

# CRS Issue Brief for Congress

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## **Campaign Finance: Constitutional and Legal Issues of Soft Money**

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## Campaign Finance: Constitutional and Legal Issues of Soft Money

### SUMMARY

In the debate over campaign finance reform, “soft money” is a major issue because these generally unregulated funds are perceived as resulting from a Federal Election Campaign Act (FECA) loophole. Generally, soft money is funds that are raised and spent according to applicable state laws, which FECA prohibits from being spent directly on federal elections, but that may have an indirect influence on federal elections. This Issue Brief discusses the three major types of soft money: political party soft money, corporate and labor union soft money, and soft money used for issue advocacy communications.

Political party soft money is those funds raised by the national parties from sources and in amounts that FECA otherwise prohibits. In accordance with the applicable state law, it is then largely transferred to state and local political parties for grassroots and party-building activities, overhead expenses, and issue ads. Much of the recent campaign finance legislation would subject national party contributions, expenditures, or transfers, for activities that might influence a federal election, to the limitations, prohibitions, and source restrictions in FECA. Although the courts have not had occasion to address this issue specifically, it appears arguable that such restrictions on political party soft money could pass constitutional muster.

Soft money can be used to pay for certain corporate and labor union activities that are expressly exempt from FECA regulation: (1) communications by a corporation directed at stockholders, executive or administrative personnel and their families or by a labor organization directed at its members and families, on any subject; (2) nonpartisan voter

registration and get-out-the-vote activities by a corporation, directed to its stockholders, executive or administrative personnel and their families, or by a labor organization to its members and their families; and (3) the establishment and administration of a political action committee (PAC).

Soft money spent for issue advocacy communications is another use of soft money that has gained great popularity. Issue advocacy typically occurs when a group, such as a for-profit or non-profit corporation or labor organization, pays for an advertisement that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. The prevailing view in the lower courts is that Supreme Court precedent generally holds that regulation of such communications, which do not contain specific express words of advocacy, is unconstitutional. Hence, issue ads may be paid for with soft money.

Three major campaign finance reform bills in the 107<sup>th</sup> Congress address the issue of soft money. S. 27 (McCain-Feingold), as passed by the Senate on April 2, 2001, and H.R. 2356 (Shays-Meehan) generally prohibit the raising of soft money by national parties and federal candidates or officials and restrict the spending of soft money by state parties on activities defined to be related to federal elections. H.R. 2360 (Ney-Wynn) generally prohibits national parties from using soft money for federal elections and limits soft money donations to national party committees for non-federal elections. All three of these bills also regulate in the area of issue advocacy.

## MOST RECENT DEVELOPMENTS

**House debate fails to occur.** House debate on H.R. 2356 (Shays-Meehan) and H.R. 2360 (Ney-Wynn) does not occur as expected on July 12, 2001, when the House rejected the proposed rule (H.Res. 188) for considering the issue. Both bills address party soft money and issue advocacy.

**Senate passes S. 27 (McCain-Feingold).** On April 2, 2001, the Senate passed S. 27 by a vote of 59-41, after including 22 amendments offered during a two-week floor debate. The two primary features of the bill are restrictions on party soft money and issue advocacy.

## BACKGROUND AND ANALYSIS

### Definitions of Hard and Soft Money in Federal Elections

The terms “soft money” and “hard money” are not defined in federal election law or regulations. However, the FEC broadly describes “soft money” as “funds that are prohibited under the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.*, either because they come from a prohibited source, (*see* 2 U.S.C. §§ 441b, 441c and 441e), or because the amount exceeds the contribution limits in 2 U.S.C. § 441a.” (Memorandum from Lawrence M. Noble, General Counsel, FEC, to the Commissioners of the FEC (June 6, 1997)). Sometimes referred to as nonfederal funds, soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of federal limits, which cannot legally be used in connection with federal elections, but can be used for other purposes. (Federal Election Commission Twenty Year Report, p. 19 (April 1995)) Similarly, Common Cause has defined “soft money” as “funds raised by Presidential campaigns and national congressional political party organizations purportedly for use by state and local party organizations in non-federal elections, from sources who would otherwise be barred from making such contributions in connection with a federal election, e.g., from corporations and labor unions and from individuals who have reached their federal contribution limits.” (*See Common Cause v. Federal Election Commission*, 693 F.Supp. 1391, 1392 (D.D.C. 1987).) For the purposes of this issue brief, “soft money” will be used to describe funds that are not subject to regulation under the FECA, but appear to be raised and spent in an attempt to affect federal elections.

The term “hard money,” also undefined under federal election law and regulations, is typically used to refer to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of the FECA. (*See* 2 U.S.C. §§ 441a, 441b(a).) Unlike soft money, hard money may be used in connection with a federal election. Under the FECA, hard money restrictions apply to contributions and expenditures from any “person,” as defined to include, “an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government,” (2 U.S.C. § 431(11).)

This Issue Brief discusses three major types of soft money: political party soft money, corporate and labor union soft money, and soft money used for issue advocacy.

## Political Party Soft Money

Political party soft money funds are raised by the national parties from sources and in amounts prohibited in federal elections by the FECA and are then largely transferred, in accordance with applicable state law, to state and local political parties for grassroots and party-building activities, overhead expenses, and issue ads. Since the 1979 FECA Amendments, certain grassroots, voter-registration, get-out-the-vote, and generic party-building activities are exempt from FECA coverage. (2 U.S.C. § 431(9)(B)(viii),(ix).) Therefore, money raised and spent for these activities is not regulated and hence, is considered political party soft money.

Although the courts have not had occasion to address this issue specifically, it appears that subjecting the contributions, expenditures, or transfers of national political parties, for any activity that might affect the outcome of a federal election, to the limitations, prohibitions, and reporting requirements of the FECA, would arguably pass constitutional muster.

In the landmark *Buckley v. Valeo* case, the Supreme Court made it clear that the right to associate is a “basic constitutional freedom,” and that any action that may have the effect of curtailing that freedom to associate would be subject to the strictest judicial scrutiny. (424 U.S. 1, 25 (1976) (*quoting Kasper v. Pontikes*, 414 U.S. 51, 57 (1973)).) But the Court further asserted that the right of political association is not absolute and can be limited by substantial governmental interests such as the prevention of corruption or the prevention of even the appearance of corruption. (424 U.S. at 27-28.)

Employing this analysis, the *Buckley* Court determined that limitations on contributions can pass constitutional muster if they are reasonable and only marginally infringe on First Amendment rights in order to stem actual or apparent corruption resulting from *quid pro quo* relationships between contributors and candidates. The Court noted that, unlike an expenditure limitation, a reasonable contribution limitation does “not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.” (424 U.S. at 20-38.)

It could be argued that eliminating political party soft money by subjecting it to the limits and restrictions of the FECA would not significantly impact political debate because many other methods of expression under the FECA would still be available to a person seeking to make political contributions. For example, persons could: contribute directly to a candidate, to a PAC that would support a certain candidate, to the political party of such a candidate in accordance with FECA-regulated contribution limits (also known as “hard money” contributions), to state parties for state activities, or make independent expenditures on behalf of the candidate. It could be further argued that prohibiting political party soft money would stem corruption or the appearance thereof that could result from *quid pro quo* relationships between large-dollar soft money contributors and federal office candidates who benefit from political party soft money expenditures. The Court in *Buckley* found that preventing corruption or the appearance thereof, which can be presented by such *quid pro quo* relationships, would constitute a substantial governmental interest warranting reasonable

infringement on First Amendment rights. (424 U.S. 26-27.) Hence, under *Buckley*, it appears that a prohibition on political party soft money could arguably pass constitutional muster.

In a recent Supreme Court decision, *Nixon v. Shrink Missouri Government PAC*, (120 S.Ct. 897 (2000)), the Supreme Court vote upheld a Missouri state campaign contribution limits and reaffirmed its landmark 1976 precedent in *Buckley v. Valeo* that the government can regulate campaign contributions. The Court noted that it has consistently found that less justification is required in order to uphold limits on campaign contributions than is required to uphold limits on campaign expenditures. In his dissent, however, Justice Kennedy warned that the Court's decision undermines free speech protections and will add to the proliferation of "covert speech" in the form of soft money.

## **Corporate and Labor Union Soft Money**

Generally, contributions and expenditures by corporations, labor unions, membership organizations, cooperatives, and corporations without capital stock have been prohibited in federal elections. (2 U.S.C. § 441b.) The FECA, however, provides for three exemptions from this broad prohibition, that is, contributions and expenditures for: (1) communications by a corporation to its stockholders, executive or administrative personnel and their families or by a labor organization to its members or families on any subject; (2) nonpartisan voter registration and get-out-the-vote activities by a corporation aimed at its stockholders and executive and administrative personnel and their families or by a labor organization aimed at its members and their families; and (3) the establishment, administration and solicitation of contributions to a separate segregated fund (commonly known as a political action committee or PAC or SSF) to be utilized for federal election purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock. (2 U.S.C. § 441b(b)(2)(A)-(C); *see also* 11 C.F.R. § 114.1(a)(2)(i)-(iii).)

In *Communication Workers of America v. Beck*, (487 U.S. 735 (1988)), the Supreme Court held that labor unions are not permitted to spend funds exacted from dues-paying non-union employees under an agency shop agreement for certain activities unrelated to collective bargaining when those employees object to such expenditures. According to the Court, Congress' purpose in providing the union shop was to force employees to bear their fair share of the costs of labor-management negotiations and collective bargaining activities, but not to force employees to support unrelated labor union political activities they oppose. As a result of *Beck*, non-union employees in an agency shop agreement can request a refund of that portion of their dues used by the union for political activities. Accordingly, if workers exercise their rights under *Beck*, labor unions would lose some soft money funds, which would otherwise be available for election-related expenses. Campaign finance reform legislation that simply codifies the *Beck* decision, without expanding on the Court's ruling, would appear to be constitutional.

## **Soft Money Spent On Issue Advocacy**

Spending on issue advocacy communications is another use of soft money that has gained popularity in recent federal election cycles. Issue advocacy communications are paid

for by a group, such as a for-profit or non-profit corporation or labor organization, for advertisements that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. The prevailing view in the lower courts is that Supreme Court precedent requires that only those communications that expressly advocate the election or defeat of a clearly identified candidate can be constitutionally regulated; any such communication that does not meet this “express advocacy” standard is constitutionally protected First Amendment speech, which cannot be regulated. Hence, issue ads may be paid for with unregulated soft money.

## Court Decisions

In *Buckley v. Valeo*, (424 U.S. 1 (1976)), the Supreme Court generally held that campaign finance limitations apply to “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” A footnote to the opinion provides examples of such “express advocacy”: terms “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” (*Id.* at 44 n.52; *see* 11 C.F.R. 101.22(a)). Communications without these ‘magic words’ are often classified as issue advocacy, thus falling outside the scope of the FECA.

In the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, (*MCFL*), (479 U.S. 238 (1986)), the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the FECA prohibition against corporate use of treasury funds to make an expenditure “in connection with” any federal election. (*Id.* at 249-250). In *MCFL*, the Court ruled that a publication urging voters to vote for “pro-life” candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a “mere discussion of public issues that by their nature raise the names of certain politicians.” Instead, the Court found, the publication “in effect” provided a directive to the reader to vote for the identified candidates and ergo, constituted express advocacy. (*Id.* at 249-250.)

In *FEC v. Furgatch*, (807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987)), the Ninth Circuit presented the following three-part test to determine whether a communication may be considered issue advocacy:

First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of election or defeat of a candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. (*Id.* at 864.)

On July 6, 1995, the FEC promulgated regulations defining “express advocacy” in a manner consistent with the test espoused in *Furgatch*. (60 Fed. Reg. 35292, 35304 (codified at 11 C.F.R. 100.22) (effective Oct. 5, 1995. 60 Fed. Reg. 52069 (Oct. 5, 1995).)

However, the trend in the circuit courts appears to be away from the *Furgatch* and FEC definitions toward a more limited interpretation of what type of speech will constitute “express advocacy.” Hence, regulation of fewer types of communications are being upheld as constitutionally permissible and therefore, more “issue ads” are permissibly funded with soft money.

In *Maine Right to Life Committee v. FEC*, (914 F.Supp. 8 (D. Maine 1996), *aff’d per curiam* 98 F.3d 1 (1st. Cir. 1996), *cert. denied*, 118 S.Ct. 52 (Oct. 6, 1997)), the First Circuit affirmed the district court’s opinion that the FEC surpassed its authority when it included a “reasonable person” standard in its definition of “express advocacy.” The court reasoned that such a standard threatened to infringe upon issue advocacy, an area protected by the First Amendment. (*Id.* at 12.) The Fourth Circuit reached a similar conclusion in *FEC v. Christian Action Network*, (92 F.3d 1178 (4th Cir. 1997).) Most recently, on June 14, 2000, the Second Circuit, in *Vermont Right to Life Committee v. Sorrell*, (216 F.3d 264 (2d Cir. 2000)), found that state campaign regulations triggering disclosure and reporting requirements of speech that “expressly or *implicitly* advocate[] the success or defeat of a candidate” were facially invalid under the First Amendment because they would result in a regulation of constitutionally protected issue advocacy, (*emphasis added*). In *Vermont*, the court held that the Supreme Court in *Buckley* had established an “express advocacy standard” in order to insure that regulations were neither too vague nor intrusive on First Amendment protected issue advocacy. Accordingly, the court held that by including the term “implicitly,” the regulations extend to advocacy with respect to public issues, in violation of the rule enunciated in *Buckley* and its progeny.

Nevertheless, the FEC has declined to revise its regulations defining “express advocacy.” (See 63 Fed. Reg. 8363 (Feb. 19, 1998).) The FEC has stated that its primary reason for this decision is “its belief that the definition of ‘express advocacy’ found at 11 CFR 100.22(b) is constitutional.” (*Id.* at 8264.)

Recently, in *Vermont Right to Life Committee v. Sorrell*, (216 F.3d 264 (2d Cir. 2000)), the Second Circuit Court of Appeals found that state campaign regulations triggering disclosure and reporting requirements of speech that “expressly or **implicitly** advocate[] the success or defeat of a candidate” were facially invalid under the First Amendment because they would result in a regulation of constitutionally protected issue advocacy, (*emphasis added*). In *Vermont*, the court held that the Supreme Court in *Buckley v. Valeo* had established an “express advocacy standard” in order to insure that regulations were neither too vague nor intrusive on First Amendment protected issue advocacy. Accordingly, the court determined that by including the term “implicitly,” the regulations extend to advocacy with respect to public issues, in violation of the rule enunciated in *Buckley* and its progeny.

## **Issue Advocacy Distinguished from Independent Expenditures**

Soft money spent for issue advocacy communications is sometimes confused with independent expenditures. Although both types of expenditures are purportedly independent, (Justice Kennedy argues that, by nature, practically all expenditures are coordinated with a candidate and, thus, cannot be considered independent. *Colorado Republican Committee v. FEC (Colorado I)*, 518 U.S. 604 (1996)(Kennedy, J., concurring in the judgment, dissenting in part)), only independent expenditures are subject to the FECA, (2 U.S.C. §§ 431 *et seq.*) The *Colorado I* Court held that the First Amendment would prohibit the application of a



FECA provision, 2 U.S.C. § 441a(d)(3), limiting political party expenditures made independently and without any coordination with a candidate or his or her campaign. The *Colorado* decision essentially banned any limitations on political party expenditures when they are made independently of a candidate's campaign. (*Colorado I*, 518 U.S. at 614-17.) Since a political committee making independent expenditures, however, is still subject to FECA restrictions regarding sources and contribution amounts it may receive from a person, (*see, e.g.*, 11 C.F.R. § 110.0(d)), an independent expenditure is not considered soft money.

Recently, in *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, (No. 00-191, slip op. (June 25, 2001)), the Supreme Court held that a political party's coordinated expenditures, unlike genuine independent expenditures, may be limited in order to minimize circumvention of the Federal Election Campaign Act's (FECA) contribution limits. While the Court's opinion in *Colorado I* was limited to the constitutionality of the application of FECA's "Party Expenditure Provision" (2 U.S.C. § 441a(d)(3)) to an *independent* expenditure by the Colorado Republican Party, in *Colorado II* the Court considered a facial challenge to the constitutionality of the limit on *coordinated* party spending. Persuaded by evidence supporting the FEC's argument, the Court found that coordinated party expenditures are indeed the "functional equivalent" of contributions. (Slip op. at 12.) Therefore, in its evaluation, the Court applied the same scrutiny to the coordinated "Party Expenditure Provision" that it has applied to other contribution limits: inquiring whether the restriction is "closely drawn" to the "sufficiently important" governmental interest of stemming political corruption. (Slip op. at 21.) The Court further determined that circumvention of the law through "prearranged or coordinated expenditures amounting to disguised contributions" is a "valid theory of corruption." (Slip op. at 7, 21.) In upholding the limit, the Court noted that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law," which, the Court concluded, "shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." (Slip op. at 22.)

## Section 527 Organization "Issue Ad" Disclosure Law

On July 1, 2000, P.L. 106-230 was enacted, which requires disclosure by organizations claiming Internal Revenue Code (IRC) Section 527 status. The disclosure requirement is triggered by the IRC definition of "exempt function," 26 U.S.C. § 527(e): "influencing or attempting to influence the selection, nomination, election or appointment of any individual" to public office. As the "exempt function" definition appears broader than the definition of "express advocacy," *i.e.* words expressly advocating the election or defeat of a clearly identified candidate, the IRC definition arguably encompasses what the courts have defined as First Amendment protected issue advocacy, which may not be constitutionally permissible to regulate. As a result, a court could find that P.L. 106-230 unconstitutionally regulates issue advocacy because it requires public disclosure by Section 527 organizations spending soft money for issue ads. On August 28, 2000, in the U.S. District Court for the Southern District of Alabama, the National Federation of Republican Assemblies filed suit alleging that P.L. 106-230 is unconstitutional under the First and Tenth Amendments; a decision is pending.

## Selected 107<sup>th</sup> Congress Legislation

### S. 27 (McCain-Feingold) (passed by Senate April 2, 2001)

**Party Soft Money.** Prohibits national party committees from soliciting, receiving, directing, transferring, or spending soft money; generally prohibits spending of soft money for a “federal election activity” by state and local party committees, including an entity directly or indirectly established, financed, maintained, or controlled by: a state or local party committee or one or more state or local candidates or officials, (permits the principal campaign committees of state or local candidates to raise and spend funds under state law, if not for “federal election activity” referring to a clearly identified federal candidate), but allows a state, district, or local party committee to use funds raised in accordance with state law for the allocable share of voter registration drives during the last 120 days of federal election, for voter identification efforts, get-out-the-vote drives, and for generic activities, if they do not refer to a federal candidate and no person donates over \$10,000 per year for such activities; defines “federal election activity” to include: (1) voter registration drives in last 120 days of a federal election; (2) voter identification, get-out-the-vote drives, and generic activity in connection with an election in which a federal candidate is on the ballot; and (3) “public communications” that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether it expressly advocates a vote for or against) or services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election; prohibits federal candidates, officeholders, and their PACs from raising soft money in connection with a federal election, or money from sources beyond federal limits and prohibitions in non-federal elections; requires disclosure by national parties of all activity (federal and non-federal) and by state and local parties of specified activities that might affect federal elections; removes building fund exemption.

**Issue Advocacy.** Requires disclosure of “electioneering communications” above \$10,000, with identification of donors of \$500 or more; defines “electioneering communication” as: broadcast, cable, or satellite advertisement that “refers” to a clearly identified federal candidate, made within 60 days of a general election or 30 days of a primary, to an audience that includes voters in that election (exempts news events, “expenditures,” and “independent expenditures”); provides alternative definition of “electioneering communication,” in the event that the first definition is ruled unconstitutional, based on *FEC v. Furgatch*, (807 F.2d 857 (9<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 850 (1987)), *i.e.*, communication promoting, supporting or attacking, opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate, and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

**Corporate/Labor Union Soft Money.** Prohibits funding of “electioneering communications” with union or certain corporate funds, but exempts Internal Revenue Code §501(c)(4) or § 527 tax-exempt corporations making “electioneering communications” with funds solely donated by individuals, who are citizens or permanent resident aliens, unless the communication is “targeted,” *i.e.* it was distributed from a broadcaster or cable or satellite

service whose audience “consists primarily” of residents of the state for which the candidate is running for office.

Introduced Jan. 22, 2001; referred to Committee on Rules and Administration; passed the Senate on April 2, 2001 (59-41) after including 22 amendments offered during a two-week floor debate.

## **H.R. 2356 (Shays-Meehan)**

**Party Soft Money.** Prohibits national party committees from soliciting, receiving, directing, transferring, or spending soft money; generally prohibits spending of soft money for a “federal election activity” by state and local party committees, including an association or group of state or local candidates or officials. Prohibits state or local candidates from using soft money for public communications that promote or attack a clearly identified federal candidate, but exempts communications referring to a federal candidate who is also a state or local candidate. Permits state, district or local party committees to use some funds raised under state law for an allocable share (at a 50-50 hard to soft money ratio) of voter registration drives in the last 120 days of a federal election, and voter identification, get-out-the-vote drives, and generic activity if it: (1) does not refer to a federal candidate; (2) does not pay for a broadcast, cable or satellite communication (unless it refers solely to state/local candidates); (3) takes no more than \$10,000 per year from any person for such activity; and (4) uses only funds raised by that party committee expressly for such purposes, with no transfers from other party committees. Defines “federal election activity” to include: (1) voter registration drives in last 120 days of a federal election; (2) voter identification, get-out-the-vote drives, and generic activity in connection with an election in which a federal candidate is on the ballot; and (3) “public communications” that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether it expressly advocates a vote for or against) or services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election. Requires disclosure by national parties of all activity (federal and non-federal), and by state and local parties of specified activities, that might affect federal elections; removes building fund exemption.

**Corporate/Labor Union Soft Money.** Prohibits funding of “electioneering communications” with union or certain corporate funds, but exempts Internal Revenue Code §501(c)(4) or § 527 tax-exempt corporations making “electioneering communications” with funds solely donated by individuals, who are citizens or permanent resident aliens, unless the communication is “targeted,” *i.e.*, it was distributed from a broadcaster or cable or satellite service and is received by 50,000 or more persons in the state or district where the Senate or House election, respectively, is occurring.

**Issue Advocacy.** Creates a new term in federal election law, “electioneering communication,” which would regulate political ads that: “refer” to a clearly identified federal candidate, are broadcast within 30 days of a primary or 60 days of a general election, and (differing from S. 27) for House and Senate elections, is “targeted to the relevant electorate.” Generally, it would require disclosure of disbursements over \$10,000 for such communications, including identification of each donor of \$1,000 or more, and such communications would be prohibited from being financed with union or certain corporate funds. With respect to corporate funds, it exempts Internal Revenue Code § 501(c)(4) or §

527 tax-exempt corporations from making “electioneering communications” with funds solely donated by individuals who are U.S. citizens or permanent resident aliens, unless the communication is “targeted,” *i.e.*, (differing from S. 27) it was distributed from a broadcaster or cable or satellite service and is received by 50,000 or more persons in the state or district where the Senate or House election, respectively, is occurring. H.R. 2356 expressly exempts from the definition news events, “expenditures,” and “independent expenditures,” and (differing from S. 27) candidate debates and certain other communications expressly exempted by FEC regulation. If this definition of “electioneering communication” is ruled unconstitutional, H.R. 2356 provides an alternative definition, based on *FEC v. Furgatch*, (807 F.2d 857 (9<sup>th</sup> Cir. 1987)): a communication promoting, supporting, attacking, or opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

Introduced on June 28, 2001; ordered reported unfavorably by Committee on House Administration, June 28 (H.Rept. 107-131, pt. 1).

## **H.R. 2360 (Ney-Wynn)**

**Party Soft Money.** Prohibits national party committees from soliciting, receiving, directing or transferring soft money for federal election activities. For non-federal election activities, it imposes a limit of \$75,000 per calendar year on the amount of soft money any person may donate or transfer to a national party committee. Defines “federal election activity” to include: (1) voter registration drives in last 120 days of a federal election, unless for generic activity; (2) voter identification or get-out-the-vote drives in an election with at least one federal candidate on the ballot, unless for generic activity, (3) any public communication that refers to or depicts a clearly identified federal candidate and that promotes, attacks, or opposes a candidate for that office (regardless of whether it expressly advocates a vote for or against); or (4) any public communication made by broadcast, cable or satellite.

**Corporate/Labor Union Soft Money.** Contains no provision similar to those in S. 27 and H.R. 2356.

**Issue Advocacy.** Requires disclosure for spending on communications disseminated within 120 days of a federal election that, if broadcast, “mention” or, if non-broadcast, “refer to or depict” a clearly identified federal candidate by name, image, or likeness and, for non-broadcast communications, are “targeted to the relevant electorate” and total over \$50,000 in a year on all such communications. H.R. 2360 expressly exempts from the disclosure requirement broadcast news stories and commentaries; “expenditures,” as defined in FECA; payments by vendors acting solely pursuant to a contractual agreement with the person sponsoring the ad; and, in the case of non-broadcast media, communications by a membership organization (including a union) or a corporation solely to its members, stockholders, or executive and administrative personnel, if the entity is not organized primarily for purposes of influencing federal elections.

Introduced on June 28, 2001; ordered reported favorably by Committee on House Administration, June 28 (H.Rept. 107-132).

## FOR ADDITIONAL READING

### CRS Issue Briefs

CRS Issue Brief 87020. *Campaign financing*, by Joseph E. Cantor.

### CRS Reports

CRS Report RL30587. *527 Organizations: How the differences in tax and election laws permit certain organizations to engage in issue advocacy without public disclosure and proposals for change*, by Marie B. Morris.

CRS Report RS20650. *527 Organizations: Reporting requirements imposed on political organizations after enactment of P.L. 106-230*, by Marie B. Morris.

CRS Report 97-973. *Business and labor spending in U.S. elections*, by Joseph E. Cantor.

CRS Report RL31036. *Campaign finance bills in the 107<sup>th</sup> Congress: Comparison of S. 27 (McCain-Feingold), H.R. 2356 (Shays-Meehan), H.R. 2360 (Ney-Wynn), and current law*, by Joseph E. Cantor and L. Paige Whitaker.

CRS Report RL30937. *Campaign finance legislation in the 107<sup>th</sup> Congress: Comparison of S. 27 (McCain-Feingold) as passed by Senate, with current law*, by Joseph E. Cantor and L. Paige Whitaker.

CRS Report 98-282. *Campaign finance reform: A legal analysis of issue and express advocacy*, by L. Paige Whitaker.

CRS Report RS20849. *Campaign finance reform: Constitutional issues raised by disclosure requirements*, by L. Paige Whitaker.

CRS Report RS20854. *Campaign finance reform and incentives to voluntarily limit candidate spending from personal funds: Constitutional issues raised by public subsidies and variable contribution limits*, by L. Paige Whitaker.

CRS Report RL30669. *Campaign finance regulation under the First Amendment: Buckley v. Valeo and its Supreme Court progeny*, by L. Paige Whitaker.

CRS Report 97-1040. *Campaign financing: Highlights and chronology of current federal law*, by Joseph E. Cantor.

CRS Report 97-555. *Compulsory union dues and agency fee objectors*, by Gail McCallion.

CRS Report 96-484. *Political spending by organized labor: Background and current issues*, by Joseph E. Cantor.

CRS Report 97-91. *Soft and hard money in contemporary elections: What federal law does and does not regulate*, by Joseph E. Cantor.

CRS Report 97-618. *The use of union dues for political purposes: A legal analysis*, by L. Paige Whitaker.

## **Selected World Wide Web Sites**

Federal Election Commission:  
[<http://www.fec.gov>]

For access to full text of court decisions:  
[<http://www.findlaw.com/cascode/cases.html>]