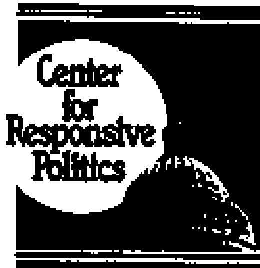

November 14, 2001

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

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

RE: DRAFT STATEMENT OF POLICY REGARDING PARTY COMMITTEE TRANSFERS FOR PAYMENT OF NONFEDERAL FUNDS NOTICE 2001-15:

Dear Ms. Smith:

The Center for Responsive Politics (CRP) submits these comments in response to the Federal Election Commission's Draft Statement of Policy Regarding Party Committee Transfers for Payment of Nonfederal Funds. CRP is a non-partisan, non-profit research group that tracks money in politics and its effect on elections and public policy. CRP's work is aimed at creating a more educated voter, an involved citizenry, and a more responsive government.

This matter first arose in the context of Advisory Opinion Request 2001-16 from the Democratic National Committee, which requested the Commission to waive the requirements of 11 C.F.R. §106.5(g) that transfers of soft money to a federal account to pay for the allocable share of expenses be made not earlier than 10 days before, or 60 days after, the payments for those expenditures are made by the federal account. The DNC cites as support for this request the fundraising difficulties resulting from the tragic events of September 11, 2001. In response, the FEC now proposes a policy statement announcing that it will not pursue violations by party committees of the time limit for any allocable expenses paid between August 27, 2001 and November 1, 2001, if the transfer is made no later than December 31, 2001. Alternatively, the Commission is considering not pursuing transfers made for the nonfederal share of allocable expenses paid between August 27, 2001 and December 31, 2001, if the transfer is made no later than March 1, 2002.

The Center for Responsive Politics urges the Commission to reject the draft policy statement and to enforce the law and regulation as they were enacted. Adopting this non-enforcement policy would further undermine one of the few restrictions left on the political parties' use of soft money and move the Commission even further down the path of eviscerating the limits and prohibitions found in the Federal Election Campaign Act.

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THE FEC SHOULD NOT LIBERALIZE ITS SOFT MONEY RULES THROUGH POLICY STATEMENTS

The FEC's soft money regulations are the subject of much criticism and debate, but up until now the agency has at least confined its carving out of exceptions and loopholes to the formal avenues of rulemakings, advisory opinions and enforcement actions. Now, the FEC proposes using sweeping policy statements to just announce its intention not to enforce the rules as written. The policy and practical impact of this method of proceeding should not be minimized.

While section 553 of the Administrative Procedures Act, 5 U.S.C. §551, *et seq,* allows federal agencies to issue policy statements, that authority is not without its limits, especially with regard to the FEC. In 1979, Congress repealed 2 U.S.C. 437d(a)(9), which expressly gave the Commission "power to formulate general policy." The House Report to the 1979 amendments stated that this action was taken to "insure that the formulation of general policy is done through the regulatory process which is open to public comment." H. Rep. 96-422 at 19 (1979). Thus, even though the FEC decided to seek comments on the draft statement, CRP believes that the draft statement is exactly the type of broad policy statement that Congress intended to foreclose the FEC from making through methods other than the normal regulatory process. Even General Counsel Lawrence H. Norton acknowledged that "[t]he legal authorities...appear to lead to conflicting conclusions" as to the Commission's authority. Memorandum from General Counsel Lawrence H. Norton to The Federal Election Commission, October 26, 2001, p. 10. While General Counsel Norton reconciled the conflict he perceived by recommending that the FEC issue a draft statement, CRP urges the FEC to decline to waive duly enacted regulations through a policy statement. Simply put, the FEC's work goes to the heart of our democratic government. The issues with which the agency deals are too important—and the pressures on the agency to take the path of least resistance in the face of political pressure too strong—to allow it to use mere policy announcements to waive rules that have the force and effect of law.

THERE IS NO SOUND REASON FOR THE FEC TO WAIVE THE TRANSFER RULES

Even if the FEC believes it has the authority to adopt a broad policy statement announcing its intent not to enforce the law, in this instance the damage that would be done by such a statement far outweighs the stated justification for its adoption. While there is no doubt that the terrorist attacks of September 11 were an unprecedented national tragedy, the attempt to use them to justify non-enforcement of long standing soft money rules should be rejected.

First, it must be remembered that nothing requires the party committees to use any soft money to pay for the expenses at issue. Rather, the FEC has *allowed* the party committees to raise and spend soft money for the supposedly nonfederal portion of expenses undertaken by the party committees, *if they so desire.* In an effort to track these nonfederal funds and give some credence to the fiction that they are not being used to influence federal elections, the FEC mandated that all expenses be paid through the federal account. However, since any payment of soft money into the federal account would be a violation of the law absent some exception, the FEC created a 70-day window (10 days before and 60 days after the expenditure) during which the transfer of soft money to the hard money account would be permitted. Under the regulations, transfers of soft money outside this window are presumed to be a violation of the law. 11 C.F.R. §106.5 (g)(2)(iii). Therefore, what the draft policy would do is enlarge an already expansive window for the transfer of soft money into federal accounts that was only put into place for the administrative convenience of the parties. The cost of this non-enforcement policy would be paid both in the immediate and long term.

In the short run, the broadest version of the FEC proposal would have the agency not enforcing the law in situations where the party committees take up to 6 months—three times as long as they have under current regulations—to make the transfer. This would make tracking the transfers and related expenditures all the more difficult, leading to a wide open window through which the parties could shovel soft money into their hard money coffers. Moreover, this broad waiver of the rules would apply to party committees regardless of whether they have, in fact, had difficulty raising soft money, or whether that difficulty was due to the events of September 11.

Equally as important is the long range impact of this decision. While there is no doubt that the events of September 11 caused great pain, suffering and hardship throughout the country, the fundraising difficulties the DNC claims to have faced in no way rise to the level of the hardships faced by those directly impacted by the tragedy. The fundraising troubles of the DNC do not equate to the examples of waivers of rules by other agencies cited by General Counsel Norton in his memorandum of October 26, 2001. This is not the same as banks being urged to be lenient with customers who have trouble meeting bills because of their direct involvement in the tragedy, businesses being unable to make filings because their files were destroyed in the devastation, or financial markets impacted because of the loss of lives and businesses. While the DNC may have cancelled some fundraising events and may have found givers more difficult to approach or reluctant to give, the DNC's behavior, as appropriate as it may have been, is merely a part of fundraising. There are numerous reasons why fundraising may become difficult, just as there are reasons why it sometimes becomes easier. (Of course, no one expects a shortening of the transfer window when the parties are flush with soft money.) There never has been, and never should be, an expectation that the window to transfer funds will be wide enough to ensure that the parties can make the greatest use of the soft money loophole. However, that is the unspoken assumption of the proposed non-enforcement policy.

Finally, while the draft pays lip service to this not being "viewed as precedent," there should be little doubt that that is precisely what will happen. The long history of these rules and regulations has been that the ratchet works in one direction. Is there any doubt that if this policy is approved, having been based on a request by the DNC, another party committee facing fundraising troubles will cite it as precedent and demand equal treatment at some future date? The seeds of that future request are being planted with this across-the-board policy that will apply to all party committees, regardless of whether they believe they have faced the same difficulties as the DNC. While we all hope that there will never be another tragedy of the magnitude of September 11, what about smaller, more confined hardships, be they caused by hurricanes, tornadoes or economies gone bad? What will be the standards when "equal" treatment is demanded? What evidence of soft money financial hardship and causation will be required? How will the agency avoid a "we know it when we see it" standard, which provides guidance to no one?

The tragic events of September 11, 2001 impacted all of us in ways great and small. These hardships require great sensitivity and a high level of compassion and understanding about how lives have been changed. However, the ability to raise soft money to fund political party activity should not be elevated to the level of an entitlement that justifies an ad hoc adoption of a policy statement to ensure the greatest opportunity to fill the parties' coffers. If there is an argument for fundraising difficulties being considered justification for a waiver of the soft money rules, the Commission should consider it in the normal rulemaking process, not through the ad hoc adoption of policy statements.

Respectfully submitted,

Steven C. Weiss
Communications Director