The ‘soft money’ and ‘issue ad’ mess: How we got here, how Congress responded, and what the FEC is doing

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I. Summary of the 'soft money' and 'issue ad' problems[1]

The United States Government's attempts to prevent the corrosive effect of wealthy interests helping government officials get elected have met with limited success. The statutory efforts have stemmed from the common understanding that someone wanting a favor often will try to provide a favor in order to get it. The old aphorism, "I'll scratch your back if you scratch mine," sums up this concept nicely. While a common courtesy in polite society, this 'quid pro quo' arrangement can lead to government leaders working against the public interest, for example approving tax breaks, government subsidies, and spending priorities that would be anathema to the vast majority of citizens.

Throughout U.S. history, political leaders like Teddy Roosevelt have lamented the role 'big money' plays in 'buying' influence.[2] The Tillman Act of 1907, which prohibited corporations from making contributions "in connection with" federal elections, was one of the first responses to this concern. This prohibition was extended to unions in 1943. Other provisions requiring disclosure or contribution limits or limits on spending were tried, but the first truly comprehensive regulatory scheme was implemented after the Watergate revelations.

The Federal Election Campaign Act (FECA) Amendments of 1974 pieced together a comprehensive set of prohibitions, contribution limits, and disclosure provisions that is intact today. The unfortunate reality, however, is that aggressive campaign consultants, lawyers, and office-seekers and disapproving judges and FEC commissioners have rendered the law full of loopholes.

The restrictions on large contributions in connection with federal elections have been rendered ineffective through two vehicles: (1) the raising and spending of federally impermissible funds through the non-federal (or 'soft money') accounts of party committees and (2) the use of so called 'issue ads' whereby federally impermissible money is spent on communications that stop short of 'expressly advocating the election or defeat of any federal candidate.'

A. <u>The soft money loophole</u>

The party soft money loophole began with a 1978 advisory opinion by the Federal Election Commission (FEC) that allowed a state party to use whatever moneys state law permitted to fund a reasonable 'non-federal' share of party building

[1] This document reflects my own views. Most of the content was presented at the Council on Governmental Ethics Laws 2002 Conference in Ottawa, Canada. It has been updated to incorporate FEC actions since then.

[2] A good survey of the early history of campaign finance restrictions is set forth in *United States v. United Auto Workers*, 352 U.S. 567, 570-84 (1957).

expenses, like voter registration or get-out-the-vote (GOTV).[3] Many states do not put restrictions on corporate, union, or individual donations to party committees, so the allocation concept permits such funds to pay for a portion of activities that inescapably assist federal election efforts. Not long afterward, this allowance was extended to national party committees such that they too could allocate a portion of their activity as 'non-federal' and pay for that share with money raised in states with permissive laws.[4] In 1979, Congress essentially ratified this 'allocation' approach in certain FECA amendments directed at loosening restraints on state and local parties.[5] During these early years of allocation, the FEC only required that any formula used by a party committee be "reasonable." It didn't take long for party committees to 'push the envelope' by allocating their expenses in a way that allowed the vast majority to be paid with soft money.

In the 1992 election cycle the FEC attempted to put some brakes on this pattern of evasion with regulations that required party committees to use specified allocation formulas.[6] For example, the two national party committees were required in presidential years to allocate 65% of their party-building costs as federal, leaving only 35% that could be paid with soft money.[7] State and local parties, though, were allowed to work with a 'ballot composition' formula whereby the number of federal candidates on the ballots was determinative.[8] In most states, the federal share ranged around 25%, leaving the rest payable with soft money. Once again, clever party operatives figured out that transferring available soft money to the state parties would allow for much more soft money to be spent for party-building activity. In the 1996 and 2000 election cycles, tens of millions of soft dollars raised by the national leaders in Washington D.C. were routed to various state party committees where hot congressional and presidential battles loomed.[9]

Thus, the 1974 reforms designed to insulate national elected leaders from the deleterious effect of large political donations were rendered essentially

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[3] Advisory Opinion 1978-10, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5340. Perhaps the best summary of the development of the soft money loophole is set forth in a notice of proposed rulemaking the FEC issued in 1998. *See* 63 Fed. Reg. 37722 (Jul. 13, 1998). This rulemaking stalled while the legislation that became the Bipartisan Campaign Reform Act was taking on life.

[4] Advisory Opinion 1979-17, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5416.

[5] The House Report accompanying the bill that in relevant part became law explained that, for example, where state or local party committees pay for materials that "contain reference to both State and Federal candidates," the committees may allocate and "[t]he money used to pay the cost attributable to State candidates would be subject to State, not Federal law." H.R. Rep. No. 96-422, 96th Cong., 1st Sess. (1979), p. 9. It further explained regarding a similar provision, "if State law allows the use of treasury funds of a corporation, that money could be used for the State portion, but not for any portion allocable to Federal candidates." *Id*., p. 8.

[6] *See* 55 Fed. Reg. 26058 (June 26, 1990).

[7] 11 C.F.R. § 106.5(b) (2002).

[8] 11 C.F.R. § 106.5(d) (2002).

[9] In the 2000 cycle, the FEC tracked about $150 million in soft money transferred by national committees of the Democratic Party to state or local party committees and about $130 million transferred by the national committees of the Republican Party to state or local party committees. FEC Press Release, May 15, 2001. These represented large portions of the approximately $250 million in soft money raised by each of the national party structures. *Id*.

meaningless in just over two decades. Those same leaders were intimately tied to helping the parties raise and spend huge special interest sums that, in reality, were targeted to help in federal races of most concern. Calling such funds 'non-federal' became a matter of form over substance. More importantly, though, Federal candidates and officials and their operatives were constantly placing themselves in the position of being asked by big donors for a 'friendly hearing.'[10] The 'access' to federal elected officials that soft money facilitated clearly undermined the purpose of the campaign finance laws.

Fueling this soft money joyride were certain confusing court decisions and faulty legal interpretations that led party operatives to start treating advertisements attacking or praising particular federal candidates as allocable party-building expenses.[11] By the 1996 election cycle, this practice was in full swing, such that

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[10] Two big donors of some fame, Charles Keating and Roger Tamraz, were asked if they thought they were getting something in the nature of better access to government officials with their political donations, and both essentially replied, "I certainly hoped so."

[11] For many years the FEC had treated most party-paid ads mentioning specific candidates as 'coordinated expenditures' that had to be funded *solely* with federally permissible dollars. This approach was described and applied most clearly in Advisory Opinion 1985-14. There, the Commission treated a proposed party mailing critical of a particular named House candidate as a 'coordinated expenditure' that had to fall within the statutory spending limit, 2 U.S.C. § 441a(d), and had to be paid for exclusively with federally permissible funds. Other proposed ads that did not clearly identify a candidate by name or that did not appear designed to urge the public to vote for or against a candidate (i.e., did not contain an 'electioneering message') were not treated as coordinated expenditures. *Id*.

The Supreme Court's use of an 'express advocacy' test in connection with independent spending on behalf of a candidate, see *Buckley v. Valeo*, 424 U.S. 1, 74-82 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (discussed more later), eventually led to claims by some party officials that a similar 'express advocacy' test should apply when party committees advertise for their candidates. This argument was accepted in 1993 by a U.S. district court in an enforcement case brought against the Colorado Republican Party regarding certain ads it ran in April 1986 that were critical of the likely Democratic Senate nominee, Tim Wirth. *FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996). Although the 10th Circuit decision in 1995 rejected the 'express advocacy' standard in the circumstances presented, the case was taken up to the Supreme Court which in 1996 completely dodged the 'express advocacy' question and instead found an absence of coordination and, hence, no 'coordinated expenditure' violation. The Court remanded the case back to the lower courts to resolve whether, in the abstract, party coordinated expenditure limits are constitutional. This was not resolved until the year 2001 when in *FEC v. Colorado Republican Federal Campaign Committee*, 121 Sup. Ct. 2351 (2001), the Supreme Court upheld the constitutionality of party coordinated expenditure limits with no indication that 'express advocacy' was a required element. Needless to say, from the beginning of this litigation until the end, there was a fair degree of uncertainty as to whether the FEC could treat most party-paid ads mentioning particular federal candidates as 'coordinated expenditures' that had to be funded solely with federally permissible money.

National party operatives also relied on faulty legal advice regarding an advisory opinion issued by the FEC in 1995. The advisory opinion in question reportedly had been sought by the Republican National Committee (RNC) in order to ensnare the Democratic National Committee (DNC) in an enforcement action stemming from the latter's 1993 health care advertising campaign. The RNC earlier had filed a complaint with the FEC arguing that the DNC had inappropriately used solely soft money to fund the 1993 ads, and it hoped the advisory opinion it sought would speed an FEC decision that the DNC should have paid for an allocable portion of the cost of the ads with federally permissible funds. The RNC, though, *refused to*

the biggest share of the soft money raised at the national party level and transferred to the state parties was spent on ads blatantly promoting President Clinton or Senator Dole.[12] When in 1999 the FEC got around to addressing whether this was permissible, three new commissioners were on board. They joined with a fourth commissioner in a statement indicating the FEC's longstanding approach (applying the coordinated expenditure rules when there was a clearly identified candidate and the ad in question was designed to influence the public to vote for or against a candidate) was unacceptable.[13] As a result, the FEC since then has deadlocked time and time again when confronted with cases where party-paid ads promoting or attacking particular federal candidates were allocated simply as party-building expenses.[14] The bottom line is that the parties have been able to raise and spend huge amounts of soft money for hard-hitting ads that are primarily designed to affect particular federal elections. The FEC certainly has not stood in their way.

B. The 'issue ad' loophole

The origins of the 'issue ad' loophole are similar. A combination of court rulings and FEC deadlocks has left political players almost unfettered opportunity to spend unlimited, undisclosed corporate or union resources for communications to the electorate that plainly are aimed at electing or defeating particular candidates.

The 1976 Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), set the stage. In ruling that an individual or PAC's non-coordinated spending promoting a candidate had to rise to the level of 'express advocacy' in order to be regulable, the Court was trying to draw a distinction between "advocacy of a political result" and pure "issue discussion." *Id*. at 79. The Government could only show a

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assure that any specific examples of ads it submitted were part of its advisory opinion request and, accordingly, the FEC carefully explained that although it was concluding that ads promoting the party must be allocated, it *was not ruling on whether any particular examples described in the RNC's advisory opinion request would qualify as a 'coordinated expenditure*.' Advisory Opinion 1995-25, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162. Notwithstanding the clear FEC disclaimer, several attorneys apparently advised their clients in the 1996 election cycle that under Advisory Opinion 1995-25, ads like those submitted by the RNC but not incorporated in its request were not to be treated as coordinated expenditures. The opinion, in other words, was wrongly cited as authority for treating obvious campaign ads mentioning particular candidates as general party-building expenses that could be paid for with whatever soft money the FEC's allocation rules permitted.

[12] The FEC audits of the Clinton and Dole campaigns indicated the Democrats spent about $44 million on candidate-specific ads to promote President Clinton, and the Republicans spent about $18 million to promote Senator Dole. Roughly two thirds of this spending represented soft money. These amounts far exceeded the allowances for party 'coordinated expenditures' on behalf of presidential candidates (using 'hard money'), which in the 1996 election amounted to about $12 million for each party.

[13] *See* statements in audits of Clinton/Gore and Dole/Kemp, available at Commissioner Mason and Commissioner Thomas websites, www.fec.gov/members

[14] *See* statements of reasons in MUR 4378 (NRSC, Montanans for Rehberg et al.), MURs 4553/4407 et al. (RNC, Dole for President, DNC, Clinton for President et al.), and MUR 4994 (Ashcroft Victory Committee et al.), at Commissioner Thomas website, www.fec.gov/members.

compelling interest in requiring disclosure as to the former. The Court indicated 'express advocacy' would include communications containing words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Id*. at 44, n. 52.

Later, in *FEC v. Massachusetts Citizens for Life Inc*., 479 U.S. 238 (1986), the Court extended this analysis to corporations (and unions) covered by the prohibitions set forth at 2 U.S.C. § 441b. The Court reaffirmed *Buckley's* teaching that "the 'express advocacy' requirement [is meant] to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id*. at 249. As a result of *MCFL*, corporations and unions acting independently could spend *unlimited* amounts for ads mentioning federal candidates as long as the ads avoided 'express advocacy.'

In the intervening years a battle has raged regarding the proper interpretation of the 'express advocacy' holdings of *Buckley* and *MCFL*. The FEC adopted a regulation in 1995[15] that defined the term as "a communication that . . . taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) . . . ." 11 C.F.R. § 100.22(b) (2002).

Several have challenged this interpretation in the courts, in essence arguing that something close to the 'magic words' listed in the *Buckley* decision must be present to constitute 'express advocacy.' *See Virginia Society for Human Life v. FEC*, 187 F.3d 379 (4th Cir. 2001), and cases cited therein. To date it is clear that the approach set forth in the FEC's regulation is unenforceable in the Fourth, First, and Eighth United States Judicial Circuits.[16] In theory, though, the regulation is the law of the land in the other nine judicial circuits.

The FEC unanimously sought Supreme Court review of the regulation when it was overturned by the First Circuit in 1996,[17] but more recently, three of the six commissioners blocked seeking Supreme Court review when the opportunity was presented.[18] It is apparent that three of the FEC's six commissioners may not believe the regulation is constitutional. What is not apparent is why any commissioner would not want the Supreme Court to resolve this question.

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[15] *See* 60 Fed. Reg. 35292 (July 6, 1995) for explanation and justification.
[16] *See Maine Right to Life Committee Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Iowa Right to Life Committee Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999) (ruling on an identical State-level regulation).
[17] *Maine Right to Life Committee Inc*., cited in previous footnote.
[18] December 11, 2001 vote regarding *Virginia Society for Human Life Inc.*, *supra*. The FEC's General Counsel had recommended asking the Solicitor General to seek Supreme Court review. To date, no statement of reasons has been issued by the three commissioners in question.

The division among FEC commissioners has played out at other levels, as well. When asked to repeal the regulation, the FEC has twice split 3-3 on the request.[19] In two fairly recent enforcement cases, the FEC again split 3-3 on whether the communications involved were 'express advocacy.' One involved a mailing a week before the 1998 congressional election by a consortium of municipal corporations identifying a particular Congressman as "a tenacious and aggressive fighter on our behalf on the issues of [airport] expansion," stating it was "essential that we have a strong and knowledgeable advocate on this issue as our Congressman," and including at the bottom of most pages, in large bold type, the words "VOTE ON NOV. 3."[20] The other involved a $2 million advertising campaign just days before several important 2000 presidential primaries comparing Senator McCain and then Governor Bush, saying "Republicans care about clean air . . . So does Governor Bush," adding "John McCain voted against solar and renewable energy. . . That means more use of coal-burning plants that pollute our air," and concluding with "Governor Bush . . . Leading . . . so each day dawns brighter."[21]

By splitting on these kinds of questions, the FEC has signaled that very obvious campaign ads will not be pursued as 'express advocacy.' This in turn, means that there is no practical restraint currently in place regarding the use of unlimited, often undisclosed[22] corporate or union (or foreign or individual) resources on hard-hitting ads to influence federal elections. Political advisers do not have to tax many brain cells to avoid messages that will be viewed as 'express advocacy' by at least four FEC commissioners.

The foregoing summary of the emergence of the 'soft money' and 'issue ad' loopholes largely explains why Congress felt the need to intervene and bring some sense to these areas of law. The next section will explain what the Bipartisan Campaign Reform Act did to address these problems, what the FEC is doing to implement the new statute, and what likely concerns will remain afterward.

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[19] *See* 63 Fed. Reg. 8363 (Feb. 19, 1998); 64 Fed. Reg. 27478 (May 20, 1999).

[20] *See* Thomas and McDonald Statement of Reasons in MUR 4922 (Suburban O'Hare Commission), www.fec.gov/members/thomas.

[21] *See* Thomas and McDonald Statement of Reasons in MUR 4982 (Republicans for Clean Air), www.fec.gov/members/thomas.

[22] Many of the 'issue ads' seen in recent election cycles have been paid for through amorphous groups that raise donations from others and use pleasant sounding names like 'Citizens for Clean Government.' If these groups are established as non-profit organizations exempt from taxation under 26 U.S.C. § 501(c)(4), they can avoid disclosure of their donors and expenses, other than what the IRS requires on Form 990. Groups that are established as "political organizations" for tax purposes under 26 U.S.C. § 527 often have to report such information with either the FEC or with a state-level campaign finance authority. For those 527s that don't have to file with the FEC, Pub. L. 106-230, effective July 1, 2000, requires many of the larger such 527s to file this information with the IRS. *See* Rev. Rul. 2000-49. Groups that were avoiding disclosure of 'issue ad' activity in recent election cycles usually were working in these 501(c)(4) or 527 realms.

II. The Bipartisan Campaign Reform Act of 2002 (BCRA)[23]

Signed into effect on March 27, 2002, the new law is designed to lessen the raising and spending of 'soft money' in connection with federal elections, and to require the use of federally permissible funds to pay for certain 'issue ads' that run near the election of the candidates mentioned. Most provisions go into effect the day after the 2002 general election, November 6, 2002.

A. Soft money provisions

To address soft money, BCRA prevents national level political parties from raising any funds other than those permissible for federal elections.[24] State and local level party committees are required to treat certain expenses as "Federal election activity" and to use only federally permissible contributions, or an allocation of federally permissible contributions and donations of $10,000 or less allowed under State law, to pay for such expenses.[25]

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[23] Pub. L. No. 107-155, 116 Stat. 81 (to be codified at 2 U.S.C. § 431 et seq.). For ease of presentation, the United States Code references will be used unless otherwise noted. The Public Law version and the United States Code version (showing the integration with existing provisions) can be viewed at the FEC's website, www.fec.gov/pages/bcra/major_resources_bcra.htm.

[24] 2 U.S.C. § 441i(a): "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act."

[25] 2 U.S.C. § 441i(b)(1): "Except as provided in paragraph (2) [allowing for use of 'Levin funds' (named after the Senator who introduced the relevant amendment) to pay for the non-federal share of certain expenses], an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party . . . , or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." The referenced paragraph (2)(A) allows a "State, district, or local committee of a political party" to pay for "voter registration activity" within 120 days of a regularly scheduled Federal election and for "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" using funds "allocated (under regulations prescribed by the Commission)." The funds used to pay the non-federal share must be "donated in accordance with State law," and "no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such . . . disbursements." 2 U.S.C. § 441i(b)(2)(B)(iii). The activity payable in part with 'Levin funds' must not "refer to a clearly identified candidate for Federal office," and must not involve "costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office." 2 U.S.C. § 441i(b)(2)(B)(i), (ii). Thus, other than activity payable in part with 'Levin funds,' "Federal election activity" must be paid for entirely with 'hard money.' "Federal election activity" is defined to include the voter registration, voter identification, get-out-the-vote, and generic campaign activity noted above, plus: "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate);" and "services provided during any month by an employee of a State, district, or local committee of a political party who

To insulate federal candidates and officeholders[26] from 'soft money,' BCRA prevents them from soliciting any funds other than funds that would be permissible under federal law.[27] Thus, although they can continue to help state and local parties raise permissible federal account funds, they cannot solicit for or direct to such party committees any 'soft money.' Further, to the extent such candidates or officeholders have 'leadership PACs,' they can only raise federally permissible funds within the federal contribution limits for such leadership PACs.

Party committees, federal candidates, and federal officeholders also face restrictions on raising funds for outside groups, such as 501(c) groups[28] or 527s[29] that are not federally registered "political committees."[30] National party operatives cannot raise any such money, and State or local party operatives cannot raise funds for 501(c)s that make expenditures or disbursements in connection with federal elections or for 527s other than party or candidate committees.[31] Federal candidates and officeholders can raise funds for 501(c) organizations that don't primarily undertake federal election activities, or for those that do *if* solicitations are limited to individuals who give no more than $20,000 per year.[32]

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spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election." 2 U.S.C. § 431(20)(A).

[26] The term "officeholder" refers to a U. S. Senate or House Member or Delegate, or the President.

[27] Under 2 U.S.C. § 441i(e)(1), "A candidate [or] individual holding Federal office . . . shall not (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or (B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds (i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of [2 U.S.C. § 441a(a)]; and (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office."

[28] These are groups, usually incorporated, that are mostly exempt from federal taxation under 26 U.S.C. § 501(a). They are generally referred to as charitable or social welfare organizations.

[29] This refers to what the federal tax laws define as "political organizations" at 26 U.S.C. § 527. They are exempt from taxation for the most part. *See* n. 22, *supra*.

[30] This appears to have been a response to instances where party committees raised funds for, or transferred soft money to, outside groups that undertook voter registration or get-out-the-vote efforts designed to help the benefactor party. This was a way to utilize *exclusively* soft money to accomplish the goal. *See FEC v. California Democratic Party*, CIV-S-97-891 GEB PAN (E.D. Cal. Oct. 14, 1999) (unpublished opinion); MUR 3774 (National Republican Senatorial Committee) (FEC Public Records Office).

[31] *See* n. 24 regarding national party committees. Further, 2 U.S.C. § 441i(d) provides: "A national, State, district, or local committee of a political party . . . shall not solicit any funds for, or make or direct any donations to—(1) an organization that is described in section 501(c) . . . and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or (2) an organization described in section 527 . . . (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office)."

[32] 2 U.S.C. § 441i(e)(4): "(A) *General solicitations*. Notwithstanding any other provision of this subsection, [a federal candidate or officeholder] may make a general solicitation of funds on behalf of any [501(c) organization] (other than an entity whose principal purpose is to conduct [voter registration, voter identification, get-out-the-vote, or generic campaign activity described at 2 U.S.C. § 431(20)(A)]) where such solicitation does not specify how the funds will or should be spent. (B) *Certain specific solitications*.

To tighten the party 'soft money' restrictions, the statute extends the reach of several provisions to any "officer" or "agent" of a party committee, federal candidate, or federal officeholder and to "any entity that is directly or indirectly established, financed, maintained, or controlled by" such party committee, federal candidate, or federal officeholder.[33] To prevent party committees that can more freely raise corporate or union funds or large donations from transferring such funds to other party committees, BCRA contains a rule that "federal election activity" must be paid for with funds each committee raises itself.[34]

B. Issue ad provisions

Regarding 'issue ad' activity, BCRA creates a new term of art: "electioneering communication." It defines this as any "broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."[35] A communication is "targeted" if it "can be received by 50,000 or more persons" in the House district or State the House or Senate candidate seeks to represent.[36]

There are several statutory exceptions to the definition of electioneering communication. A "news story, commentary, or editorial" is exempted.[37] So is a communication that constitutes an "expenditure" under FECA.[38] (This should mean, at a minimum, that "political committees" already reporting as "expenditures" what could be deemed electioneering communications will not have to undertake any additional reporting.) There is a statutory exemption for

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In addition to the general solicitations permitted under subparagraph (A), [a federal candidate or officeholder] may make a solicitation explicitly to obtain funds for carrying out the activities described [above], or for an entity whose principal purpose is to conduct such activities, if—(i) the solicitation is made only to individuals; and (ii) the amount solicited from any individual during any calendar year does not exceed $20,000."

[33] *See, e.g.*, 2 U.S.C. § 441i(a)(2); (b)(1); (e)(1).

[34] Under 2 U.S.C. § 441i(b)(2)(B)(iv), certain State or local party Federal election activity can be allocated if the conditions noted in n. 25 are met *and* "the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—(I) any other State, local, or district committee of any State party [or] (II) the national committee of a political party . . . ." Further, such amounts must not be "solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committee of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States." 2 U.S.C. § 441i(b)(2)(C)(ii).

[35] 2 U.S.C. § 434(f)(3)(A).

[36] 2 U.S.C. § 434(f)(3)(C).

[37] 2 U.S.C. § 434(f)(3)(B)(i).

[38] 2 U.S.C. § 434(f)(3)(B)(ii).

debates and debate promotions as well.[39] Finally, there is an exemption for "any other communication exempted under such regulations as the Commission may promulgate . . . , except that under any such regulation a communication may not be exempted if it meets the requirements of [the paragraph defining electioneering communication] and is [a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)]."[40]

Electioneering communications by corporations, unions and other entities covered by 2 U.S.C. § 441b are prohibited.[41] There is statutory language suggesting that incorporated 501(c)(4) or 527 organizations can make electioneering communications if paid for "exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence" out of "a segregated account."[42] There is other language, though, indicating the preceding allowance is not available in the case of a "targeted communication."[43] The term "targeted communication" is then rather ambiguously defined to mean "an electioneering communication . . . that, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."[44] One can read this language to mean *all* electioneering communications are removed from the ethereal allowance for 501(c)(4) and 527 organizations, not just targeted House and Senate race communications.

Persons allowed to make electioneering communications—e.g., individuals, partnerships, and unincorporated associations—will have to report to the FEC such activity that aggregates in excess of $10,000 during any calendar year.[45] The reports must contain the identification of: the person making the disbursement, any person "exercising direction or control over the activities of such person," and the custodian of the books and accounts of the person making the disbursement.[46]

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[39] 2 U.S.C. § 434(f)(3)(B)(iii).
[40] 2 U.S.C. § 434(f)(3)(B)(iv).
[41] Under 2 U.S.C. § 441b, for example, it is unlawful for a corporation or union to make a "contribution or expenditure in connection with" a federal election. The term "contribution or expenditure" now includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift" for "any applicable electioneering communication." 2 U.S.C. § 441b(b)(2). The latter term includes not only those made by the entities covered by § 441b, but also those made "by any other person using funds donated by an entity [covered by § 441b]." 2 U.S.C. § 441b(c)(1).
[42] 2 U.S.C. § 441b(c)(2), (3).
[43] 2 U.S.C. § 441b(c)(6)(A).
[44] 2 U.S.C. § 441b(c)(6)(B).
[45] 2 U.S.C. § 434(f)(1): "Every person who makes 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 shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2)." The term "disclosure date" means "the first date" during any calendar year by which a person has made disbursements aggregating in excess of $10,000 and "any other date" during such calendar year by which a person has made disbursements aggregating in excess of $10,000 "since the most recent disclosure date." 2 U.S.C. § 434(f)(4).
[46] 2 U.S.C. § 434(f)(2)(A).

If the disbursements were made from a "segregated bank account which consists of funds contributed solely by individuals . . . directly to this account for electioneering communications," the report must list the names and addresses of all "contributors" who gave $1,000 or more "to that account" since the beginning of the preceding calendar year.[47] If not made from such a segregated account, the report must include the names and addresses of all "contributors" who gave $1,000 or more "to the person making the disbursement" since the beginning of the preceding calendar year.[48]

III. FEC regulations implementing BCRA

A. Soft money regulations

The FEC was obligated by BCRA to complete regulations implementing the soft money provisions in the statute by June, 25, 2002. Its regulations in this area were approved on June 22, 2002 and published on July 29, 2002. 67 Fed. Reg. 49064 (July 29, 2002). It is fair to say that in most instances when the FEC was confronted with the choice between greater restriction of soft money and less restriction of soft money, a majority of commissioners chose the latter.

With regard to national parties not being able to skirt the soft money prohibition through "any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee,"[49] the FEC chose to create a 'safe harbor' whereby, for the most part, actions or relationships before the statutory effective date of November 6, 2002 will be disregarded.[50] This seems to leave national party officials free until November 6, 2002, to actively engage in setting up alternative soft money networks that will accomplish the same tasks previously handled by the national party committees. While ostensibly tracking the "*is* established" language of the statute, and trying to prevent the unfair use of ancient history, the 'safe harbor' contradicts what most people would assume is the relevant inquiry regarding the period between passage of BCRA and its effective date—whether a group set up by national party operatives on November 5 ought to be treated as a national party entity on November 6.

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[47] 2 U.S.C. § 434(f)(2)(E).
[48] 2 U.S.C. § 434(f)(2)(F).
[49] 2 U.S.C. § 441i(a)(2).
[50] 11 C.F.R. § 300.2(c)(3) (new) [for ease of the reader, the future Code of Federal Register locations will be cited with a "(new)" reference]: "On or after November 6, 2002, an entity shall not be deemed to be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities' actions and activities solely after November 6, 2002, they satisfy the requirements of this section. If an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of this section."

The BCRA provisions preventing the use of soft money by state or local party committees for "Federal election activity" depend on a broad reading of that term in order to have any real impact. Any allocable state or local party activity that doesn't qualify as "Federal election activity" can be paid for in large part with soft money under the traditional allocation rules.[51] Thus, interpretations by the FEC that narrow the term "Federal election activity" increase the opportunity to use soft money. Several such interpretations were adopted by a majority of commissioners in the rulemaking process.

When defining the voter identification, get-out-the-vote, and generic campaign activity "in connection with an election in which a candidate for Federal office appears on the ballot,"[52] the FEC opted for an interpretation that restricts application of the statute in most states to the time period beginning with the filing deadline for access to the primary ballot.[53] In states with late primaries and, hence, late filing deadlines (e.g., at least 13 states in 2002 with July filing deadlines),[54] this means that the BCRA soft money provisions will have little effect on operations until very late in the election season. The FEC considered a simple January 1 approach, but rejected it.

When defining the term "voter identification" the FEC limited its reach to "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates."[55] This apparently excludes the costs of acquiring voter lists or other lists and simply verifying the addresses or similar contact information—a significant part of the typical voter identification process.

The term "get-out the vote" also was confined somewhat to include only "contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting."[56] This appears to exclude such contacts if designed merely to encourage voters to vote. In this day of direct mail and pre-recorded computerized telephone banks, a good deal of energy could be directed through the latter route, although some such activity might qualify as "generic campaign activity"[57] and still be covered as "Federal election activity."

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[51] As noted earlier, much "Federal election activity" can be paid for in part with 'Levin funds' which must be raised in amounts of no more than $10,000 per donor. Soft money, by contrast, can be raised in whatever amounts state law allows, meaning in some states *un*limited amounts.

[52] 2 U.S.C. § 431(20)(A)(ii).

[53] 11 C.F.R. § 100.24(a)(1)(i) (new): "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."

[54] 2002 U.S. Congressional Primary Election Dates and Candidate Filing Deadlines for Ballot Access (FEC July 30, 2002).

[55] 11 C.F.R. § 100.24(a)(4) (new).

[56] 11 C.F.R. § 100.24(a)(3) (new).

[57] "Generic campaign activity" was defined by the FEC as "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or non-Federal candidate." 11 C.F.R. § 100.25 (new). This also is a narrower interpretation than the statute would

In most of the debates on which interpretation of BCRA to adopt regarding the reach of "Federal election activity," the concern for 'clarity' was often asserted. Of course, applying a January 1 date across the board rather than various candidate filing dates would have been at least as clear. Similarly, including list acquisition and address verification costs in "voter identification" would have been straightforward. Including individualized contact to simply encourage voting in the "get-out-the-vote" definition would have been unambiguous. Likewise, including the cost of party rallies in "generic campaign activity" would have been clear to all.

Regarding the BCRA restrictions on federal candidates and officeholders soliciting soft money donations, a majority of commissioners rejected a proposed regulation that defined 'solicitation' as a "request, suggestion, or recommendation to make a contribution or donation." Instead, the FEC adopted a test covering only "to ask that another person make a contribution."[58] In an effort to avoid "examination of a private conversation to impute intent when the conversation is not clear on its face,"[59] the Commission, ironically, has left somewhat unclear whether a declarative statement like "It would be great if you could send some money" qualifies as solicitation. This narrow construction of 'solicitation' runs contrary to the FEC's longstanding broad application of the concept in determining whether a corporate or union official has solicited beyond the organization's restricted class.[60]

Interpreting the term "agent" in the context of the restrictions on national party operatives and candidate operatives soliciting or directing soft money, the FEC suggested an approach that allows any individual to demonstrate that he or she is not acting on behalf of such principals, but in a separate capacity on behalf of a state or local party or candidate.[61] This will raise some interesting questions when someone clearly an agent of a national party or federal candidate claims to have been raising soft money solely in the capacity of an agent of a state or local party or candidate. The Commission's adoption of the 'two hat' theory may lead to a flurry of formalized 'agency designations' by the latter to provide evidence of the separate and distinct agency relationship. As an alternative, the FEC could have adopted a hard and fast rule that anyone serving as an employee, full time

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allow since the statute refers to "campaign activity" rather than "public communication." The latter is a term of art meaning a communication "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22). Much of the cost of party rallies, for example, may escape the definition of "Federal election activity" as a result.

[58] 11 C.F.R. § 300.2(m) (new).

[59] *See* Explanation and Justification at 67 Fed. Reg. 4907 (July 29, 2002).

[60] *See* Advisory Opinions 82-65 and 79-13, Fed. Elec. Camp. Fin. Guide (CCH), ¶¶ 5701 and 5403 ("encouraging" and "suggesting" are part of the analysis).

[61] In the Explanation and Justification the FEC indicated, "[A] principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals." 67 Fed. Reg. 49083 (July 29, 2002)

consultant, or official of the fundraising team is an "agent" deemed incapable of acting outside that capacity when it comes to raising soft money.

It will take some time to determine how much the FEC's regulatory approaches weaken the BCRA provisions. Soft money would have been allowed at the State and local party level to pay for the non-federal share of administrative expenses and some voter registration costs even under the strictest reading of BCRA. Thus, the FEC's interpretations do not mean the difference between no soft money and some soft money. More likely, though, they mean many of the same people will be raising the soft money and a significant amount of traditional party building activity will be paid for the same way as before.

B. Issue ad regulations

The FEC's regulations regarding BCRA's "electioneering communication" provisions were published in the Federal Register on October 23, 2002. 67 Fed. Reg. 65190. In one respect the Commission interpreted the statute tougher than Congress intended, and in one other respect the Commission loosened the statute more than Congress intended.

As noted above, Congress gave the FEC leeway to create exceptions to the 'any reference to a federal candidate within 30/60 days of the election' language in the statute as long as the exceptions did not involve communications that 'promote, support, attack, or oppose' the named candidate. Yet three commissioners voted against a proposal to create an exception for grassroots lobbying ads that merely mentioned a federal candidate in an innocuous way.[62] As a result, even a purely grassroots ad simply urging recipients to urge their named Congressman to support a particular bill will be swept into the "electioneering communication" rules if it is run during the applicable time frame. This, in essence, 'tees up' the regulation for unfavorable treatment in the courts.

Going in the opposite direction, the same three commissioners were joined by another to create a 'total carve out' for communications by 501(c)(3) groups.[63]

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[62] The proposed exception would have covered an ad "devoted exclusively to a particular pending legislative or executive branch matter" that only refers to the Federal candidate by "urging the public to contact that Federal candidate to persuade him or her to take a particular position on the pending . . . matter" and that does not contain any reference to "a political party or the political persuasion of the . . . candidate" or to "the candidate's record or position on any issue" or to "the candidate's character, qualifications, or fitness for office" or to "an election, voters or the voting public, or anyone's candidacy." Sept. 25, 2002 Memorandum from Commissioner Scott E. Thomas, Ag. Doc. No. 02-68-A. This proposal failed even though the chief sponsors of BCRA expressly stated they favored such an approach. Letter of Sept. 25, 2002 from Senators McCain, Feingold, Snowe, and Jeffords, and Representatives Shays and Meehan. The three commissioners who blocked this approach seized on the comment of the congressional sponsors during the soft money rulemaking that creating a similar lobbying exception for party committees was not appropriate since party committees were in the business of electing candidates and any vagueness concerns were greatly reduced.

[63] 11 C.F.R. § 100.29(c)(6) (new). *See* Explanation and Justification at 67 Fed. Reg. 65199, 65120 (Oct. 23, 2002).

Thus, radio or TV paid programming or ads by religious or charitable groups completely escape any regulation as "electioneering communication." This will leave such activity to the scrutiny of the Internal Revenue Service, though.[64] Moreover, such activity by incorporated 501(c)(3) groups—even if conducted independently—cannot cross over into "express advocacy" because of other underlying provisions of the FECA and Commission regulations.[65] Nor can it cross over into "coordinated communication" as newly defined by the FEC (discussed below).

The Commission unanimously approved an interpretation of the statute whereby non-paid programming will escape regulation as "electioneering communication."[66] This will allow regular programming of broadcasters and cablecasters and public service announcements that are run without air-time charges to go forward without concern about "electioneering communication" restrictions. Again, though, some caution should remain when broadcasters and cablecasters wander into "express advocacy" or "coordinated communication" that extends beyond the statutory allowance for a "news story, commentary, or editorial" or involves communications by a facility owned or controlled by a candidate or political party.[67]

The FEC also unanimously adopted an exemption from the corporate prohibition at 2 U.S.C. § 441b for "electioneering communications" by certain non-profit, ideological corporations since they already enjoy protection from the ban for their "express advocacy" communications.[68] Thus, such entities will be able to use treasury funds to make electioneering communications. They will, though, be subject to the disclosure provisions for electioneering communications, and can minimize the disclosure aspect by paying for electioneering communications using a segregated account containing only permissible funds.[69]

In sum, the 'issue ad' business indeed will have to adapt to meet the new "electioneering communication" rules (assuming they survive the judicial gauntlet). Interest groups relying on corporate or union funds will have to 'beat up' named candidates before the 30/60 day time frames begin. Within such time

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[64] The IRS rarely invokes its authority. *But see Branch Ministries v. Rissotti*, 211 F.3d 137 (D.C. Cir. 2000). One tax expert recently suggested there will be aggressive enforcement of the 'shall not intervene in political campaign' provisions of the tax code 'when Hell freezes over.' Money and Politics Report (BNA), Jan. 8, 2003.

[65] 2 U.S.C. § 441b continues to prohibit corporate and union expenditures "in connection with" a federal election, and the FEC's regulation at 11 C.F.R. § 114.2(b) continues to prohibit expenditures "expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party."

[66] The FEC implemented this exemption through its definition of "publicly distributed" which, as a result, covers only dissemination "for a fee." 11 C.F.R. § 100.29(b)(3)(i) (new). *See* Explanation and Justification, 67 Fed. Reg. 65192, 65193 (Oct. 23, 2002).

[67] 2 U.S.C. § 431(9)(B)(i). *See also* 11 C.F.R. § 100.8(b)(2) (2002).

[68] 11 C.F.R. 114.10(d)(2) (new). *See* Explanation and Justification, 67 Fed. Reg. 65203- 65207 (Oct. 23, 2002).

[69] 11 C.F.R. § 114.10(e)(2)(ii) and (h) (new).

frames, ads will have to 'hammer' a hot campaign issue without mentioning a particular candidate. We might be in for a spate of ads just before the election saying, "We need people in Washington who have supported, and will continue to support, the Administration's courageous fight against terrorism," or "This country needs leaders who will stand up against more tax breaks for the rich and sweet deals for big drug companies that charge too much for medicine for our seniors." Some of the infamous 'issue ads' of recent years may be gone, but chances are, the airwaves will be quite busy nonetheless.

C. The coordination rules

Perhaps as important as the soft money and electioneering communication regulations are the regulations defining when a communication is deemed coordinated with a candidate or party committee such that it is treated as an in-kind contribution or party coordinated expenditure.[70] BCRA expressly invalidated recently adopted regulations of the FEC defining "coordinated general public political communications" and directed that the agency try again.[71] BCRA specifies that new FEC regulations "shall not require agreement or formal collaboration to establish coordination."[72]

The Commission adopted what, first of all, can only be described as a very complicated formulation. *See* 68 Fed. Reg. 421-458 (Jan 3, 2003). In an effort to deal with the view that some communications do not contain content that should be regulated under FECA even if coordinated with a candidate or party, the Commission crafted language that, in essence, requires analysis of the *content and timing* of the communication before analyzing whether it was coordinated. In the final version, the Commission's regulations now include language that broadly exempts from the limits, prohibitions, and contribution reporting provisions *fully coordinated* communications that run more than 120 days before the election as

[70] For purposes of the contribution limits, the statute has long characterized expenditures made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate's operatives as a contribution. 2 U.S.C. § 441a(a)(7)(B)(i). BCRA extended similar treatment to expenditures coordinated with political party operatives, 2 U.S.C. § 441a(a)(7)(B)(ii), and to electioneering communications coordinated with candidate or party operatives. 2 U.S.C. § 441a(a)(7)(C). The Commission's past and new regulations tie this concept to the reporting provisions, the party coordinated expenditure limits, and the prohibitions at 2 U.S.C. § 441b, as well. 11 C.F.R. § 100.23(b) (2002); 11 C.F.R. §§ 109.20(b), 109.21(b), and 109.37(b) (new). Thus, corporations or unions not wanting to tinker with donations to party committees and wanting instead to undertake non-express advocacy communications outside the 30/60 day time frames of the electioneering communication restrictions, must avoid the coordination rules in order to stay clear of the prohibition on "contributions" set forth at 2 U.S.C. § 441b. Similarly, PACs, party committees, and individuals wanting to undertake unlimited independent expenditures or other communications must be wary of the coordination rules lest the activity be deemed a "contribution" or "party coordinated expenditure" subject to the limits at 2 U.S.C. § 441a(a) and (d) and the reporting rules that attach to the making and/or receiving of a "contribution" or "party coordinated expenditure."

[71] Section 214(b) and (c) of Pub. Law No. 107-155, 116 Stat. 94, 95. The disapproved regulations at 11 C.F.R. § 100.23 (2002) technically only addressed coordinated communications paid for by persons other than party committees or candidates.

[72] Section 214(c) of Pub. Law No. 107-155, 116 Stat. 95.

long as they avoid express advocacy.[73] With this rule, there will be no need for even pretense regarding independence when undertaking 'issue ads' that bash the record of named candidates in the months leading up to the election in question. For example, between a March primary and early July, Senate candidate Dinglethorp can draft and produce an ad calling his opponent a lazy fool, a tax cheat, and a wife-beater, and can pick the days and stations where the ad is to run, and then simply arrange for a friendly corporation, union, or foreign government to fund the costs involved. Dinglethorpe could make the same arrangement with a party committee or wealthy individual. Even though coordinated to the hilt, the ad will escape treatment as a contribution or party coordinated expenditure.

Needless to say, the congressional direction given to the Commission to toughen its coordination regulations was lost in the shuffle. Indeed, what was regulated before outside the 120 day timeframe is no longer regulated, except for "express advocacy." Some commissioners countered that the FEC now was regulating what essentially had been unregulated by clarifying that party communications mentioning federal candidates within the 120 day timeframe will be subjected to party limits if coordinated.[74] Of course, the latter point only holds water if one buys the argument that the existing law didn't cover such communications.[75]

In sum, like the FEC's efforts to implement the soft money and the electioneering communication provisions of BCRA, the coordination regulations seem to stray from the intent of Congress when passing BCRA. Clearly, Congress had in mind a stricter regimen for the raising and spending of money to influence federal elections. The choices made by the Commission when interpreting BCRA do not seem to reflect that approach.

[73] 11 C.F.R. §§ 109.21(c)(4) and 109.37(a)(2)(iii) (new).
[74] *See* 11 C.F.R. § 109.37.
[75] *See* statements referenced in footnote 14.