March 4, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2005-3: Definition of "Agent"

Dear Mr. Deutsch:

These comments are submitted jointly by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2005-3 published at 70 Fed. Reg. 5382 (February 2, 2005), seeking comment on whether to modify the Commission's regulatory definition of the statutory term "agent" to include those acting with "apparent authority."

If the Commission decides to hold a hearing on this matter, all three commenters request the opportunity to testify.

1. Introduction

In Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress sought to "plug the soft money loophole" that had been opened in the Federal Election Campaign Act (FECA) by the use of political party committee accounts to raise and spend non-federal funds for the purpose of influencing federal elections. *McConnell v. FEC*, 540 U.S. 93, 133 (2003).

In Title II of BCRA, Congress strengthened provisions of the FECA related to expenditures made by candidates and parties coordinated with others, which "may be treated as indirect contributions subject to FECA's source and amount limitations." *Id.* at 219.

These provisions of Title I and Title II apply not only to candidates and parties, but also to their "agents" as well. *See, e.g.*, 2 U.S.C. §§ 441i(a)(2) (prohibition on national party committee raising or spending soft money applies to "agent acting on behalf of such a national committee"); 441i(b)(1) (prohibition on state party committee spending soft money for federal election activities includes spending by "agent acting on behalf of such committee); 441i(d) (prohibition on party committee solicitations for, or donations to, certain tax exempt organizations includes an "agent acting on behalf of such party committee");

441i(e) (prohibition on federal candidates or officeholders soliciting, receiving or spending soft money applies to "agent of a candidate or individual holding Federal office"); 441a(a)(7)(B)(i) (expenditures made in coordination with a candidate or his committee "or their agents" shall be treated as a contribution); 441a(a)(7)(C) (disbursement for an electioneering communication coordinated with a candidate or party committee "or an agent or official of any such candidate, party or committee" shall be treated as a contribution).

Thus, the definition of the term "agent" bears directly on the scope of numerous key provisions of BCRA and FECA. The regulation of "agents" is one of the steps "designed to ensure the integrity of Title I." *McConnell*, 251 F. Supp. 2d 176, 652 (D.D.C. 2003)(three-judge court) (Op. of Kollar-Kotelly, J.).

In the first post-BCRA rulemaking on this matter, these commenters all stressed the importance of including those operating with "apparent authority" within the scope of the term "agent." Democracy 21 stated:

> To carry out the purposes of the Act, the Commission should rely on common law definitions of agent, including those individuals who the party "holds out" as acting on its behalf, whether or not they have specific "instructions" to do so. In many instances, a party committee could give an individual serving in a fundraising capacity an honorary title, in which case the individual *appears* to be acting on behalf of the party for purposes of raising money. Such individuals should be considered "agents" of the party for purposes of the ban on soliciting or receiving non-Federal funds.[1]

The Campaign Legal Center commented:

> These definitions are, perhaps, particularly relevant to the world of politics. In fundraising, some individuals are given titles by a party or campaign suggesting to the public that they have the power to act for the candidate or party. In these instances, we believe that the candidate or party should bear responsibility for the actions of those who are authorized to raise funds in their name. This will have the salutary effect not only of maintaining the broad prohibition of soft money; it will also protect these agents by forcing their candidates and parties to put them on proper notice of what is forbidden, in order to avoid exposing *themselves* to liability. Further, any paid employee of a political party or committee or campaign should be held to be an agent for purposes of the Act. Nor should volunteers and vendors be per se excluded.[2]

The Center for Responsive Politics stated:

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1 Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 16.

2 Comments of the Campaign Legal Center (May 29, 2002) at 6.

> [T]he proposed rule should also make it clear that the principal cannot avoid responsibility for the actions of the agent in situations where the principal may have expressly granted the agent general authority to act on behalf of the principal but has not expressly granted the agent the authority to engage in the unlawful actions. The principal should be held responsible for the actions of the agent in both of these situations. In order to accomplish this, the rule should be revised to encompass apparent authority.[3]

Nonetheless, the definition of "agent" promulgated by the Commission in the 2002 rulemaking included only those with "actual authority," 11 C.F.R. § 300.2(b), and did not include those with "apparent" authority.

This rule, among many others, was challenged in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal pending* No. 04-5352 (D.C. Cir). The district court concluded that the Commission's failure to include those with "apparent" authority within the scope of its regulation defining "agent" violated the Administrative Procedures Act (APA) because the Commission "did not adequately explain its decision," and "entirely failed to consider" key aspects of the problem. *Id.* at 72 *quoting Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although the court upheld the Commission's narrow rule on so-called "*Chevron*" grounds, finding it was a "permissible" and not "untenable" interpretation of BCRA, *id.* at 85, this should not be construed as an endorsement of the rule. At best, the court found only that the narrow rule would not "unduly" compromise the law, or "on its face" create the potential for "gross" abuse. *Id.* at 85.

On the other hand, the court specifically noted that the Commission has ample discretion to extend the definition of "agent" to include those acting with "apparent" authority. *Id.* at 84 ("[E]xtending the term to include those acting with apparent authority would not be an abuse of the FEC's authority under FECA...."). Indeed, Judge Kollar-Kotelly said, "The Court agrees that a regulation that included within its scope those acting with apparent authority may better implement the statutory scheme of BCRA." *Id.* at 86. And the court found that the Commission's narrow rule "may compromise the Act or create the potential for abuse...." *Id.* at 72.

This rulemaking follows the court's invalidation on APA grounds of the narrow definition of "agent," and the court's remand of the rule to the Commission. The NPRM proposes a simple – and correct – response to the remand, which is to modify the two existing regulations that define the term "agent," 11 C.F.R. § 109.3 and § 300.2(b), by adding to both the phrase "or apparent authority." For the reasons set forth below, commenters strongly support this proposal.

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[3] Comments of Center for Responsive Politics (May 29, 2002) at 7.

2. The definition of "apparent authority."

As a threshold matter, it is important to be clear about what apparent authority is, what it is not, and how it differs from "actual authority." Much of the objection to the Commission's use of "apparent authority" stems from a misunderstanding of what it means.

An agent's "actual" authority is determined by the instructions (express or implied) given directly by the principal *to the agent*. *See* Restatement (Second) of Agency § 7 (1958). "Apparent" authority, on the other hand, focuses on the "manifestations" that the principal makes *to third persons* about the agent's authority. *Id.* § 8. The Restatement (Second) says:

> Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not, as when [actual] authority is created, to the agent.

Id. § 8 cmt. a.[4] The Restatement (Second) also explains how apparent authority is created:

> [A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. § 27. The comment on this section emphasizes that the creation of apparent authority – like actual authority – is the responsibility of the principal, and is thus within the control of the principal:

> Apparent authority is created by the same method as that which creates [actual] authority, except that the manifestation of the principal is to the third person rather than to the agent. For apparent authority there is the basic requirement that *the principal be responsible for the information which comes to the mind of the third person*, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent. *Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.*

Id. § 27 cmt. a (emphasis added).

The D.C. Circuit has emphasized the same points:

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[4] To similar effect is the Restatement (Third) of Agency (Tentative Draft), which defines "apparent authority" as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* § 2.03 (T. D. No. 2, 2001).

> "Apparent authority" exists where the principal engages in conduct that "reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." ... For there to be apparent authority, however, the third party must not only believe that the individual acts on behalf of the principal but, in addition, "either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."[5]

Thus, apparent authority does not exist absent actions (or manifestations) made *by the principal,* where such actions are *reasonably interpreted* by third parties as establishing authority in an agent to act on the principal's behalf. The creation of apparent authority – just like actual authority – is entirely within the control of the principal. It cannot be created, or imposed on the principal, by the purported "agent" himself, or by other third parties, absent actions or statements traceable back to the principal that manifest the principal's intent to create the agency relationship.

Thus, concerns expressed by some that the Commission's adoption of "apparent authority" would unwittingly expose candidates, parties or political committees to liability based solely on actions by third parties, or purported agents, out of the control of the candidate or committee, are entirely unfounded. The test is *not,* in the abstract, what a purported agent claims to be, or even what a purported agent simply appears to be. Rather, the test is what a principal has or has not done or said that would cause a third party to reasonably believe another is acting as the principal's agent. This test does not make candidates or parties cede control of their activities, or their liability, to others. The test for apparent authority, like the test for actual authority, leaves the creation of the agency relationship solely in the hands of the principal.

3. Both the Commission and the courts have used the concept of apparent authority in regulating candidates and political committees.

The Commission is certainly no stranger to the doctrine of apparent authority, which it has invoked on multiple occasions.

Prior to BCRA, the Commission had consistently defined "agent" to include those with apparent authority. A longstanding Commission rule governing coordination of expenditures defined "agent" as a person who had either "actual oral or written authority, either express or implied," *or* had "been *placed in a position within the campaign organization where it would reasonably appear* that in the ordinary course of campaign-related activities he or she may authorize expenditures." 11 C.F.R. § 109.1(b)(5) (2001) (emphasis added).

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[5] *Overnite Transp. Co. v. NLRB,* 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting Restatement (Second) of Agency § 27 & cmt. a). *See also* 3 Am. Jur. 2d Agency § 75 (2003) ("Apparent authority, or ostensible authority, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.").

In the enforcement context as well, the Commission and its staff have relied upon, or cited, the concept of apparent authority on multiple occasions. Even as recently as 2003 – after the adoption of the narrower definition of "agent" struck down in *Shays* – the Commission was still using the notion of apparent authority in its enforcement proceedings.

In MUR 5357, which resulted in a "reason to believe" finding, the First General Counsel's Report discussed apparent authority in a matter involving the alleged making of impermissible corporate contributions through the reimbursement of conduit donors:

> Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts within the scope of his authority. *See Weeks v. United States,* 245 U.S. 618, 623 (1918). Even if an agent does not enjoy express or implied authority, however, *a principal may be liable for the agent's actions on the basis of apparent authority.* A principal may be held liable based on apparent authority even if the agent's acts are unauthorized, or even illegal, *when the principal placed the agent in the position to commit the acts. See Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993).[6]

In MUR 4843, a matter also involving the alleged making of illegal corporate contributions, the general counsel set forth the identical language in relying on the concept of apparent authority:

> Even if an agent does not enjoy express or implied authority, however, a principal may be liable for the agent's acts on the basis of apparent authority. A principal may be held liable based on apparent authority even if the agent's acts are unauthorized, or even illegal, when the principal placed the agent in the position to commit the acts. *See Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993); *First American State Bank v. Continental Ins. Co.*, 897 F.2d 319 (8th Cir. 1990).[7]

In applying this concept, the general counsel found that the finance chair of a campaign committee, who had a "very close" relationship to the campaign, "had at least apparent, if not actual, authority as an agent of the Hinchey Committee in soliciting and accepting contributions." *Id.* at 11. The knowledge of the agent as to his illegal conduct was accordingly "imputed" to the campaign committee. *Id.* at 12. The general counsel explained:

> Even if Mr. Zinn's actions were unauthorized or contrary to specific instructions, both knowledge of, and responsibility for those actions can be

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[6] MUR 5357/Pre-MUR 412, First General Counsel's Report (Sept. 8, 2003) at 4; *see also* MUR 5357, Factual and Legal Analysis (Respondent Gary Esporrin) (Sept. 24, 2003) at 2 (emphasis added).

[7] MUR 4843, First General Counsel Report (Nov. 8, 1999) at 5.

> imputed to the Hinchey Committee if he was acting as its agent. Further, even if Mr. Zinn lacked actual authority to take some or all of the specific actions described above, his position as "finance chairman" and the nature of his activities on behalf of the Hinchey campaign, as described in the indictment, seem to establish the Hinchey Committee granted him apparent authority to act on its behalf. *Thus, the Hinchey Committee may be held civilly liable for Mr. Zinn's actions, because it placed him in a position where he had apparent authority to act on its behalf and subsequently was negligent or reckless in its supervision of his activities.*

Id. at 12 (citations omitted) (emphasis added).

In MUR 4291 *et al.*, the General Counsel analyzed the question of whether there was impermissible coordination of broadcast ads during the 1996 campaign between the labor unions which sponsored ads, and the federal candidates referred to in the ads. Harold Ickes, then White House deputy chief of staff, was involved in the development of the ads. The counsel noted that Ickes, "although a member of the White House staff, acted with apparent authority over certain activities of the Clinton-Gore '96 committees and the DNC pertaining to the presidential campaign."[8] The general counsel concluded, however, that although this evidence of Ickes' apparent authority "indicates that the ads may well have been effectively coordinated with representatives of Clinton-Gore '96," there was no impermissible contribution because the ads at issue were directed more to House races than to the presidential contest. *Id.* at 40.

In MUR 3585, the Commission used this same approach in defining an "agent" for purposes of regulating contributions, emphasizing that FECA reaches the actions of an agent who "*occupies a position that would lead a third party to believe that he is authorized* to receive contributions."[9] The General Counsel explained further:

> [e]ven if an agent does not enjoy express or implied authority, ... a principal may be liable for the actions of his agent on the basis of apparent authority. ... *An agent is imbued with apparent authority where the principal has held the agent out as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority.* ... Apparent authority commonly exists when a principal appoints an agent to a position with generally recognized duties or responsibilities. *See* Restatement (Second) of Agency § 27 at 104 ('apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties').

Id. at 37-38 (emphasis added).

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[8] MUR 4291 *et al.*, General Counsel's Report (June 12, 2002) at 38.

[9] MUR 3585, General Counsel's Report (Nov. 10, 1994) at 35-36, 39-40 (emphasis added).

Thus, apparent authority has been a familiar tool in the Commission's enforcement portfolio.

Courts have also routinely applied the concept of apparent authority in cases involving the regulation of campaign committees. In *FEC v. The Christian Coalition,* 52 F. Supp. 2d 45 (D.D.C. 1999), for instance, the district court evaluated whether the Christian Coalition's activities were coordinated with those of the Bush-Quayle campaign, and cited the doctrine of apparent authority to find that Pat Robertson and Ralph Reed were acting as agents for the Coalition:

> As a preliminary matter, the Coalition argues that many of Robertson's and Reed's actions were done in their personal capacities and should not be attributed to the Coalition. The Coalition would have it that unless Robertson or Reed expressly indicated he was acting in his Coalition capacity, his actions were taken as a private individual. The Court cannot accept this formulation; the First Amendment does not provide for general preemption of the state-law doctrine of apparent authority.

Id. at 94. The court, on other grounds, rejected the Commission's argument that the Coalition's activities were coordinated with the Bush campaign. *Id.* at 94-95.

More generally, courts have used the concept of apparent authority in non-FECA issues involving the regulation of candidates and campaign committees. In *Jund v. Town of Hempstead,* 941 F.2d 1271, 1280 (2d Cir. 1991), the court held that town and county Republican Committees were liable under RICO and § 1983 for their agents' participation in a coercive political contribution scheme because the agents "were working within the scope of their 'general apparent authority.'" Similarly, in *Karl Rove & Co. v. Thornburgh,* 824 F. Supp. 662, 668-69, 671 (W.D. Tex. 1993), the court predicated both jurisdiction and liability in part on apparent authority where candidate Thornburgh "knowingly allowed Dickman to perform acts which any reasonable vendor would interpret to mean Dickman was Thornburgh's agent."[10] And in *United States v. Sun-Diamond Growers of Cal.,* 138 F.3d 961, 970 n.9 (D.C. Cir. 1998), the court suggested that "apparent authority" would be sufficient to ground FECA civil liability on an agent's acts, whether or not the agent "acted to further the principal's interests."

As this discussion indicates, the use of apparent authority by both the Commission and the courts is a familiar practice.

4. The Commission should include apparent authority in the definition of "agent"

A. Principles of statutory construction favor including apparent authority. The Supreme Court has noted that "[t]he apparent authority theory has long been the settled rule

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[10] This decision was affirmed by the Fifth Circuit in *Karl Rove & Co. v. Thornburgh,* 39 F.3d 1273, 1297-98 (5th Cir. 1994), with respect to actual authority; the court found it unnecessary to rely on apparent authority given the presence of actual authority.

in the federal system." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565, 567 (1982) (*re* Sherman Act liability) (*ASME*). As the Court there said, "In a wide variety of areas, the federal courts ... have imposed liability upon principals for the misdeeds of agents acting with apparent authority." *Id.* at 568.[11]

The doctrine is also an inherent part of the common law concept of the term "agent." As the NPRM correctly notes, "the common law definition of agent include[es] apparent authority...." 70 Fed.Reg. at 5384; *see also* § 8, Restatement (Second), *supra.*

Given this, the starting point for the Commission should be – as it has been in the past – to include the doctrine of apparent authority in the definition of "agent," absent a finding that there is some compelling reason arising from the administration of the campaign finance laws not to do so. In other words, the Commission's default position should be to conform with the "settled" federal rule, the accepted common law definition of "agent," and its own longstanding past practice. Those who urge the Commission to take a different position should bear the burden of demonstrating, with specificity, why the Commission should depart from the "settled" federal practice and common law.

Including apparent authority in its definition of "agent" is also the most sensible reading of the statutory language of BCRA. Under settled canons of construction, Congress' repetition without revision in BCRA of the phrase "agent" is strong evidence that Congress intended for the Commission's prior and longstanding use of that term to control. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.").[12] That prior use, as shown above, included the concept of apparent authority.[13]

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[11] *See AOTOP, LLC v. NLRB*, 331 F.3d 100, 103-04 (D.C. Cir. 2003) (application of apparent authority to NLRA issues); *Makins v. District of Columbia*, 277 F.3d 544, 548 (D.C. Cir. 2002) (same with respect to Title VII issues); *Lopez v. United States*, 201 F.3d 478, 481 (D.C. Cir. 2000) (same with respect to forfeiture proceedings).

[12] *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-44 (2000); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 535 (1982); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Orloski v. FEC*, 795 F.2d 156, 166 (D.C. Cir. 1986); 2B Norman J. Singer, Statutes and Statutory Construction (6th ed. 2000 rev.)§§ 49:09 to 49:10.

[13] We also note that, for this reason, the Democratic party committees in the 2002 rulemaking urged the Commission to adopt the existing Part 109 definition of "agent" for purposes of BCRA as well. In their comments, the party committees said,

> [T]he law already offers a definition of agency, at Part 109, and there is no indication that BICRA [sic] or its legislative history that Congress intended to alter it for purposes of the new law...This term is well recognized in the regulated community, and the use of this definition, in place of yet another one for a different purpose, serves the purpose of avoiding confusion and enhancing prospects for effective

Moreover, it is "well established that '[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 739-40 (1989) (*CCNV)* (defining "employee" in accord with "common-law agency doctrine") (citation omitted). Various courts of appeal have applied *CCNV* where a statute failed to define "agent," looking to the common law for the appropriate construction."[14] Thus, under the *CCNV* doctrine of construction, the best reading of the statute is to include those acting with apparent authority.

B. Use of apparent authority furthers the goals of FECA and BCRA. Including apparent authority also serves two distinct goals that further the purposes, and the Commission's administration, of the campaign finance laws.

First, the use of apparent authority strongly furthers the goal of fostering voluntary compliance with the law. It places a "powerful incentive" on principals to ensure that their agents do not abuse the positions they hold, thereby maximizing compliance with the law. *ASME,* 456 U.S. at 572-73. When a principal "cloaks its [agents] with the authority of its reputation," this can lead to situations that are "rife with opportunities" for abuse. *Id.* at 570-71. If the principal is subject to liability for the actions of its agents in these circumstances, the principal will feel "pressure" to ensure that "systematic steps" are taken to comply with the law. *Id.* at 572-73.

> compliance. The Commission may also adopt this definition with the knowledge that it is a stringent standard, one that the agency chose to guard against sham independent expenditures that escape the statutory limitations on contributions.

Letter of May 29, 2002 from Robert Bauer and Joseph Sandler to Rosemary C. Smith re Comments of DNC, DSCC and DCCC on Notice of Proposed Rulemaking: Prohibited and Excessive Contributions, Nonfederal Funds or Soft Money, at 7. The fact that these party committees supported the adoption of the Commission's existing Part 109 definition, including its incorporation of the concept of "apparent authority," further indicates the practical utility of this longstanding standard.

[14] *United States v. Saks,* 964 F.2d 1514, 1523-24 (5th Cir. 1992); *see also Swallows v. Barnes & Noble Book Stores, Inc.,* 128 F.3d 990 (6th Cir. 1997) ("Because the [Age Discrimination in Employment Act, and the Americans with Disabilities Act] do not define the term "agent," we look to the common law of agency. . ." *Id.* at 996, n.7 (citing *CCNV,* 490 U.S. at 739-41)); *United States v. Wiedyk,* 71 F.3d 602 (6th Cir. 1996) ("The Federal Rules of Evidence do not define the terms "agent" or "servant." The Supreme Court has concluded that the use of the terms without definition evidences Congress' intent to describe the traditional master/servant relationship as understood by common law agency doctrine." *Id.* at 605. (citing *CCNV,* 490 U.S. 739-40)); *City of Tuscaloosa v. Harcros Chemicals, Inc.,* 158 F.3d 548 (11th Cir. 1999) ("Because Fed.R.Evid. 801(d)(2)(D) does not define the term "agent," we must assume that Congress intended to refer to general common law principles of agency when it used the term." [sic] *Id.* at 558, n.9 (citing *CCNV,* 490 U.S. 730)); *Boren v. Sable,* 887 F.2d 1032 (10th Cir. 1989) ("However, the Federal Rules of Evidence do not define the terms "agent" or "servant". The use of the terms "agent" or "servant" without definition evidences Congress' intent to describe the traditional master-servant relationship as understood by common law agency doctrine." *Id.* at 1038 (citing *CCNV,* 490 U.S. at 730)).

This is clearly true in the area of campaign finance issues, where reliance on the doctrine of apparent authority will most often apply to the common practice of candidate and party committees bestowing titles of authority on individuals by naming them to highly visible positions in a campaign, such as fundraising chair. These individuals then operate on behalf of the party or candidate committee in soliciting and receiving funds. Their titles suggest that the campaign is holding them out to the world with power to act for the campaign or the party. In that case, it is reasonable for the campaign or party to bear responsibility for their actions, whether a particular action is actually authorized or not. The likely effect of this rule will be, appropriately, for candidates and parties to ensure that their fundraising agents are properly trained and monitored, and to establish safeguards to prevent violations of law where liability could be imposed on the campaign as well.

The net effect will be to create incentives for compliance, and such incentives will well serve the goals of the law. As the Supreme Court stated in *ASME,* in the context of antitrust law, if the principal is subject to liability for the actions of those agents its has "cloak[ed]...with the authority of its reputation," the principal will feel "pressure" to ensure that "systematic steps" are taken to comply with the law. *Id.* at 572-73; *see also Jund*, 941 F.2d at 1280 (liability of political party committees for the unlawful solicitation activities of their agents based on an apparent authority "theory of liability will encourage unincorporated associations to police their agents and their actions").[15]

Second, reliance on apparent authority will materially assist the Commission in enforcing the law. This also is a recognized virtue of the doctrine. Although "[a]pparent authority often coincides with actual authority," the former is much easier to establish because it is based on an objective, reasonable person standard and does not require a third party to prove what actually transpired between principal and agent.[16]

The adverse law enforcement consequences of relying only on "actual" authority are obvious. As Commissioner Thomas stated during the 2002 rulemaking, "There are likely to be situations where we will not be able to prove actual authority because witnesses will not recall and documentary evidence is absent. Yet apparent authority might be shown."[17] This

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[15] As the Supreme Court further noted in *ASME,* a principal who is not responsible for the actions of its apparent agents "could avoid liability by ensuring that it remained ignorant of its agents' conduct, and [federal law] would therefore encourage [the principal] to do as little as possible to oversee its agents." *Id.*. at 573.

[16] Restatement (Third) of Agency § 2.03, cmt. c (Tentative Draft Nov. 2, 2001) ("Apparent authority, when present, often has the effect of reinforcing the legal effect of actual authority when actual authority has been conferred by a principal but is not readily provable by a third party.").

[17] Agenda Doc. 02-36-B (May 8, 2002) at 3. In a subsequent article, Commissioner Thomas provided a graphic example of the utility of the concept: "If President Nixon had told his biggest donors, 'Maurice Stans is my soft money guy,' would such apparent authority not suggest liability for Stan's subsequent soft money solicitations?" Scott E. Thomas, *Beyond Silly – What the Courts and the FEC Have Done to Congressional Reform Attempts*, Practicing Law Institute Program, "Corporate Political Activities" (2002), found at http://www.fec.gov/members/thomas/thomasarticle07.pdf

is precisely the context in which the Commission has used the concept in the past. *E.g.*, MUR 4843, *supra.*

Absent apparent authority, a candidate or party committee could insulate itself from liability by carefully circumscribing an agent's "actual" authority, yet continuing to hold out the agent publicly as one authorized to act for the committee. For instance, suppose a federal candidate publicly named a fundraising chairman who thus was vested with the apparent authority of the candidate, but where the candidate privately instructed the agent to avoid raising non-federal funds. Suppose further that the fundraiser nonetheless solicits soft money, even based on a wink-and-nod understanding with the candidate. If the statutory prohibition on soliciting soft money extends only to a candidate or his *actual* agent, the candidate would be able to rely on his private instructions to his fundraiser to avoid liability. Yet, as a practical and public matter, the agent operating with the *apparent* authority of the candidate, was engaging in precisely the conduct proscribed by law.

Conversely, so long as agents kept their principals sufficiently ignorant of their particular practices — or at least communicated only through winks and nods — those operating with apparent authority could exploit their positions to continue soliciting and directing soft money contributions, continue peddling access to their principals, and continue by virtue of their *apparent* authority to perpetuate the *appearance* if not the reality of corruption.

Finally, the reasons suggested as to why it is inappropriate for the Commission to adopt a rule of apparent authority do not withstand scrutiny.

There is no evidence that past reliance on the concept of apparent authority by both the Commission and the courts has materially impaired normal political discourse, nor unduly interfered with the ability of candidates, parties and political committees to interact with volunteers and supporters, or to conduct campaign activity.

Further, the doctrine of apparent authority is not limited to areas analogous to consumer protection and anti-fraud legislation, as suggested by the NPRM, nor is it limited to the model in which a victim sues for having relied on the representations of the agent. Liability based on an agent's apparent authority is recognized in multiple areas of law, such as antitrust, RICO, labor and employment law, securities, and many other areas involving many different models of liability — including, as discussed above, cases dealing with campaign relationships and fundraising practices. In addition, even if apparent authority were limited to areas analogous to "consumer protection," BCRA *is* such a measure, in the sense that the soft money system has provided undue influence to wealthy donors at the expense of average citizens.

The concerns voiced that apparent authority would lead to open-ended or undefined liability, or sweep in all those who might be viewed as holding authority in a campaign, misapprehend the nature of apparent authority. As we noted above, and as the D.C. Circuit has emphasized, a principal is liable on an apparent authority theory *only* if the third person *reasonably* believes that the agent has the principal's authority *and* "either the principal must

intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."[18] And as the Commission itself has recognized on several occasions, liability based on an apparent authority theory arises only "*where the principal has held the agent out* as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority."[19] The fear that potential liabilities for campaigns will be open-ended is without foundation, and the similar claim that mere assertions "by volunteers" could create an agency relationship is wrong as a matter of law.[20]

5. Conclusion

For the reasons set forth above, we urge the Commission to adopt the rules proposed for sections 109.3 and 300.2(b), to include "apparent authority" in the definition of "agent."

We appreciate the opportunity to submit these comments.

Sincerely,

/s/Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
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[18] *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting Restatement (Second) of Agency § 27 & cmt. a (1958)).

[19] MUR 3585, *supra* at 40 (emphasis added).

[20] Although most volunteers will not be cloaked by candidates or parties with apparent authority, those who are should be subject to federal campaign finance laws, and it is perfectly appropriate to require principals to take reasonable steps to train and supervise anyone acting with apparent authority, whether an employee, a consultant, or a volunteer. The leading case on apparent authority, in fact, involved a nonprofit organization whose work was done largely "through volunteers from industry and government"; the Supreme Court found that the efforts of these self-interested volunteers were "rife with opportunities" for abuse. *ASME*, 456 U.S. at 559, 571.