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To: transfers@FEC
cc:

Subject: Comments from American Conservative Union

<<108447_1.DOC>> Please find attached a copy of the comments from the American Conservative Union, with originals to follow via hand delivery.

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VIA ELECTRONIC MAIL; ORIGINAL VIA COURIER DELIVERY

November 12, 2001

Ms. Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Proposed Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for Payment of Allocable Expenses (Notice 2001-15)

Dear Ms. Smith:

I am writing on behalf of the American Conservative Union, Inc. and the American Conservative Union Foundation, Inc. (collectively herein "ACU") in response to the request by the Federal Election Commission ("Commission") for comment on the proposed Statement of Policy referenced above ("Proposed Policy").

The American Conservative Union, Inc. is a non-profit corporation and the nation's oldest conservative grassroots lobbying organization. The American Conservative Union Foundation, Inc. is a 501(c)(3) public educational foundation which established last year its Election Law Enforcement Project for the purpose of monitoring and acting as a watchdog to insure the equal and non-partisan enforcement by the Commission of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act") 2 U.S.C. § 431 *et seq.* and the Commission's regulations under the Act.

On September 28, 2001, the Democratic National Committee ("DNC") submitted an Advisory Opinion Request ("AOR 2001-16) to authorize the DNC to ignore the Commission's regulatory framework for making transfers of funds from its non-federal account within a stated time period to reimburse the party's federal account for certain allocable expenditures. On October 30, 2001, the Office of General Counsel circulated the Proposed Policy which would essentially grant the terms of the DNC's request while simultaneously acknowledging in Draft Advisory Opinion 2001-16 that the request could not be granted because it does not meet the requirements for issuance of an advisory opinion.

On October 31, 2001, ACU and Common Cause jointly filed a request for a period of time for public comment regarding the Proposed Policy. ACU appreciates the decision of the Commission on November 1, 2001 to allow even this abbreviated comment period on this important matter notwithstanding the recommendation of the OGC that such comment period be denied.

ACU Opposes the Proposed Policy

ACU opposes the Proposed Policy for a variety of reasons and urges the Commission to reject the Statement of Policy recommended by the Office of General Counsel ("OGC"). ACU opposes the Proposed Policy because neither the facts presented by the DNC nor the legal framework outlined by the OGC satisfy legally permissible grounds for issuance of a Statement of Policy pursuant to the Administrative Procedures Act, 5 U.S.C. § 551 *et seq* ("APA") nor is there any authority within the FECA for the Commission to sanction the willful violation of the Act.

1. The OGC's Draft Advisory Opinion 2001-16 properly concludes that the DNC's request is not supported by the law or the facts.

In Draft AO 2001-16, the OGC has correctly interpreted the facts and the law and has concluded that AOR 2001-16 should be denied. Yet, in a very puzzling and unprecedented departure from those conclusions, OGC has nonetheless fashioned a separate justification for granting the request which OGC concludes in the Draft AO should be denied.

There is neither a legal nor a factual basis for the Proposed Policy and the Commission need only rely on the OGC's analysis contained in the Draft AO to reach that conclusion.

2. There is no factual basis to support the Proposed Policy because the DNC has demonstrated no impossibility of its compliance with the law due to the September 11 terrorist attacks.

The DNC requested in AOR 2001-16 that the Commission waive enforcement of the clear requirements of 11 C.F.R. § 106.5(g)(2)(ii)(B) on the basis that the DNC 'suspended its fundraising events and mail solicitations after (September 11)'. The AOR was submitted on September 28, 2001 – only seventeen days after the terrorist attack.

Indeed, fundraising by many organizations, including candidates, party committees, and others was suspended for a brief period of time.

Since that time, however, fundraising by *all* party committees has resumed and, indeed, at approximately the same time that the OGC was recommending the Proposed Policy to the Commission, published reports indicated that fundraising has resumed at a brisk pace. See "Attacks Hardly Dent Fundraising", by Paul Kane, *Roll Call*, October 29, 2001. According to

the spokeswoman for one of the Democratic party committees (the Democratic Senatorial Campaign Committee), " 'Our fundraisers are in high gear trying to reschedule things," said Tovah Ravitz, who said her committee viewed fundraising events as "more postponed than truly canceled.' ".

Because the DNC has elected not to file monthly reports of its income and expenditures, it is not possible for the public to ascertain the extent to which its income was actually impacted by the September 11 attacks and whether, in fact, the fundraising 'suspension' in any way precludes the DNC's compliance with the law requiring timely transfers of non-federal funds.

The Supplemental information furnished to the Commission by the DNC on October 25, 2001, however, demonstrates that the DNC had a net debt of $900,000 as of August 31, 2001, *before* the terrorist attacks occurred. Then, notwithstanding the debt and further notwithstanding the pending AOR to authorize the DNC's violation of the law, the DNC continued to make expenditures from its non-federal account, including more than $ 3.4 million of non-federal dollars in candidate support in Virginia and New Jersey. Such funds otherwise could have been utilized to address the issues contained in the AOR. Other expenditures through October 24, 2001 reported in the Supplemental Response included:

Transfers to Party Committees	$ 438, 701.91
Candidate Support	$3,410, 966.00
Other Expenditures	$ 263, 000.00
Total	**$ 4,112,667.91**

Press reports disclose additional expenditures by the DNC during October, not included in the Supplemental Response and not yet reported to the Commission such as a $50,000 contribution to the Democratic nominee for Nassau County Executive in New York. Thus, even the supplemental report to the FEC does not reflect the total amount of expenditures by the DNC for that period as requested by the Commission. See "Top Boss Makes Rounds on Long Island", by Rick Brand *Newsday*, October 18, 2001; see also, "Democrat Crashes Gate in GOP New York Suburb," by Ben White, *Washington Post*, November 10, 2001, p. A3.

The DNC has failed to demonstrate the existence of a factual impossibility of compliance with the law triggered by the September 11, 2001 attacks. What the DNC has demonstrated is its determination to make expenditures as desired from a political perspective in the weeks preceding the November elections and then to seek relief from FEC from the burden of the law.

The DNC has numerous other options available to it besides the one being contemplated by the Commission. Such options include:

a) suspend expenditures from the non-federal account if the DNC subsequently claims to lack the non-federal funds to transfer into the federal account within the time limits;

b) borrow the necessary funds to make the transfer(s) on a timely basis or

c) pay the entire costs from federal dollars and lose the opportunity for allocation from non-federal dollars if such transfers cannot be effectuated within the legal time frame.

3. The other federal agencies' actions cited by the OGC as the basis for the Proposed Policy addressed true emergencies for persons 'directly involved' in the September 11 attacks and/or which result from circumstances 'beyond their control'

The examples cited in the Proposed Policy of what other federal agencies have done to provide relief to their regulated communities are inapposite to the facts submitted by the DNC. Here, the DNC has both control and options. The actions by other agencies are directed to situations in which the affected persons have neither.

For instance, the Treasury Department's Office of Thrift Supervision's ("OTS") Memorandum for Chief Executive Officers, "Serving Customers Affected by Terrorist Attacks" (September 12, 2001) is merely an *advisory* to lenders from the OTS to authorizing the exercise of discretion by lenders on a case by case basis, *under specific circumstances* outlined by OTS, to-wit:

> "It is OTS policy not to criticize prudent efforts to either adjust payment terms or to extend new loans to customers affected by this disaster. OTS encourages all thrifts that may have customers affected by the events of September 11 — or by resulting delays in mail delivery and other services — to:
>
> - Consider temporarily waiving late payment charges as well as penalties for checks returned for insufficient funds where it appears that such late payments and nonsufficient funds conditions resulted from delays beyond the customer's control;
> - Consider waiving penalties for early withdrawal of savings in circumstances where the customer has a demonstrable need for the funds resulting from the events of September 11;
> - Consider a prudent restructuring of borrowers' debt obligations, by altering or adjusting payment terms;
> - Avail themselves of programs offered by the Federal Home Loan Banks, and Federal Reserve Banks; and
> - Consult with OTS regional offices regarding other ways in which thrifts may assist affected customers.

> OTS believes that these measures may help families in this tragic time. Thrifts that need additional guidance for dealing with customers affected by these events should contact their regional OTS office."
> http://www.ots.treas.gov/docs/25146.pdf (emphasis added)

Clearly, the OTS guidelines are intended to assist persons *directly affected* by the September 11 attacks or whose situation is *beyond their control* as a result of the terrorist attacks.

Other federal agencies whose actions in response to the September 11 attacks are cited in the Proposed Policy relate to *emergency* action by agencies such as the Securities and Exchange Commission ("This release expresses the view of the (Securities and Exchange)Commission that auditors of the financial statements of Commission registrants may provide certain bookkeeping services to those audit clients directly affected by the events of September 11, 2001"), the Federal Aviation Administration (related to "Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan", 66 FR 484932 and "Flightcrew Compartment Access and Door Designs", 66 FR 51548) and the Internal Revenue Service, whose IRS Release No. IR-2001-18 was explained by the agency as follows: "In the aftermath of the September 11th tragedy, the Internal Revenue Service and the Treasury Department want to assure taxpayers, businesses and tax practitioners that they are working aggressively to issue tax guidance and resolve potential issues. The IRS and Treasury want to assure the victims, families and others affected by the tragedies in New York and at the Pentagon that the agencies will do everything possible to provide administrative tax relief quickly. Just as importantly, the IRS and Treasury will work to minimize the distraction of tax issues during this terrible time."

There is nothing in the DNC's circumstances which are in any way comparable to the actual emergencies related directly to the events of September 11 and which served as the basis for the responses from the cited federal agencies.

Clearly, the fact that the DNC temporarily suspended its fundraising – while continuing to make expenditures at will – does not justify the Commission's suspension of the law, even temporarily.

4. The OGC has failed to cite any authority for the proposition that the Commission has the power to arbitrarily select provisions of law capable of being from time to time suspended.

The OGC makes a yeoman effort to vest the Commission with some legal basis and authority for suspending the law without repealing it. But the fact remains that there is no authority which stands for the proposition that a regulation issued by the Commission – and *not* invalidated by a Court –confers on the Commission the power to disregard its statutory obligation to enforce that provision of law.

OGC cites from *Virginia Society for Human Life v. FEC* (citations omitted) as authority to issue a statement of policy that is at odds with a duly promulgated regulation. To the contrary, the Court concluded that such a Commission policy was and is wholly ineffective.

OGC further cites the decision of the DC Circuit in *FEC v. National Rifle Association* (citations omitted) which concerned the legal effect of FEC Advisory Opinions. That case, properly read, appears to stand for the proposition that a Statement of Policy cannot be issued and relied upon by the Commission when, as here, an Advisory Opinion on the identical topic reaches the opposite legal conclusion.

The OGC posits that the Commission has the authority to issue 'interpretive rules' informing the public of the procedures and standards it intends to apply in 'exercising its discretion'. There is no suggestion here that the DNC needs *any* 'interpretation' regarding the meaning of the regulation. Rather, the DNC understands the regulation quite clearly and seeks instead the Commission's promise of immunity from prosecution from the DNC's deliberate violation of the law.

5. If the Commission waives the enforcement of its regulation in the absence of any legal or factual justification, the Commission calls into question whether the statute authorizes the regulation in the first place.

The Proposed Policy cites the U.S. Merit Systems Protection Board's announced policy of allowing 'variations in normal case processing procedures. . .' to permit(s) its judges to "waive any Board regulation the application of which is not required by law." (emphasis added)

Is the OGC suggesting to the Commission that the regulatory framework which governs allocations between federal and non-federal accounts by party committees is in fact, *not* required by the FECA?

The Commission's justification for its promulgation of these regulations was the Court's decision in *Common Cause v. Federal Election Commission*, 692 F. Supp. 1391, 1396 (D.D.C. 1987), which did 'direct the Commission to revise its allocation regulations to give party committees more guidance in complying with the FECA.'

If the Commission concludes that the regulations are not 'required by law' and thus are capable of being suspended and / or violated with impunity, it would appear that the Commission has offered *prima facie* evidence that the regulations exceed the statutory authority conferred on the Commission by the Act.

6. The issuance of the Proposed Policy undermines the public's confidence in the Commission as a non-partisan and unbiased arbiter of the campaign finance regulatory scheme.

The OGC is recommending that the Commission issue a policy statement that allows one political party *only* to ignore the law. **No other political party committee (Republican or Democratic) has joined with the DNC in this request** and there is no indication that any other party committee needs or would benefit from this temporary suspension of the rule of law. In fact, from the press reports, it would appear that the DNC may be the *only* entity which would benefit from the issuance of the Proposed Policy.Thus, the Commission is considering whether to create two legal frameworks: one for the DNC and one for everyone else in the regulated community. Surely the Commission cannot in good conscience proceed in such a manner.

While ACU has long argued that the campaign finance laws are a direct assault on the First Amendment free speech and associational rights of the American people, the law *is* the law. It is the duty of the FEC to equally and fairly promulgate and enforce the law until and/or unless it is repealed by Congress or adjudged unconstitutional or otherwise unenforceable by a court of competent jurisdiction. Neither of those events have yet occurred.

And while ACU has historically sought and will continue to diligently work to achieve a system in which political debate and activity is protected from burdensome and intrusive government regulation, as long as the regulations exist, it is *imperative* that the Commission act in the most impartial and non-partisan possible manner to enforce them. To approve the OGC's Proposed Policy is to seriously undermine the confidence of the public and the regulated community in the ability or willingness of the Commission to conduct itself in a proper manner and will invite well deserved criticism and reproach.

For these reasons, the American Conservative Union respectfully urges the Commission NOT to issue the Proposed Statement of Policy and further to approve Advisory Opinion 2001-16's essential conclusions, albeit deleting any and all reference(s) to an alternative method of achieving the result denied in AOR 2001-16.

Please contact me if you have further questions regarding these comments.

Sincerely,

Cleta Mitchell

Cleta Mitchell, Esq.
Counsel
American Conservative Union

cc: David A. Keene, Chairman