FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Rosemary Smith
Associate General Counsel

FROM: Office of the Commission Secretary

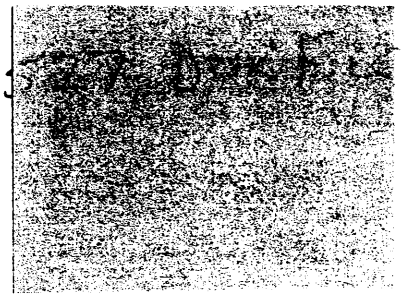
DATE: March 2, 2004

SUBJECT: *Ex Parte* Communication regarding rulemaking on political committees

Attached is an *ex parte* communication sent to the Commissioners from Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics.

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure

Attachment



February 25, 2004

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Re: Rulemaking on political committees

Dear Commissioners:

Democracy 21, the Campaign Legal Center and the Center for Responsive Politics jointly request the Federal Election Commission to adopt new rules on the allocation formula for non-connected political committees. It is essential for the Commission to take this action as part of the expedited rulemaking process the Commission plans to initiate shortly with the publication of a Notice of Proposed Rulemaking regarding political committees and section 527 organizations.

Recent events have only served to confirm that the Commission's existing allocation rules in Part 106 of its regulations are fundamentally flawed, and do not properly implement the meaning and language of the Federal Election Campaign Act. These events also demonstrate why it is essential for the FEC to act in this area on an expedited basis in order to prevent the current regulations from being used to improperly channel soft money into the 2004 federal elections.

In Advisory Opinion 2003-37, the Commission recently concluded that a political committee with both a federal and a non-federal account may allocate expenditures for partisan voter mobilization activities pursuant to 11 C.F.R. § 106.6. That regulation allows a committee to calculate its allocation ratio for the use of hard and soft money based on its "ratio of federal expenditures to total federal and non-federal disbursements" over a two year election cycle. *Id.* at § 106.6(c)(1).

In order to see the indefensible and absurd result that can and will arise under this existing allocation formula, the Commission only needs to look at one such political committee, America Coming Together (ACT), which has announced that it plans to raise and spend $95 million on partisan generic voter mobilization activities in 17 presidential "battleground" states in the 2004 election.

ACT recently filed its 2003 year-end report with the Commission and, making use of the existing allocation formula, reported that 98 percent of its spending had been for non-federal activities and 2 percent for federal activities. *See* Schedule H-1, ACT report (filed January 30, 2004).[1]

Thus, ACT is currently claiming a right to pay for its partisan generic voter mobilization activity with 98 percent soft money funding, despite the fact that ACT and its donors have made publicly clear that its overriding purpose is to spend money to mobilize voters to defeat President Bush in the 2004 elections, as we have previously demonstrated.[2]

ACT's position illustrates the fundamental flaw in the Commission's existing Part 106 regulations – a flaw that currently licenses a blatant charade. Simply put, the existing regulations completely fail to protect against the improper flow of soft money into federal elections through partisan voter mobilization activities of section 527 groups. Instead, the regulations authorize easy manipulation of the allocation ratio in order to set the soft money percentage at a fictional and absurdly high level.

The Supreme Court, in *McConnell v. FEC,* 540 U.S. ___, 157 L.Ed. 2d 491 (2003), strongly admonished the Commission for adopting political party allocation rules that created the soft money problem in the first place. The Court found that the FECA "was subverted by the creation of the FEC's allocation regime," *id* at 548, which allowed the political parties "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* The Court flatly stated that the Commission's allocation rules "invited widespread circumvention" of the law, *id.* at 550, and described the rules as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *Id.* at 548, n. 44.[3]

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1 A copy of the ACT schedule H-1 is attached.

2 *See* Comments of Democracy 21 *et al* on AOR 2004-05 (filed February 12, 2004) at 12-17.

3 The district court in *McConnell* similarly criticized the Commission's rules, calling them a "failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective." *McConnell v. FEC,* 251 F.Supp. 2d 176, 652 (D.C. C. 2003) (Kollar-Kotelly, J.).

The existing allocation rules for non-connected committees are, in fact, worse than the rules criticized by the Supreme Court for the political parties. The pre-BCRA allocation for national political party committees, for example, was subject to a minimum federal percentage of 65 percent hard money in presidential election years, and 60 percent hard money in other years. 11 C.F.R. § 106.5(b)(2) (2002).

By contrast, the current allocation formula for non-connected committees contains no minimum federal requirement, and thus enables groups that are spending literally all of their money on multi-state partisan generic voter mobilization efforts for the purpose of influencing a presidential election to pay for such efforts with virtually all soft money, as ACT is apparently planning to do.

The Commission must address this problem now in order to ensure that the 2004 federal elections are not influenced by improper soft money. The existing Part 106 allocation rules sanction what is plainly a fiction, and they allow the law, in the words of the Supreme Court, to be "subverted," 157 L.Ed. 2d at 548 n.44, "eroded," *id.* at 563, and "circumvent[ed]." *Id.* at 550.

The Commission also must address another allocation issue in its regulations, the "time/space" allocation formula in 11 C.F.R. § 106.1(a). This regulation currently allows a non-connected committee to use soft money to pay for a portion of a public communication that promotes or opposes one or more federal candidates and one or more non-federal candidates. In AO 2003-37, the Commission said that this allocation formula applies to ads run by section 527 groups that have federal accounts, and that mention federal and non-federal candidates in their public communications.

As with the formula for generic partisan voter mobilization activity, this allocation formula is also susceptible to manipulation if not properly interpreted. For example, a group that plainly has an overriding purpose to influence a presidential election could run a broadcast ad that refers to a presidential candidate and that focuses on the presidential candidate's campaign themes, but also then adds a subsidiary reference to four state or local candidates.

Under the current rules, the group might try to claim that the "benefit reasonably expected to be derived," 11 C.F.R. § 106.1(a), by the presidential candidate, as one out of five candidates mentioned, is only 20 percent, and thus pay for the ad with 80 percent soft money. This makes no sense and would open the door to circumvention of the existing campaign finance laws. This regulation and its allocation formula must be revised to ensure that such circumvention does not occur.

It is also critical that the rulemaking address the issue of section 527 groups that do not register as a federal political committee but yet have as their major purpose influencing federal elections by sponsoring public communications that promote, support, attack or oppose federal candidates.

This question was intentionally not reached by the Commission in AO 2003-37, but it remains an issue of central importance. One such group, for example, the Media Fund, has

claimed the right to operate entirely outside the coverage of the federal campaign finance laws, despite the fact that its stated purpose, and only apparent purpose, is to spend soft money prior to the Democratic convention on ads that oppose President Bush and/or promote the prospective Democratic nominee for president.

In a complaint that our organizations filed with the Commission in January 2004, we stated that the Media Fund should be treated by the Commission as a section 527 group that is required to register as a federal political committee. The Commission must ensure that its rules are appropriately drawn to address overt challenges to the federal campaign finance laws, like the Media Fund.

It is essential for the Commission to address these issues in its expedited rulemaking, in order to respond to fundamental problems already manifest in the 2004 election. In all of these instances, the Commission must adopt effective new rules in a timely manner in order to prohibit circumvention of the campaign finance laws *in this election.*

We look forward to actively participating in the rulemaking.

Sincerely,

Fred Wertheimer
Democracy 21

Trevor Potter
Glen Shor
Campaign Legal Center

Lawrence Noble
Paul Sanford
Center for Responsive Politics

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Counsel to Democracy 21

Copy to: Lawrence Norton, Esq.

SCHEDULE H1 (FEC Form 3X)

METHOD OF ALLOCATION FOR:

- SHARED FEDERAL AND NON-FEDERAL ADMINISTRATIVE, GENERIC VOTER DRIVE AND EXEMPT ACTIVITY COSTS
- SHARED FEDERAL AND LEVIN FUNDS FEDERAL ELECTION ACTIVITY EXPENSES

NAME OF COMMITTEE (In Full)
America Coming Together

USE ONLY ONE SECTION

State and Local Party Committees

Fixed Percentage (select one)

Presidential-Only Election Year (28% Federal)

Presidential and Senate Election Year (36% Federal)

Senate-Only Election Year (21% Federal)

_____ Non-Presidential and Non-Senate Election Year (15% Federal)

Seperate Segregated Funds and Non-Connected Committees

Fixed Percentage (select one)

Estimated Direct Candidates Support – Federal ..... 2.00 %

Estimated Direct Candidates Support – Non-Federal ..... 98.00 %

ADJUSTMENTS TO FUNDS EXPENDED:

Actual Direct Candidate Support – Federal ..... 0.00 %

Actual Direct Candidate Support – Non-Federal 0.00

SCHEDULE H2 (FEC Form 3X)
ALLOCATION RATIOS

NAME OF COMMITTEE (In Full)
America Coming Together

RATIOS FOR ALLOCABLE FUNDRAISING EVENTS AND DIRECT CANDIDATE SUPPORT ACTIVITIES APPEARING ON THIS REPORT.

Methods of allocation :

I. **FUNDRAISING** activities are allocated using the 'funds received method' where the federal proportion of expenses must equal the federal proportion of monies raised.

II. Shared **DIRECT CANDIDATE SUPPORT** activities are allocated according to benefit expected to be derived, where the federal proportion of disbursements is based on benefit derived by federal candidates from the activity.

ACTIVITY OR EVENT IDENTIFIER	FEDERAL %	NON-FEDERAL %
FRP		
ACTIVITY IS: [X] Fundraising [ ] Direct Candidate Support	2.00 %	98.00 %
CHECK IF THE RATIO IS: [X] New [ ] Revised [ ] Same as Previously Reported		Transaction ID: R1