Republican
National
Committee

Counsel's Office

May 29, 2002

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Federal Election Commission
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**VIA HAND DELIVERY AND E-MAIL: BCRAsoftmon@fec.gov**

Dear Ms. Smith:

These comments on the Federal Election Commission's ("the Commission") Proposed Rules relating to Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 35654 ("Proposed Rules" or "Rulemaking") are submitted on behalf of the Republican National Committee and Patricia P. Brister, in her capacity as Chairman of the Republican State Chairmen (collectively hereinafter "RNC"). The RNC thanks the Commission for the opportunity to comment on these Proposed Rules, and when the Commission holds hearings on the Proposed Rules, we wish to testify.

## I. Introduction

The RNC has consistently taken the position that political parties have an important and unique role within the American political system,[1] and the RNC now has both through litigation to overturn the unconstitutional provisions of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), and through this Rulemaking – a responsibility to defend our political party system and the constitutional rights of all Americans at the local, state, and national level. To this end, the RNC is currently seeking a Court declaration that numerous provisions of the BCRA are invalid and unenforceable, as well as an injunction barring the Defendant Federal Election Commission from enforcing those unconstitutional provisions. Along a parallel track to the litigation, the RNC is also commenting herewithin on the Commission's Proposed Rules.[2]

The RNC sympathizes with the enormous task the Commission faces in trying to make sense of this long debated, yet hastily drawn legislation, and appreciates that the

[1] *See* RNC's December 21, 2001 Comment on the Commission's Proposed Rules relating to the Internet and Federal Elections.

[2] Nothing in this Comment should be viewed as in any way conceding any points in the RNC's litigation against the FEC.

Commission is bound to write regulations based upon the statute as written, notwithstanding the fact that parts of the BCRA are almost certainly unconstitutional. An additional duty of the Commission is to promulgate Rules based upon the plain language of the statute as written. Although the Congressional sponsors of the various versions of "Shays Meehan" and "McCain Feingold" may have intended one thing, the lobbyists who ended up drafting the BCRA may have written another, and the Commission is now charged with interpreting the statute as written. As it appears in the Statutes at Large, the BCRA covers 36 densely packed pages. Yet the prohibition on raising and spending non-federal so-called "soft-money"[3] by national political party committees occupies just two paragraphs of the statute. Despite the media's focus on the ban on national political party use of non-Federal funds, this Proposed Rulemaking by the Commission brings into focus the clear reality that much of what is in the BCRA was never contemplated by its sponsors, and certainly never discussed or debated in either house of Congress. We, then, as members of the "regulated community" are left to attempt to discern what the Statute means. As the Commission attempts to assist us in this task through the instant and forthcoming Rulemakings, a few overriding concepts should be kept in mind: 1) The statute is forward looking. All regulations should relate only to activity of parties – or their potential agents or "coordinating" entities – that takes place after November 6, 2002, the effective date of the BCRA; 2) The Commission's job is to provide guidance to the regulated community so that we can act in a prepared manner, in full compliance with the law. Ambiguities should be resolved, not created, by Commission regulations; 3) Although at times constrained by the plain language of the statue, the Commission should be respectful of the federalism issues inherent in the American system of Federal regulation of Federal campaigns, and state and local regulation of state and local campaigns. States and localities have traditionally been the ones to regulate their own elections, and whenever possible the Commission should promulgate Regulations that respect this federalist division of power and allow continued state and local regulation of their respective elections.

Because of the scope and length of these Proposed Regulations, the RNC has not attempted to answer every question raised in the NPRM. No implication should be drawn from our failure to answer any particular question raised by the Commission in this NPRM. We would be pleased, however, to expand on any issues at the hearings in June. The following are our comments on a variety of the issues raised in the Proposed Rulemaking.

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[3] The Commission is correct in its decision to avoid the usage of the term "soft money" in the text of this NPRM. "Soft money" is generally defined as money that does not fall under the limits and prohibitions of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*)("FECA" or "the Act"). The term "soft money," includes not only non-Federal funds that go to political party committees, but also funds raised and spent by special interest groups such as Center for Responsive Politics, the Brennan Center, the Sierra Club, *etc.* The term "soft money" causes confusion, however, because although all political party "soft money" is currently regulated and spent in connection with state and local electoral activity consistent with relevant state law, "soft money" raised and spent by special interests groups such as the Center for Responsive Politics and the Sierra Club is undisclosed and unregulated, and remains so even after the BCRA. In the context of this rulemaking regarding political party committees, therefore, it makes sense to use the clear and unambiguous term "non-Federal funds."

## II. Definitions

The BCRA creates a new defined term, "Federal election activity." State and local party programs categorized as such must be paid with 100% Federal dollars or a combination of federal dollars and so-called "Levin" funds (Federally limited, regulated and reportable non-Federal state and local party money). The NPRM seeks comments as to when certain party programs should be classified as "Federal election activity" and, therefore, restricted in the source of funding. The RNC encourages the Commission to adopt reasonable standards that allow state and local parties to continue to pursue their "party building" programs without classifying those efforts as "Federal election activity."

### A. Proposed 11 CFR 100.24(a)(1) Definition of "voter registration activity"

#### 1. "Voter identification" versus "voter registration activity"

The RNC maintains the position that *all* activity that does not expressly advocate the election or defeat of a clearly identified Federal candidate is beyond the Commission's authority to regulate. To the extent, however, that courts determine that the Commission may regulate in this area, then it is important to note that voter identification programs are generally "party building" programs, and should be classified as "federal election activity" only when voters are actually contacted by a party committee to "get out and vote" in a general election where federal candidates are on the ballot. It is important to note that party committees continually contact potential voters in order to determine party affiliation and to compile voter lists, as well as on a number of other issues. Those ongoing party activities should not automatically be classified for the purposes of these regulations as "federal election activity."

In contrast, "voter registration" programs are specifically classified in the BCRA as "Federal election activity" if conducted within 120 days of the general election.

#### 2. "GOTV" Activities

Any costs incurred in the preparation and planning of generic GOTV programs should not be classified as "Federal election activity." For example, preparation of voter files, generic issue identification, evaluating and planning "Victory Programs" and internal polling and analysis would not be classified as "Federal election activity." Rather, these costs should be viewed as party administrative costs not requiring 100% federal payments or a "Levin" allocation.

To the extent that local party committee activity at all falls under the jurisdiction of the Commission, the RNC supports the concept of a "de minimus" exemption from regulation for "generic" GOTV efforts. If, for example, a local party committee spends $5,000 or less, its "generic" GOTV effort would then be presumed to be non-Federal.

### 3. Non-federal GOTV programs

If a GOTV effort is designed to solely encourage the election of state and local candidates, even though occurring at a time when federal candidates are on the ballot, those costs should be viewed as 100% non-federal and outside the purview of FEC regulation, provided there is no "generic" get-out-the-vote message included. Therefore, the suggestion in the NPRM that a public communication that urges the voter to vote for a state or local candidate should be viewed as a federal election activity, since it is by definition a GOTV message, should be rejected. These are 100% non-Federal GOTV disbursements and should be paid with 100% state regulated funds. In most states these non-federal candidate specific GOTV programs are reportable candidate donations/disbursements and may require payment solely from state regulated funds.

### 4. "Exempt party activity"

Comments are also sought on the issue of "exempt party activity" such as slate cards and whether they should be included in the definition of "Federal election activity." There are instances where "non-allocable" candidate support activities include both federal and non-federal candidates. In our view these federally "exempt" party candidate support efforts should not automatically be included either in the definition of "Federal election activity" requiring 100% Federal funding, or viewed as "generic" activity requiring "Levin" funding. Rather, if these "exempt" party efforts support both Federal and non-Federal candidates, they should continue to be allocated based on the formula required under current FEC Regulations, namely, the "time and space" devoted to each candidate. It is important to note that some states may treat the non-federal candidate support portion of the "exempt" activity as a reportable and perhaps limited donation that must be paid for with state regulated funds.

It is also important to note that although the BCRA defines "public communications" and "mass mailings," the BCRA does not in any way diminish the ability of state and local parties to conduct currently sanctioned FECA "exempt" party activities on behalf of candidates. For example, under the exemption from the definitions of contributions and expenditures, state and local party "slate mailings" are still allowed even though they may be classified as a "mass mailing" and "public communication." There is no need to bring these activities into the "Federal election activity" or "generic" umbrellas to further restrict what certainly was not intended.

## B. Proposed 11 CFR 100.25 Definition of "generic campaign activity"

The BCRA creates new 2 U.S.C. § 431(21) to define "generic campaign activity" as "a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." Rather than providing guidance to the regulated community about specifically what "promoting" a political party means – in other words, explaining that "promotes" means to support the whole party ticket and or/candidates of the party - the Commission instead, *sua sponte*, seeks to expand the scope of the statutory language to cover through regulations activity that "opposes" a political party. The NPRM attempt

to define "generic campaign activity" is confusing. Simply stated, "generic party activity is activity that promotes or opposes the particular party's ticket, without mentioning or referring to candidates by name. Defining "generic activity" as party promotion, unnecessarily clouds the distinction of voter registration and GOTV activities, for example, "for lower taxes, become a Republican: "for lower taxes, vote Republican."

### C. Proposed 11 CFR 100.26 Definition of "public communication"

The Commission asks if the definition of "public communication" should be extended by the Commission through regulations to cover activity on the Internet. The simple answer is no. As the RNC explained in our *Comment on the Commission's Proposed Rules relating to the Internet and Federal Elections* (December 21, 2001), the use of Internet websites allows the dissemination of political and issue messages at very little or no cost, and no regulatory action should be taken by the Commission that would in any way discourage Internet usage by political parties and other political organizations. The Commission should be looking for ways to facilitate, not impede, the greater use of the Internet in American politics.

### D. Proposed 11 CFR 300.2 / Definition of "Agent"

In the NPRM, the Commission requests comment on when an "agent" is acting on behalf of a principal. Specifically, the Commission seeks comments concerning the circumstances under which a principal would be held liable for the actions (*e.g.*, political or fundraising activities) of an agent. We see no reason that the Commission should not simply adopt the definition used by the Restatement Second 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." Restatement (Second) of Agency § 1(1) (emphasis added). This definition limits "agency" to those circumstances where the principal, such as a party committee or campaign, expressly authorizes the agent to act on its behalf and exercises control over the actions of the agent. The key element in the definition is control. Requiring "control" in the definition of agency prevents party committees, campaigns and other participants in the political process from being held liable for activities that are beyond their power to prevent. Holding party committees or campaigns accountable for the actions of others that are beyond their control is not only unfair to political committees and susceptible to abuse by political rivals, but is also contrary to First Amendment jurisprudence that forbids overbroad Government regulations that have the potential to chill more political speech than is absolutely necessary to serve the Government's interest in preventing an appearance of corruption.

Consequently, the Commission's definition should center on the ability of a party committee, or other principal, to control the actions of its agent. The control mechanism must take the form of an express written or oral agreement defining the scope of the agent's authority and providing that the party committee or campaign retains control over

the actions of the agent. Such a definition would be consistent with the common law definitions of many states.[4]

In addition, the Commission's definition must also provide that party committees, campaigns and other principals are liable for the actions of agents only when they are acting within the scope of their defined authority.[5] For example, assume a party committee or campaign contracts with a research firm and grants the firm the authority to act on its behalf to complete the assigned research task. The research firm does not have the authority to act on behalf of the party committee or campaign in any other context. The party committee or campaign must not be held liable if an employee of the research firm engages in political or fundraising activities for a section 501(c) organization outside of any relationship with the party committee or campaign.[6] Any definition of agency must also take into account the real world role of members of the Republican and Democratic National Committees, especially State Chairs. Both Parties' State Chairs are automatically members of their National Committees. The Commission's definitions should not make them agents so that a State Chair cannot raise money legally under State law for State candidates, or be a member of an issue group, be it the National Rifle Association, the AFL-CIO, or the Sierra Club.

Moreover, the definition should not sweep so broadly as to encompass independent contractors, because all of an independent contractor's activities are not subject to a fiduciary relationship with, or control by, the party committee or campaign. An independent contractor is someone who contracts to provide specific services to the organization. The existence of this contractual relationship does not create a fiduciary relationship at common law, so long as the contracting entity is not subject to the other's control.[7] The fact that an independent contractor receives compensation from a party

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[4] *See, e.g. Multi-State Contracting Corp. v. Midwest Indem. Corp.*, 556 S.E.2d 524, 526 (Ga. App. 2001) ("Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control* . . .") (emphasis in original) (citations omitted); *Happy Indus. Corp. v. American Spectalites, Inc.*, 983 S.W.2d 844, 852 (Tex. App. – Corpus Christi, 1988) (holding that "agency" is "the consensual relationship between two parties when one, the agent, acts on behalf of the other, the principal, and is *subject to the principal's control*.") (emphasis added) (citations omitted); *Reistroffer v. Person*, 439 S.E.2d 376, 378 (Va. 1994) ("Agency is a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and *subject to his control*, and the other person's manifestation of consent to so act.") (emphasis added); *Evangelou v. Terzano*, 689 A. 2d 840, 845 (N.J. Super. App. Div. 1997) ("It is fundamental that an agency relationship arises when one party authorizes another to act on its behalf *while retaining the right to control and direct any such acts*.") (emphasis added) (citations omitted).

[5] *See* Restatement (Second) of Agency § 219(1) (1957) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."); *Happy Indus. Corp.*, 983 S.W.2d at 852 ("It is the *principal's extent of control* over the details of accomplishing *the assigned task* that primarily distinguishes the status of independent contractor from that of agent.") (emphasis added).

[6] *See Pensue Assocs., Ltd. v. Quon Industries, Ltd.*, 660 N.Y.S.2d 563, 566-67 (N.Y. App. Div., 1997) ("Agency is a fiduciary relationship created as a result of conduct by parties manifesting that the principal party is willing to allow the other party, upon such other party's consent, to act for it *subject to the principal's control and within the limits of the authority thus conferred*.") (emphasis added).

[7] *See Constance v. B.B.C. Development Corp.*, 25 W.3d 571 (Mo. App. W.D., 2000) ("An independent contractor is one who contracts with another to do something for him but is neither controlled by the other nor subject to the other's control.").

committee does not, by itself, create an agency relationship. Instead, the existence of an agency relationship is again determined by focusing on the issue of control.[8] Because the party committee or campaign does not exercise control over all the actions of an independent contractor, it ought not be liable for all an independent contractor's actions. We see no reason why this logic, which has governed at common law for centuries, should be altered in the context of political campaigns and political speech.

An understanding of the concept of "agency" that focuses on the party committee's or campaign's control over the activity of an alleged-agent provides a degree of certainty regarding whether or not a party will be held liable for an individual's political or fundraising activities that is not present in more expansive definitions. This degree of certainty is necessary to safeguard the party committee's or campaign's right to engage in protected political speech that is guaranteed by the First Amendment. It is by now well-established that "the First Amendment affords the broadest protection to political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[9] Where a regulation "burdens [a party committee's or campaign's] rights to free speech and association, it can only survive constitutional scrutiny if it serves a compelling government interest" and is narrowly tailored towards serving that goal."[10] An understanding of agency that utilizes a "facts and circumstances" test would not be narrowly tailored to serve the Government's goal of enforcing the provisions of the BCRA. The Government's interest in avoiding corruption may be fully served by a more narrow definition that would impose liability on party committees and campaigns for political, fundraising and other activities by agents that are subject to their control (i.e. the "control test"). Subjecting committees to liability based on the actions of independent contractors and other actors over whom the party committee or campaign may exert *no* real control serves no legitimate purpose in dissuading the party committee or campaign from committing misconduct, but will severely decrease the likelihood that the party committees and campaigns will engage in legitimate forms of political expression that require the use of such types of actors. Because an expansive definition of agency that imposed unforeseen liability on political committees and campaigns would restrict significantly more expressive conduct than is necessary to serve the government's legitimate interest in avoiding corruption, it would violate basic First Amendment principles expressed in the *Eu* and *Buckley* decisions.[11]

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[8] *McCarty v. King County Medical Service Corp.*, 175 P.2d 665, 3 (Wash. 1947) ("*Control is the vitally essential element* in the relationship of principal and agent.") (emphasis added); *Roper v. Compania De Perforaciones Y Servicio, S.A.*, 315 S.W.2d 30, 33 (Tex. Civ. App., 1958) ("The Court said that control was an essential element of agency, and further said that one person may act for and in behalf of another *but if he or she is not under the other person's control then the relation of agency does not exist*") (emphasis added).

[9] *Buckley v. Valeo*, 424 U.S.1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

[10] *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222, 226, 228 (1989).

[11] *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) ("The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association."); *Cf. Thompson v. Western States Medical Center*, 122 S.Ct. 1497, 1506 (2002) (stating, in context of striking down restrictions on lesser-protected commercial speech, "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so").

Finally, the RNC urges the Commission to exclude "implied" or "apparent authority" from the definition of agency. "Apparent agency" is a form of agency that does not depend on an express appointment of agency or actual authority, but arises from the words, attitude, conduct, and knowledge of the principal.[12] The RNC believes that the agency relationship should be based upon express or actual authority demonstrated by a written agreement or an overt act by the party committee or campaign. The inclusion of implied or apparent authority in the definition would create a facts and circumstances test which provides for inconsistent Government enforcement and will fail to give the regulated community advance notice concerning which individuals or entities qualify as an "agent."

The RNC recognizes that many states consider implied or apparent authority when determining whether an agency relationship exists, and that the Restatement Second of Agency provides a limited role for liability based on apparent authority where a third party can demonstrate detrimental reliance.[13] However, the Supreme Court has made clear that not every nuance of agency law should be incorporated into federal statutes, where such liability is not necessary to effect the underlying purpose of the statute. In determining the scope of an employer's liability under Title VII for an employee's sexual harassment, for example, the Court explained that, while agency concepts provided a starting point, the Court's task was to adapt them to the "practical objectives of Title VII."[14] Consequently, the Court did not adopt the factors set forth in the Restatement Second of Agency Sections 219, 228, and 229, *in toto*, but instead conducted an "enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view."[15] Because the Commission's definition of "agent" will operate exclusively in the area of core First Amendment activities, such as expressive political communications and fundraising, in this context the Commission must provide the regulated community with a clear and categorical definition of "agent" that is limited to actual authority and control over the agent.

Of course, if the Commission does include implied or apparent authority in the definition of agency, the Commission should likewise adopt the common law limitation that the question of agency must center on the actions of the party committee or other principal indicating that the agency relationship exists, rather than any action of the alleged-agent.[16] This limitation would serve to partially mitigate the uncertainty over

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[12] *See McDuff v. Chambers*, 895 S.W.2d 492 (Tex. App. -- Waco 1995).

[13] *See* Restatement Second of Agency, §219(2)(d) (master is liable for employee's acts outside scope of employment where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority").

[14] *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998).

[15] *Id.* at 797.

[16] *See* Restatement Second of Agency §219(2)(d); *Valley Nat. Bank of Phoenix v. Milmoe*, 248 P.2d 740, 743 (Ariz. 1952) ("The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control"); *Evangelou*, 689 A.2d at 845 ("Moreover, even if a person is not an actual agent, he or she may be an agent due to apparent authority;

liability created should the Commission decide, we think mistakenly, to use an apparent authority standard.

Both as a matter of fairness to the political entities involved, and in order to avoid chilling political speech protected by the First Amendment, the definition of "agent" that the Commission ultimately adopts should provide a bright-line test for determining which individuals and entities may qualify. The Commission ought not adopt any definition that is tantamount to a "facts and circumstances test." This can only lead to inconsistent rulings by the Government in an area of protected First Amendment speech. In addition, such a vague and arbitrary standard would prevent regulated entities from determining whether or not a particular individual may trigger liability in advance, both rendering compliance for regulated entities unduly difficult and potentially dissuading them from engaging in lawful activities due to the fear of assuming an unknown risk of liability under the Act. The best way to impose a bright-line "agency" test is to follow the common law approach by limiting the definition of "agent" to those circumstances where the party committee, campaign or other political entity expressly authorizes the agent to act on its behalf and exercises control over the actions of the agent. The definition should focus on the party committee's or campaign's control over the actions of the agent, and not on such vague and overbroad elements such as implied or apparent authority. The inclusion of such elements, as with the imposition of a "facts and circumstances" test, would prevent the regulated community from being able to determine in advance which particular individuals and entities will trigger liability for the party committee or campaign in the eyes of the Government regulators, and therefore would be unworkable and having a chilling effect on the grassroots activities of political parties on the local, state and national levels. We therefore strongly urge the Commission to adopt the brightline standard outlined above.

### E. Proposed 11 C.F.R. 300.2 / Definition of "directly or indirectly establish, finance, maintain, or control"

The Commission has a definition of affiliation at 11 C.F.R. § 100.5(g)(4) that is now well developed through regulations and through application in enforcement proceedings. Although the RNC does not necessarily agree with all facets of the current affiliation standard, in terms of potential application to the definition of "established, financed, maintained or controlled," it has the overwhelming advantage of having been tested and now understood by the regulated community. In contrast to the byzantine and unworkable Rule at Proposed Section 300.2(c), the Commission should determine whether an entity has been "established, financed, maintained or controlled" by a parent entity simply by applying § 100.5(g)(4) to activity taking place on or after the effective date of the BCRA (i.e. November 6, 2002).

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*such authority arises based on acts by the principal which give a third party the impression that the agent has certain power.*") (emphasis added).

### F. Definition of "donation"

For the sake of clarity and simplicity, the term "donation" should be defined as non-federal funds or anything of value donated for the purpose of influencing non-federal election activity from sources subject to state limits and prohibitions and state disclosure requirements. There is no federal regulation of such donations, unless raised and/or deposited into a "Levin" account.

Exemptions from the definition of contribution should not be classified as donations, since those activities are still subject to FEC jurisdiction, even though they may not be limited. Donations by definition are outside FEC purview, other than "Levin" funds, and appropriately regulated by state law.

### G. Definitions of "Levin funds" and "Levin accounts"

The so-called "Levin Amendment" found at 2 U.S.C. § 441i(b)(2) should – and possibly even must – be interpreted, as the proposed definition contemplates, to permit the spending of Levin funds on non-Federal activity. Absent anything in the plain language of the BCRA (or in this case even in the legislative history) proposing a contrary interpretation, the Commission is obligated to adopt a definition that permits, and not restricts, state regulation of grassroots political activity. In addition, although the RNC agrees that is would likely be a wise practice for state and local party committees to open separate "Levin accounts," this is not a requirement that should be mandated by the Commission. "Best practice" issues such as this are best dealt with in a permissive, rather than obligatory manner, which allows for deviation as may be necessitated by the unique circumstances of diverse state and local parties (such as state laws regarding the opening of multiple bank accounts).

### H. Proposed 11 C.F.R. 300.2 / Definition of "promote or support or attack or oppose"

The Commission notes the language of the BCRA, then wisely asks what potential definition is likely to survive Constitutional scrutiny. This is not a new "battle" regarding a variety of entities, ranging from certain members of the Commission itself, to now Congress, who insist on ignoring the Supreme Court's explicit admonition in *Buckley*[17] that for a regulation of political speech such as this to survive Constitutional scrutiny and avoid being struck down on vagueness grounds, the regulation must apply only to communications that "in express terms advocate the election or defeat of a clearly identified candidate..."[18] The use of vague terms such as "promote" and "oppose" clearly fails that test. As the Commission is well aware, its own similar regulation at 11 C.F.R. §100.22(b) has been struck down as unconstitutional in numerous courts, including the U.S. Court of Appeals for the First and Fourth Circuits, Federal District Courts in the Second and Fourth Circuits, and an Iowa statute using identical language was held to be

[17] *Buckley*, 424 U.S. at 43-44.
[18] *Id.* at 44.

unconstitutional by the U.S. Court of Appeals for the Eighth Circuit.[19] We respectfully recommend, therefore, that the Commission heed the consistent and unwavering admonitions of the courts, and adopt a limiting construction along the lines of the seminal "footnote 52" of *Buckley*.[20]

### I. Definition of "to solicit or direct"

As has been discussed above, and in the context of agency, the Commission should be looking to draw bright lines for the regulated community. In contrast to this principle, proposed section 300.2(m) defines an impermissible solicitation or direction using vague terms such as "suggest" and "recommend." Instead of this vague and potentially overbroad approach, the Commission should limit the term "solicit" to an explicit request that an individual or entity make a contribution. The alternative approach found in proposed section 300.2(m) runs many of the risks we discuss in our agency discussion, and has the potential to subject grassroots party volunteers to endless federal investigations that are bound to chill all participation in the political process.

The Commission asks in the NPRM whether the term "direct" should be limited to the definition of "conduit or intermediary" as defined in the Commission's regulations at section 110.6(b)(2). The RNC supports this common sense limitation. In addition, the RNC supports the Commission's acknowledgement in the NPRM that the passive providing of information in response to an unsolicited request for information should be specifically, and explicitly, excluded from the definition. To take any other approach would be unworkable and lead to endless accusations and investigations.

## III. National Party Committees

As stated previously, the Republican National Committee has filed suit along with a number of state and local party committees challenging the constitutionality of certain provisions of the BCRA restricting national party activities and the ability to associate with state and local party organizations. However, in response to the NPRM request, the RNC offers the following comments relating to proposed FEC regulations impacting on national parties.

### A. Proposed 11 CFR 300.11 / General Prohibitions

First, regarding Convention Committees, the Commission has indicated in the NPRM that it will seek comments relating to convention committees at a later date. Certain observations, however, deserve brief comment at this time.

The Committee on Arrangements ("COA"), established by a national party to organize and run its national party convention, as required under FEC regulations (11 C.F.R. § 9008.3(a)(2)) and referred to in the NPRM, generally is limited to spending only

[19] *See* Statement of Reasons of Commissioner Bradley A. Smith in MUR 4922.
[20] *See Buckley* at 44, n. 52.

the federal public grant provided to both major parties the year before the convention. No private contributions can be raised or spent.

Under current FEC rules party officials are prohibited from raising funds for a city's "host committee" which is usually established by individuals within a city, not party officials, as a non-profit 501(c)(4) entity or a 501(c)(3) charity. Since "host committees" are non-profit organizations that do not engage in election related get-out-the-vote activities, there should be no restriction placed on federal office holders raising funds for a city's "host committee", similar to an officeholder's ability to raise unlimited funds for other non-profits as provided in 2 U.S.C. § 441i(e)(4) of the BCRA.

Second, regarding possible agents or "affiliates" of the RNC, as discussed above the RNC strongly encourages the Commission to adopt a narrow definition of agency and maintain its current definition of establish, finance, maintain and control in order to determine the "affiliation" status between national parties and other party organizations. In response to the NPRM suggestion, there should not be a specific listing of such presumed "affiliated" organizations. These determinations must be made by applying the "affiliation" standard specified in the rules. Although we do not always agree with Commission interpretation of the current standards, we believe it better to maintain the current "affiliation" rules. These standards have been the focus of many FEC Advisory Opinions and enforcement cases over the years. Any new standards would merely bring more confusion to what is already a complex set of regulations and could have the effect of further discouraging party interaction. Also, to reiterate, the "affiliation" standard should only be applied prospectively, starting with the effective date of the BCRA, November 6, 2002.

### B. Proposed 11 CFR 300.11 / Prohibition on National Party Fundraising for Certain Tax-Exempt Organizations

First, it is important that a temporal restriction be added to any definition proposed by the Commission (the alternative of the current Proposed Rule is that a mention in an organizational newsletter from years ago could trigger the "finances voter registration at any time" provision). Second, a safe harbor provision for parties *should* be included, as suggested in the NPRM, that provides parties with a bright line for compliance with the law. The RNC supports the concept in the NPRM that if a state or local party committee obtains a nonprofit organizations application for tax-exempt status or Form 990 and determines from such materials that the organization has not reported making, and was not organized to make, disbursements for federal election activity, the party committee should then be able to conclusively determine that it can contribute to or raise funds for the tax-exempt organization.

In addition, it is important that the statutory language of the BCRA placing restrictions on national party non-profit fundraising not be expanded. Specifically, the restriction placed on national party non-profit fundraising should be limited to only those 501(c)(4) entities engaged in political activity that effect federal elections, and that determination should be prospective and based on activities post November 5, 2002 -

past election related activity should not be a consideration. Generally, the Commission's implementing regulations should recognize and accept the ability of any entity to modify its activity and structure based on changes in the law without that entity being penalized for past activity that was legal, and in some cases encouraged, under the law in effect at the time.

The need for a limited definition of who is an RNC agent for the purposes of non-profit fundraising is also critical, and we refer the Commission to our above discussion of agency. Also, in defining prohibited "directed" donations by a national party, its personnel or its agents to certain restricted 501(c)(4) non-profit organizations, the Commission should limit the scope of the definition by allowing national party personnel or agents to respond to unsolicited requests for information regarding organizations that shares the Party's political and philosophical goals.

## IV. State, District and Local Party Committee, and Organizations

### A. Proposed Revisions to 11 CFR 100.14 / State, District, or Local Committee of a Political Party

In the Commission's attempt to define state, district and local committees, the explanation of proposed paragraph (b) asserts that "as determined by the Commission" is added to both standardize treatment of state committees and "give the Commission the necessary authority and flexibility..." to benignly (in the Commission's characterization) ensure consistent and fair treatment. This, however, is a quintessential state and local regulatory issue, and the statute does not leave discretion to the Commission to make this decision. The phrase "as determined by the Commission" should therefore be deleted from the definition at proposed section 100.14(c).

### B. Proposed Revisions to 11 C.F.R. 106.5

These Proposed Rules fundamentally confuse the relationship between "Federal election activity" and "exempt activities." Any material or communication that mentions a federal candidate could be considered a "public communication," as defined in the BCRA at 2 U.S.C. § 431(22). If such material or communication is a "public communication," the costs will have to be paid from 100% federal funds (with no allocation of non-Federal or Levin funds). If, however, such activity constitutes an "exempt activity" under 11 C.F.R. §§100.8(b)(10), (16) or (18), then the costs of such activity would not count against the applicable contribution or expenditure limits. In contrast, if under 11 C.F.R. §§ 100.8(b)(10) and (16) such material or communication also mentions non-federal candidates, then it is not a "Federal election activity," even though it is not specifically excluded from the definition of "Federal election activity." Its costs should be allocated between federal and regular (non-Levin) non-federal funds, presumably based on the Commission's existing time/space approach set forth in 11 C.F.R. §§ 106.1(a)(2) and 106.5(e).

### C. Proposed 11 C.F.R. 300.30 / Accounts[21]

The Levin amendment was created to encourage grassroots political activity by allowing state and local parties to use non-federal donations, as permitted by state law (but only up to $10,000 per donor) in combination with Federal funds for the purposes of voter registration and GOTV. Although the statutory language of the Levin amendment imposes restrictions on the way such non-federal donations can be raised, *nowhere* does the statute provide for *any* special language to be used in the solicitation by the state or local party, much less the special designations created by the Commission at section 300.30(b)(2) of the Proposed regulations. The RNC strongly opposes these potential Commission-created restrictions on the solicitation of Levin amendment funds, and therefore recommends the deletion of both Proposed section 300.30(b)(2) and Proposed section 300.30(b)(4)(iii), referring to solicitation conditions.

### D. Proposed 11 C.F.R. 300.31 / Receipt of Levin Funds

The plain language of the BCRA – and also legislative intent[22] – makes clear that state, district and local committees of the same political party are not considered to be affiliated for purposes of the $10,000 donation limitation in new FECA section 323(b)(2)(B)(iii). Also, the statutory restriction on "joint fundraising" should apply to joint fundraising *events*, but the Commission should clarify that state and local parties may nonetheless assist one another in raising Levin funds, just not through joint events (or "fundraisers").

### E. Proposed 11 C.F.R. 300.32 / Expenditures and Disbursements

First, regarding local party activity, the Commission should make clear that a local committee that does *not* otherwise qualify as a "political committee" under current law (2 U.S.C. §431(4)) is *not* (and would not be under the BCRA) required to register or file reports with the Commission.

Second, with respect to proposed section 300.32(a)(3), the Commission's proposed regulation is fundamentally overbroad. The Commission's overreach is exemplified by the Commission's omission of the word "election" from the phrase "Federal activities" in proposed section 300.32(a)(3). The statutory authority for this section of the Proposed Rules, section 323(c) of the BCRA explicitly applies to funds raised for "Federal *election* activity" (emphasis added). Not all federal funds raised are used for "federal election activity," and the Commission should not attempt to *sua sponte* bootstrap non-federal election activity federal funds into its definition. In contrast, the Commission should clarify that the funds received method should be utilized for fundraising where the funds raised at a mixed (Federal/non-Federal) state party event or program are not used for "Federal election activity."

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[21] *See* discussion of separate accounts for state and local party committees *infra* at RNC Comment § II (G).
[22] *See* Statement of Representative Chris Shays (R-Ct), 148 Cong. Rec. H410 (Feb. 13, 2002)(cited in this NPRM)

Third, the RNC supports the Commission's Proposed section 300.32(b)(2), which provides that Levin funds may be used for any purpose that is lawful under state law.

### F. Proposed 11 C.F.R. 300.33 / Allocation of Expenses

The plain language of the BCRA requires that Federal election activities, as defined, must be paid for with 100% Federal funds. The clear converse of this statutory concept, however, is that when the BCRA does not treat a category of expenses as having a sufficient nexus to federal elections to be treated as "Federal election activity," state and local parties should have the ability to pay for such expenses with entirely non-Federal funds (or alternatively they may allocate such expenses between their federal and regular non-Federal accounts, as proposed in the NPRM). Included in this, of course, would be the salaries of employees who spend less than 25% of their time in a particular month on activities "in connection with a Federal election,"[23] and section 300.33(a)(1) should be revised to specifically provide that salaries of employees who spend less than 25% of their time can be allocated or paid for entirely with non-Federal funds. In addition, the costs of voter registration activity undertaken more than 120 days before an election should also be allowed to be paid for with entirely non-Federal funds, or alternatively allocated.

The Commission seeks comments as to whether the proposed regulations should require that state and local party committees document the time spent by their employees to justify the decisions as to the accounts from which their salaries are paid. All three alternatives concocted by the Commission are neither realistic nor practical. The Commission should recognize the realities of the operation and small staff size of many covered committees, and allow state and local party committees to utilize any reasonable method to document the time spent by their employees on activities in connection with a federal election.

Next, as previously discussed, state and local party committees should be able to pay for administrative costs which are not defined as federal election activity entirely with non-Federal funds (or to allocate such expenses, at the discretion of the state or local party).

Regarding the allocation of administrative expenses (to the extent that it is required), the Commission has proposed a fixed formula to be applied in all states, with variations for Presidential election cycles and states where a U.S. Senate candidate appears on the ballot. The RNC supports this across the board approach only to the extent it supplements, rather than supplants, the current state specific allocation formulas.

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[23] Note that 2 U.S.C. § 431(20)(A)(iv) of the BCRA refers to an employee of a state or local party spending more than 25 percent of their compensated time during a month on "activities in connection with a Federal election." This has a very different meaning from the Commission's proposed language at section 300.33(a)(1), using the phrase "Federal election activity." Proposed section 300.33(a)(1) should be corrected to delete the phrase "Federal election activity" and replace it with "activities in connection with a Federal election."

The current formulas were created in recognition of the variety of different percentages of Federal and state candidates on ballots in different states, and are reflective of this federalist diversity. In addition, state and local parties understand and are used to dealing with the current formulas, so to replace them for a misguided sense of "uniformity" would place an unnecessary burden on some parties. Party committees should have the ability to choose between either the proposed fixed formula, or the existing ballot allocation formula, at the beginning of each election cycle.

The RNC supports proposed section 300.33(b)(5), which recognizes that in a period when no Federal candidate is on the ballot, the costs of voter identification, generic campaign activity and GOTV may be paid for entirely with non-federal funds. In addition, for purposes of allocation, the RNC supports the concept that fundraising costs include only those expenses directly associated with a *particular* fundraising event or program. This means that party committees should be able to pay the costs associated with raising funds specifically for non-Federal activity 100% from a non-Federal account. Also, party committees should be given discretion to treat the costs of "under-25% Federal" fundraising staff either as fundraising expenses or as administrative expenses.

### G. Conforming Amendments to 11 C.F.R. 104.10 and 106.1

The proposed amendments to section 106.1, regarding the allocation of expenses between candidates, miss the point that, as explained earlier, the BCRA does not require that *every* activity that mentions a clearly identified federal candidate must be paid for with 100% Federal funds. Specifically, materials and communications that reference both federal and non-federal candidates, and either are exempt party activities, or are not "public communications," or do not otherwise meet the definition of Federal election activity, should remain subject to allocation based on a time space ratio (as under the Commission's current regulations).

## H. Proposed 11 C.F.R. 300.35 / Office Buildings

### 1. Application of State Law

The RNC supports proposed subparagraphs (a) and (b)(1) of section 300.35. As for proposed section 300.35(b)(2), however, it is important to turn to the statutory language of the BCRA. 2 U.S.C. § 453(b) of the BCRA was intended to allow state and local parties to pay for their office facilities entirely with non-Federal funds, and therefore provides that a state or local party committee "may, subject to state law, use exclusively funds that are not subject to the prohibitions, limitations and reporting requirements of the Act..." This plain language of the BCRA indicates that state and local parties are clearly permitted, but are not required, to use non-Federal funds for office facilities. The Commission's language in subsection (b)(2), prohibiting state and local parties from paying for a building using 100% Federal funds if a state law imposes limitations or prohibitions inconsistent with federal law, however, finds no statutory support and appears to have been created out of whole cloth. The RNC opposes this extra-statutory restriction at proposed section 300.35(b)(2).

### 2. Definition of "purchase or construction of an office building"

The BCRA, in section 453(b), makes reference to an "office building" in the context of state party building funds. In what can only be described as an exercise in statutory interpretation gone horribly amuck, the Commission has attempted to discern meaning from this reference to an "office building," as opposed to previous statutory references to an "office facility." Sometimes, however, "a rose is just a rose."

The plain language of the BCRA, notwithstanding the creativity manifested in proposed section 300.35(c), does not give any indication that it is necessary for the Commission to deviate from its previous comprehensive examinations of the scope of building funds.[24] The current building fund regulations have provided guidance to the regulated community and are working well. Absent any indication in the statute or legislative intent – of which there is none – that the current rules were meant to be changed, the Commission should preserve the status quo. Consequently, the RNC strongly opposes the language of proposed section 300.35(c) in its entirety. All of paragraph (c) should be deleted. In addition, the RNC notes that Proposed section 300.35(c) is likely moot because state and local party committees should now be able to use 100% non-Federal funds for administrative expenses not defined as Federal election activity, including office "facilities."

### 3. Transitional Provisions for State Party Building Fund or Facility Account

The RNC opposes proposed section 300.35(e). In contrast to the statutory provision requiring national party committees to expend all monies in their building funds prior to November 6, 2002, the BCRA does not impose such a restriction on state parties. Proposed section 300.35(e) is therefore extra-statutory, and should be eliminated.

## I. Proposed 11 C.F.R. 300.36 / Reporting Federal Election Activity; Recordkeeping

Subparagraph (a)(2) of proposed section 300.36 would provide that the Federal portion of any payment by local or district committee for Federal election activity would constitute an "expenditure" under FECA, even if such activity does not reference any Federal candidate. The effect of this Commission-initiated regulation would be to impose federal "political committee" status on thousands of local and district committees not currently required to register or file reports with the Commission. There is nothing in the statutory language, or legislative history, of the BCRA to require such a regulation.

Regarding the disclosure of Levin fund receipts, because state and local party committees will not be segregating specific Federal funds for Levin activity, it would be unworkable to require them to separately disclose Federal receipts on the monthly reports as required by this section because Federal receipts are fungible and used for a wide

[24] Most recently, *see e.g.*, A.O. 2001-12 and A.O. 2001-01.

variety of purposes. The RNC therefore opposes a requirement that Federal receipts for Levin activity be disclosed.

### J. Proposed 11 C.F.R. 104.17 / Reporting of Allocable Expenses by Party Committees

Proposed new section 104.17(a) is premised on all payments on behalf of both Federal and non-Federal clearly identified candidates being made exclusively with Federal funds. This premise, however, is faulty, and therefore proposed § 104.17 is nonsensical. Specifically, and as has been explained above, communications on behalf of both federal and non-federal candidates that are not "public communications," or are exempt party activities, or are not otherwise defined as federal election activity, should continue to be subject to allocation between federal and non-federal funds.

### K. Proposed 11 C.F.R. 300.37 / Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations

The RNC's comments above regarding proposed 11 C.F.R. § 300.11 for national party fundraising also apply here. In addition, the Commission has requested comments on whether state and local party committees should be able to donate or raise funds for state PAC's, i.e., organizations that are State-registered political action committees supporting only non-Federal candidates. The RNC supports interpreting the term "political committee" to permit such activity by state and local party committees.

## V. Federal Candidates and Officeholders

The BCRA prohibits the RNC, Federal Candidates, and Officeholders from "soliciting" non-federal funds on behalf of state and local party committees. These same individuals, however, are allowed to attend state and local party fundraising events and be the featured guest or speaker. Without a clear definition of "solicitation" in the BCRA, the question remains to what extent may fundraising material acknowledge these individual as attending an event and what restrictions will be placed on the speech of these individuals while at a fundraising event.

The Commission is encouraged to adopt regulatory provisions that only restrict direct one-on-one solicitations by RNC representatives, Federal Officeholders and Candidates, whether made by mail, telephone or in person. The Commission should, however, allow state and local parties to identify these individuals in fundraising materials as attending and/or speaking at a fundraising event without that recognition being defined as a "solicitation" by that individual or individuals so recognized. In turn, any RNC representative, Federal Officeholder or Candidate should not be restricted in what they say at the fundraiser. Even without considering the constitutional implications, any restriction placed on the speech of RNC representatives, Federal Officeholders and Candidates at fundraisers would be virtually impossible to regulate and enforce. The Commission's past experience in determining travel allocations based on the nature of election activities at a specific event/stop should be evidence enough of potential

problems. Rather, the Commission is encouraged to exempt the speeches at state and local fundraisers made by these "restricted" individuals from its definition of "solicitation."

## VI. Conclusion

The Commission's attempt to make sense of the BCRA has made clear that the BCRA, through a cornucopia of vague and ill-defined terms, favors third party special interests over parties by constraining the right of political parties to represent the views of their broad-based coalition of members and participate in politics and elections at all levels, from the courthouse, to the statehouse, to the White House. Provisions of the BCRA will necessarily chill political activity, speech and free association, and as such are offensive to the very core of American democracy. Recognizing that the Commission is forced to work within this unfortunate paradigm, however, the RNC believes that many aspects of the Proposed Rules are a step in the right direction. By keeping the core concepts outlined in our introductory section in mind, the Commission can do the "least damage" possible while promulgating Regulations to carry provide guidance to all Americans wishing to comply with the multitude of provisions and restrictions in the BCRA.

The RNC thanks the Commission for its consideration of our Comments, and we look forward to answering questions and expanding upon these Comments at the upcoming hearing in June.

Respectfully Submitted,

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