Public Citizen's Analysis of How the FEC Is Undermining the Bipartisan Campaign Reform Act (BCRA) of 2002

As of October 7, 2002

Rulemaking Issue	BCRA	FEC Rulemaking Loopholes
Soft Money	Bans soft money in federal elections.	**FEC Regulation #1: Here's How You Bring Soft Money Back Into Federal Elections**. The FEC ruled that state and local parties may raise unlimited amounts of soft money, and spend as much as they want on broadcast advertisements that promote or attack the Democratic or Republican parties in federal elections ("generic activities"), spend a small portion of it on ads that clearly identify federal candidates (up to $5,000 per committee of "allocable expenses"), and pay the salaries of campaign consultants (pollsters, media consultants, GOTV specialists) involved in federal elections.
	Prohibits federal parties from raising or spending soft money.	**FEC Regulation #2: Plan Now, Play Later.** The FEC has ruled that anyone, including the national parties, can set up "independent" committees before November 6, 2002, that can raise and spend unlimited soft money to promote or attack federal candidates after that date. These shadow committees can be staffed by former party activists or other political allies, so long as they are not part of the formal party structure. These "independent" committees would not even have to disclose where their money comes from. Needless to say, "independent" committees are popping up all over Washington, D.C.
	Prohibits federal officeholders and candidates from soliciting soft money for any party committee.	**FEC Regulation #3: Federal Officeholders Can Raise Soft Money for State and Local Parties, Just Don't Say So.** According to the FEC, BCRA's prohibition on federal officeholders soliciting soft money for any purposes really only means that federal officeholders can't verbally ask for a soft money donation. They can participate in state and local soft money fundraisers in every other way, even help organize and speak at the fundraising events, so long as they are not the ones asking for the check.

	Prohibits federal officeholders and candidates from soliciting soft money for any other political committee.	**FEC Regulation #4: If Federal Officeholders Still Want More Soft Money, Set Up an "Independent" Leadership PAC and Assist Interest Groups.** Most federal officeholders already have set up soft money "leadership PACs," which are affiliated with their hard money PACs. These committees raise and spend money that rallies supporters and spreads the word of all the good things the officeholder has done, but do not explicitly pay for campaign expenses. Though BCRA bans federal officeholders from playing in the soft money game, the FEC has suggested that so long as the officeholder keeps some distance from the committee and that the PAC's expenditures are not made "on behalf of" the officeholder, the officeholder's leadership PAC can go right ahead and raise and spend soft money on these so-called independent activities. No doubt, when a federal officeholder first attempts to make use of this loophole, the reform community will challenge it in court. Finally, the new regulations effectively permit federal officeholders to assist special interest groups (such as the NRA or AFL-CIO) with raising soft money, such as by appearing at fundraising events.
Electioneering Communications	Broadcast advertisements that depict a candidate within 60 days of the election, and target that candidate's constituencies, are defined as campaign ads subject to contribution limits and disclosure requirements.	**FEC Regulation #5: If We Provide No Help Implementing this Provision, Maybe the Law Will Be Thrown Out.** While riddling the soft money part of BCRA full of loopholes—as one dissenting FEC commissioner remarked, "You have so tortured this law it's beyond silly"—the FEC is offering very few standards to help ensure that the electioneering communications part of the law will be fairly administered and declared constitutional. A useful rule that should have been carved into the law by the FEC, for example, would exempt certain lobbying activities that mention an officeholder (e.g., true issue ads focused on a floor vote on pending legislation) from the definition of electioneering communications. Some of the commissioners are convinced that the electioneering communications provision is the most legally problematic aspect of the law. If they can make its implementation as draconian as possible, the courts may be tempted to throw BCRA out the window.

Coordinated and Independent Expenditures	Campaign consultants, pollsters and staff that work for two or more non-party committees in the same candidate race will make those committees count as one in the face of the law.	**FEC Regulation #6: Same as Regulation #3 But Apply It to Non-Party Committees**. BCRA's new coordination language is designed to capture the activities of campaign consultants and pollsters who work simultaneously for two or more non-party committees involved in the same candidate race. It is not uncommon for campaign consultants to help design the campaign strategy of separate committees fighting for or against the same candidate. For instance, a media advisor could work both for a candidate's committee and an independent committee supporting the same candidate. Under BCRA, these committees would be counted as one coordinated committee subject to a single set of contribution limits and disclosure requirements. But not according to the FEC's new regulation. Unless it can be demonstrated that these coordinating campaign staff are controlling agents in the campaign, and acting with the intent of coordination, then each committee can pretend that they do not know what the other(s) are doing.