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March 17, 2002

VIA FAX AND MAIL

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Advisory Opinion Request (AOR) 2003-05

Dear Mr. Norton:

These comments are respectfully submitted on behalf of the Campaign and Media Legal Center, a non-partisan organization which seeks to represent the public interest in legal and governmental proceedings involving Federal campaign finance laws. They address the Advisory Opinion Request (AOR 2003-05) submitted by the National Association of Home Builders of the United States (NAHB), concerning permissible participation by Federal officeholders, candidates, and their agents in certain NAHB events and activities. Our comments here focus on the purpose and importance of the Federal officeholder and candidate solicitation prohibitions of the Bipartisan Campaign Reform Act of 2002 (BCRA). We intend subsequently to provide comments on the particulars of any draft Advisory Opinion prepared by the Office of General Counsel in response to AOR 2003-05.

In general, BCRA prohibits Federal officeholders, candidate, their agents, and any entities they directly establish, finance, maintain or control from soliciting, directing, disbursing, spending, transferring, or receiving soft money. *See* 2 U.S.C. § 441i(e)(1). These prohibitions constitute one of the fundamental components of BCRA – among other things aimed at, in combination with the statute's mandate that the Commission issue more stringent coordination regulations, preventing Federal officeholder and candidate entanglement in electioneering activities of outside groups involving unlimited donations. One of BCRA's principal sponsors elaborated on the rationale for these prohibitions during Senate consideration of the legislation on March 20, 2002:

> These provisions break no new conceptual grounds in either public policy or constitutional law. This prohibition on solicitation is no different from

> the Federal laws and ethical rules that prohibit Federal officeholders from using their offices or positions of power to solicit money or other benefits. Indeed, statutes like these have been on the books for over 100 years for the same reason that we're prohibiting certain solicitations to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold.
>
> For example, the Ethics Reform Act of 1989 generally prohibits Members of Congress or Federal officers and employees from soliciting anything of value from anyone who seeks official action from them, does business with them, or has interests that may be substantially affected by the performance of official duties. No one could seriously argue that this prohibition is without a compelling purpose. The same holds true here. We are prohibiting Federal officeholders, candidates, and their agents from soliciting funds in connection with an election, unless such funds are from sources and in amounts permitted under Federal law. The reason for this is to deter any possibility that solicitations of large sums from corporations, unions, and wealthy private interests will corrupt or appear to corrupt our Federal Government or undermine our political system with the taint of impropriety.

148 CONG. REC. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Mindful of the compelling purposes they serve, the Commission should give full effect to the soft money solicitation prohibitions applicable to Federal officeholders, candidates, and their agents under BCRA. Particularly relevant to AOR 2003-05 is the ban on their soliciting unlimited funds on behalf of any Section 501(c) tax-exempt organization for activities in connection with an election, including "Federal election activity." While Federal officeholders and candidates may solicit limited contributions only from individuals to 501(c) organizations for certain voter mobilization activities (as defined at 2 U.S.C. §§ 431(20)(A)(i)&(ii)), the Commission's Explanation and Justification accompanying its final soft money rules correctly notes that "solicitations are not permitted for other election activities, including Federal election activity such as public communications promoting or opposing clearly identified Federal candidates." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49,064, 49,109 (Jul. 29, 2002) (discussing 11 C.F.R. § 300.65(d)). Likewise, the allowance for general solicitations of funds on behalf of 501(c) organizations without regard to source and amount limitations does not extend to solicitations for entities whose principal purpose is to conduct election activities or any activity described in 2 U.S.C. §§ 431(20)(A)(i)&(ii). *See* 11 C.F.R. §§ 300.52(a)(2)(i), 300.65(a)(2)(i).

The Commission should not shrink from fully enforcing these prohibitions. Indeed, even under such an approach, Federal officeholders and candidates could continue to play an active role in raising funds for election-related purposes. Notably, nothing in BCRA prevents Federal officeholders, candidates or their agents from raising "hard money" funds for political committees registered with the FEC. Moreover, 2 U.S.C. § 441i(e)

does not in any way restrain Federal officeholders, candidates, or their agents from engaging in fundraising or spending that is truly unconnected to elections (for example, raising funds for a 501(c) organization that does not engage in any activity in connection with an election, including Federal election activity). As such, there is considerable opportunity for Federal officeholder and candidate involvement in the political contests and policy debates of the day even with the full application of the BCRA restraints on soft money fundraising and spending.

We appreciate the Commission's willingness to consider these general comments and respectfully urge it to give full effect to the Federal officeholder and candidate soft money restrictions under BCRA as it proceeds to evaluate this and other Advisory Opinion requests.

Sincerely,

Glen Shor
Associate Legal Counsel