National Republican Congressional Committee

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General Counsel

May 29, 2002

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

Re: Comments to Proposed Rulemaking

Dear Ms. Smith:

These comments on the Federal Election Commission's Proposed Rules relating to Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 35654, are submitted by the National Republican Congressional Committee ("NRCC"). Established in 1866, the NRCC is composed of Republican Members of the United States House of Representatives, and concerns itself with the election of Republicans to House as well as other state and local offices.

The task facing the Commission is enormous. Much of what is contained in the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") was never discussed, debated (and perhaps not even read) by the legislation's sponsors and supporters. Much of the public rhetoric and media reports simply do not match what the bill actually says. In addition to the vagueness of much of the bill, virtually all of it is being challenged in court, and appears as though the law will go into full effect before the court has a chance to rule. Ultimately, it is the Commission's task to give meaning to the actual language of the BCRA, and not guess what the sponsors imagined their bill to do.

Because of the scope and length of the Proposed Regulations, and due to the limited resources of the NRCC, we are unable to comment on much of it at this time. Nor are we going to debate the constitutionality of the BCRA at this time, nor waive any constitutional arguments that we have. However, we wish to present what may be a different perspective on two issues, the ability of Members of Congress and federal candidates to raise non-federal monies, and the meaning of "agent." To the extent the Commission deems it helpful, we can be prepared to testify on any issue presented in the proposed rules.

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1. **Federal Candidates and Officeholders**

Distilled to its essence, the BCRA prohibits Members of Congress and congressional candidates from soliciting non-federal funds for national, state and local parties. The BCRA states in pertinent part:

> A candidate, individual holding federal office, agent of a candidate, or an individual holding federal office . . . . shall not –
> (A) solicit, receive, direct, transfer, or spend funds in connection with an election for federal office, including funds for any federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

On its face, the provision would seem simple enough. But as a practical matter, the provision's over breath could have the absurd result of cutting Members of Congress off from their home state parties completely and avoiding even superficial conversations, for fear of "directing" non-federal monies. For example, say a party supporter/lobbyist approaches a Member of Congress at a reception and says, "My company is going to give $100,000 to your state party." The always-polite Member instinctively says, "That's great, it will really help," and the lobbyist instinctively runs back to his office to tell everyone that the Member of Congress said it would be great if they gave that $100,000. This innocent conversation could now have serious legal implications. After all, the BCRA has some rather draconian criminal provisions, and who would really want to risk being the unlucky one singled out as a test case?

Fortunately, the plain language of other sections of the BCRA makes clear that the prohibition ought not be read broadly. Contrary to what the sponsors of the bill publicly claimed (that Members would not be allowed to raise "soft money"), the BCRA is abundantly clear that Members may continue to raise soft money, whether it be for 501(c)'s,[1] non-federal 527's (albeit in $5,000 personal non-federal amounts), or for a state election campaign. Similarly, Members may "attend, speak, or be a featured guest at a fundraising event for a state, district, or local committee of a political party." Thus, at least under its plain language, a Member could certainly consent to having his name appear on a party committee invitation, noting that he is the "featured guest," "guest speaker," or the like. Nothing in the BCRA would limit or restrict what he or she could say (nor could it, in light of the First, Fifth and Tenth Amendments). Nor does the BCRA prohibit the national committees from encouraging Members of Congress to attend or arranging for them to speak at state and local party events.

Thus, contrary to the "reformers" public relations rhetoric, the BCRA does not prohibit Members of Congress from raising non-federal monies. Instead, the prohibition at issue, if it is to be read in context with the rest of the BCRA, can only be read to

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[1] In fact, news reports indicate that Democrats have already decided to "channel soft money" to outside groups. "Dems seek to channel soft money," *The Hill* (4/24/02).

prevent Members of Congress and federal candidates from raising non-federal funds for a state or local party that would eventually benefit their own campaigns. Thus, any rule adopted by the Commission ought to reflect this, and ought to concern only direct and unambiguous solicitations, or specific instructions regarding the directing or spending of non-federal monies in connection with the Member's own election effort. Certainly, the Commission should not even attempt to regulate what is said or not said within the confines of a state or local party event. To attempt to regulate such matters would, in addition to the obvious constitutional problems, create a vague and ever-shifting landscape based not on clear rules, but case-by-case situations. There are already enough pitfalls for the unwary; already enough deterrents to first-time candidates becoming involved in the system. We do not need any more disincentives, and we do not need the party committees singled out for disparate treatment anymore than the BCRA already has.

2. Agents

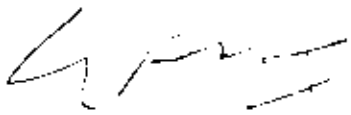
The Commission has also sought comment on when an "agent" is acting on behalf of a principal. The Commission ought to balance the need for simple, easy to understand rules with the practical implications of the rule. We suggest adopting what is essentially the current operating procedure – the definition found in the Second Restatement of Agency, which defines "agency" as "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to control, and consent by the other so to act." The notions of consent and control are critical, and would prevent party committees and campaigns from being held liable for things not under their control or not done with their consent. As a practical matter, everyone who has ever had anything to do with a party committee or a campaign likes to think of him or herself as being in the proverbial loop. How many times do we see on cable news shows various talking heads who claim to be "Republican Party pollster" or "Democrat political consultant," when in fact they haven't had a paying client in years? How many lobbyists claim to be kitchen cabinet advisors with inside information, when in reality they simply read the Cook Report? If the Commission adopts a case-by-case rule, looks for apparent authority, etc., such outsiders will become the responsibility of the party committees, despite the fact that we have no control over what they do or say. This is an unsound approach.

The same can be said of independent contractors of the party committee. For example, merely because someone provides direct-mail fundraising to the committee does not make that person an "agent" of the committee. That contractor is free to contract with whomever else he or she chooses, and that ought not raise legal issues. At a minimum, the Commission ought not promulgate a rule that becomes a government-mandated non-compete that forces people to forgo their livelihood simply because they choose to perform limited work for a political party or campaign.

This approach will not open some "loophole" or otherwise cause the sky to fall. If someone is acting on behalf of someone else, that person will be an agent. But if they are not acting on behalf of the principal, then they should not be swept into an agency

relationship. The ability to wear more than one hat (or perhaps more precisely, switch hats) already occurs every day in the lives of Members of Congress, their staff and political operatives. Sometimes, Members are acting in their official capacity – official funds can be used for certain activities, funds may not be solicited because they are in their official offices, etc. Sometimes, they act as candidates – using campaign funds, attending political events, etc. And sometimes, they are private citizens – hence the list on personal use of campaign funds. Thus, the Commission ought not fear that adopting the common law notion of agency will undercut the BCRA.

Respectfully submitted,



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