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FACSIMILE TRANSMITTAL SHEET

TO: MS. ROSEMARY SMITH FROM: TREVOR POTTER

COMPANY: FEDERAL ELECTION COMMISSION DATE: MAY 29, 2002

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PHONE NUMBER: SENDER'S PHONE NUMBER: (202)736-2200

RE: PUBLIC COMMENTS ON SOFT MONEY REGS SENDERS FAX NUMBER: (202)736-2222

OTHER:

NOTES/COMMENTS:

Ms. Smith,

Following are the Campaign & Media Legal Center's public comments in response to the Commission's Notice of Proposed Rulemaking on the soft money portions of the new regulations. Additionally, our request to testify at the public hearing is included.

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May 29, 2002

VIA FAX and E-MAIL

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
Washington, DC 20463

Re: Notice 2002-7

Dear Ms. Smith:

These comments are submitted on behalf of the Campaign & Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving the federal campaign finance laws. The proposed rules implement Title I of the Bipartisan Campaign Reform Act of 2002 ("the Reform Act"), relating to the Act's ban on soft money. The Commission's Notice of Proposed Rulemaking, issued as Notice 20002-7, is published in the Federal Register at 67 Fed. Reg. 35654 (May 20, 2002). **Please also accept this letter as a request to testify at the Commission's hearing on these proposed rules.**

At the outset, we would like to commend the Commission's staff on their hard work in preparing draft rules within the challenging timetable established by the Reform Act.

However, on several critical issues, it appears to us that these proposed rules do not reflect the plain language of the Reform Act, its legislative history or Congressional intent. These draft provisions constitute a grave threat to the successful implementation of the new law, and should prompt us all to remember that the flood of soft money that the Reform Act attempts to stem began not with any Congressional legislation or court ruling, but with unwise actions by the FEC beginning in 1978. Congress has now undone the soft money system, and we urge the Commission to construe the Act consistent with the drafters' intent to avoid creating the sort of loopholes that would undermine the Reform Act and recreate the soft money abuses.

Toward that end, we associate ourselves with the detailed comments being submitted by the Reform Act's principal sponsors, Senators McCain and Feingold and Congressmen Shays and Meehan (the "sponsors' comments"). Their comprehensive suggestions are, naturally, the best

indication of Congress' intent in passing the Act, and represent the culmination of seven years of close work and intimate experience with these issues. We strongly endorse their comments, and urge the Commission to grant their views the greatest deference.

We write separately to add our expertise to theirs on a few areas of particular importance to the successful implementation of Title I: namely, the Commission's definitions of "federal election activity," "agent," "promote, support, oppose, or attack," and "solicit or direct." We also offer suggestions for treatment of "public communications" involving use of the Internet and e-mail. We believe that the Commission's proposed rules, if left unaltered, would not serve the Reform Act's purpose, and threaten to became major obstacles to the successful implementation of the law. Our comments are attached.

We look forward to working with the Commission to produce rules that are workable and that reflect the purpose and principals behind the Reform Act. In that connection, we look forward to testifying on these matters in June.

Sincerely,

Trevor Potter
General Counsel

Comments of the Campaign and Media Legal Center
Trevor Potter, General Counsel

Proposed CFR § 100.24: definition of "Federal election activity"

In the commentary on this section, the Commission asks whether non-partisan "get-out-the-vote" activities by state parties should be excluded from the definition of "federal election activity." We urge the Commission to treat such party get-out-the-vote, voter registration, voter identification, and other activities (however "non-partisan" they claim to be) as federal election activities wherever they meet the criteria set forth in the Act. Failing to do so would be inconsistent with the plain language of the statute, and would undermine its main purposes. As a threshold matter, political parties exist for the purpose of electing candidates. It is therefore an oxymoron to say that they ever engage in non-partisan registration and get-out-the-vote activities: their very purpose for existing infuses these activities with partisanship.

The Commission also inquires whether, and under what circumstances, it would be appropriate to treat 501(c) voter activity initiated by parties or candidates as exempt from the definition of federal election activity for purposes of the soft money solicitation restrictions. If candidates or parties are allowed to initiate such activities by other entities, there is a risk that they could end up as the principal forces behind such activities. This would contradict the Act's restrictions on fundraising by candidates and officeholders for 501(c) organizations whose primary purpose is to engage in such election-related activities.

As to the Commission's proposed commentary regarding the definition of "voter identification activity" in CFR § 100.24(a)(2), it is inappropriate to exclude from the definition efforts by state parties to identify potential voters through contacts that do not mention a Federal candidate. Such a broad exemption could have the effect of excluding voter identification activities which, while not naming a candidate, nevertheless directly affect Federal elections. This would be inconsistent with the provisions of the BCRA that regulate state and local committee activities that affect Federal elections, regardless of whether they mention a Federal candidate.

Finally, the commentary inquires whether regulation of get-out-the-vote and voter identification activities ought to be time-bounded. The Act does not impose a limit of those days near an election when an activity may be characterized as "Federal election activity." Accordingly, the Act covers such activity whenever it occurs, and the activity should be characterized as "in connection with" the next scheduled election. In the case of states with odd-year elections, such activity taking place in the odd year prior to the election will not be "in connection with" an election in which a Federal candidate is on the ballot, and will therefore not be deemed to be a "federal election activity."

Proposed 11 § CFR 300.2(b): definition of "agent"

We strongly disagree with the Commission's definition of "agent." That draft definition includes only those who have *both* "actual" and "express" authority to act on a candidate or other person's behalf. This fails to take into account the realities of fundraising, and creates the potential for a loophole that would utterly swallow the rule.

The Act aims at prohibiting the raising of soft money by candidates, parties and other entities. In practice, these persons and entities very often raise these funds through agents—event chairs, committee members, and others. Those persons often have not been granted, in any technical, legal sense, actual and express authority to raise particular kinds of money in particular ways. Nonetheless, they must be considered "agents" of a candidate when engaged in such fundraising activity. Plainly, as a matter of policy, a definition that is too narrow will merely lead restricted persons to direct impermissible fundraising activities to others.

Moreover, as the Commission's own commentary notes, current law contains a definition of "agent" for the purposes of independent expenditures that is broader than this proposed soft-money regulation in that it closely mirrors the common law definition. That regulation, 11 CFR § 109.1(5), includes individuals with implied authority to act for a principal, or who have a position within a campaign in which it would "reasonably

appear" that they had authority to act. There is, at a minimum, no justification for a narrower definition here.

We urge the Commission to hew closely to common law definitions of agency in this rule, and include those with apparent or implied authority to act. These include persons who are "held out to the world" such that a reasonable person would believe they had authority to act for the principal.

These definitions are, perhaps, particularly relevant to the world of politics. In fundraising, some individuals are given titles by a party or campaign suggesting to the public that they have the power to act for the candidate or party. In these instances, we believe that the candidate or party should bear responsibility for the actions of those who are authorized to raise funds in their name. This will have the salutary effect not only of maintaining the broad prohibition of soft money; it will also protect these agents by forcing their candidates and parties to put them on proper notice of what is forbidden, in order to avoid exposing *themselves* to liability. Further, any paid employee of a political party or committee or campaign should be held to be an agent for purposes of the Act. Nor should volunteers and vendors be per se excluded.

Moreover, while the Sponsor's Comments urge that "[a]t the very least, if the principal is aware of the activities of the agent, it must be held responsible for those activities, even if they are not expressly authorized," we would go further. While we agree that knowledge by the principal should be a basis for imposing liability on the principal, we believe that

is not a sufficient standard. In order to guarantee that principals may not avoid liability by maintaining a studied ignorance of the activities undertaken by their subordinates, we would urge the Commission to adopt a broad standard—again, one closely attuned to the common law concepts of "implied" and "apparent" authority.

Proposed 11 CFR § 300.2(l): proposed definition and discussion of "promote, support, attack or oppose."

The Commission's draft rules define "promote, support, attack or oppose" far too narrowly.

In the Act, that term is central to any understanding of "federal election activity" because any "public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)" is a federal election activity that must be funded by the State party with Federal (hard) money.

This provision is targeted at the practice, increasingly prevalent in recent years, of evading existing limits on soft money by "laundering" contributions intended to influence federal elections through state parties. Those state parties then use those funds to pay for advertisements that quite effectively influence national elections, as in the Clinton/Dole

race of 1996, but which do not engage in "express advocacy" of federal candidates, and thereby avoid federal limits on the sources of funds.

To preserve the intent of the Act's provisions regulating state party soft money, the Commission must define its terms more broadly than the draft rule proposes. For instance, in the draft, a communication is only deemed to "promote, support, attack or oppose" a candidate if it "encourages action to elect or defeat a candidate." However, that definition may well fail to cover a state party ad that does not expressly call for any action, but plainly furthers that result by favorably or unfavorably describing that candidate's views. This is precisely the sort of evasion that infects the current system, and that the Act is aimed at preventing.

The examples provided by the Commission in proposed 11 CFR § 300.2(l)(2) of communications that would not be covered by the proposed definition are, therefore, not in keeping with the Act's plain meaning and intent.

In particular, 11 CFR § 300.2(l)(2)(ii) of the Commission's proposed rules contains a list of per se exclusions from the "public communications" element of the definition of "federal election activity" that do not appear in the Act. A real-world determination of whether a particular communication promotes, support, or attacks a clearly identified candidate should be made taking into account all of the facts and circumstances, and should consider the communication as a whole. We therefore urge that the per se exclusions be removed from the rules.

We particularly urge that state, local or district party communications that feature a Federal candidate endorsing a state or local candidate should not be exempted in a per se fashion from the Act's reach. Further, a similar provision that refers to a bill by its popular name, when that popular name includes the name of a candidate for Federal election, should not be granted a per se exemption. Instead, such communications should be considered on their merits, to prevent evasion of the purposes of the Act.

In general, any public communication that mentions the name of a Federal candidate in the course of referring to legislation by its popular name should not be covered by the "public communications" prong of the test for "federal election activity," as long as it does not in any way promote, support, attack or oppose that candidate. However, some communications may refer to a Federal candidate by mentioning a popular bill name, but only in the context of an attack on that Federal candidate.

Also, 11 § 300.2(1)(2)(A) exempts some communications in which a Federal candidate "endorse[s] another Federal . . . candidate." That exemption should certainly be deleted; as such communications clearly promote or support a Federal candidate, and therefore must be paid for solely with federal funds.

Proposed 11 CFR § 300.2(m): proposed definition of "solicit or direct"

The proposed definition of "solicit or direct" appears only to forbid situations in which a covered person or entity makes a suggestion that a person make a contribution. This leaves out scenarios in which a person suggests where a contributor who has already decided to contribute may send her contribution.

Further, the proposed rule appears to limit the prohibition to suggestions made to candidates, committees, or non-profits. Certain provisions of the Act apply to soliciting contributions from any "persons," which would include individuals, partnerships, unions, and corporations under the Act. The definition should reflect that fact.

Proposed 11 CFR § 100.26: Definition of "Public communication"

To be clear, proposed 11 CFR § 100.26 deals only with *public communications* by *political parties*. The definition thus excludes, for example, internal party communications and other non-public messages, and public communications by non-party persons and entities. Political parties and candidates, as opposed to individuals, have long been subject to regulation of their public communication with regard to both the source of the funds used to pay for those communications, and with regard to requirements for disclosure. This regulation merely ratifies those longstanding principles with regard to widely distributed electronic communications.

With that in mind, in response to the question posed in the Commission's commentary concerning Internet and e-mail, we note that BCRA contains no per se exclusion from the definition of a "public communication" for political party communications widely distributed by Internet and e-mail. A broad per se exclusion of that nature would be inadvisable because it could permit state and local party entities to exploit rapidly developing technology and new communications media to re-create or prolong the current soft money system. In light of the complexities of this area, we urge the Commission in this and related rulemakings to specify that the appropriate disclosure requirements and funding restrictions apply to public communications by political parties via electronic means.