RECEIVED FEDERAL ELECTION COMMISSION

Alliance for Justice

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May 29, 2002

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

RE: Federal Election Commission Notice of Proposed Rulemaking 2002-7: Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money

Dear Ms. Smith:

The Alliance for Justice welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking ("NPRM") issued on May 15, 2002. We appreciate the effort that the Commission has made to create regulations to implement the fundraising provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). However, we write to express our concerns about the overly broad scope of these regulations.

The Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. While most of the Alliance's members are charitable organizations, a significant number also work with or are affiliated with social welfare and advocacy organizations that engage in political activity.

The Alliance is aware that some groups and individuals have questioned the constitutionality of BCRA. We recognize that Congress directed the Federal Election Commission ("FEC") to write the regulations on an accelerated basis, doing so without the benefit of a final judicial determination of the constitutional validity of the statute. However, even assuming that the statute is constitutional, we believe that some proposed regulations go beyond BCRA's requirements and move into

constitutionally suspect territory by restricting fundraising for legitimate non-partisan activity. We concur with the Supreme Court in *FEC v. Massachusetts Citizens for Life* when it wisely advised, "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[1] We believe that certain proposed regulations would curtail more speech then necessary to address the problems prompting campaign finance reform and are more restrictive than BCRA requires. It is on this basis that we make the following comments.

I. THE FEC SHOULD OMIT NONPARTISAN VOTER REGISTRATION, VOTER IDENTIFICATION AND GOTV ACTIVITIES FROM THE DEFINITION OF "FEDERAL ELECTION ACTIVITY"

The proposed regulations prohibit national, state and local committees of a political party from soliciting any funds for, or making or directing any donations to, an organization described in 26 U.S.C. § 501(c) and exempt under taxation under 26 U.S.C. § 501(a) that makes expenditures or disbursements in connection with an election for federal office, including expenditures or disbursements for *federal election activity*. 11 C.F.R. § 300.11 (proposed). The regulations also restrict the ability of federal candidates to raise funds for organizations that engage in or plan to use the funds for federal election activity. 11 C.F.R. § 300.52 (proposed).

"Federal election activity" is defined under the proposed regulations to include, among other things, voter registration activity that occurs 120 days prior to a regularly scheduled federal election (proposed 11 C.F.R. § 100.24(a)(1)); voter identification, including canvassing, and other activities designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or political party (proposed 11 C.F.R. S 100.24 (a)(2)(i)); and get-out-the-vote ("GOTV") activity (proposed 11 C.F.R. § 100.24(a)(2)(iii)). Although the regulations do include some specific exceptions to this definition,[2] there is no exception for nonpartisan electoral activities.

Including nonpartisan voter registration, voter identification, and GOTV drives in the definition of federal election activity, this potentially causes grave harm to 501(c) organizations that lawfully engage in nonpartisan election-related activity. Therefore, the Alliance urges the FEC to exclude nonpartisan voter registration, voter identification, and GOTV drives from the definition of "federal election activity" so as not to restrict fundraising for appropriate nonpartisan activities by other 501(c) organizations.

a. Fundraising for nonpartisan voter registration and GOTV should not be restricted

The proposed regulations restrict fundraising for all election-related activity. They fail to distinguish between fundraising for partisan efforts and fundraising for activities that are solely conducted to encourage all members of the general public to exercise their right to vote. BCRA's soft money prohibitions, however, were specifically intended to curtail any effort to

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[1] 479 U.S. 238, 265 (1986)

[2] The proposed regulations provide exceptions to the definition of federal election activity for voter registration outside of the 120 day window prior to a regularly scheduled federal election (proposed 11 C.F.R. § 100.24(b)(5)); and GOTV and voter identification activities in elections in which no candidate for federal office appears on the ballot (proposed 11 C.F.R. § 100.24(b)(6)).

redirect non-federal money that formerly could go to parties, from being transferred to other organizations that would then expend those funds to *aid federal candidates*. The restrictions on nonpartisan activity imposed by the regulations would, therefore, conflict with both the democratic principles that BCRA was designed to protect and core constitutionally protected speech.

Many 501(c) organizations engage in nonpartisan voter registration and GOTV drives to encourage people to exercise their right to vote. Unlike partisan efforts that urge people to vote for a particular candidate or party, these nonpartisan efforts do not encourage voters how to vote or even inquire about the voters' political preferences. Instead, through nonpartisan voter registration drives, groups register people of all political beliefs for the sole purpose of ensuring that as many eligible voters as possible are registered to vote. Nonpartisan GOTV drives inform people of important election information, such as when or where an election is occurring, or provide any citizen, regardless of political party, transportation to the polls. These drives often encourage underrepresented groups to engage in the democratic process.

This effort to broaden public participation in the process of electing our representatives is one of the underlying themes in BCRA as it tries to reduce the influence of large, corporate donors and increase the importance of individual contributors. As Senator McCain noted, it is the intent of BCRA to eliminate the "exclusive relationships of power and influence between a privileged few Americans and the guardians of the public trust" and "make every American's voice as loud as those of the special interests."[3] It would be ironic, therefore, to use this rulemaking to restrict fundraising for such activities, particularly in the absence of language in BCRA that requires the FEC to restrict fundraising for nonpartisan voter registration and GOTV.

Efforts to restrict fundraising for nonpartisan voter registration and GOTV activity also raise constitutional concerns. No activity is more closely associated with the First Amendment's protections for speech and assembly than efforts to encourage people to exercise their franchise. The government's interests in protecting against surreptitious support for campaigns are perhaps sufficient to justify restrictions on fundraising for partisan voter registration and GOTV efforts. Nevertheless, restrictions on fundraising for efforts that support no candidate and that are not controlled by any candidate or party would be unlikely to survive constitutional challenge.

We urge the FEC to revise 11 C.F.R. §§ 100.24(a)(1) and 100.24(a)(2)(iii) of the proposed regulations to allow parties to assist with fundraising for nonpartisan voter registration and GOTV drives.

b. National party fundraising for voter identification activity with a non-electoral purpose should not be restricted

The proposed regulations would also restrict fundraising for "voter identification." The Alliance fears that this term is overly ambiguous and might be interpreted to include efforts to identify the shared interests of individuals for non-electoral purposes. We urge the FEC to limit

[3] John McCain. *Only One Bill Means Reform*, Wash. Post, Feb. 13, 2002.
[4] 11 C.F.R. § 100.3.

its fundraising restrictions to activities designed primarily to identify the political preferences of individuals in order to influence their voting.

Many organizations attempt to gauge the positions and beliefs of people for a number of different purposes related to a political, legislative, or organizational agenda. For example, an organization may attempt to identify members who are voters in a particular legislative district because they will be more compelling advocates when attempting to influence that particular legislator's vote on a bill. Other organizations have discovered that people who are regular voters are more likely to respond to fundraising appeals [5]

Although groups may not be engaging in these activities to attempt to influence the votes of the people identified, the process does frequently involve identifying people who vote in particular legislative districts or who share certain beliefs. A broad definition of "voter identification" might include these non-electoral activities.

If the FEC decides to restrict fundraising for "voter identification" activities, the Alliance urges the FEC to define voter identification as activities conducted primarily to identify voters who will likely support or oppose particular candidates or parties. We urge the FEC to exempt from this definition any activities that are not used primarily to influence how those individuals will vote.

Moreover, the Alliance does not believe that the FEC can regulate voter identification activities that are specific to state and local candidates that do not mention a federal candidate. Such a regulation would violate the 10th amendment which reserves for states the power to control state and local issues. The proposed regulations would except from the definition of federal election activity voter identification for elections in which no federal candidate appears on the ballot. 11 C.F.R. § 100.24(b)(6) (proposed). We believe this exception should be extended to include an instance where there is a federal candidate on the ballot. As long as the voter identification does not mention the federal candidate, it should be excepted from the fundraising restriction.

II. THE FEC SHOULD CREATE A SAFE HARBOR FOR FUNDRAISING EFFORTS ON BEHALF OF 501(C)(3) ORGANIZATIONS

The fundraising restriction in BCRA was intended to prevent soft money from flowing to organizations that can help the national, state and local parties through their political activity. The proposed regulations exceed BCRA's intent by restricting national parties from fundraising for 501(c)(3) organizations that legally engage in nonpartisan election-related activity, including voter education on issues and nonpartisan GOTV efforts—efforts that by their very nature cannot be intended to benefit any particular party. Public charities may not, under the tax law that creates them, engage in partisan political activity. Therefore, fundraising by national parties or federal candidates on their behalf is not the type of activity BCRA intended to regulate. Moreover, Congress has clearly made fundraising by 501(c)(3) organizations a priority in the tax law. Regardless of whether the FEC accepts our suggestion to narrow the proposed definition of

[5] Gail M. Harmon and Elizabeth Kingsley, *Maximize Your Grassroots Power, Legal Guide to List Enhancement and Citizen Contact*, League of Conservation Voters Education Fund 2000, 2.

"federal election activity," the Alliance urges the FEC to create a safe harbor excluding fundraising for 501(c)(3) organizations from proposed 11 C.F.R. § 300.11.

Charitable organizations recognized under Section 501(c)(3) of the Federal Tax Code are strictly prohibited from engaging in partisan political activity. They cannot "participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[6] If a 501(c)(3) organization engages in any activity that seems to support or oppose any candidate, the Internal Revenue Service is empowered to revoke the organization's tax-exempt status.[7]

Because these restrictions are tied to recognition of an organization's tax-exempt status, the courts have been more willing to uphold them against constitutional challenge.[8] The restrictions are far greater than those that the courts have upheld with regard to organizations that are not seeking recognition of their charitable status.[9] As a result, 501(c)(3) organizations are strictly prohibited from engaging in "federal (or state) election activity," exactly the type of activity that BCRA is intended to regulate. Thus, a safe harbor for 501(c)(3) fundraising by national parties would not conflict with the intent of BCRA.

In addition, as a matter of policy, Congress has made it easier for 501(c)(3) organizations to raise funds because they provide essential educational, religious, scientific, and social services. These organizations are exempt from the burden of federal income tax, can offer their donors a federal tax deduction, and are more easily able to receive grants from federally recognized private foundations than are other tax-exempt organizations. Restricting fundraising for 501(c)(3) organizations, as the proposed regulations do, would seem to contradict this longstanding Congressional policy. Therefore, the FEC should exempt all charitable organizations from any fundraising restrictions it promulgates in these regulations.

III. THE FEC IS CORRECT IN EXCLUDING INTERNET COMMUNICATIONS FROM THE DEFINITION OF PUBLIC COMMUNICATIONS

The proposed regulations defining public communication include communication by broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public advertising. 11 C.F.R. § 100.26 (proposed). These regulations, noting the BCRA omission of Internet activity, exclude such communications from the definition of public communication. We concur with this exclusion.

As noted in our comments to the FEC's NPRM 2001-14: Use of the Internet for Campaign Activity, we believe that any regulation of Internet activity should foster the Internet's potential to be a low-cost, democratic forum for greater participation in the political process.

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[6] IRC § 501(c)(3).

[7] *See Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir 2000).

[8] *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding restrictions on lobbying by charitable organizations).

[9] *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (expanding the scope of permissible electoral speech for certain 501(c)(4) organizations).

Because of the Internet's relatively low barriers to entry and low cost of access, there is no compelling government interest in regulating online speech.

IV. A POLITICAL PARTY SHOULD BE PERMITTED TO RAISE FUNDS FOR A 501(C) ORGANIZATION AFFILIATED WITH ANOTHER ORGANIZATION THAT ENGAGES IN FEDERAL ELECTION ACTIVITY

The proposed regulations would prohibit national, state, or local committees of a political party from soliciting funds for any 501(c) organization that engages in federal election activity. Neither the regulations nor the NPRM address whether a political party can solicit funds for a 501(c) organization that does not engage in federal election activity but is affiliated with another organization that does. For example, the Alliance for Justice shares staff and office space with the 501(c)(4) Alliance for Justice Action Campaign. If the Alliance for Justice Action Campaign were to engage in federal election activity, it is not clear whether a national party could help to raise funds for the Alliance for Justice.

The Alliance for Justice believes that the activities of one organization may not determine the permissible activities of another, despite some connection between the two.[10] We urge the FEC to clarify that a national party may assist a 501(c) organization with fundraising even if the organization is connected to another organization for which the party could not raise funds.

Likewise, we urge the FEC to clarify that a political party may help raise funds for a 501(c) organization that maintains a separate segregated fund that independently conducts federal election activity.[11] Although typically a separate segregated fund is used to conduct express advocacy, we envision that if the FEC maintains its proposed definition of federal election activity, 501(c) organizations will create a separate segregated fund to conduct voter registration, GOTV, and voter identification activity. The fundraising restriction should not apply to a 501(c) organization merely because it has a separate segregated fund that conducts federal election activity. Thus, in addition to clarifying that a political party may raise funds for a 501(c) organization with a separate segregated fund, the FEC should affirmatively state in its regulations that a 501(c) organization can avoid the party fundraising restrictions by creating a separate segregated fund.

V. THE FEC SHOULD CREATE SAFE HARBORS TO PROTECT CANDIDATES ENGAGED IN NON-ELECTORAL FUNDRAISING FOR 501(C) ORGANIZATIONS

BCRA prohibits federal candidates, officeholders, and their agents from soliciting, receiving, directing or transferring funds in connection with a federal election unless the funds

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[10] *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding limits on lobbying by a charitable organization because a charity could create an affiliated 501(c)(4) organization that could lobby without limit).

[11] We recognize that even this proposal may go too far and that the courts may eventually hold that requiring groups to create and maintain such a fund to engage in these activities is too burdensome. *See, e.g., FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986) (holding that the burden of creating a separate segregated fund to engage in express advocacy was too great and allowing 501(c)(4) MCFL to engage in express advocacy with general treasury funds.)

are subject to the Federal Election Campaign Act's ("FECA") limitations, prohibitions, and reporting requirements. In the proposed regulations federal candidates, officeholders, and their agents are permitted to solicit contributions for an IRC § 501(c) organization if (a) the solicitation does not specify how the funds are to be spent; (b) the 501(c) organization does not conduct federal election activity as its principal purpose; and (c) the contributions received are not used for the organizations federal election activity. 11 C.F.R. § 300.52 (proposed).

As we explain below, we are concerned that these regulations will preclude any candidate or officeholder from participating in a 501(c) organization's fundraiser or convention. The rules threaten candidates with penalties that encourage compliance by avoidance. Therefore, we recommend that the FEC create safe harbors to clarify certain permissible activities.

a. Candidates should be allowed to appear at events that raise funds for tax-exempt organizations

The proposed regulations leave uncertain whether a candidate's appearance at an organization's convention, fundraising dinner, or similar event that raises funds for the organization would constitute a solicitation of funds for that organization. We urge the FEC to create a safe harbor declaring that it is not a solicitation for a candidate to appear at an organization's fundraiser or convention without making a specific solicitation of contributions for *federal election activity*. If the FEC chooses not to accept this suggestion, we urge it to create a safe harbor for candidates that appear at an organization's fundraiser or convention and that make no specific solicitation for *any funds*.

b. The FEC should create a presumption that the "principal purpose" of any 501(c) organization is not federal election activity

Under federal tax law, no 501(c) organization may conduct partisan electoral activity as its primary purpose.[12] Indeed, as discussed above, 501(c)(3) organizations may not engage in *any* partisan political activity. Regardless of whether the FEC accepts our suggestions related to the definition of federal election activity, we urge that the FEC allow candidates to presume that 501(c) organizations are not principally engaged in federal election activities and that it not require candidates to make an inquiry into the issue before assisting an organization with fundraising.

We are concerned that by creating a burden on candidates to have to determine whether a 501(c) organization engages in *federal election activity as its principal purpose* will result in an unnecessary chilling effect on their assistance to these organizations that, by law, cannot engage in substantial electoral activities. We reject the FEC's suggestion that a candidate or officeholder can reasonably be expected to determine whether an organization conducts federal election activity as its principal purpose. We think it more likely that candidates will refrain from any activity that *might* put them at risk. In particular, we note that the IRS Forms 990, 1023, and 1024 lack the information necessary to address the question of electoral activity, as they are designed to ensure compliance with federal tax law, not the scope of an organization's "federal election activities."

[12] IRC § 501(c)(4).

If the FEC creates a presumption that the principal purpose of any 501(c) organization is not federal election activity, we suggest that this presumption be rebuttable if the candidate or officeholder had knowledge or reason to know that the 501(c)'s principal purpose was federal election activity.

c. Any definition of "principal purpose" should be based on a multi-year average

The proposed regulations do not define "principal purpose," as used in the restrictions on fundraising for a federal candidate or officeholder.[13] We recommend that "principal purpose" consider activity that occurs within a defined period of time.

Many organizations engage in very little election-related activity (under any definition of that term) except for brief periods of the election cycle, and measuring their activities during that period might skew the evaluation of the organization's principal purpose. For example, a 501(c)(4) might engage in a huge GOTV effort in the weeks before an election and engage in no other election-related activity at any other time.

We recommend that the FEC define "principal purpose" to reflect a more accurate view of an organization's actual level of activity. We propose that an organization be found to have engaged in federal election activity as its principal purpose only when expenditures for federal election activities exceed 50% of the organization's total expenditures over any two consecutive tax years.

VI. THE FEC SHOULD NARROWLY DEFINE THE SCOPE OF AGENT

The Alliance recognizes that the definition of "agent" creates a multitude of problems, not only with respect to its impact on the soft money regulations but also on the proposed regulations yet to come. The entire context of our comments has focused on issues that are unique to the nonprofit advocates we serve. It is our belief that others will comment on the importance of defining "agent;" thus, our limited comment identifies only one of the key problems.

The proposed regulations define "agent" to mean any person who has actual express oral or written authority to act on behalf of a candidate, officeholder or a national committee of a political party, or a state, district or local committee of a political party, or an entity directly or indirectly established, financed, maintained, or controlled by a party committee. 11 C.F.R. § 300.2(b) (proposed).

This definition becomes problematic when the role of an individual becomes blurred. For example, at the state or local level, often the same individual will have two distinct roles--one in the state or local party and one with an exempt organization. In that instance, the proposed rules present a conflict. The regulations need to narrowly define when the individual is an agent of the state or local party and when they are operating under the guise of their exempt organization. There should not be any presumption that they are at all times an agent of the state or local party.

[13] Proposed regulation 11 C.F.R. § 300.52(a)(2).

We recommend that the FEC narrowly define "agent" to avoid this particularly harsh consequence at the state and local level; in limiting our comments on this subject matter, we defer to the voices of other commenters who will undoubtedly raise the full scope of issues presented by the definition of "agent."

CONCLUSION

The speed with which Congress has mandated these regulations and the uncertainty of the outcome of the court proceedings surrounding BCRA has created a difficult task for the FEC and its staff. The Alliance is mindful that the FEC will be attempting to create regulations quickly with the expectation that future enforcement actions and court proceedings will help to clarify areas of uncertainty. We fear that if the FEC fails to clarify areas of uncertainty in the regulations now, it will create confusion and over-cautious behavior that will have long-term ramifications for candidates and nonprofit organizations. We urge the FEC, wherever possible, to include language in the regulations that affirmatively permits legitimate activities and provides clear guidance to the people and organizations that BCRA seeks to regulate.

Thank you for the opportunity to comment on these proposed regulations. We would be happy to provide whatever additional information or thoughts the FEC would find helpful in its consideration of this rule.

Sincerely,

Nan Aron,
President