Donald Simon <DSimon@SONOSKY.COM> on 11/09/2001 09:17:37 AM

To: transfers@FEC
cc:

Subject: Notice 2001-15

On behalf of Common Cause and Democracy 21, I am submitting the attached comments regarding Notice 2001-15, regarding party committee transfers of nonfederal funds.

I am also submitting a paper copy of these comments.

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November 9, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Draft Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds For Payment of Allocable Expenses (Notice 2001-15)

Dear Ms. Smith:

I am writing on behalf of Common Cause and Democracy 21 in response to the request for comment on the Commission's draft statement of policy regarding party committee transfers of nonfederal funds for payment of allocable expenses. The request for comment was posted by the Commission on its web site on November 2, 2001.

Common Cause is a nonpartisan, nonprofit organization that works for open, accountable government and the right of all citizens to be involved in shaping our nation's public policies. Common Cause has more than 200,000 members nationwide, with active members in every state.

Democracy 21 is a nonpartisan, nonprofit public policy organization that supports campaign finance laws to prevent the undue influence of money in politics, to promote competitive elections and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched, written and publicly commented about the relationship between money, power and influence in the American political process.

The proposed Statement of Policy would announce that, for a specified period of time, the Commission does not intend to enforce the rule in its regulations that provides party committees with a 60-day window of time in which to transfer nonfederal funds to a federal account in order to pay for the nonfederal share of allocable expenses.

Common Cause, joined by the American Conservative Union, wrote to the Commission on October 31, 2001 and requested that the Commission provide the public with this opportunity to comment before taking action on the draft policy statement. We believe that the administration of the law will always be enhanced by providing the opportunity for public comment prior to adopting regulatory changes, such as the one proposed.

Common Cause and Democracy 21 believe the draft policy statement is inappropriate and we urge the Commission to reject it.

The Commission's regulations permit party committees to pay the costs of allocable expenses out of a federal (or hard money) account, and to allow a nonfederal (or soft money) account to reimburse the federal account for the nonfederal share of the expense. 11 C.F.R. §106.5. But the regulations establish a fixed "window" – from ten days prior to 60 days after the payment of the allocable expense -- in which all such transfers must take place. 11 C.F.R. §106.5(g)(2)(ii)(B). There are no applicable exceptions. The regulations state plainly that any transfer from a nonfederal to a federal account which does not occur within this time window "shall be presumed to be a loan or contribution from the non-federal account to a federal account, *in violation of the Act.*" 11 C.F.R. 106.5(g)(2)(iii) (emphasis added).

The Commission is not proposing as a formal matter to modify or repeal this regulation. Rather, leaving the regulation in effect, the Commission proposes to issue a statement that it will exercise "its discretion by not pursuing *prima facie* violations of the 60 day time limit" for transfers made either by December 31, 2001 or March 1, 2002, depending on which version of its proposal it chooses.

The Commission's announcement of its prosecutorial intentions will, as a practical matter, amount to a functional repeal the 60-day transfer window for a period of time, even though the language of the regulation is left in place.

Transfers made outside the 60-day window will still be "in violation of the Act," under the language of the regulation. Yet, the Commission is announcing that it will not enforce the Act in the face of such clearly stated violations.

i.

As a procedural matter, we believe the Commission should not proceed in this fashion. A duly promulgated Commission regulation should not be functionally suspended by the issuance of a "statement of policy." Even though a truncated opportunity for public comment has been made available, the Commission should proceed only through its normal rulemaking procedures in order to promulgate what is, as a practical matter, a suspension of a formal regulation. For the Commission to use informal "statements of policy" as a mechanism to suspend the enforcement of formal rules is a dangerous and perhaps illegal precedent.

This conclusion is supported by the 1979 amendments to the Act. The FECA originally gave the Commission the power to "formulate general policy with respect to administration of the Act." 2 U.S.C. 437d(a)(9). That provision was repealed in 1979, and the House report on the repeal stated that "this section, which allowed the Commission to formulate general policy with respect to the administration of the Act and Title 26, was deleted *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)(emphasis added).

Thus, nothing in the FECA authorizes the Commission to promulgate general statements of policy, such as the one it now proposes, and the only provision which ever did so was repealed by the Congress specifically in order to ensure the Commission makes such policy only through the formal rulemaking process. Whatever general authority an administrative agency has under the APA to issue general policy statements must be read in light of the specific repeal of such authority for the FEC. This legislative history indicates that the authority of the FEC to issue this statement of policy is in serious doubt.

ii.

The Commission's rationale for the temporary repeal of the 60-day window rule is that the attack on September 11, 2001 has made it more difficult for one political party, the Democratic National Committee, to raise soft money, and therefore it is an unreasonable burden for all political parties to comply with the requirement of the 60-day window.

This reasoning is incorrect on several grounds.

First, the 60-day rule at issue here is itself an overly permissive regulation of party soft money finances. The Commission could require the parties to make immediate reimbursements between accounts in order to best enhance the tracking of soft money through federal accounts. Allowing a 60-day period for the reimbursements, instead of immediate transfers, is already a

generous provision to accommodate the parties. It is simply unreasonable to make that period even more generous.

Second, if the Commission is not going to require immediate transfers between accounts in the administration of the allocation system, a "window" requirement of some defined period at least helps to ensure proper tracking and accounting for the flow of soft money through federal accounts. *See* Explanation and Justification, 55 Fed.Reg. 26058, 26066 (June 26, 1990). The Commission has through its rulemaking process decided that a 60-day window best serves this purpose. To lengthen the period for the transfer undermines this tracking and accounting protection, which is intended to ensure that soft money is not improperly allowed to flow into federal activities.

Third, the soft money system as a whole is already a travesty of the law that is used as a routine matter by both of the major political parties to spend nonfederal money for the purpose of influencing federal elections. As Common Cause and Democracy 21 have said previously, the Commission should ban soft money fundraising by the national political parties entirely, in order to close a huge loophole that the Commission has opened in the federal election law, and then stood by idly as the parties abused the loophole and opened it wider.[1] The Commission should not collaborate once again in expanding the soft money loophole.

Fourth, it is not the job of the Commission to protect the political parties from the consequences of adverse fundraising results. There is no doubt that the events of September 11 interrupted political fundraising, just as it affected many other elements of American life. But the Commission should not tailor its rules – or relax their application – in order to accommodate the temporary interruption of fundraising by the parties.

Doing so would be a terrible precedent to set. Many other unforeseeable dynamics could also adversely affect a party's fundraising, from natural disasters to poor performance by party leaders. The Commission should not establish the principle that it will grant relief from its regulations whenever a party can make the claim that unexpected events have handicapped its

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[1] The Commission published a Notice of Proposed Rulemaking on July 13, 1998, seeking comments regarding revised rules on soft money. 63 Fed.Reg. 37722-01 (July 13, 1998). Common Cause responded with comments filed on October 2, 1998, urging that the Commission revise its regulations in order to ban soft money. The General Counsel of the FEC, on September 21, 2000, strongly recommended that the Commission act to ban soft money at the national party level. Agenda Document No. 00-95, "Soft Money Rulemaking; Analysis, Recommendations and Draft Final Rules." This rulemaking has been pending for over three years – and the OGC recommendation for over 13 months – without action by the Commission.

fundraising opportunities. The fact that it is hard to raise money does not justify an exemption from the rules that govern the raising of money.

Further, a DNC spokesperson said last week that the party has rescheduled its fundraising events for December and has seen a "pretty good response" from donors.[2] The spokesperson noted that although the DNC has had to be "very careful" about spending since September 11, there have not even been any layoffs. *Id.* The impact on the party does not appear to rise to the level of an emergency that would justify so radical an action as suspending the enforcement of a duly promulgated Commission regulation.

It is inappropriate for the Commission to accede to the request of one political party that the tragic events of September 11 be invoked to relax further the already overly lax regulation of soft money. At a time when it is more important than ever to foster public confidence in government, the corrupt soft money system should not be expanded, even if only temporarily and indirectly. It is a dishonor to the tragedy of September 11 for the Commission to seize upon this event to widen the loophole through which a flood of unlimited and corrupting funds flows into the American political process.

For the above reasons, Common Cause and Democracy 21 urge the Commission to reject the Draft Statement of Policy regarding party committee transfers of nonfederal funds.

Respectfully submitted,

Donald J. Simon

cc: Scott Harshbarger
Fred Wertheimer

[2] BNA, "FEC Defers Decision, Asks for Comment on Waiver of Rule for Use of 'Soft Money,'" (Nov. 2, 2001).