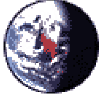

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07/09/2007 12:01 PM

To <fea.nonfederal@fec.gov>

cc <rsmith@fec.gov>, <rkatwan@fec.gov>

bcc

Subject Comments on NPRM 2007-14

Attached please find comments of the Campaign Legal Center and Democracy 21 for filing in NPRM 2007-14.

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Comments on NPRM 2007-14 (FEA).pdf

July 9, 2007

By Electronic Mail (fea.nonfederal@fec.gov)

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2007–14: Federal Election Activity and Non-Federal Elections

Dear Mr. Katwan:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Notice of Proposed Rulemaking (NPRM) on "Federal Election Activity and Non-Federal Elections." *See* NPRM 2007-14, 72 Fed. Reg. 31473 (June 7, 2007). The proposed rule would make permanent, with several revisions, an interim final rule that excluded from the definition of "Federal election activity" (FEA) certain activities the Commission deemed to impact only non-Federal elections. *See* Notice 2006-7, Definition of Federal Election Activity, 71 Fed. Reg. 14357 (Mar. 22, 2006). The interim final rule, promulgated by the Commission in March 2006, will cease to be in effect September 1, 2007. *Id*. at 14358.

For the reasons set forth below, we urge the Commission to allow the interim final rule to expire and to not adopt the rule proposed in NPRM 2007-14, permanently amending the definition of the phrase "in connection with an election in which a candidate for federal office appears on the ballot" at 11 C.F.R. § 100.24(a).

I. BCRA's Legislative History, Purpose and Structure Make Clear That the "Federal Election Activity" Restrictions are Critical to Preventing Circumvention of the Soft Money Ban and Should Not Have Been Interpreted Through the Interim Final Rule to Open a New Loophole.

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C. § 441i(b)(1). The Act contains a limited exception for certain "Federal election activity" that a state or local party committee may

finance with an allocated mixture of hard money and so-called Levin funds. 2 U.S.C. § 441i(b)(2).

The Act defines "Federal election activity" (FEA) to include, *inter alia*, "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. § 431(20)(A)(ii). These activities are often referred to as "Type II FEA," whereas voter registration activity within 120 days of a Federal election is referred to as "Type I FEA." The rule at issue here concerns only two categories of Type II FEA – voter identification and get-out-the-vote activity.

In crafting BCRA's definition of "Federal election activity," Congress took pains to be detailed and comprehensive. Not only is the statutory definition unusually precise, but Congress went a step further and specified what activity was "excluded" from the definition.[1] In short, Congress did not leave any room for this important term to be further restricted in its scope by administrative interpretation. S*ee Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (statute's "mention of one thing implies the exclusion of another thing") (internal quotation marks and citations omitted).

Congress's overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the Federal campaign finance laws. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," while Congress did "not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of "Federal election activity" to cover only those activities that "in the judgment of Congress . . . clearly affect Federal elections" and left unregulated "activities that affect purely non-Federal elections." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The legislative history, unmistakable purpose and statutory structure of BCRA make clear that the definition of "Federal election activity" is critical to preventing circumvention of the soft money ban, and should not be further narrowed by the Commission's administrative interpretations.

[1] The activities Congress excluded from the definition of "Federal election activity" are: (1) public communications that refer solely to nonfederal candidates so long as the communication does not constitute voter registration, voter identification, GOTV, or generic campaign activity; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. 2 U.S.C. § 431(20)(B).

II. The Supreme Court in *McConnell* Upheld BCRA's Definition of "Federal Election Activity."

The BCRA prohibition on state and local party committee use of soft money to fund Federal election activity was upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court said the prohibition was a permissible means of preventing "wholesale evasion" of the national party soft money ban "by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections." *Id.* at 161. The Court noted:

> [I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. *Rather, state committees function as an alternative avenue for precisely the same corrupting forces.*

Id. at 164 (emphasis added). The Court continued:

> Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was "neither novel nor implausible" for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . . .

Id. at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)). The *McConnell* Court concluded that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *McConnell*, 540 U.S. at 165–66.

The Court went on to explicitly discuss BCRA's definition of "Federal election activity," explaining that BCRA's ban on state party use of soft money for "Federal election activity" "is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties *that can be used to benefit federal candidates directly*." *Id*. at 167 (emphasis added). The Court continued:

> Common sense dictates, and it was "undisputed" below, that a party's *efforts to register voters sympathetic to that party* directly assist the party's candidates for federal office. It is equally clear that federal candidates reap substantial rewards from *any efforts that increase the number of like minded registered voters who actually go to the polls*.

Id. at 167–68 (internal citations omitted) (emphasis added).

The Court concluded: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *Id*. at 168. The Court found BCRA's prohibition on state party soft money expenditures for "Federal election activity" to be "a reasonable response to that risk." *Id*.

In short, the Supreme Court in *McConnell* recognized that soft money contributions to state political party committees pose a serious threat of real and apparent political corruption where that money is spent *on activities that benefit Federal candidates*, and that BCRA's prohibition on state political party use of soft money to fund "Federal election activity," as defined in BCRA, is a "closely-drawn means of countering both corruption and the appearance of corruption." *Id.* at 167.

III. Definition of "In Connection With an Election in Which a Candidate for Federal Office Appears on the Ballot."

As noted above, Type II FEA includes "voter identification, get-out-the-vote activity, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. § 431(20)(A)(ii) (emphasis added).

Prior to the Commission's adoption of the interim final rule, the phrase "in connection with an election in which a candidate for federal office appears on the ballot" was defined by Commission regulations to mean:

> (i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.
>
> (ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

11 C.F.R. § 100.24(a)(1) (2005).

In May 2005, the Commission published Notice of Proposed Rulemaking (NPRM) 2005-13, 70 Fed. Reg. 23068 (May 4, 2005), seeking comment on proposed changes to its rules defining various components of the term "Federal election activity" under 11 C.F.R. § 100.24. In NPRM 2005–13, the Commission specifically sought comment on several proposed changes to its rule defining the phrase "in connection with an election in which a candidate for Federal office appears on the ballot." 70 Fed. Reg. at 23071. Among the Commission's various proposals was one to carve out holes in the FEA time periods described above in the event a municipal election is held within the FEA time period, but on a day different than the Federal election.

The Campaign Legal Center and Democracy 21, along with the Center for Responsive Politics, filed comments on NPRM 2005–13 opposing the creation of any such exception to existing "Federal election activity" time periods established by 11 C.F.R. §§ 100.24(a)(1)(i) and (ii). *See* Comments of Campaign Legal Center, Democracy 21 and the Center for Responsive Politics on Notice 2005–13 (June 3, 2005) at 17–18.

Nevertheless, although no municipal election exception was included in the draft final rule that was considered and approved by the Commission at its Feb. 9, 2006 meeting,[2] the Commission did adopt at that meeting, as an interim final rule, an exception that is even broader in scope than the one proposed in NPRM 2005–13 – applying not only to *municipal* elections, as proposed in NPRM 2005–13, but also to *state* elections.[3]

And now the Commission proposes to make permanent, with minor modifications, the interim rule exception, which would create potentially large periods of time in which state and local party committees would be authorized to operate free from BCRA rules on "Federal election activity." The proposed final rule provides:

> [the phrase] in connection with an election in which a candidate for Federal office appears on the ballot does not include any voter identification or get-out-the-vote activity that is solely in connection with a non-Federal election held on a date separate from any Federal election, and that involves a communication that refers exclusively to:
>
> (A) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;
>
> (B) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or
>
> (C) The date, polling hours or polling locations of the non-Federal election.

72 Fed. Reg. at 31477 (proposed 11 C.F.R. § 100.24(a)(1)(iii)).

IV. Comments on the Proposed Rule.

"This proposed rule is based on the premise that this voter identification and GOTV activity for non-Federal elections held on a different date from any Federal election will have no effect on previous or subsequent Federal elections." 72 Fed. Reg. at 31474. This premise, however, is flawed, or at the very least, unproven. Certainly, in the case of a non-federal election held close in time to a federal election, the GOTV spending by a state party is *likely* to

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[2] *See* Federal Election Commission Agenda Document No. 06–05, "Draft Final Rules and Explanation and Justification on the Definition of Federal Election Activity"; *available at* http://www.fec.gov/agenda/2006/mtgdoc06-05.pdf.

[3] *See* 71 Fed. Reg. at 14360.

have an effect on the follow-up federal election. Thus, for instance, a phone bank by a state party promoting its candidates and urging voters to go to the polls for a non-federal election could easily serve to promote the party insofar as a closely subsequent federal election is concerned as well.

Obviously, the closer in time between the non-federal and federal elections, the more impact the purportedly non-federal spending is likely to have on the federal election. (For this reason, it goes virtually without saying that the exemption should *not* cover activity in connection with a non-Federal election held *on the same date* as a Federal election. *See* 72 Fed. Reg. at 31475. This would indeed make the statute a nullity – by collapsing federal elections into non-federal elections, precisely the opposite of what Congress intended. There are *no conditions* under which an activity in connection with a non-Federal election held on the same date as a Federal election should be exempted from the Type II FEA time periods.)

The Commission's proposed rule makes no distinction between a non-federal election held six months before a federal election, and a non-federal election held one week before a federal election. Yet the relationship between the non-federal and federal elections is likely to be very different in the two cases. The opportunities for abuse are much greater in the latter case, and the Commission should therefore limit any exemption to apply only to non-federal elections that take place only in a period well before any federal election, such as more than 120 days. (We note that this 120 day period is used with reference to Type I FEA, *i.e.,* voter registration, as demarcating a time frame in which such activity is not likely to influence federal elections. *See* 2 U.S.C. § 431(20)(A)(i)).

It is imperative that any exemption *not* include generic activity or generic references. Allowing generic activity to be exempt would give state parties a *carte blanche* to use soft money to generically promote the party's candidates, so long as it does so prior to a non-federal election. Again, the closer in time that a non-federal election precedes a federal election, the greater will be the inevitable collateral effect that the generic activity will have on the federal election. As a functional matter, any exemption that includes generic activity would have the effect of creating large gaps in the BCRA rule on "federal election activity," and would re-introduce the opportunities for soft money spending by state parties that are precisely what the statute seeks to exclude.

Nor do we believe there is any effective way, by rule, to segregate the impact of generic activities to apply only to non-federal elections. The NPRM asks: "How could the Commission draft . . . a rule to ensure that only generic campaign activity affecting (and made solely in connection with) non-Federal elections is exempted?" 72 Fed. Reg. at 31475. We submit that it cannot be done. Generic activity, by its nature, promotes the party and its candidates generically – as a whole, and without distinguishing between non-federal and federal candidates. Any such spending purportedly aimed at a non-federal election – particularly if done in proximity to a federal election – will inherently have the effect of helping the party's federal candidates. And simply referring to the date of the non-federal election – *e.g,* "Vote for Democrats on October 28th" or "Help the great Democratic team on October 28th" – does little to alleviate this problem.

While including generic references in the exemption exacerbates the problem, requiring a reference to the non-federal candidate in order to invoke the exemption somewhat mitigates the problem. 72 Fed. Reg. at 31475. In other words, rather than including in the exemption public communications that have only generic party references, and that do not even mention a state or local candidate, the Commission *should* require that an exempt communication reference one or more clearly identified non-Federal candidates (and obviously, not reference any federal candidates).

The Commission notes that, in the event that a party committee acquires a voter identification list for use in a non-Federal election, but then also uses the list for activity in connection with a subsequent Federal election, the acquisition of the list would not meet the requirements of the proposed exemption and, consequently, would be treated as FEA. 72 Fed. Reg. at 31476. The Commission asks whether the party organization should nevertheless be permitted to allocate the cost of the list in proportion to its use in connection with non-Federal and Federal elections. 72 Fed. Reg. at 31476. The Commission should take note of the fact that allocation is precisely what the statute intended to avoid for FEA (other than the specified Levin allocation). The proposal to allocate spending between federal and non-federal funds is simply a means of returning to the pre-BCRA regime.

The Commission goes on to ask whether it is "feasible for State, district and local parties to show that the acquisition of a voter list was solely in connection with a non-Federal election by tracking when a certain voter list is 'used' in connection with certain elections[.]" *Id.* In light of an obvious administrative difficulty in so doing, the Commission asks whether it should simply "eliminate voter list acquisition and maintenance, *i.e.* voter identification, from the proposed exemption[.]" *Id.* The Commission's comments and questions illustrate the inherent lack of administrability of the proposed exemption, particularly with respect to "voter identification" activities. For this reason, we support the elimination of "voter identification" activities from any exemption the Commission promulgates in this rulemaking.

Finally, although we oppose the promulgation of the proposed exemption, we agree that any GOTV or voter identification activity which is exempted by the Commission from the definition of FEA would nonetheless still be subject to allocation rules under section 106, and could not be funded entirely with non-federal funds. It is important for the Commission to make that clear.

V. Conclusion

As the Supreme Court noted in *McConnell* with regard to the state party soft money ban: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *McConnell*, 540 U.S. at 168. The Court found BCRA's prohibition on state party soft money expenditures for "Federal election activity" to be "a reasonable response to that risk." *Id.*

This proposed final rule potentially carves several months out of every federal election year, in which state and local party committees will be permitted by the Commission to freely

spend soft money in a manner that will likely influence federal elections as well as non-federal elections. For this reason, the interim final rule constituted an impermissible construction of the statute. Having already had a federal district court reject as contrary to law multiple loopholes drafted by the Commission in its original post-BCRA regulations, *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) *aff'd* 414 F.3d 76 (D.C. Cir. 2005), the Commission should not have used the interim final rule to create an entirely new loophole. And the Commission should not compound the error by adopting the interim final rule as a permanent final rule.

We appreciate the opportunity to submit these comments.

Respectfully,

/s/ Fred Wertheimer

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