal of the law to ban soft money:

> Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions and wealth individuals. State parties that are permitted under State law to accept these unregulated contributions would be prohibited from spending them on activities related to Federal elections, and federal candidates and officeholders, fortunately and finally, would be prohibited from raising soft money under our bill.
>
> *Id.*

In the House, Rep. Shays stated the same goal for the legislation:

> Mr. Chairman, I rise today as a principal sponsor of the campaign finance legislation before the House. I want to explain...why banning soft money is critical for our democracy. Last year, the Senate courageously passed the McCain-Feingold bill. It is now time for this House to take a similar stand and finally put an end to the deluge of soft money contributions that weakens our democracy.
>
> Cong. Rec. 107th Cong. 2d. Sess. H351 (Feb. 13, 2002)

In short, the Commission's task is to faithfully carry forward the work of the sponsors of the BCRA, and to implement by regulation their goal to ensure that money unregulated by Federal law cannot continue to be used by Federal candidates and officeholders or by national or state parties to influence Federal elections, and that such money cannot continue to be raised and spent by Federal candidates and officeholders, or by the national political party committees, or by their officers or agents, or by entities established by any of them.

The BCRA was drafted by Congress to comprehensively accomplish its "key purpose" to end the soft money problem. The Commission must strive in writing every section of its regulations to give best effect to this goal and to ensure

that new loopholes are not opened, and new techniques for evasion are not created or tolerated.

2. Section-by-Section Analysis

Part 100 – Scope and Definitions

Section 100.14. The definitions of "state committee" in proposed subsection 100.14(a), as well as "subordinate committee" in subsection (b) and "district or local committee" in subsection (c), should not include the condition that the committee be "part of the official party structure" as a mandatory requirement. If a committee is part of the "official structure" of a party or if it is responsible for day-to-day operation of the party, it should be considered to be within the definition. (The same change should be made to the definitions of "subordinate committee" in subsection (b) and "district or local committee" in subsection (c)). As Commissioner Thomas correctly points out in his Memorandum of May 8, the section as drafted would be subject to manipulation and evasion, by arranging the "official party structure" to exclude a committee that should, because of its day-to-day operations, be properly considered to be a party committee. Thomas Memo. at 4.

Even though the limitation of being part of the "official party structure" is included in an existing regulation at 11 C.F.R. 100.5(e)(4), that requirement is in the context of illustrating "party committees" with the definition of the term "political committee." The regulation proposed at section 100.14 is to define state

and local party committees, whether or not they constitute "political committees," and thus should be broader. Indeed, the existing definition of "state committee" at 11 C.F.R. 100.14 does not include a requirement that the committee be part of the "official structure" of the party, only that it be responsible for the "day-to-day operation" of the party. There is no good reason to apply a narrower definition under BCRA than in current law.

We also assume that the phrase "directly or indirectly established, financed, maintained or controlled," as used in this section, has the same meaning as the definition set forth in proposed section 300.2(c). There should be an appropriate cross reference.

Section 100.24. This section sets forth the very important definition of "Federal election activity."

In proposed section 100.24(a)(2)(iii), the regulation sets forth "examples" of get-out-the-vote activity (GOTV), and includes as one example "contacting voters on election day or shortly before to encourage voting but without referring to any clearly identified candidate for Federal office..." While this may be a correct "example" of GOTV activity within the meaning of the statute, the Commission should make clear that this example in no way limits the scope of the definition.

For instance, the definition of GOTV activity is not time-limited under the BCRA (nor is it under current FEC regulations), and the Commission should not

read any time limitation into the statute (such as "activity on election day or shortly before"). Indeed, GOTV activity can occur weeks or months prior to an election.

Similarly, GOTV activity can include references to Federal candidates, or to non-Federal candidates, or to both, or to neither. Again, the regulation should make clear it is not limited by the example given.

In response to a question posed in the commentary, we believe that the statute makes clear that all efforts to identify voters, even if done so in the name of state and local candidates, falls within the scope of section 431(20)(A)(ii). In response to another question, there is certainly a distinction between fundraising activities and voter identification activities, although the line between them may blur at times. It will undoubtedly be necessary for the Commission to ensure that voter identification activities are not undertaken in the name of fundraising in order to escape coverage as "Federal election activities" and thereby evade the BCRA. This raises issues that are similar to those in existing law, which requires allocation for voter identification activities but not necessarily for fundraising activities. *Compare* 11 C.F.R. 106.5(a)(2)(iv) (allocation required for voter identification drives where no candidate is identified) *with id.* at 106.5(a)(2)(ii) (allocation required for fundraising only if both Federal and non-Federal funds are solicited).

As a separate matter of line drawing, the commentary proposes to distinguish between voter identification activities and GOTV activities by, for instance, limiting GOTV to activities "within a week of the election." Nothing in the BCRA provides that GOTV activities should be limited by any time frame. And in any event, the statute treats voter identification and GOTV activities identically for all purposes.

The commentary raises the question of whether a time frame should bound the definition of section 431(20)(A)(ii) activities – i.e., GOTV and voter identification conducted "in connection with an election in which one or more candidates for Federal office appears on the ballot...."

Neither this language nor any other in the BCRA imposes a time limit proximate to election for voter activity to be deemed "Federal election activity." Voter activity such as voter identification or GOTV should be deemed to be "in connection with" the next scheduled election. In those five states that hold odd-year elections, voter activity that takes place in the odd year prior to the election will not be "in connection with" an election in which a Federal candidate is on the ballot, and therefore not a "Federal election activity." But all voter activity within the scope of proposed section 100.24(a)(2) that takes place in a state with only even-year elections will be "in connection with" a Federal election, whenever it is conducted. (Voter registration activity under proposed section 100.24(a)(1), by

contrast, is a "Federal election activity" only if conducted within the period of 120 days immediately prior to a Federal election).

In this sense, we strongly agree with Commissioner Thomas' observation in his memorandum of May 8, 2002, that "the most plausible view" of the statutory language is that "unless we are dealing with a State that conducts most of its non-Federal elections in odd-numbered years, the full two years of any standard Federal election cycle should be considered the time period covered" by the phrase "in connection with" in section 431(20)(A)(ii) of the BCRA. Thomas Memo, at 2.

The commentary suggests that voter identification or voter registration activities "may sometimes be conducted on a nonpartisan basis," and should accordingly be exempted from the definition of "Federal election activities." 67 Fed. Reg. 35656. These voter activities in the definition of "Federal election activities" are used in section 441i of the BCRA principally in the context of activities by state political parties. It is simply wrong – and inconsistent with the BCRA -- to suggest that a political party might conduct "non-partisan" voter activities.

In any event, the statute does not distinguish between partisan and non-partisan voter registration and GOTV. All such voter activities which fall within the definition of section 431(20)(A)(i) and (ii), whether conducted by political parties or other entities, are "Federal election activities," whether conducted on a partisan or non-partisan basis.

In proposed section 100.24(a)(3), there should be a cross-reference to the definition of "promotes, supports, attacks or opposes" in proposed section 300.2(l).

The proposed regulation also sets forth several categories of "exceptions" to the definition of "Federal election activity." Proposed section 100.24(b)(6) threatens to create confusion in its departure from the statutory language. Section 431(20)(A)(ii) includes within "Federal election activities" those voter identification, GOTV and generic campaign activities that are "conducted in connection with" an election in which a candidate for Federal office is on the ballot. This language is reflected in proposed section 100.24(a)(2). But the regulatory converse in proposed section 100.24(b)(6) states that "Federal election activities" do not include GOTV and voter identification activities "in elections" in which no candidate for Federal office appears on the ballot. It would be better for the Commission to retain the parallel "in connection with" language in both sections, as used in the statute itself.

Section 100.25. We have no comment on the proposed regulation. In response to the commentary, however, we note that "exempt activities" under the FECA should not be excluded from the definition of "generic campaign activity." Activities which are "exempt activities" are not subject to overall party spending caps under 2 U.S.C. 441a(d), but BCRA makes clear that such activities have to be funded entirely with Federal and Levin funds as "Federal election activities."

Section 100.26. We have no comment on the proposed regulation. The commentary raises the question of whether communications by means of the Internet should be included within the definition of "public communications." While we do not believe that communications by Internet can be excluded *per se* from coverage under the FECA or the BCRA, we believe the Commission must carefully and on a case-by-case basis assess the impact of including the Internet in coverage of the various provisions of the law.

Section 100.27. The definition of "mass mailing" includes the condition that 500 or more pieces of mail be "substantially similar." But this concept should be broader than the proposed definition set forth in the draft regulation, which would allow only individuation for purposes of personalizing a letter. Limited changes to a letter that go beyond personalization should not allow a mailing to escape the definition of "mass mailing."

Section 100.28. The definition of "telephone bank" should, like the definition of "mass mailing," include limited changes beyond simple personalization, as the draft regulation states. Particularly in the context of telephone calls, each individual call is likely to be slightly different beyond simple personalization, though still "substantially similar" as the term is used in the BCRA. 2 U.S.C. 431(24).

Part 102 – Registration and Organization

Section 102.5. There is a conflict between proposed section 102.5(b)(2), which does not require a State or local committee which is not a political committee to have a Levin account, and proposed section 300.30(b)(1) which states that such committees "must" have a Levin account. The language of the latter provision reflects the intent of the BCRA, and proposed section 102.5(b)(2) should be modified to require state and local committees to establish Levin accounts.

Part 104 –Reports by Political Committees

We have no comments on the proposed regulations in this part. We do agree that the national parties should continue to file disclosure reports on their soft money accounts through December 31, 2002

Part 106 – Allocations of Candidate and Committee Activities

We have no comments on the proposed regulations in this part. We agree with the new language in proposed section 106.1(a) to clarify that national party committees must use only Federal funds to make expenditures for both Federal and non-Federal candidates. The language relating to national parties in proposed section 106.5, that national parties may use only Federal accounts, is similarly appropriate.

Parts 108, 110 and 114

We have no comments on the proposed regulations in this part.

Part 300 – Non-Federal Funds.

Section 300.1. We have no comment on the proposed regulation.

Section 300.2 – Definitions.

a. "**501(c) organization that makes expenditures or disbursements in connection with a Federal election**" We have no comment on the proposed definition.

b. "**Agent**" The Commission's proposed definition of "agent" is inconsistent with the BCRA and, if adopted, will seriously undermine the law.

The definition of "agent" plays a key role in the BCRA. Under the proposed regulation, it will be possible for national party committees and Federal candidates and officeholders to undermine and evade the statutory scheme to ban the raising and spending of soft money. Such party committees and candidates will simply work through agents – implied or in fact -- who might not be considered agents in law under the Commission's proposed definition. Thus, if the definition of "agent" is too narrowly drawn by the Commission, the very practices the statute seeks to prevent -- the raising and spending of soft money by party committees and candidates – will simply take place through agents of party committees and candidates.

The regulation incorrectly proposes a very narrow definition of "agent" to include only a person who has both "actual" and "express" authority to act on behalf of another. This definition excludes those with apparent authority as well as those with implied authority. Indeed, the proposed regulation in section 300.2(b) further narrows the category of "actual" authority by defining it to include only those agents who have "instructions" to act on behalf of a candidate or committee.

To carry out the purposes of the Act, the Commission should rely on common law definitions of agent, including those individuals who the party "holds out" as acting on its behalf, whether or not they have specific "instructions" to do so. In many instances, a party committee could give an individual serving in a fundraising capacity an honorary title, in which case the individual appears to be acting on behalf of the party for purposes of raising money. Such individuals should be considered "agents" of the party for purposes of the ban on soliciting or receiving non-Federal funds.

Indeed, the Commission has already adopted a far broader definition of "agent" than it proposes here. In its current regulations, at 11 C.F.R. 109.1(5), relating to independent expenditures, the Commission has defined "agent" to include any person who has "actual oral or written authority, either express or implied" or "who has been placed in a position within the campaign organization

where it would reasonably appear" that "in the ordinary course" of campaign activities he or she could act on behalf of the campaign.

This is a definition that more realistically addresses the question of agency than does the new proposed definition in section 300.2(b). The current Part 109 definition correctly recognizes that a key factor in agency is whether it would "reasonably appear" that the person is an agent of the principal, and is acting on behalf of the principal. At a minimum, the same concept should be adopted here. There is no basis in the BCRA for adopting a weaker definition of "agent" for purposes of the soft money ban in the BCRA than the Commission has already adopted in its Part 109 regulations.

In response to the specific questions posed by the Commission on this topic, we believe that a principal should be held liable for the actions of an agent pursuant to the standards of established law on agency: when the agent is working on behalf of the principal within the scope of his actual or apparent authority. It is not be necessary for an individual to be a paid employee or a vendor in order to be an agent, although both employees and vendors likely would be agents if acting within the scope of their authority. Volunteers can be agents of committees or candidates as well, certainly where the volunteer is acting pursuant to instructions, or if acting within the scope of apparent authority (such as a fundraiser) or acting where the candidate or committee had knowledge of the agent's actions. In sum, it

is inconsistent with the BCRA and with existing FEC regulations to limit the definition of "agent" to either express or actual agency.

c. "Directly or indirectly establish, maintain, finance or control"

This is a key term of the BCRA and the Commission's definition is inconsistent with the language and intent of the BCRA's ban on soft money. Like the definition of "agent," the definition of this term is also critical to ensure that the restrictions and prohibitions of the BCRA are not evaded by the easy subterfuge of a principal accomplishing activities that he is prohibited from doing himself by instead conducting those same activities through an entity that he has established or controls.

We have several comments on the proposed definition:

First, in order to reflect the language of the statute, the definition in the proposed regulation should apply to national party committees as well as to State, district or local party committees. (*See* section 441i(a)(2), where this phrase appears in relation to national party committees).

Second, the definition in the proposed regulation should also apply to donors of Levin funds (*See* section 441(b)(2)(B)(iii) where this phrase appears in relation to the contribution limit that a "person…may donate" in Levin funds.)

Thus, the proposed regulations should be amended to read: "This paragraph applies to *National*, State, district or local committees of a political

party, candidates, holders of Federal office and *donors of Levin funds*, which shall be referred to as "sponsors" in this paragraph."

Third, we agree with the approach in the proposed regulations that this definition should extend beyond the existing concept of "affiliation" in section 100.5(g) of the Commission's regulations, and that the additional proposed criteria are necessary.

Further, in subparagraph (c)(1)(iii) of the proposed definition, the solicitation of significant funding by a sponsor should be included as the basis for a finding that the sponsor has "financed" or "established" the entity. Indeed, the fact that a candidate or officeholder is a significant fundraiser for a committee or nonprofit entity demonstrates that the committee or entity has been "directly or indirectly established" or "financed" by the sponsor. Thus, this subparagraph should be amended to read:

> The sponsor provides a significant amount of the entity's funding at any point in the entity's existence, whether by contribution (including in-kind contribution), donation (including in-kind donation), *solicitation or fundraising of contributions or donations*, transfer, or other means…

For the same reason, the phrase "or raised" should be inserted after the word "provided" in subparagraphs (A), (B) and (C) of subparagraph (iii).

Similarly, the concept of directly or indirectly "controlling" an entity should apply to the situation where a candidate or officeholder is the ongoing beneficiary of expenditures or disbursements made by a political committee to

benefit such candidate or officeholder. In such a case, there should be a presumption established in the regulations that the candidate or officeholder "controls" the committee repeatedly making the disbursements for his or her benefit.

In response to specific questions asked in the accompanying text, we believe that the definition of this term should include, but extend beyond, the current affiliation standard.

Further, it directly contravenes the BCRA to apply the new regulation only to entities created or established after the effective date of the Act, as suggested in the commentary. Doing so would open the door to a major subversion of the BCRA by exempting from the law a large number of preexisting entities that have been "created" or "established" by their sponsors -- and which accordingly should be treated similarly to their sponsors under the language and intent of the BCRA.

Exempting such entities from this definition would create a major loophole in the BCRA by allowing the entity established or controlled by the sponsor to escape the regulation imposed on the sponsor by the BCRA. This would, as a practical matter, allow the activity sought to be regulated by the BCRA to continue on an unregulated basis through the preexisting entity. Similarly, there should be no "rebuttable presumption" that entities organized before a given date are not directly or indirectly established by the sponsor.

Finally, there should not be a temporal limit on a sponsor's provision of funding to an entity in subparagraph (c)(1)(iii). Even after the passage of time, the prior provision of funding by a sponsor may have been so significant that the entity should continue to be treated as "directly or indirectly" established by the sponsor. If an entity wants to seek a change in that status based on particular facts, the proposed regulation appropriately provides for the entity to request an advisory opinion for such a determination. *See* section 300.2(c)(2)(i).

d. **"Disbursement"** We have no comment on the proposed definition.

e. **"Donation"** The definition of "donation" should include anything of value given to a "person," not just to a "non-Federal candidate," as currently proposed, in order to conform with the use of the term in proposed sections 300.10, 300.11, 300.37, 300.50 and 300.51, all of which contemplate recipients of "donations" to other than non-Federal candidates.

f. **"Federal account"** The definition should be explicit that only Federal funds (as defined) should be deposited into a Federal account, other than for specific purposes of making allocated disbursements.

g. **"Federal funds"** We have no comment on the proposed definition.

h. **"Levin account"** We have no comment on the proposed definition.

i. **"Levin funds"** The definition of "Levin funds" should reflect the statutory restriction, 2 U.S.C. 441i(b)(2)(A), that such funds be spent only for activities within the scope of the first two prongs of "Federal election activities,"

see section 431(20)(A)(i) and (ii), and not (as the proposed regulation provides) for any "Federal election activity."

j. **"Non-Federal account"** We have no comment on the proposed definition.

k. **"Non-Federal funds"** We have no comment on the proposed definition.

l. **"Promote, support, attack, or oppose"** The statutory phrase "promote, support, attack or oppose" plays a pivotal role in the state party soft money ban. Yet the Commission's proposed regulation uses the wrong model to define this term, basing it on a modification of the definition of "express advocacy," the very concept that Congress rejected in the statute.

The Commission's proposed definition of this term threatens to seriously undermine the intent of the soft money ban by opening a huge loophole for continued state party spending on ads that promote Federal candidates.

The term "promote, support, attack or oppose" forms a key part of the definition of "Federal election activity," in that any "public communication" by a state party that "refers" to a Federal candidate "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)" is a "Federal election activity" and must accordingly be funded by the state party with Federal funds. 2 U.S.C. 431(20)(A)(iii).

In order to give proper effect to the state party soft money ban in the bill, this phrase must be given the sweep intended by Congress. Senator McCain noted on the floor that "[i]n order to close the existing soft money loophole and prevent massive evasion of Federal campaign finance laws, the soft money ban must operate not just at the national party level but at the State and local level as well." Cong. Rec. 107th Cong. 2d. Sess. S2138 (March 20, 2002). As Senator McCain further noted:

> The bottom line is, whatever the technical niceties, soft money is being spent by State parties to support Federal campaigns. In fact, much of the soft money spent in the 2000 elections to support Federal campaigns was spent by State parties.
>
> Congress has a compelling interest in ensuring that State parties do not use backdoor tactics to finance Federal election campaigns in this way. It has an interest in ensuring that Federal election activities are paid for with funds raised in a non-corrupting manner and in accordance with the Federal guidelines.
>
> State parties receive soft money to influence Federal elections in the form of direct contributions to State parties and transfers from national parties for this purpose. Much of this money is then spent on television advertisements *attacking or promoting Federal candidates and other activities that we all know are designed to, and do, influence Federal elections.*
>
> *Id.* (emphasis added).

It is important that the Commission keep foremost in mind Congress' central goal of closing the soft money loophole, and in particular, the aspect of that loophole that has allowed state parties to influence Federal elections by using soft money funds to run non-express advocacy ads that promote or attack Federal candidates. Congress acted to ensure that state parties would be required to spend

only Federal funds on ads that promote or attack Federal candidates, since such ads are party campaign ads.

The use of the phrase "promote, support, attack or oppose" in the third prong of the definition of "Federal election activity" should accordingly be given sweep to ensure that it fulfills its purpose. The statutory language, by including the admonition "regardless of whether the communication expressly advocates a vote for or against a candidate" in the definition of this phrase, makes explicit that this provision is to extend beyond state party ads that contain "express advocacy."

Nor is it necessary to base the "promote, support" definition on express advocacy in order to avoid constitutional problems of vagueness. The Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976) that the vagueness concerns that gave rise to the Court's development of the "express advocacy" test did not apply in the case of speech by candidates and political committees, including party committees. Expenditures by candidates and "political committees" (defined as committees, such as parties, with a "major purpose" of electing candidates) "can be assumed to fall within the core area sought to be addressed by Congress. *They are, by definition, campaign related.*" 424 U.S. at 79 (emphasis added). The Court created the "express advocacy" test only for those situations "when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a 'political committee'...." *Id.*

Thus, it is not necessary as a constitutional matter to use an "express advocacy" test to define and limit the scope of state party spending that is subject to the definition of "Federal election activity." The proposed definition at section 300.2(l) is, however, based on the Commission's existing definition of "express advocacy" that is contained in 11 C.F.R. 100.22(b). While this subpart (b) definition of "express advocacy" is broader than a simple "magic words" test in subpart (a), it is a fundamental mistake to define the "promote, support, attack or oppose" language in BCRA by reference to "express advocacy," which is an inherently narrower concept.

The problem is illustrated in that the proposed definition of "promote, support, attack or oppose" requires the communication to "encourage[] action" to elect or defeat a candidate. Congress, we believe, had a much broader sweep in mind for requiring hard money to be used to pay for ads by state parties. Even if such ads do not explicitly encourage a particular action to elect or defeat a candidate, the ad could "promote" or "support" that candidate by favorably describing his or her views. Such ads should be included in the prong three definition of "Federal election activity," but would be excluded by the Commission's proposed definition.

The language in the BCRA is similar to the concept used by the Commission for many years in its test for "electioneering message," as developed in the analogous context of party spending under 2 U.S.C. 441a(d). In a series of

advisory opinions, the Commission used a broad test for deciding when party spending was sufficiently related to a candidate campaign so as to trigger the party's section 441a(d) limits. The "electioneering message" test included statements "designed to urge the public to elect a certain candidate or party *or which would tend to diminish support for one candidate and garner support for another candidate.*" *See* Statement of Reasons of Commissioner Karl Sandstrom in MUR 4553 et al. 9 (emphasis added); *see also* A.O. 1998-9 *quoting in part United States v. United Auto Workers*, 352 U.S. 567, 587 (1957). An illustration is given in A.O. 1984-15:

> [T]he proposed television advertisements will show the image or portrait of one of the current Democratic presidential candidates. They will quote statements by that candidate about the budget deficit or government morality and depict his record relating to those statements.

Id.

The advisory opinion concludes that "the clear import and purpose" of these ads "is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee."

While a majority of the Commission abandoned the "electioneering message" test in June, 1999 (in addressing the post-1996 presidential campaigns audits), Congress in the BCRA has enacted a similar standard in its use of the phrase "promote, support, attack or oppose" in the BCRA. Those words speak for themselves and do not need to be defined by the regulations.

Any public communication that refers to a clearly identified Federal candidate and that would tend to either diminish support or garner support for that candidate is within the scope of this phrase, and hence, is a Federal election activity.

The fundamental problem with the Commission's basic definition of the "promote, support" standard is exacerbated by the proposed exemptions from the definition in section 300.2(l)(2)(ii).

First, the Commission proposes that a communication will not fall within the scope of this definition if the reference to the candidate consists "only" of the "fact" that the Federal candidate has endorsed another candidate, *id.* at (A), or "only" of the "fact" that another candidate agrees or disagrees with the Federal candidate. *Id.* at (B).

These two exceptions state potentially major loopholes for ads that could be carefully tailored to exploit them. As Commissioner Thomas has pointed out in his memorandum of May 8, 2002, an ad could promote a Federal candidate by the manner in which the ad "only" endorses another candidate. Thomas Memo. at 3. This could certainly occur if, for instance, the reasons for an endorsement are discussed in addition to the fact of the endorsement itself.

Although the proposed regulation tries to address this problem by providing that the ad can "consist[] only of the fact of" endorsement, the regulation opens up great potential for abuse in having state parties spend soft money for ads featuring

Federal candidates in the new guise of "endorsement" ads instead of the old guide of "issue" ads.

A party ad is likely to "promote" a Federal candidate if the ad features the Federal candidate himself talking about his endorsement of another candidate, as opposed to the ad simply stating that "Senator Smith endorses Jones for governor" or some similar message. In short, a state party ad could note the fact of the endorsement without the Federal candidate appearing in the ad. Such an ad is less likely to cross the line and "promote or support" the Federal candidate.

In any event, there should be no *per se* exemption from the "promote or support" definition for an endorsement ad. The ad should be judged by the underlying test of whether it "promotes, supports, attacks or opposes" a Federal candidate. (Under any circumstances, if an ad features one Federal candidate endorsing another Federal candidate, as the language of the regulation contemplates, the ad would necessarily "support" one or the other of the candidates, if not both, and have to be funded with Federal funds).

So too, a state party ad in which a Federal, State or local candidate discusses his agreement or disagreement with another Federal candidate's position on an issue is likely to promote that Federal candidate. There should be no exemption from the definition of "promote or support" for any such ad.

While some ads that contain endorsements or statements of position might not promote or support a Federal candidate, others certainly might. The ads that

do not promote (or attack) a Federal candidate are not within the scope of the underlying definition in any event. The ads that do promote (or attack) a candidate should not escape the definition simply by the fact that the "promotion" comes in the form of an endorsement. The proposed "safe harbor" provisions in 300.2(l)(2)(ii)(A) and (B) are inconsistent with the BCRA and should be omitted.

Finally, the proposed exclusion in subparagraph (C) for references to a bill or law "by its popular name" is also subject to abuse. While the mere reference to a bill's popular name should not trigger coverage under the "promote, support" standard, it is certainly conceivable that a party could craft an attack ad on a candidate that is based on reference to a bill name. Rather than stating that any reference to a bill name is a *per se* exclusion, the regulation should state that references to a bill name do not *per se* trigger coverage so long as the communication does not "promote, support, attack or oppose" the candidate named.

Finally, to fall within the protection of the suggested provision, the Commission should also ensure that the reference is actually a "popular name" of a bill or law, such as "McCain-Feingold," not just an invented name given to a bill or law for purposes of crafting a party ad, such as "Senator Smith's health care bill" or "the Smith bill."

m. "To solicit or direct" In order to comply with the Act, the recipients listed in the proposed definition should encompass all "persons" as

defined in the Act, and thus include corporations and individuals, as well as the entities listed in the proposed definition.

Further, the definition should encompass not just the act of suggesting to a person that he or she make a donation, but also suggesting where the donation should be directed or sent, even if the person had previously decided to make some donation to help the party or one of its candidates. As currently written, the definition would cover the "solicitation" – *i.e.*, the request that a person contribute or donate, but not the "direction" *i.e.*, the request that the contribution or donation go to a particular recipient. This is inconsistent with the BCRA and would open the door to major evasions of the soft money ban. The language should be amended to cover this as well.

In response to the Commission's questions, we believe that the definition of 'solicitation" should clearly cover a series of conversations which, taken together, constitute a request for a contribution. The Commission should examine the totality of circumstances surrounding the conversations or communications to determine whether, taken together, they constitute a solicitation. Thus, we urge that the proposed definition be amended by adding at the end of the first sentence, "...including a series of communications which taken together, constitute a request, suggestion or recommendation."

It is inconsistent with the BCRA to limit the term "direct" to the standards of the Commission's earmarking regulations, which have been interpreted to

require some form of control over the funds. That is far too narrow a restriction to impose on Congressional language that broadly prohibits party committees and Federal candidates and officeholders from participating in the raising or spending of non-Federal funds.

In its commentary, the Commission asks whether the "passive providing of information in response to an unsolicited request for information" should be excluded from the definition. The answer to this question is no. To do so, for example, would open the possibility of directing where donations should be made in "response" to a request for guidance. However, the actual language in the Commission's proposed regulation more narrowly limits the information that can be provided in response to a request to "the requirements of applicable law." This limited ability to respond to a request is reasonable.

Part 300, Subpart A – National Party Committees

Section 300.10. We have no comment on the proposed regulation. We note however, the application of this provision to the party conventions, and the fact that it bars the national parties and their officers and agents from raising non-Federal funds for, or directing such funds to, host committees for party conventions. Although we believe this was properly a topic for Title I rulemaking under the BCRA, the Commission asserts that this matter will be further addressed in a subsequent rulemaking to implement this provision of BCRA specifically in reference to national party conventions.

Section 300.11. We have no comment on the proposed regulation.

In response to questions posed in the commentary, we agree with the suggestion that there should be a temporal limitation on the reach of the restriction, provided it complies with certain certification requirements.

A section 501(c) organization that had previously made expenditures in connection with a Federal election, but has not done so for the past three election cycles should thereafter not be considered to be within the class of organizations that have made such expenditures, for purposes of the restriction on party donations or fundraising in proposed section 300.11, provided that the organization will not make such expenditures in the next cycle.

A 501(c) organization that wants to receive a party donation and that has not made expenditures in connection with a Federal election for three cycles, and will not make such expenditures in the next election cycle, should be able to certify this status to the Commission, subject to Federal perjury penalties under 18 U.S.C. 1001. A party committee could rely upon an organization's certification to this effect in order to determine whether it may make donations to, or engage in fundraising for, the organization. Similarly, a new section 501(c) organization could certify that it will not make such expenditures in the next cycle, and a party committee could also rely on this certification. Otherwise, the party committee should be strictly liable for making donations to or engaging in fundraising for a

section 501(c) organization that spends money in connection with a Federal election.

Finally, it is appropriate for a party committee to respond to an unsolicited request for information about organizations that share the party's goals, so long as neither the request nor the party's response is in connection with a proposed or potential donation. Otherwise, the party's response will fall within the prohibited category of "directing" donations to the section 501(c) organization.

Section 300.12. In proposed section 300.12(e), the Commission proposes that the national party committees dispose of non-Federal funds remaining in building accounts as of November 5, 2002 by donating such funds, prior to December 31, 2002, either to the United States Treasury or to "an organization described in 26 U.S.C. 170(c)."

We believe this transition provision opens the door to abuse. A number of section 501(c) organizations spend money in connection with elections, and a transfer of party soft money to such organizations could result in soft money being spent for political and electoral purposes, thereby allowing section 501(c) organizations to serve as vehicles to launder into Federal elections the same party soft money that the legislation seeks to exclude from elections.

The Commission should allow remaining national party soft money as of the effective date of the BCRA to be transferred only to the United States Treasury or returned to the donor.

Finally, the word "national" should be deleted from the next-to-last sentence of proposed section 300.12(e). After November 5, 2002, the national parties should not be allowed to spend their non-Federal funds for any party building, not just a national party building. (Alternatively, the second part of that sentence should be deleted, and the sentence should read, "After November 5, 2002, the national committees may no longer accept funds into such an account.").

Section 300.13. We have no comment on proposed section 300.13. In response to the commentary, we note that this provision should be read to require reporting by groups such as the National College Republicans, or National College Democrats, as subordinate committees of the political parties.

Part 300, Subpart B – State, District and Local Party Committees

Section 300.30. We have no comment on proposed section 300.30(a), other than to note that the proposal in section 300.30(a)(2)(ii) that an entity which does not qualify as a political committee be allowed to "demonstrate by a reasonable accounting method" that it has received sufficient Federal funds to make an expenditure or contribution should not be used as a means of circumvention, and that the Commission must ensure that this permissive approach is not abused.

In proposed section 300.30(b), we strongly agree that a state party committee that intends to spend money for Levin activities be required to establish a separate Levin account. (We assume that this would not preclude a state party

committee from funding Levin activities entirely with Federal funds). We do not believe that "accounting procedures" would be an adequate basis for a state party to demonstrate its compliance with the strict requirements of the Levin amendment, and that any such weaker requirement would create insuperable oversight and enforcement difficulties for the Commission. For this reason, it should not be left to the choice of the state party committee as to whether or not to establish a separate Levin account. As the Commission's commentary suggests, imposing a clear requirement that a separate Levin account be established for Levin activities best ensures compliance with the BCRA and promotes the greatest transparency.

In response to the Commission's question in the commentary, the use of Levin funds for non-Federal activities is not inconsistent with the BCRA, so long as such use is consistent with state law. This is the approach taken in proposed section 300.30(b)(3).

But section 300.30(b)(3) should be clarified in two ways. First, the cross reference to Levin activities should specifically cite 11 CFR 300.32(b)(1), instead of the more general reference to section 300.32, which includes Federal and non-Federal activities as well. And second, the word "exclusively" should be inserted before "non-Federal activities" to emphasize that Levin funds cannot be used for Federal activities.

Section 300.31. Subsection (c) should explicitly state that the source ban on contributions or donations by foreign nationals in 2 U.S.C. 441e continues to apply to the raising of Levin money. The BCRA does not allow foreign nationals to contribute money to state parties for Levin account purposes. Thus, the phrase, "other than section 441e," should be inserted after the phrase "by the Act and this chapter,".

In proposed section 300.31(e)(1), the regulation leaves out a key requirement, and should be rewritten. The language should reflect section 441i(b)(2)(B)(iv)(III) and (IV) of the statute which provides that Levin funds may not include funds provided, not only by a national party committee (including the congressional campaign committees), but also by "any officer or agent acting on behalf of" any national party committee and "any entity directly or indirectly established, financed, maintained or controlled" by any national party committee.

Similarly, under the same statutory provisions of BCRA, sections 300.31(e) and (f) should make clear that Levin funds cannot include funds solicited by or provided by any other State, local or district committee, or by an agent or officer acting on behalf of such committee, or by an entity directly or indirectly established, financed, maintained or controlled by such a committee. These provisions should make explicit that transfers of Levin funds from other committees are prohibited.

Finally, we want to call attention to the language in proposed section 300.31(f) providing that use of a common vendor by two or more state party committees "by itself" will not be deemed to be joint fundraising. While we agree with this statement, we want to emphasize that the Commission should be careful to ensure that fundraising for two state committees through a common vendor does not result in *de facto* joint fundraising. Such joint fundraising would result if, for instance, the common vendor referred to the two party committees in a fundraising letter he prepared. Any such activity by a common vendor that in fact results in joint fundraising must be expressly prohibited by the regulation.

Section 300.32. In proposed section 300.32(a)(3), the Commission should reflect the statutory language that the costs of fundraising to raise funds "that are used, in whole or in part, for expenditures and disbursements for a Federal election activity" must be paid only with Federal funds. 2 U.S.C. 441i(c). The proposed regulation does not correctly reflect that fundraising which even in part is directed to raise Federal funds must be paid for entirely with Federal funds.

We strongly agree with the position taken in proposed section 300.32(a)(4) that all costs of raising Levin money must be paid only with Federal funds. We specifically object to any proposal that would allow the use of allocated funds to raise Levin money, as suggested in the commentary, which would be inconsistent with the BCRA. Doing so would directly contravene section 441i(c) of the statute

which requires only Federal funds be used to pay for the fundraising costs of raising money for Federal election activities, which include Levin activities.

The language of proposed section 300.32(b)(2) should not override the restrictions on funding certain "Federal election activity," such as that described in section 431(20)(A)(iii) only with Federal funds, and not Levin funds. As currently drafted, this paragraph could be read to authorize the spending of Levin funds for any lawful use, including for public communications that promote or support Federal candidates and therefore otherwise require exclusive Federal funding.

Proposed section 300.32(b)(2) is structured in a way that is likely to lead to confusion. That provision allows the spending of Levin funds for non-Federal election activities. Although this permission is not objectionable, the proposed regulation would allow such Levin funds to be exempt from subparagraph (c), which among other things requires Levin funds to be raised in accordance with the limits set forth in proposed section 300.31. *See* proposed section 300.32(c)(3). This implies that a state party committee could intermingle in its Levin account both funds which comply with section 300.31 and funds which do not. Doing so would defeat the purpose of establishing segregated Levin accounts into which only funds that comply with Levin limits could be deposited. For this reason, the second sentence of proposed section 300.32(b)(2) should be deleted, leaving state parties free to spend Levin funds on non-Federal election activities if they wish,

but clarifying that all such funds must comply with Levin fundraising restrictions if spent out of a Levin account.

In proposed section 300.32(d), it would be appropriate to insert "Levin" in the first sentence, after "Federal," to reflect the fact that Levin funds may be used to make disbursements for non-Federal activity, such to state law.

Section 300.33. We strongly disagree with a fundamental premise of the proposed regulation – that currently allocable activities need not continue to be allocated under the BCRA, or may be allocated at the option of the state party. This premise is set forth in proposed sections 300.33(a)(1) and (2), which state that "administrative costs" of state party committees and salaries of employees who spend less than 25 percent of their time on Federal activities "may" continue to be allocated. And in proposed sections 300.33(b)(4) and (b)(5), the regulations provide that state party committees expenses for voter registration activities outside the 120-day window, and for certain GOTV activities, "may" be paid entirely with non-Federal funds, or they "may" be allocated between the committee's Federal and non-Federal accounts.

Instead of saying that such costs "may" be allocated, the regulation should say that these costs "must" be allocated. The regulation should not permit these expenses to be paid entirely with non-Federal funds.

All such costs are allocable under current pre-BCRA law, and nothing in the BCRA modifies this allocation requirement. The BCRA was clearly intended

to strengthen the protections in the law against the use of non-Federal funds in Federal elections. Congress found that the pre-BCRA allocation system was an insufficient protection against this abuse. As Rep. Shays said during the House floor debate,

> [T]hese allocation rules have proven wholly inadequate to guard against the use of soft money to influence federal campaigns. Much state party "party building activity" is directed principally to influence federal elections, and all of the party voter activity inevitably does have a substantial impact on federal campaigns.
>
> Cong. Rec. 107th Cong. 2d Sess. H409 (February 13, 2002)

So Congress adopted the BCRA to strengthen the law – both by requiring certain currently allocable activities (such as those described in section 431(20)(A)(iii)) to be paid for entirely with Federal funds, and by requiring the allocated use of Levin funds for activities described in section 431(20)(A)(i) and (ii).

But nothing in the BCRA provides that other, currently allocable activities should not continue to be allocated. The BCRA is explicit in how the current allocation system is to be changed and strengthened. Nowhere does it provide that currently allocable activities should become activities that can be funded entirely with non-Federal money.

In proposed section 300.33(a)(3)(i) and (ii), both subsections of the regulation should reflect the dual limitation on Levin activities that they may not clearly identify a Federal candidate (currently reflected in subsection (i) of the proposed regulation but not subsection (ii)), and that they may not be broadcast

unless they refer solely to a state or local candidate (not reflected in either subsection of the proposed regulation). *See* section 441i(b)(2)(B)(i), (ii).

We do not disapprove of the Commission's attempt to simplify the system for allocation. However, the specific approach taken in proposed section 300.33(b)(2) and (3) is inconsistent with the BCRA.

Problems with the allocation system lie at the heart of this legislation. Indeed, it was Congress' dissatisfaction with reliance on the allocation system as a means of fencing non-Federal funds out of Federal elections that primarily led to the passage of the BCRA.

Although the BCRA continues to rely on a system of allocation in certain instances – administrative costs, voter registration prior to 120 days before an election, salaries of party employees who spend less than 25 percent of their time on Federal activities, and Levin spending – the Commission must ensure that the allocation percentages used protect against the spending of non-Federal money to influence Federal campaigns. This goes to a core focus on congressional concern in enacting the legislation. The commentary to the proposed regulation correctly identifies as a key point that the allocation regulations "are to assure that activities deemed allocable are not paid for with a disproportionate amount of non-Federal or Levin funds." 67 Fed. Reg. 35666.

There are several alternatives that would achieve this purpose, while still moving to simplify the system of allocation.

One approach would be to adopt a flat 33 percent Federal requirement for allocating Levin expenditures and other non-administrative allocable costs (such as voter registration outside the 120-day window) in off year (or non-Presidential) elections, and a flat 40 percent Federal requirement for the same allocations in Presidential election years. Administrative costs in all years would be subject to a 25 percent allocation. This approach would reflect the current assumption that state parties spend about one-third Federal funds for mixed activities that are required to be allocated, but that a somewhat higher percentage of Federal funding is required in Presidential election years.

Another approach would be to follow the Commission's proposed calculations, but use the high percentage for allocation of Levin spending and voter registration outside the window, and the average percentage for non-Levin allocation, such as administrative costs. (Thus, this approach would set the Levin allocation numbers at 33 percent for Presidential-only election cycles, 43 percent for Presidential and Senate election cycles, 25 percent for Senate only election cycles, and 17 percent for neither Senate nor Presidential election cycles). Since Levin activities include precisely those mixed voter activities where large amounts of soft money have in the past been directed in an effort to influence Federal campaigns, it is appropriate to use higher percentages of Federal funds to reflect this reality and experience.

Whichever method of allocation is chosen, the regulations must make clear that the allocation percentages apply on a two-year election cycle basis, not just in the year of the Federal election itself. As currently drafted, proposed sections 300.33(b)(2) and (3) apply the allocation formulae, for instance, "in any year" in which a Presidential or Senate candidate "appears on the ballot."

This language can be read to mean that the Commission's higher proposed allocation numbers apply only in even years, when Federal candidates "appear" on the ballot. Under this reading of the Commission's proposal, every odd year would be a year "in which neither a Presidential nor a Senate candidate appears on the ballot," *see* proposed section 300.33(b)(2)(iv) – simply because there is no ballot -- and thus would automatically allow parties to use the lowest allocation ratio of 15 percent. This would result not only in having parties switch allocation ratios on an annual basis, but also work the great anomaly of allowing the parties to use the lowest possible allocation ratio in the first year of a two-year Presidential/Senate cycle in which the highest ratio should be required. As is current practice, allocation ratios should be applied on a two-year cycle basis. To do otherwise would be to weaken the current protections in the law, a result contrary to the BCRA.

As noted above, in proposed section 300.33(b)(4), the Commission should require allocation for voter registration activities prior to the date that would bring them within the scope of the definition of "Federal election activities." Nothing in

the BCRA changes the requirement under current law that such activities are allocable. The proposed regulation takes the wrong approach, and is inconsistent with the BCRA, in giving state party committees the option of allocating these disbursements between Federal and non-Federal funds (not Levin funds) or paying for them entirely with soft money.

For reasons explained above, to allow such disbursements not to be allocated would weaken protections that exist under pre-BCRA law and would be fundamentally inconsistent with the Congressional intent in the BCRA to provided increased protection against the use of non-Federal funds in Federal elections.

Proposed section 300.33(b)(5) is, at best, confusing. As drafted, this section appears to apply only to off-year elections in those five states that hold odd year state and local elections. If so interpreted, the section correctly provides that GOTV and related voter activity described in section 431(20)(A)(ii) could be paid for with entirely non-Federal funds because such activities are not "in connection with" an election in which a Federal candidate appears on the ballot. But for the great majority of states which do not hold off-year elections, all GOTV-type activities in off years are "in connection with" Federal elections and thus "Federal election activities," as defined in BCRA. As such, they must be subject to Levin allocation and not, as the regulations states, either paid for entirely with non-Federal funds or allocated between Federal and non-Federal accounts.

Proposed section 300.33(c)(1) should clarify that Federal funds must be used for disbursements by state party committees for activities that refer to Federal candidates even if a state or local candidate is also mentioned.

Proposed section 300.33(c)(2) is overly broad, and conflicts with sections 300.33(b)(4) and (5). Those latter sections provide that activities in connection with Federal elections that are not "Federal election activities" (such as voter registration prior to 120 days before an election, whether or not it refers to a Federal candidate) may be (and we believe, must be) paid for with an allocated mixture of Federal and non-Federal funds, as required by current law. But proposed section (c)(2) would require solely Federal funds to be used. This provision should be deleted.

Finally, proposed section 300.33(d)(1) should be broadened to take account of allocation of disbursements other than administrative expenses and Levin activities, such as those that should be required by subsection (b)(4) – voter registration activities prior to 120 days before a Federal election. These disbursements should also be paid from Federal accounts with appropriate reimbursement transferred from the non-Federal account to reflect the allocation.

Section 300.34. Subsection (a) correctly states that a state party committee may not use Federal funds transferred to it from another committee to meet the hard money component of the allocated spending on Levin activities. But since a state party committee's Federal account will contain both Federal funds raised by

the party committee itself (and thus qualified for Levin purposes) as well as hard money transferred to it (and thus available for other Federal purposes, but not for Levin spending), there must be some basis for the Commission to ensure that only non-transferred Federal funds raised by the state party committee itself is being spent for Levin activities out of the committee's Federal account.

The Commission should require that a reasonable and industry-accepted accounting method should be used by the state party committee to demonstrate that, as of the day the allocated Levin expenditure is made, there was sufficient Levin-qualified Federal funds in the state party committee's Federal account to provide the Federal component of the Levin allocation.

Section 300.35. Subsection (a) should explicitly state that the ban on contributions or donations by foreign nationals in 2 U.S.C. 441e continues to apply to the raising of money for state party building funds. Similarly, proposed subsection (b)(1) should make clear that Federal law, other than section 441e of the FECA, does not preempt state law. It was not the intent of the BCRA to allow foreign nationals to contribute money to state parties for the purpose of their building funds.

The proposed regulation correctly reflects the distinction made in the BCRA between "buildings" and "facilities." We strongly agree with the position taken in proposed section 300.35(c)(1). The BCRA intended that building funds be used to pay only for the construction of a structure and its fixtures, and that is

why the statute uses the word "building" and not "facility." *See* section 453(b). The broader definition of "facility" developed in recent Commission advisory opinions to include furniture and office equipment is outside of the statutory permission in this section. Such "facilities" should be funded by state parties with an allocated mixture of Federal and non-Federal funds, as correctly provided in proposed section 300.35(d).

Section 300.36. We agree with the requirement stated in proposed section 300.36(b)(2)(ii) that state party committees must report and itemize Levin funds. This provision is required by section 434(e)(2)(A) and (B) of the FECA, as amended by the BCRA, which require state party committees to report "all receipts and disbursements" for Federal election activities, unless the aggregate amount is less than $5,000.

Section 300.37. The BCRA prohibits any party committee from soliciting funds for or making donations to any section 501(c) organization that makes expenditures or disbursements in connection with a Federal election. 2 U.S.C. 441i(d)(1). It also prohibits soliciting for, or making donations to some section 527 organizations. But the statute exempts from the prohibition those section 527 organizations that are political committees, state party committees or candidate committees. 2 U.S.C. 441i(d)(2). This proposed regulation implements these prohibitions.

In response to a question posed in the commentary, we believe subsection 441i(d)(2) should allow a state, district or local party committee to also make a solicitation for, or donation to, a section 527 organization that is not a Federal political committee and that does not spend make expenditures or disbursements in connection with Federal elections or for Federal election activities. Thus, in the context of section 441i(d)(2), the term "political committee" should be read to include both Federal and non-Federal political committees.

Part 300, Subpart C – Tax Exempt Organizations.

Section 300.50. We have no comment on proposed section 300.50.

Section 300.51. Our comments here are the same as those stated in regard to proposed section 300.37.

Section 300.52. This section implements the statutory prohibition on Federal candidates and officeholders soliciting or spending funds "in connection with an election for Federal office," 2 U.S.C. 441(e)(1)(A), or "in connection with an election other than an election for Federal office," *id.* at 441(e)(A)(B), unless the solicitation is for funds that comply with Federal law.

The statute creates two express categories of exemptions from the general rule. First, section 441i(e)(4)(A) allows a candidate or officeholder to make a "general solicitation" for a section 501(c) organization where the "principal purpose" of the organization is not to conduct voter registration or get-out-the-vote activities as described in 2 U.S.C. 431(20)(A)(i) and (ii).

Second, the statute allows a candidate or officeholder to make a specific solicitation for a section 501(c) organization to conduct voter registration or GOTV activities, or a solicitation for a section 501(c) organization whose principal purpose is to engage in such activities, so long as the solicitation is made only to individual and is for an amount that does not exceed $20,000 in a year. *Id.* at 441i(e)(4)(B).

But in implementing these provisions, the Commission's proposed regulation can be read to prohibit solicitations that should not be barred. The statute does not prohibit a candidate or officeholder from making either a general or specific solicitation in any amount on behalf of a section 501(c) organization which (like the Red Cross) engages in no electoral activities of any nature. Yet proposed section 300.52(a)(1) implies that a specific solicitation for such an organization is prohibited. It should not be.

This position is clear from the statutory scheme, which states a general prohibition on solicitations only with regard to activities "in connection with" a Federal or non-Federal election. Since the activities of a section 501(c) organization that does not engage in electoral activities is not within the scope of the prohibition in the first instance, it is not necessary for solicitations of this type to be expressly excluded from the scope of the prohibition in subsection (c)(4) of the statute.

This reading is confirmed by the legislative history where, in discussing this provision, Senator Feingold notes that "the bill's solicitation restrictions would not apply to a Federal candidate soliciting funds for the Red Cross explicitly to be used for a blood drive – as this is not an organization whose principal purpose is to engage in get-out-the-vote or voter registration activities and the solicitation is not expressly to obtain funds for such activities." Cong. Rec. 107th Cong. 2d Sess. S2140 (March 20, 2002).

Therefore, the Commission's regulation implementing the BCRA should not, by inference, include within the scope of the underlying ban general or specific solicitations for section 501(c) organizations that never engage in any electoral activity. The regulation should be clarified to provide that a candidate or officeholder may make either a general or specific solicitation of an unlimited amount for a section 501(c) organization that does not engage in any activities in connection with either Federal or non-Federal elections.

We agree with the position taken in the proposed regulation, and noted in the commentary, that the specific exemptions stated in proposed section 300.52 apply to individuals – candidates, officeholders and their agents -- and not to entities established by such individuals. Thus, those entities would not be permitted to engage in the types of solicitations allowed under proposed section 300.52.

Finally, proposed section 300.52(b)(2) should apply only to section 501(c) organizations, not to any "entity," as currently drafted. Sections 441i(e)(4)(A) and (B) should be read together to apply only to section 501(c) organizations.

In response to a question raised in the commentary, we do not believe the term "agent" should have a meaning different from its meaning in sections 441i(a) and 441i(d) of the statute. Implied in the statutory use of the word "agent" is that the agent is "acting on behalf of" the principal.

The certification by section 501(c) organizations discussed above in reference to section 300.11 should be used here as well. An organization could certify that it has not made expenditures in connection with Federal or non-Federal elections, or that such expenditures are not its "principal purpose." That certification, subject to 18 U.S.C. 1001, could be relied on by candidates and officeholders as a safe harbor to determine the scope of the permissible solicitations they may make on behalf of the organization.

Finally, the regulations should make clear that a candidate or officeholder must ensure that he or she is soliciting only permissible funds. As the commentary suggests, the burden should be on the candidate or officeholder to inform a corporate or labor officer that he is soliciting only personal funds, not corporate or labor funds.

Part 300, Subpart D – Federal Candidates and Officeholders

Section 300.60. We have no comment on the proposed regulation.

Section 300.61. We have no comment on the proposed regulation.

Section 300.62. We have no comment on the proposed regulation.

Section 300.63. We have no comment on the proposed regulation.

Section 300.64. We agree with language of proposed section 300.64. The proposed regulation correctly reflects the line drawn in the statute, section 441i(e)(3), between an officeholder or candidate attending, speaking or being a "featured guest" at a fundraising event, on the one hand, which is permitted, and the officeholder or candidate engaging in solicitation of funds for, or at, the event, on the other hand, which is not permitted.

The commentary raises several issues about this line. First, section 441i(e)(3) is not a "total exemption from the general solicitation ban," as the commentary suggests. Indeed, it is not an exemption at all. It is simply a clarification that while candidates and officeholders may not solicit non-Federal funds, they may nonetheless attend, speak or be a guest at a fundraising event where such funds are solicited by others.

Under section 441i(e)(3), the Federal candidate or officeholder may attend or speak at a fundraising event, and the invitation to the event may refer to the fact that the Federal official will be a guest and/or speak. The invitation may note that the official will be a "featured" or honored guest at the event. However, the invitation may not refer to the Federal official in a way that is tantamount to a solicitation by the official. For this reason, the Federal candidate or officeholder

may not be a member of the event's "host committee," since that directly implies the official is soliciting funds for the event.

Section 300.65. Our comments here are the same as those stated in regard to proposed section 300.52

Section 300.70. We have no comment on the proposed regulation.

Section 300.71. We have no comment on the proposed regulation, but we incorporate here our prior comment regarding the definition of "promote, support, attack or oppose" in regard to proposed section 300.2(l)(1).

Section 300.72. This regulation should make clear that it applies only in the context of a dual candidacy or officeholder, i.e., a Federal officeholder or candidate who is also, at the same time, a candidate for State or local office. Only in such a case, the State candidate can use non-Federal funds to pay for a public communication that refers to himself or his opponent in the State campaign. Because in this situation, the State candidate is also a Federal candidate or officeholder, the use of non-Federal funds to pay for a public communication that refers to himself would otherwise be barred by section 441i(f)(1) of the BCRA and proposed section 300.71 of the regulations. Section 441i(f)(2) of the BCRA provides a limited exception to this general rule for the relatively rare instances where a state candidate is also, simultaneously, a Federal officeholder or candidate.

The language in proposed section 300.72 does not properly reflect the statute, and should be modified to allow a state candidate who is also a Federal candidate or officeholder to spend non-Federal funds for public communications in connection with his State campaign, and that promote or support himself as a State candidate, or attack or oppose his State campaign opponent.

Part 9034 – Entitlements

We have no comment on the proposed regulation.

Respectfully submitted,

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