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By Electronic Mail

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

Re: **Comments on Advisory Opinion Request 2005-13**

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics in regard to AOR 2005-13, an advisory opinion request submitted by EMILY's List, seeking the Commission's opinion as to the application of 11 C.F.R. §§ 106.6 and 100.57 to various EMILY's List fundraising and spending activities.

Introduction: Background to the New Allocation Rules

Given that this is the first advisory opinion request seeking construction of the new allocation and solicitation rules promulgated as a result of the Commission's 2004 rulemaking on "Political Committee Status," it is important first to set forth some of the pertinent background to that rulemaking in order to set the context for why the new rules were issued, and what abuses they were intended to address.

1. The pre-2005 allocation rules.

In *McConnell v. FEC,* 540 U.S. 93 (2003), the Supreme Court found that the Commission's pre-BCRA allocation system resulted in circumvention of the law. The FECA "was subverted by the creation of the FEC's allocation regime," *Id.* at 142, which allowed party committees "to use vast amounts of soft money in their efforts to elect Federal candidates." *Id.* The rules made possible the virtually unrestricted flow of soft money through the political parties into Federal elections, so much so that the Court described these rules as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *Id.* at n.44. The Commission's allocation rules, the Court stated bluntly, "invited widespread circumvention" of the law. *Id.* at 145. The Court accordingly upheld in their entirety the provisions of BCRA that ended party committee allocation, rejecting any argument that the allocation regime had been

constitutionally compelled. *Id.* at 186-89 (rejecting claims based on the Elections Clause, the Tenth Amendment and the Due Process Clause).[1]

Although the Court in *McConnell* addressed the operation of the allocation rules for party committees, its conclusion that allocation as a regulatory mechanism "subverted" the law and "invited widespread circumvention" was equally applicable to the pre-2005 allocation rule for non-party committees as well.

In particular, the "funds expended" allocation method devised in a 1990 rulemaking allowed non-party committees to massively circumvent the FECA by structuring their activities so that the Federal portion of their allocated spending could be calculated at zero or close to zero – even if the committee's spending was almost entirely directed at influencing the outcome of a Federal election. Because the "funds expended" allocation method imposed no minimum Federal allocation percentage, the rule permitted non-party political committees to engage in an even more egregious soft money abuse than the Court in *McConnell* found the party allocation rules had permitted.

This manipulation could take place because of how the "funds expended" formula worked. The percentage of Federal funds required to pay for a committee's generic activity and administrative costs was entirely based on the committee's *candidate-specific* disbursements. The formula compared the amount of a committee's Federal candidate-specific expenditures to the committee's total candidate-specific disbursements (not including overhead or other generic costs). The resulting ratio was then used as the Federal percentage for that committee's *non-candidate-specific* spending, *i.e.*, for administrative costs and generic activities. And unlike for party committees, no minimum Federal percentage was imposed. 11 C.F.R. § 106.6 (2002).

This allocation approach could readily be manipulated in order to work absurd results. For instance, if a nonconnected political committee made a single small disbursement on behalf of a specific non-Federal candidate, but did not undertake any expenditures on behalf of specific Federal candidates, this "funds expended" allocation formula would put zero in the numerator of the fraction, and thus calculate a zero Federal allocation requirement. This would permit the committee to pay for a generic partisan voter drive – even one intended to elect a presidential candidate – *entirely* with soft money, since the committee would have no expenditures "on behalf of specific Federal candidates." In the Commission's view, this would be true even if the sole and explicit purpose of the committee and its donors was to elect a presidential candidate.

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[1] The Court also recognized that measures taken to avoid circumvention of the law themselves serve compelling governmental purposes: "[B]ecause the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,' *Colorado II*, 533 U.S. at 457, these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits. ('[A]ll Members of the Court agree that circumvention is a valid theory of corruption')." *McConnell*, 540 U.S. at 144, *quoting FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001). Similarly, in *Cal. Med. Ass'n. v. FEC*, 453 U.S. 182, 197-98 (1981), the Court upheld the limit on contributions to multi-candidate political committees, 2 U.S.C. § 441a(a)(1)(C), in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*."

After BCRA shut down the flow of soft money through party committees into Federal elections, this kind of allocation manipulation by non-party committees quickly became more than a theoretical matter. Although the pending AOR was submitted by EMILY's List, it is impossible to understand the context of this AOR without a discussion of the activities conducted by America Coming Together (ACT) under the pre-2005 allocation rule.

In mid-2003, ACT was organized as a Federal political committee, for the overriding purpose of engaging in massive generic voter mobilization activities to elect the Democratic presidential nominee. But the committee carefully avoided all but a minimal amount of Federal candidate-specific activity. Because it was doing little such activity, it filed reports with the FEC claiming an allocation ratio, calculated under the "funds expended" method, of 2% Federal and 98% non-Federal. It then applied this ratio to all of its generic spending, as well as to its administrative and overhead expenses. Since ACT was doing almost nothing other than generic voter drive activity on behalf of the Democratic presidential nominee, virtually all of its spending was funded as allocated activity, and virtually all of that spending – 98 percent – was funded out of its non-Federal account with soft money.[2]

But ACT was plainly and publicly engaged in these voter mobilization activities in order to defeat President Bush, and to elect the Democratic nominee. That overriding Federal purpose was made clear by its founders, its funders, and its public communications. For example, according to a report in *The Washington Post* about the formation of ACT, its president, Ellen Malcolm, said that ACT would conduct "a massive get-out-the-vote operation that we think will defeat George W. Bush in 2004."[3] This overriding purpose was confirmed by ACT's direct mail fundraising solicitation materials, discussed in the comments we submitted in response to NPRM 2004-6,[4] and detailed in comments we submitted in response to AOR 2004-5.[5]

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2 *See* ACT allocation schedules, Forms H-1 and H-2, filed with the FEC in 2003 and 2004 and available on the Commission Web site at http://query.nictusa.com/cgi-bin/fecimg/?C00388876. These reports, with one exception, all show an allocation ratio of 98 percent non-Federal and 2 percent Federal. In its 2004 Post General Report, ACT modified its allocation ratio to 88 percent non-Federal, 12 percent Federal, but reverted to the 98-2 split in the 2004 Year End Report.

3 Thomas Edsall, *Liberals Form Fund to Defeat President; Aim is to Spend $75 Million for 2004*, THE WASHINGTON POST, Aug. 8, 2003.

4 *See* Comments by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics re NPRM 2004-6: Political Committee Status (April 5, 2004) at 3, which can be found in the record of that rulemaking on the Commission's Web site at http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobel_sanford.pdf.

5 *See* Comments by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics re AOR 2004-5 (filed Feb. 12, 2004) at 12-17, which can be found on the FEC Web site at http://www.fec.gov/aos/2004/aor2004-05com2.pdf).

According to disclosure reports, ACT spent over $78 million dollars of soft money on these activities.[6] It received the bulk of its funding from a handful of large donors, most prominently George Soros, who gave $7.5 million directly to ACT.[7] Soros made clear that this money was given for the purpose of defeating President Bush. Referring expressly to ACT, Soros wrote in an op-ed column in *The Washington Post* that he and others were "contributing millions of dollars to grass-roots organizations engaged in the 2004 presidential election" because they "are deeply concerned with the direction in which the Bush administration is taking the United States and the world."[8] Another article describes Soros meeting "with half a dozen top Democratic political strategists" in an effort "to try to figure out how he could help bring down [President] Bush . . . ."[9]

2. The 2004 Allocation Rulemaking

The fact that ACT in early 2004 was claiming a right to fund its activities with 98 percent soft money under the then-existing allocation rule was an important backdrop for the Commission's rulemaking begun in March, 2004.[10]

A political committee organized by operatives associated with the Republicans, Americans for a Better Campaign (ABC), submitted an advisory opinion request to the FEC in late 2003, seeking clarification of the law in these areas. In February, 2004, the Commission issued a narrowly crafted response to the questions posed, Ad. Op. 2003-37,[11] but also

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6 A compilation of its disclosure reports by the Center for Responsive Politics shows that ACT spent a total of $78,040,480. *See* http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004.

7 A list of the donors to ACT can be found on the Web site of the Center for Responsive Politics at http://www.opensecrets.org/527s/527cmtedetail.asp?ein= 200094706&cycle=2004&format =& tname =America+Coming+Together. It shows that Soros was the largest individual donor directly to ACT. Soros also gave over $12 million dollars to a section 527 group, "Joint Victory Campaign 2004," which in turn donated $18.3 million to ACT. *Id.* In total, Soros gave $23.5 million to section 527 groups in the 2004 election cycle. *See* http://www.opensecrets.org/527s/527indivs.asp?cycle=2004.

8 George Soros, *Why I Gave*, THE WASHINGTON POST, Dec. 5, 2003.

9 Mark Gimein, *George Soros Is Mad As Hell*, FORTUNE, Oct. 27, 2003.

10 So also were published reports at the same time that other Democratic groups such as The Media Fund, operating under section 527 of the tax code, were intending to spend massive amounts of soft money on broadcast ads to defeat President Bush. The Media Fund took the position it could engage in this activity without registering as a Federal political committee.

11 In this advisory opinion, the Commission held that a public communication that "promotes, supports, attacks or opposes" a Federal candidate is "'for the purpose of influencing a Federal election' when made by a [registered Federal] political committee," and must accordingly be funded entirely with hard money. Ad. Op. 2003-37, at 10. The Commission also held that generic voter drive activities that do not mention a clearly identified Federal candidate are subject to allocation under its section 106.6 rule. *Id.* at 13. (In the E&J issued in November, 2004 promulgating the new section 106.6, the Commission said that this advisory opinion was "superseded" by the Commission's new rules. 69 Fed. Reg. 68,063 (Nov. 23, 2004)).

announced that it would undertake a rulemaking on these same issues, because of their scope and significance.

At the same time, we wrote to the Commission and urged it to deal with the allocation issue in its planned rulemaking, calling the Commission's attention to the manipulation of the allocation rules that was being undertaken by ACT.[12]

The Commission published its Notice of Proposed Rulemaking (NPRM) on March 11, 2004. "Political Committee Status," 69 Fed. Reg. 11736 (March 11, 2004). The NPRM, in part, addressed the allocation issue. It sought general comment on "whether either BCRA or *McConnell* requires, permits, or prohibits changes to the allocation regulations for separate segregated funds and non-connected committees." *Id.* at 11753. It raised the fundamental question of whether the Commission should permit allocation at all:

> Given *McConnell*'s criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between the Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?

Id.

The NPRM presented various alternative proposals for comment and consideration. One of the proposals was that the "funds expended" allocation method be modified so that the Federal "numerator" would include not just "expenditures" for specific Federal candidates, but also those disbursements that "promote, support, attack or oppose" a Federal candidate. *Id.* at 11754-55. And importantly, it specifically proposed setting a minimum level of Federal funds for allocated spending by non-party political committees, and set forth three alternative versions of what the Federal minimum should be, depending on whether the committee operated in one state, or more than one state. *Id.* at 11759-60; 11 C.F.R. § 106.6(c)(ii)(A), (B) (Alternatives 3-A, 3-B) (proposed).

The general counsel recommended revising the allocation rules for non-party political committees, and replacing the "funds expended" allocation method with a 50 percent Federal minimum percentage that would be applied to generic activities and administrative costs. The general counsel's allocation proposal also addressed spending for a "public communication" that refers to specific Federal or non-Federal candidates, or to political parties. Where such a communication refers only to Federal candidates, the proposal stated that it needed to be funded

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12 Letter of February 25, 2004 to FEC Commissioners from Democracy 21, the Campaign Legal Center and the Center for Responsive Politics. A copy of the letter is in the rulemaking record and can be found on the Commission's Web site at http://www.fec.gov/pdf/nprm/political_comm_status/exparte_commissioners.pdf.

entirely with Federal funds; where a communication refers only to non-Federal candidates, it could be funded entirely with non-Federal funds; and where the communication refers to a political party, it would be subject to allocation as a generic activity (and thus would have to be funded with at least 50 percent Federal funds). And where the public communication refers to both Federal and non-Federal candidates, it would be allocated "based on the proportion of space or time" devoted to the Federal candidates as compared to the non-Federal candidates, and funded accordingly. The general counsel also made recommendations to deal with the related issue of spending by section 527 groups that did not register as "political committees" and thus did not operate under the allocation system at all.[13]

At its August 19, 2004 meeting, the Commission severed two parts of the general counsel's four-part proposal – the clarified definition of "contribution" and the modifications to the allocation system – and adopted those portions by a vote of 4-2.[14] The Commission met again on October 28, 2004 to approve an Explanation and Justification ("E&J") for the two new rules. Final publication of the rules was made on November 23, 2004, approximately two weeks after the 2004 election. "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed. Reg. 68056 (Nov. 23, 2004). The two new rules adopted by the Commission took effect on January 1, 2005.

Questions Posed in EMILY's List Advisory Opinion Request

1. **Does EMILY's List correctly read 11 C.F.R. § 106.6 as requiring that no less than half (50 percent) of its administrative expenses and generic voter drive expenses be paid with Federal funds?**

EMILY's List states in AOR 2005-13 that it intends to spend 65 percent of its "candidate budget" for the remaining months of the 2006 election cycle on contributions to, or amounts otherwise spent on behalf of, specific non-Federal candidates. EMILY's List inquires as to whether it correctly reads 11 C.F.R. § 106.6 as requiring that no less than half (50 percent) of its administrative expenses and generic voter drive expenses be paid with Federal funds?

EMILY's List has correctly interpreted section 106.6 as requiring it to use Federal funds to pay at least 50 percent of its administrative and generic voter drive expenses. There is no other plausible reading of the regulation on its face. Section 106.6(c) clearly states that "[n]onconnected committees . . . shall pay *their administrative expenses, costs of generic voter drives,* and costs of public communications that refer to any political party . . . *with at least 50 percent Federal funds.*" (emphasis added).

As discussed above, the Commission adopted this rule last year in the context of evidence before it of abuses that had been patent under the previous "funds expended" rule, and in order to

[13] Agenda Document 04-75 (August 19, 2004) (available at http://www.fec.gov/agenda/2004/mtgdoc04-75.pdf).

[14] The minutes of this meeting are available on the Commission's Web site at http://www.fec.gov/agenda/2004/approve04-77.pdf.

"simplify" allocation. According to the Commission's E&J for the rule, "A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation." 69 Fed. Reg. 68056, 68062.

EMILY's List has registered with the Commission as a *Federal* political committee and, as such, has self-identified its major purpose to be influencing *Federal* elections. *See Buckley v. Valeo,* 424 U.S. 1, 79 (1976). The committee notes that its plan is to spend 65 percent of its "candidate budget" on activities to support or oppose non-Federal candidates. Such activities, assuming they refer only to non-Federal candidates, will not be subject to allocation, and can be funded entirely with non-Federal funds. 11 C.F.R. §§ 106.6(b)(2)(iv), 106.6(f)(2)(i); *see* 69 Fed. Reg. at 68059 ("[W]hen the voter drive or public communication refers to clearly identified non-Federal candidates, but no clearly identified Federal candidates, the costs may be paid 100% from a non-Federal account.")

But insofar as the committee spends funds for *generic* activities, such as voter drives or public communications that mention a party without referring to specific candidates, the 50-percent allocation rule clearly and properly applies to the committee's spending. That kind of spending by Emily's List will substantially affect the *Federal* races on the 2006 ballot. As the Commission said in promulgating the new rule:

> A flat 50% allocation minimum recognizes that SSFs and nonconnected committees can be 'dual purpose' in that they engage in both Federal and non-Federal election activities. These committees have registered as *Federal* political committees with the FEC; consistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds. However, the 50% figure also recognizes that some Federal SSFs and nonconnected committees conduct a significant amount of non-Federal activity in addition to their Federal spending....
>
> Public communications that refer to a political party without referring to any clearly identified Federal or non-Federal candidates are subject to the new 50% flat minimum percentage in revised 11 CFR 106.6(c). *Like the administrative expenses and generic voter drives (which may refer to a political party), which are also allocated under section 106.6(c), these references solely to a political party inherently influence both Federal and non-Federal elections. Therefore the 50% Federal funds requirement reflects the dual nature of the communication.*
>
> 69 Fed.Reg. 68062 (first emphasis in original; second emphasis added).

The whole point of the new allocation rule is to set a *floor* for the Federal spending that is required on generic activities and administrative costs -- spending by a Federal political committee for activities that, by their very nature, affect both Federal and non-Federal elections. The implicit premise behind the question posed by EMILY's List is the argument that the allocation ratio for generic spending should instead reflect the allocation ratio of a committee's

"candidate budget," and that it is unfair or improper to do otherwise. But for EMILY's List to note that 65 percent of its "candidate budget" will be spent on non-Federal candidates is no different than ACT's claim in the 2004 cycle that 98 percent of its candidate-specific activities were non-Federal as well. Yet it was precisely that logic which led to the enormous abuses of the previous "fund expended" method. The premise of EMILY's List question is simply another way of suggesting the Commission should go back to its "funds expended" allocation method – a method which led to demonstrable abuse in the 2004 election and which the Commission directly, and correctly, has rejected in promulgating its new section 106.6(c) rule.

2. **Does EMILY's List correctly read 11 C.F.R. § 106.6 to require a public communication (but not made through television or radio) referring to Senator Debbie Stabenow to be paid for with Federal funds? And must the funds raised by such a communication "be treated entirely as Federal funds"?**

EMILY's List explains in AOR 2005-13 that it is preparing a public (non-broadcast) communication that will refer to Senator Debbie Stabenow, but that the communication will neither be distributed in the State of Michigan, where Senator Stabenow is a candidate for reelection, nor reference her Federal candidacy, nor solicit funds for her Federal candidacy.

EMILY's List asks whether it correctly reads section 106.6 to require this public communication to be paid for with Federal funds, and whether the funds raised by this communication must be treated as Federal funds.

Again, this question is directly answered by the regulation on its face, and there is no basis for the Commission to do other than apply what the regulation clearly says.

Section 106.6(f) states that "public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is a reference to a political party, but do not refer to any clearly identified non-Federal candidates," shall "be paid 100 percent from the Federal account of the nonconnected committee or separate segregated fund." 11 C.F.R. § 106.6(f)(1)(i).

The Commission's E&J for this rule explains:

> The Commission views voter drives and public communications that refer to a political party and either Federal or non-Federal candidates, but not both, as "candidate-driven." The Federal or non-Federal nature of the political party reference is determined by whether the clearly identified candidates in the communication are Federal or non-Federal. Thus, voter drives and public communications that refer to a political party and also refer only to clearly identified Federal candidates must be paid for with 100% Federal funds from the Federal account under new 11 CFR 106.6(f)(1). Permitting these voter drives and communications to be paid for with some non-Federal funds based on a cursory reference to a political party would invite circumvention of the intent of the allocation scheme. *Voter drives and public communications that refer to clearly identified Federal candidates, without any reference to political parties or non-*

Federal candidates, similarly must be paid for with 100% Federal funds from the Federal account. . . . Finally, voter drives and public communications that refer to both Federal and non-Federal candidates, regardless of whether there is also a reference to a political party are subject to a time/space allocation method in new 11 CFR 106.6(f)(3), which is similar to the method outlined in 11 CFR 106.1.

69 Fed. Reg. at 68063 (emphasis added).

In short, Section 106.6(f) requires that:

- Public communications that refer to <u>both</u> a <u>political party</u> and a clearly identified <u>Federal candidate</u> must be paid for with 100 percent Federal funds;

- Public communications that refer <u>only</u> to a clearly identified <u>Federal candidate</u>, without any reference to political parties or non-Federal candidates, similarly must be paid for with 100 percent Federal funds; and

- Public communications that refer to <u>both Federal and non-Federal candidates</u>, regardless of whether there is also a reference to a political party, are subject to a time/space allocation method in 11 CFR § 106.6(f)(3)

The AOR states that the communication will refer to Senator Stabenow but "will not refer to any clearly identified non-Federal candidate." AOR at 2. Thus, under the plain language of the regulation, EMILY's List must pay for the communication using 100 percent Federal funds.

Again, there is an implication to the question posed here – that if a committee sponsors a public communication referring to a Federal candidate, but does not disseminate that communication to the candidate's electorate, then it should be exempt from the allocation rules set forth in section 106.6. The rules, however, do not contain such an exemption and one cannot be created by advisory opinion. If the Commission believes that sound policy dictates a different result when a communication is disseminated only outside the electorate of the candidate referenced in the communication, it should propose a change to its regulations. *Cf.* 2 U.S.C. § 434(f)(3)(A)(III) (definition of "electioneering communication" includes requirement that the communication be "targeted to the relevant electorate").[15]

The AOR also poses the question of whether the funds received in response to this solicitation would have to be "treated as federal funds, on the grounds that it is a public communication that 'refers' to a federal candidate (Senator Stabenow)?" AOR at 2. The answer to this question is governed by 11 C.F.R. § 100.57, not by section 106.6, and thus depends not on whether the communication "refers" to Senator Stabenow, but whether it "indicates that any portion of the funds received will be used to support or oppose" Senator Stabenow. *See* discussion below of Question 3.

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[15] If the Commission does commence a rulemaking in this regard, we look forward to commenting on the specific language in any proposed exemption.

3. Would the public communication language proposed by EMILY's List in question number three of AOR 2005-13 be construed to "indicate" a use of the funds to support Federal candidates?

EMILY's List states that it "wishes to avoid any language in its public communication that would be construed to 'indicate' a use of the funds to support Federal candidates," thus rendering the funds received as a result of the solicitation "contributions" under 11 C.F.R. § 100.57. As such, EMILY's List requests the Commission's opinion on three examples of solicitation language it proposes to include in its public communications.

Section 100.57 reads:

> A gift . . . of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication *indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.*

11 C.F.R. § 100.57(a) (emphasis added).

All three examples of solicitations proffered by EMILY's List are requests for funds by Senator Stabenow, a Federal officeholder. As such, these solicitations are subject to the requirements of 2 U.S.C. § 441i(e)(1), which prohibits a Federal officeholder from soliciting funds unless such funds are Federal contributions (if to be used in connection with a Federal election), or comply with Federal contribution limits and source prohibitions (if to be used in connection with a non-Federal election). Thus, the direct answer to the question posed by the AOR is that all funds received by EMILY's List in response to these solicitations by Senator Stabenow must comply with Federal contribution limits and source prohibitions, apart from the application of section 100.57.

Beyond that, section 100.57 of the regulations applies to at least the first two of the three examples provided by EMILY's List. Those examples of proposed solicitation language indicate that the funds contributed as a result of the solicitation will be used, at least in part, to support Senator Stabenow. They are framed as a statement by Senator Stabenow, and contain the following common thread: EMILY's List supports me, so you should support EMILY's List. *See* AOR at 2, option (a) (asking for support "so that EMILY's List can support candidates who, *like me*, could never succeed...without...the combined commitment of all of us."); option (b) (EMILY's List support "*for candidates like me* has made" a difference and "[t]hat's why I need your help.").

These statements indicate that EMILY's List has supported Senator Stabenow in the past and it now seeks donations so that the political committee can continue to support her and candidates such as her in the future. The regulation is clear that all funds received in response to a solicitation must be treated as "contributions" if the solicitation indicates "that any portion of the funds" will be used for Federal purposes. It is hardly a novel proposition that a solicitation sent by a *Federal* political committee featuring a *Federal* candidate soliciting funds to be used for candidate campaign purposes, and where the committee's past support for that Federal

candidate is specifically referenced, should be treated as a solicitation, at least in part, for Federal contributions. *See* 69 Fed.Reg. at 68057 (discussing examples of solicitations covered by section 100.57).

The third statement in the AOR, option (c), is arguably different because the solicitation may be viewed as limited to using the funds for "women...seeking state office today." In order to clarify the ambiguity, the Commission should require the solicitation to state that none of the funds received will be used for Federal election purposes.

Of course, the Commission need not reach the analysis under section 100.57 because, for the reasons stated above, the funds received in response to all three solicitations will have to comply with Federal rules in any event, given the application of 2 U.S.C. § 441i(e)(1) to these proposed solicitations by Senator Stabenow.

4. **May EMILY's List avoid the Federal financing restrictions associated with a reference to a Federal candidate in any mailing or other public communication if the candidate is a candidate for FECA purposes but not running in the 2006 Federal election cycle?**

The allocation requirement established by 11 C.F.R. § 106.6 for public communications that "refer to one or more clearly identified Federal candidates," *see id.* at § 106.6(b)(2)(iii), includes no exception for a candidate "who is a candidate for FECA purposes but not running in this 2006 Federal election cycle." AOR at 3. The use of the term "candidate" in the section 106.6 regulation is plainly based on the definition of "candidate" at 11 C.F.R. § 100.3. If the person referenced in the communication is a "candidate" under section 100.3, then section 106.6 applies to the communication, regardless of when the candidate next stands for reelection.

Again, this result follows from the plain language of the existing regulations. If the Commission believes that sound policy dictates a different result in the case of a reference to a "candidate" who is not on the ballot in the election cycle during which the public communication is made, it can initiate a rulemaking proceeding to consider adopting an exemption for such activity in its regulation, with appropriate notice and comment.[16]

5. **Does EMILY's List correctly read 11 C.F.R. § 106.6 to require that the reference to Democrats in its public communications requires that the associated costs be paid at least 50 percent with Federal funds?**

EMILY's List explains in its AOR that it expects to make public communications in support of state ballot measures which would not name any Federal or non-Federal candidate but would appeal to "Democratic" women to support or oppose the ballot measures. The requestors inquire whether it correctly reads section 106.6 to require that such communications be paid at least with 50 percent Federal funds. That section requires that "public communications" that "refer to a political party, but do not refer to any clearly identified Federal or non-Federal

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[16] Again, if the Commission does commence a rulemaking in this regard, we look forward to commenting on the specific language in any proposed exemption.

candidate," 11 C.F.R. § 106.6(b)(1)(iv), are to be funded "with at least 50 percent Federal funds." *Id.* at 106.6(c).

The public communications regarding state ballot measures described by EMILY's List fall squarely within these regulatory provisions. Any other reading of the regulation would permit a political committee such as EMILY's List to spend unlimited soft money funds to urge "Democratic" women to go to the polls and vote for a ballot initiative in a Federal election year, where the impact of that spending would clearly assist the party's Federal candidates on the same ballot. Allowing explicitly partisan appeals to be free from the allocation rules simply because they are couched around ballot initiative campaigns would open a soft money loophole in the Commission's regulations.

6. **Does the answer to the preceding question depend on the nature of the support that EMILY's List provides in the particular state? More specifically, does the answer depend on whether EMILY's List otherwise only supports non-Federal candidate in that state in this cycle?**

The allocation requirements of section 106.6 apply to *all disbursements* by nonconnected Federal political committees such as EMILY's List, regardless of the amount of Federal activity in any particular state.

Conclusion

For the reasons set forth above, we urge the Commission to advise EMILY's List that, as a Federal nonconnected political committee, its public communications are subject to the allocation requirements established by 11 C.F.R. § 106.6. EMILY's List must use entirely Federal funds to pay for public communications that refer only to a Federal candidate, and must use at least 50 percent Federal funds to pay for the costs of its generic voter drives and administrative costs. We appreciate the opportunity to submit these comments.

Respectfully,

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Democracy 21

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