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September 13, 2002

VIA E-MAIL

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice 2002-14

Dear Ms. Dinh:

These comments are submitted on behalf of The Campaign and Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving federal campaign finance laws. They address the Federal Election Commission's Notice of Proposed Rulemaking published at 67 Fed. Reg. 54366 (August 22, 2002), containing draft regulations to implement certain sections of the Bipartisan Campaign Reform Act of 2002 (BCRA) relating to "Contribution Limitations and Prohibitions."

We appreciate the FEC's work on draft "contribution limitations and prohibitions" regulations and offer the following comments to assist the Commission in completing this rulemaking.

1. New Hard Money Contribution Limits (proposed 11 CFR 110.1, 110.2, 110.5, 110.9, 110.17)

110.1(b)(1): The Commission seeks comment on whether post-election increases in limits on contributions to candidates by persons other than PACs (which apply per election) due to inflation indexing should apply to elections that occurred before the effective date of the increase in the limits. We oppose that interpretation, which contravenes the basic notion that there should be one contribution limit applicable to a given election, is destined to spawn confusion and compliance problems insofar as it establishes multiple candidate contribution limits for such an election, and is not mandated by BCRA. Rather, post-election increases in limits on contributions to candidates due to indexing should apply only to future elections (*e.g.*, if a contribution limit were increased from $2,000 to $2,100 effective November 3, 2004 due to indexing

in January of 2005, a person could make a $2,100 contribution to a candidate designated for the 2006 primary or general election). In other words, there should be only one candidate contribution limit per an election, and that limit should attach whenever a contribution is made with respect to that election.

110.5(b), 110.1(c): The Commission has also proposed to alter the bi-annual period established by BCRA during which aggregate limits on contributions by individuals would be applicable. As amended by Section 307(b) of BCRA, 2 U.S.C. 441a(b)(3) indicates that the bi-annual aggregate limit on individual contributions applies "[d]uring the period which begins on January 1 of an odd-numbered year and ends of December 31 of the next even-numbered year." To conform this to the inflation indexing provision (which applies to the bi-annual aggregate limit), the Commission has proposed in 11 CFR 110.5(b)(3) to shift the bi-annual period during which individual contributions would be aggregated to the period from the day after Election Day of an even-numbered year to Election Day of the next even-numbered year. We respectfully disagree with the Commission's choice regarding how to conform indexing and the bi-annual aggregate limit. The bi-annual aggregate limit is the core provision in this regard, and Congress very specifically determined the dates during which it would apply. Indexing merely adjusts the bi-annual aggregate limit amount and should thus be conformed in all respects to the applicability of that limit, rather than vice-versa. Indeed, indexing could readily be conformed to a bi-annual aggregate limit applicable starting on January 1st of an odd-numbered year and ending December 31st of the next even-numbered year, given that, under 2 U.S.C. 441a(c)(1)(C) and proposed 11 CFR 110.17(b), it would not occur in any event until at least January of an odd-numbered year. Incidentally, even under the principle of legislative construction cited by the Commission (which we do not consider the best approach to resolving this issue), we note that, compared to indexing, the bi-annual aggregate limit is "last in time" in terms of its addition to BCRA.

Similarly, in the case of contributions by persons other than PACs to national party committees, indexing can and should be conformed to the statutory "calendar year" limit for such contributions. *See* 2 U.S.C. 441a(a)(1)(B). For example, a national party limit of this nature that increases due to indexing in January of 2005 should apply from January 1, 2005 through December 31, 2005 (and the same limit would apply again from January 1, 2006 through December 31, 2006).

We agree with the Commission's interpretation that increased contribution limits would take effect on January 1, 2003 in the specific amounts authorized by BCRA, with indexing first occurring in January of 2005.

110.1(b)(5)(B), (k)(3)(ii)(B): The proposals on redesignation and reattribution contained in the draft "contribution limitations and prohibitions" rules are not required or anticipated by BCRA. As such, we believe that they are more appropriately addressed in a separate, non-BCRA rulemaking. If the Commission is intent on proceeding forward on this issue, we support Alternative 1-B outlined under proposed 11 CFR 110.1(b)(5)(B). It would be appropriate for excessive undesignated primary contributions made by persons other than PACs to candidates prior to a primary to be treated as made

with respect to the general election, if there is notice provided to the contributor of the redesignation and of the opportunity to obtain a refund of the contribution. The particularities of this situation suggest that redesignation is a reasonable approximation of donor intent, with the notice procedure ensuring that any deviation in actual donor intent from such approximation is honored.

However, we would caution the Commission against employing backwards-looking "presumption" or "notification" approaches with respect to undesignated contributions received after a general election, as this would not be a reasonable approximation of donor intent under the circumstances. Moreover, we do not believe either a "presumption" or "notification" approach is appropriate with respect to contributions to candidates by PACs, given the likely familiarity of PACs with the Commission's rules relating to assigning contributions to particular election limits.

We do not support any "presumption" or "notification" approach with respect to reattribution and accordingly oppose both Alternatives 2-A and 2-B outlined under proposed 11 CFR 110.1(k)(3)(ii)(B) (relating to instances where a written instrument is imprinted with the names of more than one account holder, though presumably signed by only one account holder). Advance authorization from contributors should be required for reattribution, as inferring a non-signatory's intent to contribute solely on the basis of mention of his or her name on a written instrument as an account holder would be extremely unreliable.

2. Prohibition on Contributions or Donations by Minors (proposed 11 CFR 110.19)

The Commission inquires whether minors who are emancipated under state law should be exempt from the prohibition of new 2 U.S.C. 441k. We support such an approach, which would be consistent with the intent of this provision.

As indicated in the legislative history, 2 U.S.C. 441k responds to what the Commission characterized in its 1998 Annual Report as "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors," notwithstanding existing FEC regulations aimed at preventing such abuse. The concern about parents' using their children as vehicles to make contributions to candidates or parties in excess of federal limits is significantly diminished when a minor is emancipated, for this typically entails a showing that such minor is removed from parental control and supporting himself or herself.

2 U.S.C. 441k does not prevent minors from contributing to state or local candidates or participating in all campaigns by means other than making contributions or donations, such as by volunteering.

3. Prohibition on Contributions, Donations, and Expenditures by Foreign Nationals (proposed 11 CFR 110.20)

In its commentary accompanying the "contribution limitations and prohibitions" draft regulations, the Commission seeks comment regarding any specific impact of BCRA on the ability of foreign-controlled U.S. corporations, including U.S. subsidiaries of foreign corporations, to make non-federal donations of corporate treasury funds (assumedly to state or local parties, if permissible under state law) or to establish and maintain a separate segregated fund (or PAC). We are surprised at this inquiry, as BCRA's legislative history does not reveal any intent that the Commission visit this specific issue. Indeed, it is clear that the purpose of BCRA's modification to 2 U.S.C. 441e was to resolve ambiguity as to the fundamental issue of whether foreign national *soft money* contributions and *soft money* electioneering disbursements were covered at all by this provision of the law. In this sense, BCRA directly responded to scandals arising out of the 1996 elections involving the provision of overseas funds to political parties as soft money contributions and differing legal opinions as to whether the prior 2 U.S.C. 441e's ban on foreign national "contribution[s]" covered only hard money or both hard and soft money. *See U.S. v. Trie*, 23 F. Supp. 55 (D.D.C. 1998) ("contribution" in FECA refers only to funds given to influence a federal election, thus limiting scope of foreign national prohibition to hard money contributions); *cf. U.S. v. Kanchanalak*, 192 F.3d 1037 (D.C. Circ. 1999) (foreign national prohibition encompasses contributions "in connection with an election to any political office" and thus covers both hard and soft money contributions). As the Commission recognizes, BCRA's modification to 2 U.S.C. 441e thoroughly clarifies this particular aspect of the soft money prohibition.

Therefore, in light of the absence of any evident intent on the part of Congress in enacting BCRA that the Commission visit the issue of permissible political activity by foreign-controlled U.S. corporations, we do not believe that the Commission should address this matter under the cover of BCRA. This is particularly the case given the controversial and intricate nature of this issue and the Commission's significant, ongoing BCRA-related workload (including a number of other unfinished BCRA rulemakings).

110.20(b): We agree with the Commission's conclusion that 2 U.S.C. 441e's prohibition on foreign national contributions or donations includes amounts given by foreign nationals to any political party organization, whether or not it is a political committee under the Act.

110.20(d)&(e): We agree with the Commission's regulations prohibiting disbursements by foreign nationals not only for electioneering communications but also in connection with any federal, state, or local election. As the Commission notes, this approach is consistent with its past practice with respect to "expenditures" by foreign nationals.

110.20(f): We support the Commission's regulation explicitly stating that foreign nationals are prohibited from making contributions or donations to committees of a political party for the construction or purchase of any office building.

110.20(g): We agree with the Commission that 2 U.S.C. 441e's prohibitions on the solicitation, acceptance, or receipt of contributions or donations from foreign nationals (including assisting foreign nationals to make contributions or donations) should not be

construed as strict liability offenses. However, particularly given that interpretation, we oppose using the definition of "to solicit" at new 11 CFR 300.2(m) for purposes of construing that term as used in proposed 11 CFR 110.20(g)(1). The definition of "to solicit" at 11 CFR 300.2(m) is unduly narrow, departs from relevant Commission precedents interpreting that term, and could undermine the effect of this important provision.

We appreciate this opportunity to provide comments on the Commission's draft regulations relating to "contribution limitations and prohibitions." Thank you in advance for your consideration of these comments.

Sincerely,

/s/

Trevor Potter
General Counsel
The Campaign and Media Legal Center

/s/

Glen Shor
Associate Legal Counsel
The Campaign and Media Legal Center