The Facts About the Federal Election Commission's Rules on Soft Money Pursuant to the Bipartisan Campaign Reform Act of 2002*

By a 5-1 vote on June 22, 2002, the Federal Election Commission promulgated the first of six sets of rules to implement the Bipartisan Campaign Reform Act of 2002 (usually called, "McCain-Feingold," "Shays-Meehan," or simply "BCRA"). These rules have been criticized as being contrary to BCRA's language, and threats have been made to use the Congressional Review Act of 1996 to repeal the regulations.

The assault on the FEC's rules ranges from misleading to simply incorrect, as the following chart shows.

Allegation	The FEC defined the term "solicit" "extremely narrowly," opening the door to federal office holders to continue raising soft money.[1]	The FEC's rules allow officeholders to solicit soft money at state and local party fundraisers.[4]
What the Law Provides	The statute does not define "solicit."	"Not withstanding paragraph (1) or subsection (b)(2)(C) [the ban on solicitations by federal office holders], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. 441i (e)(3).
What the Commission Did	On a 4-1 vote, defined "solicit" as "to ask that another person make a contribution, donation, or transfer of funds, or otherwise provide anything of value, whether … directly, or through a conduit or intermediary." 11 C.F.R. 300.2 (m). Contrary to many reports, the Commission's definition does not require that one "explicitly," "expressly," or "directly" ask for a contribution before triggering the Act's limits on solicitations.	On a 5-1 vote, provided that, "A Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party … Candidates and individuals holding Federal office may speak at such events without restriction or regulation." 11 C.F.R. 300.64.
What the Critics Want/Analysis	Wanted the Commission to include the word "suggest" in the definition of "solicit."[2] Webster's defines "solicit" as "1. Entreat, beg; 2. To approach with a request or plea; 3. Ask, request." All of these would seem to be covered by the Commission's definition. Reformers complain, however, that the FEC's definition will allow solicitations through "a wink and a nod."[3] The Commission rejected this approach as overly vague and an invitation to frivolous complaints, in which almost any contact between an office holder and an individual could be considered a solicitation. Office holders, political parties, and volunteers should not be subject to investigation and liability unless a solicitation is made.	Despite the clear exemption in the statute for officeholders to "speak" as the "featured guest" at a "fundraiser," reformers claim that, "nothing in the statute permits Federal candidates and officeholders to raise unlimited soft money for state parties at any state party fundraising events."[5] This defies the plain language of the statute - officeholders may "speak," "notwithstanding" the ban. This provision would make no sense if comments made at the event were not exempt from the ban, since nothing in the statute otherwise prohibits speaking at such events. And it begs the question: what does one think that the "featured guest" at a "fundraiser" is likely to speak about? The FEC is not a speech police reviewing transcripts of an officeholder's remarks looking for signs of "solicitation."

Allegation	The Commission exempted internet communications from its regulations.	The Commission exempted e-mails from its regulations.	The FEC rules will allow lawmakers to continue raising unlimited soft money for their Leadership PACs.[8]
What the Law Provides	"The term 'public communication' means 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).	"The term 'Mass mailing' means a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period. 2 U.S.C. 431 (23).	The Act prohibits "a candidate, individual holding Federal office, … or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more candidates or individuals holding Federal office," from raising soft money for any purpose, subject only to the exception for speaking at state party fundraisers, discussed above. 2 U.S.C. 441i (e)(1).
What the Commission Did	Provided that "public communication" means 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." 11 C.F.R. 100.26.	Mass mailing means a mailing by United States mail or facsimile of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period. 11 C.F.R. 100.27.	The rules adopted by the Commission make clear that Leadership PACs may not solicit soft money. *See* 11 C.F.R. 300.60, 300.61, and 300.62.
What the Critics Want/Analysis	Although the BCRA does not mention internet communications in its definition of "public communication," in written comments to the Commission, the Act's sponsors urged the FEC to claim authority to regulate internet communications.[6] The Commission noted that Congress discussed the internet elsewhere in the Act, but did not include it in this section. Under the long-established doctrine of *Ejusdem generis,* a general catch-all phase following a list of specific terms does not indicate intent to include a separate and distinct item not included in the list of specifics. Nothing in the legislative history indicates the intent to regulate the internet.	BCRA refers to mail and facsimile, but not to e-mail. Nevertheless, despite the lack of statutory authority, reformers urged the FEC to take jurisdiction over the use of e-mail for political purposes.[7] As with the internet, the FEC declined to exercise jurisdiction over this new media absent a manifestation of intent by Congress that it intended to regulate e-mail communications.	The FEC's rules specifically prohibit Leadership PACs from raising or spending soft money, just as the critics want. Claims to the contrary are wrong, and appear to be based on a misreading of another section of the Commission's regulations.

Allegation	Federal Office holders will still be able to raise soft money for state parties to run "issue ads" attacking federal candidates.[9]	"The Commission's regulations allow national parties to set up shell operations between now and the Election Day to carry on the raising and spending of soft money on behalf of the national parties after that date, when the new law takes effect."[10]	The Commission is allowing "soft money" to be used to raise more soft money, when the statute requires that hard money be used.[13]
What the Law Provides	The statute prohibits state parties from using soft money to pay for any ad that "promotes or supports, or attacks or opposes a candidate for [Federal office]." The statute does not define the phrase.	The statute prohibits a national committee of a political party or "any entity that *is* established, financed, maintained or controlled by such a national committee" from raising or spending soft money after November 6, 2002. 2 U.S.C. 441i (a) (emphasis added). The statute does not define the phrase "established, financed, maintained or controlled." It should be noted, however, that regardless of any definition promulgated by the FEC to implement this section, it would be perfectly legal for the Chairman of the RNC or DNC to resign prior to November 6, start a new, partisan organization, hire staff away from the national committee to run it, and spend soft money, so long as the new group was not "established, financed, maintained or controlled" by the national party.	Under BCRA, national committees will no longer be allowed to raise soft money. State and local parties may still raise soft money for state activities. BCRA also authorizes state and local parties to use "Levin Funds" to pay for some types of grassroots activities that affect both state and federal elections. Levin Funds are subject to limits, prohibitions, and reporting requirements under BCRA, although these are less strict than limits on traditional "hard money." According to BCRA, fundraising costs in connection with Levin Funds must be paid for "from funds subject to the limitations, prohibitions, and reporting requirements of this Act. 2 U.S.C. 441i (b)(2).
What the Commission Did	Did not define the phrase "promotes or supports, or attacks or opposes," thus leaving the statutory language to take effect without further definition.	After defining "established, financed, maintained or controlled," the Commission's rules provide that an organization shall only be considered established, financed, maintained or controlled based on its activities after the effective date of the Act. An organization that has previously received financial support from a national party committee must show that it has disposed of all such funds by November 6, 2002, to take advantage of this provision. 11 C.F.R. 300.2 (c)(3).	For many years the FEC's rules have required state parties to use hard money to pay the cost of raising hard money, while soft money may be used to pay the costs of raising soft money. This regulatory scheme is not changed by the law or the Commission's new rules. Similarly, the FEC's new rules allow Levin Funds, which are subject to the limits of the Act, to be used to raise Levin Funds. *See* 11 C.F.R. 300.33 (c)(3).
What the Critics Want/Analysis	The Commission did exactly what the critics requested.	Even though the House soundly defeated a proposed amendment to make the law effective immediately on passage, the critics argue that, contrary to the plain language of the statute, the ban should take immediate effect.[11] Indeed they urge that it have retroactive effect - according to the reformers, if an entity was ever established, financed, maintained or controlled by a party, even many years ago, it would be forever subject to the Act.[12] This is contrary to the statute, which applies only if an entity "*is* established, financed, maintained or controlled" by a national party, not if it ever was, or was for some past period. The critics' approach would prohibit groups such as the Republican Governors' Association or the Association of State Democratic Chairs from engaging in lawful activity under state law in connection with state elections. The FEC notes that if an organization is actually raising or spending soft money "on behalf of the national parties after that date," it would be subject to the Act's limitations, since it would be financed, maintained or controlled by the party.	Wanted fundraising costs for Levin Funds to be paid for with traditional "hard money" rather than other Levin Funds.[14] This is the basis of the claim that the Commission is allowing "soft money" to be used to pay fundraising costs when "hard money" is required. However, BCRA only requires that funds "subject to the limitations, prohibitions, and reporting requirements of the Act," be used. Levin Funds fit that definition, and follow the current, common-sense structure for paying fund-raising costs (hard money raises hard money, soft money raises soft money, Levin Funds raise Levin Funds). The Commission sought to support the use of Levin Funds to engage in grassroots activities, as intended by Congress.

Allegation	"The Commission imposed its own artificial dates" to determine when Get Out The Vote and Voter Identification occur in connection with a federal election.[15]	The Commission's definition of "Get-Out-The-Vote" (GOTV) is too narrow[18]
What the Law Provides	State parties may only use federal hard money 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." 2 U.S.C. 431 (20)(A)(ii). Does not define the phrase "in connection with an election in which a candidate for Federal office appears on the ballot."	The statute does not define "Get-Out-The-Vote."
What the Commission Did	Defined "in connection with an election in which a candidate for Federal office appears on the ballot" as "(i) the period of time beginning on the date of the earliest filing deadline for access to the primary ballot for Federal candidates as determined by state law … and ending on the date of the general election, up to and including any general runoff." 11 C.F.R. 100.24 (a)(1).	"Get-out-the-vote [GOTV] activity means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting…." The rule goes on to list examples of GOTV, including but not limited to providing information on the date of the election, the hours and location of polls, and providing transportation to the polls. 11 C.F.R. 100.24(a)(3).
What the Critics Want/Analysis	Even though the Act specifically limits this provision to activities "in connection with an election in which a candidate for Federal office appears on the ballot," the critics argue that the limit should, with one minor exception, take place literally always, because there is always another federal election coming up. This would have the effect of federalizing countless state and local elections, and would make meaningless the statute's limitation to activities "in connection with an election in which a candidate for Federal office appears on the ballot." The critics argue that the only exception created by this statutory limitation is in five states that elect governors in odd numbered years.[16] There is no basis for this in the statute. At the Commission's hearing on June 4, 2002, a representative from Common Cause admitted that the limitation would also have to apply to jurisdictions holding local elections.[17] Later, however, Common Cause went back to arguing that the statute actually federalized all elections except in five states, despite the statutory language to the contrary. Most of the nation's largest cities elect mayors in odd numbered years. Many if not most other local officials are also elected in odd years, or in the spring of even years, and many, if not most, local bond and tax issues are also voted on at that time. Since GOTV and voter ID are done close to elections, the FEC's rules assure that state funds will not be used in federal elections.	The critics claim that the definition should include "encouraging" people to vote.[19] The Commission was concerned that such a broad definition would cover general exhortations to vote, such as an officeholder generically urging citizens to vote as part of a high school commencement speech or a speech at an NAACP convention. The Commission's definition is very broad in addressing actual efforts to get out the vote in connection with an election.

Allegation	The Commission's definition of "voter identification activites" does not include the cost of purchasing lists of voters.[20]	The Commission has defined "agent" too narrowly.[21]
What the Law Provides	The statute does not define "voter identification activities."	The statute does not define "agent."
What the Commission Did	"Voter identification means 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." 11 C.F.R. 100.24 (a)(4).	The Commission defined "agent" to include those with either express or implied authority, when acting on behalf of a principal. 11 C.F.R. 300.2 (b).
What the Critics Want/Analysis	Wanted to include the purchase of voter lists as part of "voter identification." The Commission did not include the purchase of lists of voters in its definition because state and local parties often use such list for other purposes, such as fund-raising. However, any effort to enhance the list with voting information is covered, including any effort to identify the likelihood of voting in an election or for specific candidates.	Sought to have definition of "agent" include people acting without any sanction of the principal, if perceived to have "apparent authority."[22] This could have resulted in widespread liability of candidates, parties, volunteer workers, and campaigns, for actions of volunteers and others acting with no legal authority.

*This document was prepared by the office of Commissioner Bradley A. Smith. It is not an official document of the Federal Election Commission.

Footnotes

[1] Office of Sen. John McCain, *FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose and Legislative History*, undated; http://mccain.senate.gov visited June 26, 2002);
[2] *Id.*
[3] *Joint Statement of Congressional Sponsors on the FEC's Consideration of Soft Money Rules*," June 20, 2002, http://mccainsenate.gov.
[4] Office of Sen. John McCain, *supra* n. 1.
[5] *Id.*
[6] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Campaign and Media Legal Center; Comments of Center for Responsive Politics.
[7] *Id.*
[8] Office of Sen. John McCain, *supra* n. 1.
[9] David Whitney, *Political parties seeing windfall Campaign finance reform is expected to boost the 'soft money' the groups receive*, Sacramento Bee, June 26, 2002, p. A3.
[10] Office of Sen. John McCain, *supra* n. 1.
[11] *Id.*
[12] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Common Cause; Comments of Center for Responsive Politics.
[13] Richard Oppel, *Soft Money Ban Goes Into Effect, but the Effect Is Uncertain* , New York Times, June 23, 2002, p. 22
[14] *Id.*, citing comments of Larry Noble of Center for Responsive Politics.
[15] Office of Sen. John McCain, *supra* n. 1.
[16] Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays, and Rep. Marty Meehan. *See also id.,* comments of Common Cause.
[17] Federal Election Commission, Public Hearing: Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, Transcript, June 4, 2002, p. 66-68. *See also* Federal Election Commission, Hearing on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, June 4-5, 2002, Comments of Campaign and Media Legal Center ("in the case of states with odd-year elections, such activity taking place in the odd year prior to the election will not be 'in connection with' an election in which a Federal candidate is on the ballot."); Comments of Center for Responsive Politics (similarly noting that any election in an odd year would not fall under the definition).
[18] Office of Sen. John McCain, *supra* n. 1.
[19] *Id.*
[20] *Id.*
[21] *Joint Statement of Congressional Sponsors In Response to the FEC's Draft Final Soft Money Rules*, June 18, 2002, http://mccainsenate.gov.
[22] Federal Election Commission, Hearing on Prohibited and