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SECTIONS

THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON ADMINISTRATIVE LAW AND AGENCY PRACTICE OF THE DISTRICT OF COLUMBIA BAR

to the

FEDERAL ELECTION COMMISSION

on

NOTICE OF PROPOSED RULEMAKING: "SOFT MONEY"
(11 C.F.R. Parts 102, 103, and 106; 63 Fed.Reg. 37722)

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STANDARD DISCLAIMER

The views expressed herein represent only those of the Administrative Law and Agency Practice Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors. Moreover, our Section members who are government employees have recused themselves from any involvement in preparing or submitting these comments.

SUMMARY OF COMMENTS

The impact of soft money on federal elections is a scandal that Congress and the Federal Election Commission should address. Together with the President of the United States, a bipartisan group of Congressmen (representing the majority of both the House and the Senate), Common Cause, the majority of past Presidents of the American Civil Liberties Union, a bipartisan group of State Attorneys General, citizen groups, and many others, the Section on Administrative Law and Agency Practice supports the Federal Election Commission's power and authority to issue regulations more stringently regulating soft money.

Our comments are timely because the Federal Election Commission recently published proposed new rules regulating soft money. See 63 Fed.Reg. 37722 (July 13, 1998); www.fec.gov. Written comments are due filed with the agency on or before September 11, 1998. If the agency issues any regulations on soft money, its power and authority to do so are likely to be challenged in court on statutory and First Amendment grounds. These issues of agency power are classic administrative law issues.

Other responsible Bar groups, including the American Bar Association, have officially supported campaign finance reform. See, e.g., writeup of the recent ABA annual meeting in Toronto, 67 U.S.L.W. 2076, 2077-2078 (August 11, 1998). Our Section put on a program about campaign finance reform in November 1997, in which the General Counsel of the Federal Election Commission (FEC) discussed the possibility of issuing agency regulations cracking down on soft money. Our Section wishes to express its views on these proposed regulations and the important administrative law issues they present.

We believe the FEC clearly has the authority to issue regulations more stringently regulating "soft money." We support the proposed regulations issued by the FEC on July 13, 1998.

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THE DISTRICT OF COLUMBIA BAR

September 9, 1998

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999 E Street, N.W.
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Re: Campaign Finance Reform: "Soft Money"

These comments on the Commission's "soft money" regulations (63 Fed.Reg. 37722 (July 13, 1998)) are submitted by the Administrative Law and Agency Practice Section of the District of Columbia Bar.¹ The central issue we address is: Does the Commission have authority to issue regulations more stringently regulating "soft money"? We submit the answer is clearly "yes."

1. "Soft Money"

The "soft money" loophole in current campaign finance law was created, not by Congress, but by a controversial 1978 Federal Election Commission (FEC) ruling. It allowed non-regulated contributions to political parties, so long as the money was used for grassroots campaign activity, such as registering voters

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and get-out-the-vote efforts.² These unregulated contributions are known as "soft money" to distinguish them from the "hard money" that is closely regulated under the Federal Election Campaign Act.³

Over \$262 million in soft money was raised by the two major parties in the last Presidential elections, with individual donors being asked to contribute \$100,000, \$250,000 or more to gain preferred access to federal officials. This represents an enormous increase in soft money contributions since 1978. In a series of news articles in 1996, 1997 and 1998, The Washington Post extensively documented how soft money was not spent to bolster party grassroots organizing, but instead was often solicited by federal candidates and used for media advertising clearly intended to influence federal elections.⁴ The impact of these widespread practices-- by both major parties-- was to evade the FECA's campaign contribution limits and to create a corrupt system in which monied interests appeared to buy access to, and special influence with, elected officials. As syndicated columnist David Broder put it: "'soft money' [is] the huge donations to the political parties from corporations, unions and wealthy individuals that figured in most of the 1996 campaign scandals." The Washington Post, May 20, 1998, p.A25.

² See FEC Advisory Opinion 1978-10. FEC Commissioner Thomas E. Harris dissented, noting that not only was the Commission's decision contrary to precedent, but contrary to the statutory ban on corporate and union funds. Commissioner Harris also noted that the Federal Election Campaign Act's (FECA's) exception permitting limited corporate and union funding of voter drives was limited to "non-partisan drives conducted by a civic or other organization that itself does not endorse political candidates."

³ Today the FECA bans national banks, corporations, labor unions, government contractors, and foreign nationals from making hard money contributions to candidates for federal office or political parties. 2 U.S.C. 441b, 441c, 441e. The statute limits an individual's contributions to \$1,000 per election to a federal candidate; \$20,000 per year to national political party committees; and \$5,000 per year to a PAC or a state political party committee. Id. 441a(a)(1). There is also a \$25,000 annual limit on the total of all such hard money contributions from any one individual. Id. 441a(a)(3).

⁴ Cf. Note, Soft Money: The Current Rules and The Case for Reform, 111 Harv.L.Rev. 1323, 1333-1337 (1998) (canvassing statistics, published accounts, and public information about the extensive use of soft money during the 1996 Presidential campaign).

2. The Commission's Authority

The Commission has statutory authority to regulate soft money under 2 U.S.C. 437c, which authorizes it "to make, amend, and repeal such rules ... as are necessary to carry out the provisions of" the FECA. Under this broad general grant of substantive rulemaking authority, the FEC is empowered to issue soft money regulations that are "reasonably related to the purposes" of the Federal Election Campaign Act (FECA). See, e.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973), quoting Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 280-281 (1969); National Petroleum Refiners Assoc v. FTC, 482 F.2d 672, 680 (D.C.Cir. 1973). And the central purpose of the FECA is to ensure that only hard money be used to influence the outcome of federal elections. See Common Cause v. FEC, 692 F.Supp. 1391 (D.D.C. 1987), enforced, 692 F.Supp. 1397 (D.D.C. 1987).

The Commission has already exercised its statutory authority to regulate soft money in the past, first by establishing a "reasonable basis" allocation formula for joint hard/soft money activities, and then by establishing minimum allocation thresholds in 1990.⁵ See 63 Fed.Reg. at 37723-24 (summarizing prior FEC regulations). These old Commission regulations of soft money were reviewed by Congress (see 2 U.S.C. 438d) and were never challenged. Their validity is an established part of campaign finance law.

Yet given the explosive growth of soft money in recent years, and its widely-publicized corrupting influence on federal elections, the Commission's earlier regulations of soft money are no longer adequate to safeguard the purposes of the FECA. More rigorous Commission regulation is required. See, e.g., Note, Soft Money: The Current Rules and the Case for Reform, 111 Harv.L.Rev. 1323, 1340 (1998) ("Any serious assessment of the 1996 campaign must conclude that [the] purposes [of the Federal Election Campaign Act] have been undermined by large, unregulated soft-money contributions to political parties, raised by presidential and vice presidential candidates and spent on pro-candidate television advertisements. By all accounts, soft money is now an exception that has swallowed the rule.")

⁵ In Common Cause v. Federal Election Commission, 692 F.Supp. 391 (D.D.C. 1987), the Court held that the Commission was obligated to issue rules for allocating the expenses of state party "exempt" activities, but that the "Commission may conclude that no method of allocation will effectuate the Congressional goal that all monies spent by state parties on those activities" be hard money. 692 F.Supp. at 1396. The opinion recognized that the Commission has power to ban the spending of soft money by party committees to the extent the Commission concludes that such a ban is necessary to avoid having soft money expenditures influence federal elections, in violation of the FECA.

The Commission's statutory rulemaking authority empowers it to issue new regulations that come to grips with these newly changed circumstances, in which soft money threatens to subvert the central purposes of the FECA statute. Cf. Chevron v. NRDC, 467 U.S. 837 (1984). There is no warrant for the Commission to allow soft money contributions to make an end run around the statutory limits on contributions to federal candidates.⁶

Our basic submission is that under Buckley v. Valeo, 424 U.S. 1 (1979), and its progeny,⁷ the Commission's more stringent regulation of soft money is constitutional. Overwhelming evidence on the public record establishes that soft money is having a significant impact on federal elections. The soft money loophole has created the spectre of corruption, stemming from large contributions (and from prohibited sources), that led Congress to enact federal contribution limits in the first place. In Buckley v. Valeo the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections. See 424 U.S. at 23-29. The power of Congress to regulate federal elections to prevent fraud and corruption includes the power to regulate conduct which, though directed at state or local elections, also has an impact on federal campaigns.

⁶ The Commission's proposed rules are careful to preserve the soft money activities that are specifically authorized by the FECA. See, e.g., 63 Fed.Reg. at 37728, 37730. Cf. Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 64 U.S.L.W. 4663, 4666 (June 26, 1996) (Breyer, J.) (noting that FECA specifically permits narrow categories of unregulated soft money contributions).

⁷ See, e.g., FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); FEC v. National Conservative PAC, 470 U.S. 480 (1985); California Medical Assn v. FEC, 453 U.S. 182 (1981); Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 64 USLW 4663 (June 26, 1996). Justice Breyer summarized these decisions by saying: "Most of the provisions this Court found unconstitutional imposed expenditure limits. ... The provisions that the Court found constitutional mostly imposed contribution limits..." Id., 64 U.S.L.W. at 4664.