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May 30, 2002

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

Re: Response to Notice of Proposed Rulemaking
Non-Federal Funds

Dear Ms. Smith:

On behalf of The Latino Coalition and the Taxpayer Network, Inc., please accept this document in response to the Federal Election Commission's ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPR") related to proposed Bipartisan Campaign Reform Act of 2002 ("BCRA") Non-Federal Fund Regulations. In addition, please accept this document as a request to appear before the Commission during the scheduled hearings June 4-5, 2002 to provide testimony related to these same matters.

My comments fall into several general categories which cover most of the issues that are related to my clients' interests in the NPR.

1. **Capital's Terminology:** The NPR at footnote 1, (NPR page 5) requests comment as to whether it is advisable for the Commission to utilize the term "soft money" for purposes of referencing non-federal funds. I strongly suggest that the Commission refrain from using such street jargon in drafting its regulations. It will only serve to confuse those who will have to decipher these new concepts and regulations.

   Many of the definitions of the Federal Election Campaign Act of 1971, as amended ("FECA") and BCRA are terms of art; they carry with them very specific definitions and concepts. It will prove to be far better for the regulated community if the Commission would remain disciplined and consistent and confine its use to terms of art specifically defined within the FECA. It is better if the Commission would focus on reducing the number of such terms and utilizing

FOLEY & LARDNER
WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143

TEL: 202.672.5300
FAX: 202.672.5399
WWW.FOLEYLARDNER.COM

WRITER'S DIRECT LINE
202.295.4715

EMAIL ADDRESS
asullivan@foleylaw.com

CLIENT/MATTER NUMBER
999700-0606

002.837703.1

only those that are specifically defined in the FECA and in corresponding regulations. The addition of such terms as "soft money" will only serve to confuse and complicate the concepts of the FECA and the newly introduced concepts of the BCRA when viewed by the regulated community.

For similar reasons, I would strongly suggest that the committee refrain from the use of such terms as "leadership PACs" or "candidate PACs". These are terms which are not found in the FECA and again only serve to complicate and confuse those in the regulated community. By way of example, the NPR states "leadership PACs" as "entities directly or indirectly established, financed, maintained or controlled by federal candidates or office holders" (NPR page 78). If such were the case, the Commission would consider these PACs to be affiliated (11 C.F.R. §100.5(g)) with the respective candidate's principal campaign committees. The Commission has in fact expressed its concern related to the affiliation between leadership PACs and principal campaign committees (See Explanation and Justification 1996-110 Regulations (CCH ¶870, at page 2453)). These "leadership PACs" are non-connected committees and should be referenced merely as non-connected committees rather than utilizing the more common slang terminology which causes confusion; evidenced by the very use of the term "leadership PACs" and its definition as represented in this NPR.

I raise these points only to underscore the need for the Commission to be sensitive and disciplined in the use of these terms while drafting the BCRA Regulations. This will only serve to confuse issues which already appear to be rather complex and confusing to the general public.

2. **Candidate on the Ballot:** At page 12 of the NPR, the Commission raises the issue as to when a candidate is considered to be "on the ballot" for purposes of implementing the BCRA restrictions related to "federal election activities". Virtually every state has a process by which it certifies a candidate for placement on a ballot. The Commission should defer to the state's statutes and respective timeframes to determine when a candidate is "on the ballot". This should not be the "earliest" date that any federal candidate can qualify for a position on the ballot as suggested at page 13 of the NPR, but rather the date on which the candidate is certified by the appropriate certifying officer in the state. This would also be applicable for special elections or runoff elections.

3. **Definition of Agent:** The restrictions of the BCRA which run as a result of actions by a candidate or party's agent mandate should be limited so the restrictions only run where the agent is acting with expressed rather than apparent

or implicit authority. For example, a fundraising consultant who solicits and raises funds on behalf of a federal committee is traditionally viewed as an "agent" of that committee, absent contractual agreements to the contrary. Under the proposed restrictions related to a federal committee's "agent", it is feasible that these regulations would prohibit that fundraising consultant from securing a contract to raise funds for a state party committee, state candidate committee, non-profit organization, etc. The Commission must specifically address this type of an issue and indicate that an arm's length vendor relationship would not cause the commercial vendor/consultant to be considered an agent for purposes of the BCRA. This becomes relevant to entities such as my clients referenced above for purposes of avoiding allegations that non-profit organizations are using a federal committee's "agent" to solicit non-federal dollars in violation of the BCRA.

4. **Definition of "Directly or Indirectly Established, Financed, Maintained or Control":** The Commission inquires as to whether or not the use of the term "indirectly" mandates that the already defined terms of "established, financed, maintained or control" as presently defined in the FEC Regulations needs to be broadened as a result of utilizing the term "indirectly". This phrase is used in conjunction with determining affiliation between organizations. It is my opinion that the rather extensive definition of "affiliation" as presently found in the Regulations (11 C.F.R. §100.5(g)) sufficiently defines the relationship and the inclusion of the term "indirectly" does not add any material distinction.

5. **Temporal Limit:** At page 23 of the NPR, the Commission seeks opinions relative to the establishment of a "temporal limit" for determining when an entity is considered to be controlled by a "sponsor". The practical effect and the straightforward application of current FECA concepts should dictate that there be a temporal limit, that being that point in time when one entity no longer exercises maintenance, control or finance of the other entity (See 11 C.F.R. §100.5(g)(2)). This may, in fact be November 6, 2000. However, I would not suggest applying a retroactive determination and restriction relative to this issue. There is certainly precedent within the Commission's advisory opinions for this proposition. Specifically, the Commission has often recognized the capability of separate segregated funds to "disaffiliate" with other political committees or a previous "connected organization" (See A.O.'s 1996-50; 1995-36; 1996-23). Conceptually, these same concepts of the FECA should be implemented to dictate the specific timeframe related to this issue.

6. **Definition of "To Solicit or Direct":** The draft definition of "to solicit or direct" includes a request, suggestion or recommendation to make a contribution or

donation. In light of the rather severe restrictions now imposed by the BCRA, the definition of "to solicit" mandates that there be clear definitive guidelines. Ambiguous standards such as a "suggestion" or a "series of conversations which taken together constitute a request for contribution or donation, but which do not do so individually" merely lead to more confusion and allegations of violations. The Commission certainly has guidance in past advisory opinions and enforcement matters relative to what constitutes a "solicitation". However, it should be a term which through this rulemaking takes on a more definitive list of parameters.

7. **Prohibition on National Party Fundraising for Tax-Exempt Organizations:** The two (2) concerns which I have related to this section touch upon the concept of the definition of "agent" which was previously addressed. To amplify, I have concerns about the failure of the regulations to clearly state how far down the vertical political party structure and organization one goes to determine if an individual is deemed to be an agent? Would the regulation include the party's precinct chairman or the ward chairman at a county level? This is clearly an area where the Commission must define, with more specificity, those persons who are considered to be agents of the national/state party committees.

Secondly, is to what extent may those "agents" participate in an exempt organization, or for that matter federal or state committee activities?

Take the case of a federal party committee "agent" who sits on the board of advisors, or for that matter the board of directors (though not in "control" of the board) of an exempt organization that also has a non-federal political committee. I would submit that merely because the agent sits on the board, the organization is not prohibited from soliciting non-federal dollars for the state PAC. I would suggest even further that an "agent" may sit on the board of a non-federal committee provided that agent does not expressly solicit or control that non-federal/political committee.

The BCRA prohibition should only apply if the "agent" undertook direct solicitation or in fact controlled the non-profit organization. Therefore, the mere participation by an agent absent a "solicitation" or the establishment, finance or control of the organization by the agent should not preclude that organization from moving forward and conducting solicitations for non-federal funds.

This issue becomes extremely important for exempt organizations, and their affiliated state registered committees. The Commission should specifically indicate that such "agents" are not precluded from participation in such non-profit

organizations or state political committees, but rather are merely precluded from conducting solicitation or exercising control over the entity.

8. **Exempt Activities:** At page 49 of the NPR, the Commission specifically inquires about the application of the exempt activities as currently set out in the Regulations at §§100.7(b) and 108(b). I would concur that the definition of "federal election activity" should not include voter registration activity outside the one hundred twenty (120) or fewer days before an election timeframe. The statute appears to desire to restrict specific activity during that one hundred twenty (120) days and not activity beyond that specified time period. Therefore, since the BCRA did not specifically amend the application of the exemptions presently contained in the FECA, the provisions in the BCRA defining "federal election activity" must be read in conjunction with the present provisions. With that reading, the exempt activity would remain applicable.

Conclusion

This is a summary of my clients' concerns related to the NPR. I welcome the opportunity to expand upon these points during my testimony.

Very truly yours,

Paul E. Sullivan, Esq.

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