American Federation of Labor and Congress of Industrial Organizations

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November 8, 2002

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

Re: Notice of Proposed Rulemaking, "Bipartisan Campaign Reform Act of 2002; Reporting," 67 Fed. Reg. 64555 (October 21, 2002)

Dear Mr. Vergelli:

These comments are submitted in response to this notice of proposed rulemaking ("NPRM") on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the AFL-CIO Committee on Political Education Political Contributions Committee ("AFL-CIO COPE PCC"). The AFL-CIO is the national federation of 65 national and international unions representing over 13 million working men and women throughout the United States. AFL-CIO COPE PCC is the principal federal political committee sponsored by the AFL-CIO; it is registered with and periodically files reports with the Commission. These comments address aspects of the NPRM that most directly implicate the rights and obligations of labor organizations and their members, and of labor organization-sponsored federal political committees.

I. ELECTIONEERING COMMUNICATIONS

BCRA § 203, codified at 2 U.S.C. § 441b(b)(2) and (c), prohibits the AFL-CIO and other labor organizations from undertaking "electioneering communications," and the proposed regulations would exempt (correctly, for the reasons the Commission states) federal political committees such as AFL-CIO COPE PCC from reporting separately and specially their "electioneering communications," see proposed 11 C.F.R. § 100.29(c)(3) and 67 Fed. Reg. at 64561 (an exemption that, for the sake of clarity, we suggest be noted also at 11 C.F.R. § 104.20(b), which, as proposed, contains a somewhat misleading reference to "political committees"). However, we submit these comments on several aspects of the proposal because the prohibition of labor organization "electioneering communications" may be invalidated in the

McConnell v. FEC (D.D.C.) litigation, and, because several of the proposed requirements are highly problematic for labor organizations and other potential reporting entities, including unincorporated entities that BCRA does not restrain, the Commission should issue appropriate regulations as to these matters at the outset.

A. Disclosure Date

BCRA § 201(a) adds 2 U.S.C. § 434(f)(1), (4) and (5) which together require every person that makes a disbursement for the "direct costs of producing and airing electioneering communications" in an aggregate amount in excess of $10,000 in any calendar year to file a report with the Commission within 24 hours of each "disclosure date," that is, the date on which "disbursements" have been made for those costs; and a "disbursement" occurs "if the person has executed a contract to make the disbursement." Proposed 11 C.F.R. § 104.20(a)(1)(i) provides that the "disclosure date" means the date when the electioneering communication is "publicly distributed." The AFL-CIO strongly supports this implementation of the term "disclosure date."

As the Commission correctly acknowledged in its initial notice of proposed rulemaking regarding the reporting of electioneering communications, NPRM, "Electioneering Communications," 67 Fed. Reg. 51131, 51141 (Aug. 7, 2002), policy and constitutional concerns would be implicated by an application of this reporting provision to mandate public disclosure of disbursements and contracts before, and irrespective of whether, a communication is actually distributed. As the Commission stated, an advance disclosure requirement could force entities "to report information, under penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communication." Id. In its current explanation, the Commission aptly voices similar concerns, and we fully agree that "compelling disclosure of potential electioneering communications before they are finalized and publicly distributed . . . could force reporting entities to divulge confidential strategic and political information about their possible future activities." 67 Fed. Reg. at 64559. And, in any event, a person can only know that it has made an electioneering communication when it actually airs with the content, timing and reach that satisfy the definition at 2 U.S.C. § 434(f)(3).

B. Content of Reports

BCRA § 201(a), adding 2 U.S.C. § 434(f)(1), predicates the reporting obligation on "a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year . . . ." That obligation in turn requires the filing of a statement with the Commission containing the information prescribed in new § 434(f)(2). Because clear guidance as to what are "direct costs" is very important, an exhaustive list should be provided, and the list in proposed 11 C.F.R. § 104.20(a)(2) seems thorough and appropriate. Cf. 2 U.S.C. § 431(9)(B)(iii) (requiring unions, membership organizations and corporations to file reports of "costs...directly attributable" to express

advocacy communications to their respective restricted classes that exceed $2,000). Clarity here would be assisted if the regulation specified that "direct costs" do not include planning or preparatory costs such as polling and focus groups, or in-house costs such as staff compensation and other overhead.

New § 434(f)(2)(A) further requires the reporting entity to identify "the person making the disbursement" and "any person sharing or exercising direction or control over the activities of such person . . . ." In our comments on the electioneering communications NPRM, we urged the Commission to adopt neither its Alternative 4-A, because it provided inadequate guidance, nor its Alternative 4-B because it was overbroad, and we suggested as the best approach requiring the disclosure of information relevant to the "activities" that are the focus this reporting requirement, namely, the creation and dissemination of electioneering communications, rather than information concerning other, or the overall, activities of the reporting entity.

The Commission, however, proposes instead to interpret this provision to require identification of those who direct and control the overall activities of the reporting entity, and to define the phrase "sharing or exercising direction or control" to mean "exercising authority or responsibility for" any of the following functions:

i. Development, establishment, or change of policy for the organization or corporation;

ii. Day-to-day management of the organization or corporation;

iii. Obligation of funds or signing contracts; or

iv. Hiring or firing employees.

Proposed 11 C.F.R. § 104.20(a)(3).

This itemization goes well beyond a reasonable reading of the reporting requirement, which focuses on revealing the identity of the organization and the persons who have general authority over its operations (if not just the electioneering communications themselves, as we have suggested). Many individuals in an organization could have responsibility for developing, establishing and changing policy, managing the organization on a day-to-day basis, obligating its funds, signing contracts and hiring or firing, and these functions are routinely performed with respect to innumerable organizational activities, most of which have nothing to do with public communications, let alone "electioneering communications." It would be far preferable for the Commission to pursue the alternative suggestion in its explanation, namely, to require the identification of "officers, directors, partners, or any other individuals who have the authority to bind the organization, entity or person making the disbursement for [the] electioneering

communication." 67 Fed. Reg. at 64560. As the Commission acknowledges, this alternative would provide a "more objective, bright line definition of 'direction or control' and would focus the definition on those persons who have the authority to act on behalf of the organization." Id. Better still, because "individuals who have the authority to bind" an organization could still include substantial numbers of managerial staff who deal with routine matters, including many that are unrelated to electioneering communications, we suggest a formulation that is limited to "officers, directors and partners." Section 201(a) otherwise requires disclosure of the identity of that the entity itself, its custodian of books and records, and its principal place of business. Revealing that information and the names of its principal management officials fully meets the disclosure purposes of Section 201 while providing explicit guidance to reporting entities as to the scope of their disclosure obligations.

We would also underscore that the "direction and control" concept entails particular issues for labor organizations and numerous other membership organizations. Unions are democratic bodies whose officers are elected by the membership in secret ballot votes or, in the case of national and international unions, either in that manner or by convention delegates who are themselves directly elected by the membership in secret ballot votes. Members routinely approve the actions of their officers at membership meetings and in special votes. Obviously, it would be unreasonable and very likely unconstitutional for the BCRA to require unions to disclose their membership lists merely because members "shar[e] direction or control over the activities" of their union. Moreover, unions are often affiliated in a structure with mixed elements of hierarchy and autonomy, yet it would serve no meaningful purpose here to compel them to list any or all affiliates for that reason alone.

C. Disclosure of Donors

For the reasons stated by the Commission, the AFL-CIO supports the proposal to use the "donor" rather than "contributor" terminology in order to distinguish transactions reported here from those that meet the definition of "contribution" under the Act.

II. INDEPENDENT EXPENDITURES

BCRA § 212(a) added 2 U.S.C. § 434(g)(1), which requires that any person that "makes or contracts to make" independent expenditures aggregating $1,000 or more between the 20th day and 24 hours before the date of an election to file a report describing them within 24 hours, and added § 434(g)(2), which requires any person that "makes or contracts to make" independent expenditures aggregating $10,000 or more on or before the 20th day before the date of an election to so report within 48 hours.

Proposed 11 C.F.R. § 104.4(b)(2) and (c) provide that the reporting obligation is triggered only when a communication constituting an independent expenditure "is publicly distributed or

otherwise publicly disseminated," and proposed § 104.4(f) provides an aggregation rule for calculating independent expenditures that is likewise triggered when the communication is "publicly distributed or otherwise publicly disseminated." The AFL-CIO and AFL-CIO COPE PCC strongly support these proposals for the reasons explained above regarding the "disclosure date" for "electioneering communications." The Commission is also correct in observing that it is only when a communication is actually distributed that the speaker can know for certain that it has engaged in express advocacy so as to trigger the reporting obligation. Id. at 64557.

In further support of the proposal, we note two federal courts have struck down as incompatible with the First Amendment state laws requiring the reporting of independent expenditures insofar as they called for the disclosure of an entity's "obligating funds" for independent expenditures prior to the communication being made. See Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F. 3d 1174, 1196-97 (10th Cir. 2000); Florida Right to Life, Inc. v. Mortham, 1998 U.S. Dist. LEXIS 16694 at *30 (M.D. Fla. 1998). Cf. Watchtower Bible and Track Society v. Village of Stratton, 122 S. Ct. 2080 (2002) (village ordinance requiring door-to-door canvassers engaged in promoting any "cause" first to register with mayor and secure permit violates First Amendment). Insofar as the Commission by regulation can avoid a similar disposition of the BCRA reporting requirements, it should do so.

Conclusion

The AFL-CIO and AFL-CIO COPE PCC appreciate the opportunity to submit these comments.

Respectfully submitted,

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