

# Federal Restrictions on State and Local Campaigns, Political Groups, and Individuals

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Note: This paper does not constitute legal advice. Compliance with the particular laws discussed in this paper may turn on factors which have not been discussed in the paper for reasons of space or clarity. In addition, the laws are under constitutional attack and are the subject of regulatory control by federal agencies. For that reason, anything said in this paper is subject to change because of court or agency action. Please consult an attorney knowledgeable in this field before undertaking any activity relating to campaigns.

This paper does not include the FEC regulations on the following regulations for which final rules are not yet available:

Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

Coordinated and Independent Expenditures

Consolidated Reporting

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State and local elections are becoming increasingly “federalized” – that is, the rules set by the Federal government are applicable to most election administration, campaign activity, and campaign finance disclosure by both campaigns and PACs, even for non-Federal elections.

There are four ways that the Federal government may regulate State and local election administration and campaigns:

- ◆ The U.S. Constitution allows Congress to set the times, places, and manner of congressional and presidential elections.<sup>1</sup> Most States hold their elections at the same time as Federal elections and usually decide that adherence to one set of (Federal) rules is easier than running parallel elections with separate rules. The National Voter Registration Act is an example of the first type of regulation.<sup>2</sup> It applies to the registration of voters for Federal elections only. Every State covered by this Act has adopted a set of rules consistent with the NVRA to cover all voter registration.
- ◆ Congress may exercise its authority under the 14<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup>, or 26<sup>th</sup> Amendments to prevent electoral discrimination against racial minorities, women, and youth. The Voting Rights Act of 1965 is an example of the second type: it was passed under the power granted Congress by the 15<sup>th</sup> Amendment to enact appropriate legislation to protect the rights of blacks to vote.<sup>3</sup>
- ◆ Congress may regulate activities affecting interstate commerce<sup>4</sup> and thereby reach, for

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<sup>1</sup> U.S. Constitution, Art. I, § 4, and Art. II, § 1.

<sup>2</sup> 42 U.S.C. § 1973gg *et seq.*

<sup>3</sup> 42 U.S.C. § 1971 *et seq.*

<sup>4</sup> U.S. Constitution, Art. 1, § 8.

example, fraudulent voting that utilizes the mail.<sup>5</sup>

- ◆ Congress may use the “power of the purse” to condition Federal aid or favorable tax treatment to adherence by a State or an organization to a certain course of action or set of standards. Since 1954, the Internal Revenue Code has forbidden candidate endorsements or other campaign activity by tax-exempt organizations whose donors receive a charitable deduction for their contributions.<sup>6</sup>

This paper concerns the latest Federal laws which continue the trend toward Federal regulation of elections and campaigns. While the BCRA contains limitations on national party groups and federal candidates and office holders, this paper is directed toward the restrictions on other groups and individuals.<sup>7</sup>

On March 27, 2002, the President signed the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>8</sup> The BCRA represents the first major overhaul of Federal campaign finance laws in the U.S. since the Watergate era. Sponsors of the bill included U.S. Senators John McCain (R-AZ) and Russell Feingold (D-WI) and U.S. Representatives Christopher Shays (R-CT) and Marty Meehan (D-MA). The BCRA contains new provisions affecting national, State, and local political parties, PACs, candidates, and office

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<sup>5</sup> *United States v. Aczel*, 219 F. 917 (D. Ind. 1915).

<sup>6</sup> 26 U.S.C. § 501(c)(3).

<sup>7</sup> BCRA prohibits national party committees from soliciting, receiving, or spending any “soft money” – that is, money not regulated by the FECA. National parties and congressional committees are limited to hard money fundraising and expenditures. Members of Congress, Federal officials, and candidates cannot raise soft money in connection with a Federal election. BCRA § 101.

<sup>8</sup> Pub. L. 107-155, 116 Stat. 81.

holders. The outline below does not attempt to cover all the provisions of the BCRA, but only those relating to State and local political parties and campaigns.

A. New limits on contributions.

The BCRA subjects individuals to a \$95,000 aggregate contribution limitation per *two-year* election cycle (odd numbered year followed by an even year). The aggregate contribution cap is broken down as follows:

- ◆ \$37,500 per two-year election cycle to candidates;
- ◆ maximum \$37,500 aggregate per cycle to all committees other than national party committees (*i.e.*, PACs, State party, Federal PACs, etc.); and
- ◆ between \$20,000 and \$57,500 per two-year election cycle to all national party committees, depending on how much money the individual has contributed to committees other than national party committees.<sup>9</sup>

Subject to the above-mentioned aggregate caps, individuals may contribute

- ◆ up to \$2,000 to each candidate for Federal office (*i.e.*, John Smith for Congress) per election (*i.e.*, primary, general, runoff, and special);<sup>10</sup>
- ◆ up to \$25,000 per year to the Federal account of each party committee;<sup>11</sup>
- ◆ up to \$10,000 per year to each State and local party committee (if the committee uses the

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<sup>9</sup> BCRA § 307(b) amending 2 U.S.C. § 441a(a)(3).

<sup>10</sup> BCRA § 307(a) amending 2 U.S.C. § 441a(a)(1).

<sup>11</sup> BCRA § 307(a) amending 2 U.S.C. § 441a(a)(1).

funds “for the purpose of influencing any election for Federal office”);<sup>12</sup> and

- ◆ up to \$5,000 to PACs (this is unchanged).

The new contribution limits go into effect on January 1, 2003.<sup>13</sup>

Individual contributions to candidates and parties and individual aggregate spending caps will be indexed for inflation every two years. Limitations on contributions by PACs and individual limits on contributions to PACs and State parties will not be indexed for inflation.<sup>14</sup>

B. “Federal Election Activity” by State and Local Political Party Committees

Prior to the passage of BCRA, the Federal Election Campaign Act (FECA) contained limitations on contributions to and expenditures by State and local political party committees only if they were using the funds for Federal campaigns. FECA and FEC regulations contained rules for allocating costs of joint activities between Federal and non-Federal accounts.<sup>15</sup> These regulations allowed State and local parties to raise and spend large amounts of money without Federal limits and without reporting the contributions or expenditures to the FEC. Because this money was not restricted by the FECA, corporations and unions could make such

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<sup>12</sup> BCRA § 102 amending 2 U.S.C. § 441a(a)(1). The quoted language is from 2 U.S.C. § 431(9) defining a contribution, which in turn affects the definition of a “political committee” in 2 U.S.C. § 431(4). Note that this limit is separate from the \$10,000 limit contained in the Levin Amendment. See section C, below.

<sup>13</sup> BCRA § 307(e).

<sup>14</sup> BCRA § 307(d) amending 2 U.S.C. § 441a(c). The FEC recently published a notice of proposed rulemaking on indexing contributions. The proposed rules, if adopted, will clarify the date on which the indexing takes place. 67 FR 54366 (22 August 2002).

<sup>15</sup> 11 C.F.R. § 106.5 (2002).

contributions to State and local parties, if the contribution was allowed by State law. This was so-called “soft money.”<sup>16</sup>

BCRA brings some activities formerly not regulated by the Federal government under the contribution limits and reporting requirements of the FECA. If a State or local political party or a State or local candidate or office holder (and their agents) spends any funds on a “Federal election activity,” the money must be raised, spent, and reported under the requirements of the FECA.<sup>17</sup> The definition of a “Federal election activity” is long and complicated; it includes the following:<sup>18</sup>

- ◆ Voter registration activity during the 120 days before a regularly scheduled Federal election. Since a “Federal election” includes primaries, runoffs, and general elections at which there are any Federal candidates, this could include 240 days in even numbered years, or an even longer period of time in States with runoff primaries. Voter registration activity includes individual contact to encourage or assist persons to register.
- ◆ Voter identification activity for an election containing even one Federal candidate. Voter identification is defined as creating or enhancing voter lists by verifying or adding information.<sup>19</sup>
  - Voter identification becomes an activity in connection with a Federal election on the earliest filing deadline for the primary

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<sup>16</sup> Another major category of “soft money” was given directly to national party groups for non-Federal election activities.

<sup>17</sup> BCRA § 101(a) adding new 2 U.S.C. § 441i(b) [for parties] and 441i(f) [for candidates].

<sup>18</sup> BCRA § 101(b) adding 2 U.S.C. § 431(20), and 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.24.

<sup>19</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.24.

election ballot or on January 1 of an even-numbered year in States without a primary. Thus, voter identification work done a year before the election can probably be done with non-Federal funds.

- Voter identification done by an association of State and local candidates or office holders is not a Federal election activity “if the association or group engages in voter identification that refers only to one or more State and local candidates.”
- ◆ Get-out-the-vote (GOTV) activity for an election containing even one Federal candidate. GOTV is individual contact with voters to encourage or assist their voting.
  - GOTV by an association of State and local candidates or office holders is not a Federal election activity if it “refers only to one or more State and local candidates.”<sup>20</sup>
- ◆ “Generic campaign activity,” defined as a “public communication” which promotes a political party without mentioning either a Federal or non-Federal candidate and relates to an election containing even one Federal candidate.<sup>21</sup>
  - The costs of a State or local political convention are not “Federal election activities.”
  - The costs of grassroots campaign materials (such as buttons, bumper stickers, and yard signs) including only the names or pictures of State or local candidates are also not “Federal election activities.”

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<sup>20</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.24.

<sup>21</sup> BCRA § 101 adding 2 U.S.C. § 431(21) defines this term as “campaign activity” but the regulations narrow or clarify it to be “public communications.” 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.25.

- ◆ A “public communication” which refers to a clearly identified Federal candidate and promotes, supports, attacks, or opposes a candidate for Federal office; there is no requirement that there be express advocacy of the election or defeat of the candidate. A “public communication” is a communication by TV, radio, cable, satellite, newspaper, magazine, outdoor advertising, mass mailing, telephone bank, or “other form or general public political advertising.”<sup>22</sup>
  - A public communication referring only to State and local candidates and not promoting, supporting, attacking or opposing a Federal candidate is not a Federal election activity unless it is also voter registration activity, voter identification, generic campaign activity, or GOTV.
  - Communications over the Internet are not “public communications.”<sup>23</sup>
- ◆ Services by a paid employee of a State or local political party committee if the employee spends more than 25% of his or her compensated time in any month working on activities connected with a Federal campaign.
  - This work becomes an activity in connection with a Federal election on the earliest filing deadline for the primary election ballot or on January 1 of an even-numbered year in States without a primary.<sup>24</sup>
- ◆ Contributions to State or local candidates if the funds are designated for voter registration,

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<sup>22</sup> BCRA § 101 adding 2 U.S.C. § 431(20)(a)(iii).

<sup>23</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §§ 100.26, 100.27, and 100.28.

<sup>24</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.24.

voter identification, GOTV, or generic campaign activity which the party could not do directly.

Because funds to support these activities must be raised in accordance with the FECA, corporate and union contributions to State and local parties may not be spent on “Federal election activities,” except as noted in the next section.

### C. Party Mobilization Activities by State and Local Parties

If a State or local party wishes to carry out voter registration, voter identification, GOTV, or generic campaign activity for a Federal election, it may do so under the general limitation of the FECA or under the following, more relaxed rules (referred to as the “Levin Amendment”):<sup>25</sup>

- ◆ No candidate for Federal office can be clearly identified. “Clearly identified” means
  - the name of the candidate involved appears; or
  - a photograph or drawing of the candidate appears; or
  - the identity of the candidate is apparent by unambiguous reference.<sup>26</sup>
- ◆ The funds expended cannot be for broadcast, cable, or satellite communications.
- ◆ Any individual or entity may contribute up to \$10,000 to a State or local political party committee for voter registration, voter identification, GOTV, or generic campaign activity if such contributions are legal under applicable State law. Note that State contribution limits for individuals and entities

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<sup>25</sup> BCRA § 101 adding 2 U.S.C. § 441i(b)(2).

<sup>26</sup> 2 U.S.C. § 431(18).

vary considerably. Approximately 60% of the States allow some corporate contributions.

- ◆ The funds must be spent by the State or local committee which raises them and cannot be transferred among committees.
- ◆ Two or more party committees cannot make a joint fundraising effort.<sup>27</sup>

National, State, and local party committees may not solicit funds or make donations to:

- ◆ A non-profit group which engages in any campaign-related activity.
- ◆ Any political committees other than authorized campaign committees or State or local political party committees.<sup>28</sup>

Thus, an individual or entity could make a \$10,000 contribution (or the lower maximum allowed by State law) to every precinct committee in the U.S. for voter registration, voter identification, GOTV, or generic campaign activity without the amount being counted against the person's<sup>29</sup> Federal contribution limit. For instance, in Alabama, there are no limits on contributions except that for-profit corporations are prohibited from donating more than \$500 per election to a candidate or political committee.<sup>30</sup> So, an individual could give \$10,000 to a Levin fund, and a corporation could give \$500 for each election.

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<sup>27</sup> BCRA § 101 adding 2 U.S.C. § 441i(b)(2)(C).

<sup>28</sup> BCRA § 101 adding 2 U.S.C. § 441i(d).

<sup>29</sup> The term "person" in the FECA and the BCRA means individuals, corporations, labor organizations, and any other organizations or group of persons. 2 U.S.C. § 431(11).

<sup>30</sup> Ala. Code § 10-2A-70, -70.1, and -70.2 (1999).

However, in raising Levin funds, political party committees must take care not to run afoul of the prohibition established in the BCRA on joint fundraising for Levin funds.<sup>31</sup>

D. Allocation of Expenses Among Federal and Non-Federal Accounts

Prior to the passage of the BCRA, if a State or local party committee was raising and expending funds on both Federal and non-Federal campaigns, it could establish separate accounts to segregate the funds.<sup>32</sup> Only the Federal account was subject to the FECA, and the party reported only receipts and expenditures of the Federal account to the FEC.<sup>33</sup> State and local parties will have to establish up to three accounts to comply with the BCRA:

- ◆ A Federal account to pay for Federal campaigning and “Federal election activity.”
- ◆ A “Levin account” to accept contributions subject to State law limits or the \$10,000 Federal limit and to pay for party mobilization activities (described above).
- ◆ A State account to pay for whatever is not covered by the FECA.

These “accounts” could be ledger or computer accounts within a bank account.<sup>34</sup> The Federal and Levin accounts will be covered by the FECA and therefore will be subject to reports to the FEC.

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<sup>31</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 300.31(f).

<sup>32</sup> 11 C.F.R. § 106.5 (2002).

<sup>33</sup> 11 C.F.R. § 102.5(a) (2002).

<sup>34</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 102.5(a)(3).

The pre-BCRA regulations of the FEC provided several methods by which administrative expenses, expenses for generic voter drives, fundraising expenses, and candidate support expenses could be divided between Federal and non-Federal accounts.<sup>35</sup> It appears that the allocation of expenses between Federal and non-Federal campaigns will be modified as follows:

<b>expense items</b>	<b>pre-BCRA</b>	<b>post-BCRA</b>
administrative expenses (except for wages and salaries)	allocated <sup>36</sup>	allocated <sup>37</sup>
wages and salaries	allocated as administrative expenses <sup>38</sup>	Federal funds for each employee who spends 25% or more of time in a month in connection with a Federal election; otherwise from “funds that comply with state law” <sup>39</sup>
voter registration	allocated <sup>40</sup>	Federal or Levin funds if within 120 days before Federal election; <sup>41</sup> allocated other times
voter identification and GOTV	allocated <sup>42</sup>	Levin or Federal funds (depending on timing) if at least one Federal candidate on ballot; non-Federal funds may be used for completely non-Federal elections <sup>43</sup>

<sup>35</sup> 11 C.F.R. § 106.5 (2002). If the party chose to have one account, that account was entirely subject to the FECA if any funds were used “in connection with federal . . . elections”.

<sup>36</sup> 11 C.F.R. § 106.5(a)(2)(i) (2002).

<sup>37</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 106.7 and part 300.

<sup>38</sup> 11 C.F.R. § 106.5(a)(2)(i) (2002).

<sup>39</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 106.7 and § 300.33(c). I believe that “funds that comply with State law” would include Levin funds.

<sup>40</sup> 11 C.F.R. § 106.5(a)(2)(iv) (2002) (called “generic voter drives”).

<sup>41</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §§ 106.7 and 300.33.

<sup>42</sup> 11 C.F.R. § 106.5(a)(2)(iv) (2002) (called “generic voter drives”).

<b>expense items</b>	<b>pre-BCRA</b>	<b>post-BCRA</b>
fundraising	allocated <sup>44</sup>	allocated <sup>45</sup>
campaigning for or against a specific candidate	allocated <sup>46</sup>	Federal funds if “public communication” refers to a Federal candidate; <sup>47</sup> otherwise, allocated
generic campaign activity	not mentioned as a category until BCRA	Levin or Federal funds (depending on timing) if at least one Federal candidate on ballot <sup>48</sup>

#### E. Coordination of Expenditures

Since the 1970’s the FECA has contained the concepts of independent and coordinated expenditures. Basically, both are

- ◆ expenditures made to advocate or oppose the election of a candidate and
- ◆ made by someone other than the candidate (or the candidate’s principal campaign committee).

“Coordinated” expenditures are those made “in cooperation, consultation, or concert, with, or at the request or suggestion” of a candidate, campaign committee, or agents of either.<sup>49</sup> “Independent” expenditures are those which are not coordinated.<sup>50</sup>

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<sup>43</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 106.7.

<sup>44</sup> 11 C.F.R. § 106.5(a)(2)(ii) (2002).

<sup>45</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §§ 104.17 and 106.7.

<sup>46</sup> 11 C.F.R. § 106.5(a)(2) (2002).

<sup>47</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §§ 106.7 and 300.33(c).

<sup>48</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §§ 300.32(b) and 300.33(a)(2).

<sup>49</sup> 2 U.S.C. § 441a(a)(7)(B).

<sup>50</sup> 2 U.S.C. § 431(17).

Under the FECA, there were two sides to the coordination equation – the candidate and others. The BCRA creates a third group which can coordinate with the others -- national, State, and local political party committees.<sup>51</sup> In addition, electioneering communications also come under the coordination rules.<sup>52</sup> The following coordination rules will apply to both express advocacy and electioneering communications:

- ◆ If a party committee coordinates with a candidate, the expenditure will be considered a contribution to the candidate and an expenditure by the candidate.<sup>53</sup> Each party must choose whether to make coordinated or independent expenditures for each candidate. The first expenditure of either type locks the party into making only the same type of expenditure for the remainder of the election cycle for that district.<sup>54</sup>
- ◆ If outsiders coordinate with a candidate, the expenditure will be considered a contribution to the candidate and an expenditure by the candidate.<sup>55</sup>
- ◆ If outsiders coordinate with a party committee, the expenditure will be considered a contribution to the party and an expenditure by the party.<sup>56</sup> Since political parties are prohibited from accepting “soft money,” the practical effect is that any expenditure coordinated with a political party must come

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<sup>51</sup> BCRA §§ 211 and 214(a), amending 2 U.S.C. §§ 431(17) and 441a(a)(7)(B).

<sup>52</sup> See the next section for a definition of “electioneering communications.”

<sup>53</sup> BCRA §§ 202 and 214(a), amending 2 U.S.C. § 441a(a)(7).

<sup>54</sup> BCRA § 213 adding 2 U.S.C. § 441a(d)(4).

<sup>55</sup> BCRA §§ 202 and 214(a), amending 2 U.S.C. § 441a(a)(7).

<sup>56</sup> BCRA §§ 202 and 214(a), amending 2 U.S.C. § 441a(a)(7).

from money raised under the “hard money” contribution limits.<sup>57</sup>

The Supreme Court held in 1996 that the FECA spending limits were unconstitutional as applied to the Colorado Republican Party’s independent expenditures for a senatorial campaign.<sup>58</sup> Five years later, the Court upheld the provisions of FECA limiting the coordinated spending of political party and its candidate.<sup>59</sup> The BCRA attempts to reinstate a limitation on independent expenditures by requiring a political party to choose whether it will make coordinated or independent expenditures, but not both, for each Federal candidate.<sup>60</sup> In addition, the new law treats national, State, and local committees of the same political party as one aggregated committee if they are raising funds to be used in Federal elections.<sup>61</sup>

It is probable that the coordination rules will become even more detailed and onerous. The BCRA directs the FEC to promulgate new regulations (by 23 December 2002) on coordination of communications financed by persons other than candidates, candidate committees, and party committees. The regulations must consider the following factors: re-publication of campaign materials; use of a common vendor; direction of the

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<sup>57</sup> BCRA § 101, adding 2 U.S.C. § 441i.

<sup>58</sup> *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (*Colorado Republican I*).

<sup>59</sup> *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 531 U.S. \_\_\_, 121 S.Ct. 2351 (2001) (*Colorado Republican II*).

<sup>60</sup> BCRA § 213, adding 2 U.S.C. § 441a(d)(4)(A). This provision only applies once the candidate has been nominated. In the *Colorado Republican* cases, the Party had made independent expenditures attacking the front-running candidate for the Democratic nomination even before the Republican convention had chosen its nominee. Thus, the particular fact pattern of *Colorado Republican* could be repeated under the BCRA.

<sup>61</sup> BCRA § 213, adding 2 U.S.C. § 441a(d)(4)(B).

communication by a former employee of the candidate or party; and substantial discussion between an advertiser and a candidate or party.<sup>62</sup>

#### F. Electioneering Communications<sup>63</sup>

The BCRA creates a new form of regulated or reportable expenditures: “electioneering communications.” Electioneering communications

- ◆ are carried over broadcast, cable, or satellite communications,
- ◆ refer to a clearly identified candidate for Federal office, and
- ◆ are made within 60 days before a general, special, or runoff election for the candidate or within 30 days before a primary or nominating convention or caucus for the candidate,<sup>64</sup> and
- ◆ are “targeted”<sup>65</sup> – meaning “can be received by 50,000 or more persons” in the relevant electorate.
  - In the case of Senate candidates, the relevant electorate is the candidate’s State.
  - In the case of House candidates, the relevant electorate is the candidate’s district.<sup>66</sup>

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<sup>62</sup> BCRA §§ 214(c) and 402(c). The FEC recently issued a notice of proposed rulemaking with draft regulations on coordinated and independent expenditures and will hold a hearing on the proposal in late October. 67 F.R. 60042 (24 September 2002). The draft contains several alternative approaches to regulations that may be adopted by the Commission.

<sup>63</sup> The FEC recently published final rules on electioneering communications. See <http://www.fec.gov/register.htm> (last visited 16 December 2002).

<sup>64</sup> For presidential nominations, the rule is applicable only in those states where presidential primaries will be held within 30 days. 11 C.F.R. § 100.29(b)(3)(ii)(A) (final rules).

<sup>65</sup> BCRA § 201 adding 2 U.S.C. § 434(f)(3).

- For presidential primaries, the relevant electorate is a state that has not yet held its primary or convention.<sup>67</sup>
- For national presidential nominating conventions, the relevant electorate is the whole nation.<sup>68</sup>

For presidential general elections, there is no targeting requirement -- that is, a communication that meets all the other definitions will be an “electioneering communication” without regard to the number of people who can receive it.<sup>69</sup>

Electioneering communications do not include the following:<sup>70</sup>

- ◆ News stories, commentaries, and editorials of broadcasting stations (except those owned or controlled by political parties, political committees, or candidates);
- ◆ Expenditures or independent expenditures (as those terms have been used in the FECA since 1971);<sup>71</sup>
- ◆ A candidate debate or forum, or the promotion thereof, carried out under rules of the FEC; and
- ◆ Any communication exempted by the FEC, except that the FEC cannot exempt “public communications.”<sup>72</sup>

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<sup>66</sup> BCRA § 201 adding 2 U.S.C. § 434(f)(3)(A).

<sup>67</sup> 11 C.F.R. § 100.29(b)(3)(ii)(A) (final rules).

<sup>68</sup> 11 C.F.R. § 100.29(b)(3)(ii)(B) (final rules).

<sup>69</sup> 11 C.F.R. § 100.29(a)(3) (final rules).

<sup>70</sup> BCRA § 201 adding 2 U.S.C. § 434(f)(3)(B).

<sup>71</sup> 2 U.S.C. § 431(9) and (17).

<sup>72</sup> The definition is found in BCRA § 101 adding 2 U.S.C. § 431(20)(a)(iii) and discussed above. See text at note 22.

Corporations (for profit) and labor unions may not make any electioneering communications.<sup>73</sup> They may not pay for such communications indirectly; for instance, a corporation could not make a contribution to an organization which then “us[es] funds donated” to make electioneering communications.<sup>74</sup>

An *unincorporated* political organization or *unincorporated* Section 501(c)(4) non-profit organization may make electioneering communications using funds collected directly from individuals.<sup>75</sup> The organization cannot make electioneering communications if it accepts any funds directly or indirectly from corporations or labor unions.<sup>76</sup> There is no limit in the BCRA on individual contributions to such organizations for electioneering communications.

If the Section 501(c)(4) non-profit organization has any business activities or receives funds from labor unions or corporations, any electioneering communications will be considered to have been paid from

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<sup>73</sup> However, note that the Supreme Court has held that the First Amendment bars Congress from forbidding certain non-profit corporations set up to promote political ideas from expressly advocating the election or defeat of candidate. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Thus, these non-profits should still be allowed to engage in electioneering communications.

<sup>74</sup> BCRA § 203(a) and (b) amending 2 U.S.C. § 441b(b)(2) and adding 2 U.S.C. § 441b(c).

<sup>75</sup> A political organization is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for the exempt function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors. 26 U.S.C. § 527(e)(1) and (2). Most non-party and non-candidate organizations are required to file notices of formation and frequent reports with the IRS.

<sup>76</sup> BCRA §§ 203(b) adding 2 U.S.C. § 441b(c)(1) and (3)(B).

prohibited funds unless the organization establishes a “segregated bank account” to pay for electioneering communications and receives funds for that account only from individuals.<sup>77</sup>

*Incorporated* political or 501(c)(4) groups may make electioneering communications only in presidential elections.<sup>78</sup>

Any person making electioneering communications must disclose the fact to the FEC within 24 hours of spending, or contracting to spend, more than \$10,000 cumulatively since the last disclosure.

Any State or local campaigns which mention a Federal candidate, even tangentially, may run afoul of this rule and have to raise and report funds in accordance with the FECA.

#### G. Prohibitions on Involvement in State and Local Parties by National Party Officials and Federal Candidates

Federal candidates or office holders (or their agents) may not raise money for State or local party registration, or GOTV, but will be allowed to appear and speak “without restriction or regulation” at State or local party events where such funds are solicited.<sup>79</sup>

The BCRA provides that a national party committee (including the senatorial and congressional campaign committees) or “any officer or agent acting on behalf of such a national committee” “may not solicit, receive, or

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<sup>77</sup> BCRA § 203(b) adding 2 U.S.C. § 441b(c)(3).

<sup>78</sup> BCRA §§ 203(b) and 204 adding 2 U.S.C. § 441b(c)(2) and (6). While paragraph (c)(2) allows all such political and non-profit groups to engage in electioneering, paragraph (c)(6) revokes the permission for targeted electioneering communications. Since (c)(2) is an exception relating to a ban on corporate contributions, the law contains an exception to an exception to a rule.

<sup>79</sup> BCRA § 101, adding 2 U.S.C. § 441i(b)(2)(C) and (e)(3), and 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 300.64.

direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds” not subject to the FECA. Since the Republican and Democratic National Committees include all their respective State chairpersons plus other prominent party members elected by each State central committee, the California Democratic and Republican parties in their challenge to the BCRA have charged that, as a practical matter, the BCRA will bring all fundraising and expenditures by State parties under the limits of FECA.<sup>80</sup> Their reading of the Act may be too broad. The BCRA and the new FEC regulations require that the prohibition on fundraising affects only those “acting on behalf of” the national committee.<sup>81</sup> If both the national committee and the official make it clear that the official is not acting for the national committee, he or she ought to be able to carry out his or her local responsibilities.<sup>82</sup>

H. Restrictions on State and Local Political Party Involvement with Other Political Groups.

The BCRA prohibits State and local political party committees (as well as national party committees) and their agents “acting on behalf of such party committee or entity” from soliciting any funds for, or making or directing contributions to, two types of groups:<sup>83</sup>

- ◆ An organization which is tax exempt under Section 501(c) of the Internal Revenue Code and makes expenditures or disbursements in

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<sup>80</sup> *California Democratic Party et al. v. Federal Election Commission et al.*, No. 02-CV-875 (D. D.C.), complaint, available at <http://www.law.stanford.edu/library/campaignfinance> (last visited 10 July 2002).

<sup>81</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 300.10.

<sup>82</sup> See 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 300.2 (defining “agent”).

<sup>83</sup> BCRA § 101, adding 2 U.S.C. § 441i(d).

connection with a Federal election or for Federal election activities. The regulations define these activities as including the following (in the current two-year election cycle):<sup>84</sup>

- Making expenditures or disbursements for Federal election activities.
  - Making expenditures or disbursements in connection with an election for Federal office.<sup>85</sup>
- ◆ An organization which is described in Section 527 of the Internal Revenue Code (other than a political party committee or a candidate's campaign committee).<sup>86</sup>

The first of these prohibitions will prohibit a State party from giving funds or suggesting that others give funds to any organization that is ever involved in "Federal election activities." For instance, no State or local party could suggest that donors make contributions to the League of Women Voters if it carries out non-partisan voter registration campaigns within 120 days before a Federal election.

The second prohibition may turn out to be even broader than the first. State and local parties are forbidden from making contributions to any

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<sup>84</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 300.2.

<sup>85</sup> Expenditures and disbursements are in connection with a Federal election on the earliest filing deadline for the primary election ballot or on January 1 of an even-numbered year in States without a primary. 67 FR 49064 (29 July 2002) adding 11 C.F.R. § 100.24.

<sup>86</sup> A political organization is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for the exempt function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors. 26 U.S.C. § 527(e)(1) and (2).

non-party, non-candidate political group, even if the group engages in no Federal campaigning whatsoever. For instance, the FEC regulations allow an association of State and local candidates or office holders to carry out voter identification or GOTV using non-Federal funds if the activity “refers only to one or more State and local candidates.”<sup>87</sup> Because that group is a 527 political organization, it may not receive any State or local party funds or any help in fundraising from State or local parties.

#### I. Limits on Fundraising for Non-profits

Federal office holders and candidates for Federal office may make a solicitation of funds for a non-profit tax-exempt organization if it is

- ◆ a general solicitation that does not mention how the funds will be spent (this of course, excludes solicitations for organizations organized primarily to carry out voter registration, voter identification, GOTV, or generic campaign activity); or
- ◆ a specific solicitation to carry out voter registration, voter identification, GOTV, or generic campaign activity only if
  - the solicitation is made only to individuals, and
  - the amount solicited from any individual does not exceed \$20,000 per calendar year.<sup>88</sup>

#### J. Contributions by Minors and Foreigners

Individuals under 18 years of age are prohibited from making contributions to federal candidates and their committees, and to federal,

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<sup>87</sup> 67 FR 49064 (29 July 2002) adding 11 C.F.R. §100.24.

<sup>88</sup> BCRA § 101 adding 2 U.S.C. § 323(e)(4).

state, and local political party committees.<sup>89</sup> Minors will be allowed to make contributions to other political groups or to volunteer their time to any campaigns.

Foreign nationals are prohibited from contributing, either directly or indirectly, to:

- ◆ candidates for Federal, State, or local office;
- ◆ state, local, or national political party committees;
- ◆ independent expenditures or electioneering communications.<sup>90</sup>

Foreign nationals include businesses or associations organized under the laws of a foreign country or having a principal place of business there.<sup>91</sup>

#### K. Advertising Rules<sup>92</sup>

The FECA has contained requirements for identification of the candidate, committee, or group authorizing and/or paying for advertisements if they “expressly advocat[e] the election or defeat of a clearly identified candidate” or solicit a contribution.<sup>93</sup> The BCRA amends this provision in several respects:<sup>94</sup>

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<sup>89</sup> BCRA § 324 adding 2 U.S.C. § 441k; 11 C.F.R. 110.19 (added by 67 FR 69928, 19 Nov. 2002).

<sup>90</sup> BCRA § 303 amending 2 U.S.C. § 441e.

<sup>91</sup> 22 U.S.C. § 611(b).

<sup>92</sup> The FEC recently published a notice of proposed rulemaking on advertising rules. The proposed rules, if adopted, will add additional detail to these requirements. 67 FR 55348 (29 August 2002).

<sup>93</sup> 2 U.S.C. § 441d(a).

<sup>94</sup> BCRA § 311.

- ◆ Electioneering communications are now covered by the disclosure rules.
- ◆ Ads which are not authorized by a candidate must include (in addition to the name of the person who paid for the ad) the address, telephone number, or Internet address of the person.
- ◆ The disclosure (of the name of the person who paid for the ad and the statement that the ad is or is not authorized by the candidate) in a printed ad must be in a box set apart from the other contents of the ad, be in clearly readable type, and must be in a contrasting color to the background.
- ◆ Radio ads authorized by candidates must include an audio statement of authorization by the candidate.
- ◆ TV ads authorized by candidates must include a statement of authorization in the voice of the candidate, a picture of the candidate, and a written statement of authorization at the end of the ad.
- ◆ Unauthorized TV and radio ads must include similar written and audio statements and pictures of the person running the ad or a representative of the committee.

#### L. Conclusion.

These new provisions are scheduled to become effective immediately after the Fall 2002 election. The new limits on contributions become effective on January 1, 2003. Some provisions are subject to change or interpretation from two sources: the courts and the FEC.

A multi-plaintiff challenge to many of the provisions of BCRA is now pending in the U.S. District Court for the District of Columbia.<sup>95</sup> An appeal from the District Court decision will be heard by the U.S. Supreme Court.

The FEC has issued its regulations for the “soft money” provisions of the BCRA and will issue draft regulations for the electioneering communications, coordinated and independent expenditures, millionaire opponent, increased contribution limits, and consolidated reporting provisions of BCRA throughout the summer.<sup>96</sup>

If any of these provisions withstand court challenges, there will be a great change in the way State and local parties carry out their campaigns. Even non-Federal candidates and political committees will find that more of their activities will be regulated by Federal law.

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<sup>95</sup> *McConnell v. FEC*, No. 02-CV-582 (D. D.C.), pleadings and docket sheet available at <http://www.law.stanford.edu/library/campaignfinance/> (last visited 10 July 2002).

<sup>96</sup> The FEC’s proposed calendar for the consideration of these rules is at [http://www.fec.gov/pages/rulemaking\\_calendar.html](http://www.fec.gov/pages/rulemaking_calendar.html) (last visited 9 July 2002).