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May 29, 2002

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**Via E-Mail, Fax and Hand Delivery**

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

RE: Comments on Proposed Rulemaking and Request to Testify

Dear Ms. Smith:

This provides comments on behalf of the NAACP National Voter Fund ("NAACP NVF"), a non-profit organization exempt from federal income taxes under Section 501(c)(4) of the Internal Revenue Code, on the Federal Election Commission's ("FEC's" or "Commission's") Notice of Proposed Rulemaking published on May 20, 2002. Specifically, these proposed rules were issued to implement the soft money provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). We appreciate the difficult issues raised by the BCRA and the laudable effort by the Commission to issue rules in such a timely manner. However, we have significant concerns regarding certain provisions of the proposed rules as are described below. We respectfully request an opportunity to testify at the Commission's hearing regarding these proposed rules.

## I. Depleting National Party Committee Non-Federal Funds During Transition Period

Under the BCRA, beginning on November 6, 2002, national party committees may no longer raise or maintain non-federal funds, so-called "soft money" (i.e., funds that are not subject to the limitations, prohibitions, and reporting requirements of the Federal Election Campaign Act of 1971, as amended ("FECA")). However, the BCRA establishes a "transition period"—from November 6, 2002 until January 1, 2003—during which any remaining soft money of a national party committee may be depleted. The Commission's proposed rules set forth requirements that must be followed when depleting such funds during the transition period. For example, consistent with the BCRA, the proposed rules provide that a national party committee may use its remaining soft money during the transition period only to retire soft money debt. Furthermore, these rules explicitly prohibit the use of such funds to retire any hard money debt or for building fund expenses. The Commission seeks comments as to how the funds that remain after retiring such soft money debt may be used during the transition period.

The transition rules should permit a national party committee to use its remaining soft money, after retiring any outstanding soft money debts, for any activity currently permitted for such funds under FECA. Indeed, this result is mandated by the plain language and the underlying purpose of the BCRA. At the very least, the Commission's rules should expressly permit such funds to be given to Section 501(c) non-profit organizations.

One of the most longstanding rules of statutory construction requires that the plain meaning of statutory language be followed in construing a statute, unless the statute is silent on a particular matter, in which case one must look to legislative intent. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Moreover, when a statute involves the regulation of Constitutionally protected speech, it must be read in a way to most effectively protect such speech. In this case, although the BCRA states that a national party committee must use its soft money during the transition period "solely" to retire soft money debt, it is silent as to how the soft money that remains after such retirement of debt may be used. Rather, the BCRA merely prohibits the remaining soft money from being used to retire hard money debt or for building fund expenses. By creating these express prohibitions, but declining to create any other express prohibition, the BCRA necessarily permits other uses of the soft money that remains once all soft money debts are paid. Otherwise, Congress would have delineated other specific prohibitions on the use of such funds during the transition period. Thus, national party committees should be permitted to use such remaining soft money for any purpose that is currently permitted under FECA. Under no part of

BCRA, is it even implied that these remaining soft money funds must be disgorged to the U.S. Treasury or to charities, as suggested by the Commission in its Explanation and Justification.

The purpose of the BCRA also supports this conclusion in that the BCRA provision in question was intended to allow national party committees to prepare for the complete ban on soft money by providing them with a period of time after the November 5, 2002 election to deplete soft money funds remaining in their non-federal account. In reviewing the legislative history, Congress' concern regarding the national party committees' use of soft money during the transition period was solely limited to the potential use of such funds to retire hard money debt or for building fund expenses, which is already prohibited under current law. See 148 Cong.Rec. H339-02, H341 (February 13, 2002). Accordingly, based on the purpose and underlying legislative intent of the BCRA, the transition rules should permit national party committees to use remaining soft money, after retiring any outstanding soft money debts, for any activity that is currently permitted for the use of such funds, except for retiring hard money debt or for building fund expenses.

At any rate, the transition rules should at least expressly allow national party committees to transfer remaining soft money, after retiring any outstanding soft money debts, to any Section 501(c) non-profit organization. Such organizations are required under federal tax law to primarily engage in, and in the case of a Section 501(c)(3) organization, exclusively engage in, non-partisan charitable or social welfare activity.

**2. Determining When a Federal Candidate Appears on a Ballot for Purposes of Covering Get-Out-The-Vote Activity**

The BCRA includes in the definition of "federal election activity," among other things, voter identification and "get-out-the-vote" ("GOTV") drives when "conducted in connection with an election in which a candidate for federal office appears on the ballot." The Commission is attempting to clarify precisely when a federal candidate "appears on the ballot" for purposes of implementing this definition. In doing so, the Commission posits four alternative time periods: (1) the earliest date that any federal candidate could qualify for a position on the ballot under state law; (2) the last date on which the filing period for federal office closes under state law; (3) January 1 of even-numbered years; or (4) when a person becomes a federal candidate under the BCRA.

The answer to this question is of grave concern to non-profit organizations (e.g., Section 501(c) organizations) because an overly broad definition of when a federal candidate "appears on the ballot" would unduly hamper their legitimate fundraising efforts, and thus, impede many, if not all, of their valuable, non-partisan GOTV efforts. Specifically, under the BCRA, federal officeholders may make a general unlimited solicitation of funds on behalf of a Section 501(c) non-profit organization as long as the organization's primary purpose is not to engage in "federal election activity," which includes GOTV activity connected to an election where a federal candidate appears on the ballot. If a non-profit organization is deemed to be primarily engaged in such federal election activity, a federal official may only solicit individuals and only up to $20,000 per year. See 2 U.S.C. § 441i(e)(4).

None of the Commission's four proposed alternatives should be applied to the definition of "appears on the ballot" as it is used in this provision of the BCRA. First, they do not reflect the plain language of the BCRA, which states that: "[t]he term 'federal election activity' means . . . [GOTV] activity . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)." See 2 U.S.C. §§ 431(20)(A) (emphasis added). Based upon this plain language, the only possible meaning is when the first federal candidate actually qualifies for a position on the ballot under each state's applicable election law. The Commission's four proposed alternatives, on the other hand, have no nexus as to whether a federal candidate is actually on the ballot. Such overbroad and arbitrary application of the BCRA is particularly unacceptable given that it regulates speech protected under the First Amendment of the Constitution. Thus, for the Commission to select any other date than the date of actual qualification would be legally incorrect.

Moreover, the Commission's proposed alternatives would create an overly expansive time period which would unduly hinder the ability of bona fide non-profit organizations to effectively achieve their non-partisan missions. As required under federal tax law, social welfare organizations, such as the NAACP NVF, primarily engage in non-partisan activities the purpose of which is civic benefit or social improvement. For the NAACP NFV, one such activity is to conduct non-partisan GOTV drives to encourage African-Americans, who have historically been underrepresented at the ballot box, to go to the polls on election day without regard to party affiliation. The ability to engage in such non-partisan activity should not be unduly hampered by imposing overly broad restrictions on fundraising.

We note that by adopting our standard, one would have to look at the ballot access requirements on a state-by-state basis depending upon the states in which the non-profit organization is active. This may be somewhat burdensome, but not without precedent. Indeed, the Commission already requires political committees to file pre-election reports no later than 12 days before a primary election in which the committee supports or opposes a candidate. These primary election dates vary state-by-state. Thus, it should not be too difficult for the Commission to implement this standard, which is tied to the actual date that a federal candidate qualifies for the ballot in a particular state.

In light of the foregoing, the Commission should refrain from adopting any of its suggestions for determining when a candidate for federal office appears on the ballot. Instead, the Committee is compelled to adhere to the plain meaning of the BCRA, which requires that the time period begin on the date that the first federal candidate actually qualifies for a ballot.

3. **Definition of "Directly or Indirectly Establish, Finance, Maintain or Control"**

The Commission proposes a rule defining "directly or indirectly establish, finance, maintain, or control," which is a phrase used in several provisions of the BCRA. As proposed, this definition applies when the BCRA uses the phrase in connection with state, district or local committees of a political party, candidates, and holders of federal office. For example, if an organization, including a Section 501(c) non-profit organization, is deemed to be "directly or indirectly established, financed, maintained, or controlled" by a covered party committee, the organization would be subject to the same prohibitions and restrictions on soft money as that party committee.

The proposed rule sets forth six conditions that constitute a sponsor directly or indirectly establishing, financing, maintaining or controlling an entity. Under the rule, satisfying any one of these six conditions is sufficient to establish such control over an entity. We are particularly concerned with one of these conditions which addresses the financing of an entity by a sponsor, and our comments are directed toward that provision. As currently proposed by the Commission, the rule states that a sponsor directly or indirectly establishes, finances, maintains, or controls an entity when:

> 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), transfer, or other means. In determining whether or not this condition is

> satisfied, one or more of the following factors, any one of which may be dispositive, may be considered:
>
> (A) The percentage of the entity's total funding in a given calendar year represented by the amount of funding provided by the sponsor.
>
> (B) Whether the sponsor provided funding to the entity on a one-time basis or more systematically over a period of time, including the frequency, regularity, and duration of the funding.
>
> (C) The amount of time that has elapsed since the sponsor last provided funding to the entity.

This rule is not only vague so as to provide no practical guidance, but also is likely to deem entities as being "controlled" by a party committee when the BCRA never intended to reach such entities.

As a general matter, this proposed rule is flawed because it only narrowly (and inadequately) captures one element (i.e., finance) of a phrase that is intended to define the much broader concept of "control." The BCRA restricts the use of non-federal funds by, among others, political party committees and "any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." See 2 U.S.C. § 441i(a)(2). As the Commission itself notes in its Explanation and Justification, Congress was attempting in this provision to prevent the proliferation of committees or organizations as a means of circumventing BCRA's prohibitions and restrictions on soft money. Such circumvention could take place only if a covered party committee were able to control ostensibly separate entities that were permitted to accept and spend non-federal funds. In every instance in which the phrase is used in the BCRA, it is clear that Congress intended to prohibit the use of entities acting as a surrogate for the prohibited sponsor, not those who have merely received some funding from such sponsor.

The Commission requested comments on its decision to define the phrase as one term rather than separately defining each individual word in the phrase. See 67 Fed. Reg. 35658 (May 20, 2002). We believe that the Commission was correct to define the term as a phrase rather than define each word within it, because it is the broader concept of control (of an ostensibly separate entity) that Congress was concerned about. It is not unreasonable to consider the financing of an outside entity as one element of control. It is not appropriate, however, to conflate "finance" with ultimate control. If it is true that the provision of funds alone can ever amount to the type of control contemplated by Congress, then surely the funding must be much more than a "significant amount." If the Commission is intent on using "finance" alone as being sufficient to establish control, then the rule should be redrafted to include situations where the sponsor provides "all" or "virtually all" of the funds of the entity. If the Commission uses any lesser degree of financing as an indication of such control, it should be coupled with a requirement that the organization either coordinate its activities with, or take instructions from, the covered party committee.

Putting aside the broader problem with using finance alone to define the type of control that Congress sought to prohibit, the proposed rule does not provide sufficient guidance for an entity (or sponsor) to know what amount of financing would qualify as being "significant." Apparently recognizing this difficulty, the Commission set forth factors (A), (B), and (C) within the rule, that must be considered when determining what constitutes " significant funding." Unfortunately, each of these factors has its own ambiguity (e.g., what percentage of an entity's funding in a given calendar year is too much?), and none creates a bright-line standard as to when a non-profit organization has qualified as being "directly or indirectly established, financed, maintained or controlled" by a party committee.

The ambiguity created by this vague standard is a cause for grave concern. The lack of clarity as to when an entity reaches the threshold of being "established, financed, maintained or controlled" by a sponsor will result in undue restrictions on perfectly legitimate, non-partisan activity by a non-profit organization. Indeed, under this rule, as currently drafted, any 501(c)(4) non-profit organization would be constrained if it had ever received a significant amount of funding from a covered party committee, even though such organization is required under federal tax law to be primarily engaged in non-partisan activity. For that matter, even a 501(c)(3) charity that is prohibited from engaging in any partisan activity may be restricted under this rule. Creating such sweeping and vague standard is particularly troublesome given that it impinges upon speech that is protected under the First Amendment of the Constitution.

The Commission also requested comments on the proposed rule's use of the phrase "at any point" in the context of whether a sponsor has provided a "significant amount of the entity's funding *at any point* in the entity's existence." We urge the Commission to clarify that this phrase, if ultimately retained, refers to "any point" after the date that the prohibitions and restrictions on a covered political party committee's use of soft money becomes effective. While the Commission logically drafted the rule to give effect to the BCRA as it applies prospectively, it is important for the rule to be explicit that an entity that may have received funding at some point in time prior to the final effective date of the BCRA will not forever be considered "established, financed, maintained, or controlled" by the sponsor simply by virtue of this fact. Otherwise, the rule would go against any conceivable precept of the BCRA having an effective date after the 2002 general elections. For example, it would be inappropriate and contrary to the purposes of the BCRA to create a rule that would deem a non-profit organization that received even a "significant amount" of its funding from a party committee in 1998, as being forever "controlled" by that party committee, and thus ineligible to receive non-federal funds for purposes otherwise allowed under the BCRA. Rather, the only relevant question for the purposes of the BCRA is whether an entity is controlled by a sponsor after the effective date of the BCRA.

Please note that we agree with the Commission's suggestion that there should be a rebuttable presumption that entities "organized" before a given date are not directly or indirectly established by a sponsor. See 67 Fed. Reg. 35658 (in reference to 11 C.F.R. § 300.2(c)(1)(ii)). In the same vein, we believe that the Commission should also create in the rule a rebuttable presumption that entities that received any funding from a covered party committee or federal candidate prior to the effective date of the BCRA's prohibitions and restrictions on soft money, fall outside the definition of "directly or indirectly established, financed, maintained, or controlled." Failure to clarify this point is likely to have the unintended effect of unduly harming non-profit organizations, contrary to the goals of the BCRA.

The NAACP NVF appreciates the Commission's consideration of these comments and we look forward to the opportunity to testify about our views at the Commission's hearing next week.

Respectfully submitted,

Ki P. Hong
Skadden, Arps, Slate, Meagher
& Flom LLP

Counsel for NAACP National
Voter Fund