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January 10, 2005

Via EMAIL

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

Re: Notice of Proposed Rulemaking: Political Party Committees Donating
Funds to Certain Tax-Exempt Organizations and Political Organizations

Dear Ms. Dinh:

This comment is submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 69 Fed. Reg. 71388 (December 9, 2004), proposing amendments to the Commission's regulations relating to the ability of party committees to contribute to certain non-profit organizations. We are submitting this as practitioners who represent several national, state and local party committees. These comments are not submitted on behalf of, and do not necessarily represent the views of, any particular client of our firm.

The above mentioned rulemaking was initiated in response to the Court's ruling in McConnell v. Federal Election Commission, 540 U.S. 93 (2003). Specifically, the Court narrowed 2 U.S.C. § 441i(d) so that national and state party committee may contribute federal funds to non-profit organizations. Our firm supports the Commission's proposal as an accurate modification of the regulations in accordance with the Court's construction.

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This comment is being submitted to point out the need for an additional modification by the Commission of its regulations promulgated in response to the Bipartisan Campaign Act of 2002 ("BCRA"). Specifically, the Commission's regulations explicitly state, in three instances, that any funds raised through joint fundraising, in accordance with 11 C.F.R. § 102.17 may not be used for federal election activities:

11 C.F.R. § 102.17 – (a) *General*. Nothing in this section shall supersede 11 C.F.R. part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities.

11 C.F.R. § 300.31(e)(1) - ...Nothing in this section shall be construed to prohibit a State, district, or local committee of a political party from jointly raising, under 11 CFR 102.17, Federal funds not to be used for Federal election activity with a national committee of a political party....

11 C.F.R. § 300.31(f) - ...Nothing in this section shall be construed to prohibit two or more State, district, or local committees of a political party from jointly raising, under 11 CFR 102.17, Federal funds not to be used for Federal election activity.

Despite this regulatory language, the Commission's Explanation and Justification to these regulations noted that:

A national party committee suggested that the Commission clarify that these joint fundraising prohibitions extend only to Levin funds. In response, the Commission emphasizes that the section heading and the language in the introduction to paragraph (e) [of section 300.31] explicitly limit the scope of these provisions to "Levin Funds." 67 FR 49095.

Although the E & J language above appears to suggest otherwise, the plain language of the three regulatory sections referred to above, read literally, appear to contain a broad prohibition on the use of any federal funds raised through joint fundraising for any federal election activity. Thus, an individual who intended to rely upon the plain, unambiguous language of the regulation would be led to believe that any federal funds raised through joint fundraising could not be used for federal election activity. There is no reason for a person who is seeking guidance on this issue to have to locate a disclaimer to that regulation tucked into an obscure portion of the E & J.

These regulations, by their plain language appear to prohibit the use of jointly raised federal funds not only the federal portion of joint federal/Levin fund activity, but also for 100% federal activities that would otherwise qualify as federal election activities such as public communications undertaken as coordinated and independent expenditures, as well as volunteer exempt mailings and phone calls on behalf of federal candidates. Consequently, the language in these regulations go far beyond the intent of section 323(b) of the BCRA (2 U.S.C. § 441i(b)) which only intended to prohibit the solicitation and transfer of funds between party committees for joint federal/Levin activity and the joint fundraising of Levin funds.

The *McConnell* Court made clear that the BCRA does not impose any restriction of use of jointly raised federal funds for the federal share of Levin activity or for 100% federal activities:

...both the Levin funds and the allocated portion of hard money used to pay for such activities must be raised entirely by the state and local committee that spends them. § 441i(b)(2)(B)(iv). This means that a state party committee cannot use Levin funds transferred from other party committees to cover the Levin funds portion of a Levin Amendment expenditure. It also means that a state party committee cannot use hard money transferred from other party committees to cover the hard-money portion of a Levin Amendment expenditure. Furthermore, national committees, federal candidates, and federal officeholders generally may not solicit Levin funds on behalf of state committees, and state committees may not team up to raise Levin funds. § 441i(b)(2)(C). They can, however, jointly raise the hard money used to make Levin expenditures. 540 U.S. at 163-64 (emphasis added).

Plaintiffs also contend that § 323(b) is unconstitutional because the Levin Amendment unjustifiably burdens association among party committees by forbidding transfers of Levin funds among state parties, transfers of hard money to fund the allocable federal portion of Levin expenditures, and joint fundraising of Levin funds by state parties... As an initial matter, we note that the state and local parties can avoid these associational burdens altogether by forgoing the Levin Amendment option and electing to pay for federal election activities entirely with hard money... Id. at 171 (emphasis added).

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These two statements by the Court, make it plain that (1) the federal portion of Levin activities may be paid for with funds that a raised jointly between a party committee and another party committee (national, state or local, federal candidate or federal officeholder) and (2) there are no restrictions on the use of jointly raised or transferred federal funds when a federal election activity is paid for with 100% federal funds.

Based upon the Court's statements above and the Commission's own E & J language, the Commission should modify the above mentioned sections to leave no ambiguity that federal funds raised through joint fundraising may be used for the federal portion of any federal election activity, whether it be the federal portion of allocable Levin activity or for a federal election activity that is paid for solely with federal funds. Furthermore, the Commission should clarify in its regulations that the restrictions found in section 300.31 regarding the prohibitions on the use of funds by a state or local party committee of funds transferred or solicited by another party committee for the federal portion of shared federal/Levin activity do not apply if the state or local party committee uses 100% federal funds to pay for those Levin activities.

Respectfully submitted,

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