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September 13, 2002

Via Electronic Mail

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

Re: Notice 2002-14: Contribution Limitations and Prohibitions

Dear Ms. Dinh:

I am writing on behalf of Common Cause and Democracy 21 to provide comments in response to the Commission's Notice of Proposed Rulemaking, published at 67 Fed. Reg. 54366 (August 22, 2002), to implement the provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) relating to contribution limitations and prohibitions.

Both Common Cause and Democracy 21 supported the enactment of the BCRA. We address below the major topics raised by the Commission in this NPRM.

1. Indexing of contribution limits. The NPRM discusses the apparent conflict between the contribution limits of the FECA and the new indexing provision of the BCRA.

The contribution limits themselves operate on either a "per election" basis, e.g., section 441a(a)(1)(A) (contribution limit to candidate), or a "per calendar year" basis, e.g., section 441a(a)(1)(B) (contribution limit to national party committee) and section 441a(a)(3) (aggregate individual contribution limit, which now operates on a bi-annual two calendar year basis).

WASHINGTON, DC ANCHORAGE JUNEAU SAN DIEGO ALBUQUERQUE

By contrast, the new indexing provision of the BCRA that modifies these same contribution limits operates on a two-year cycle that runs from the day after one federal election to the date of the next federal election. *See* section 441a(c)(1)(C). The NPRM correctly notes a conflict in these provisions. For instance, the bi-annual limit specifically applies for the period running from January 1, 2005 until December 31, 2006, yet the indexing provision would adjust that same limit for the period running from the day after the election in November, 2004 until the date of the next election in November, 2006. Thus, the time frames of the two statutory provisions, while substantially overlapping, are not completely coincidental.

The NPRM proposes to resolve the conflict by giving effect to the statutory time frame of the indexing section, and thus run the aggregate contribution limit on a two-year "election to election" basis, instead of on a two "calendar year" basis. The NPRM cites a principle of statutory construction that gives precedence to the later appearing provision in a statute – here, the indexing provision -- where two parts of a statute are in conflict.

We urge the Commission to address this problem in a different light, and instead in each case to implement the statutory time frame of the contribution limit itself. While it is true that the indexing provision is the later-appearing provision in the ordering of the statute, it is also the clearly subservient provision in the scheme of the law. The underlying contribution limit is the master provision, and the indexing provision operates in service of the contribution limit. It is a more faithful implementation of the statutory scheme – and better serves the intent of the law -- to give precedence to the clearly more important statutory provision and, where there is a conflict, to interpret the clearly more secondary provision to yield to it.

Thus, the Commission should apply the aggregate contribution limit of section 441a(a)(3) on a two-year calendar basis, running from January 1 of an odd-numbered year to December 31 of the subsequent even-numbered year, and should index that limit in January of the odd-numbered year for the two-year cycle. While this interpretation may be arguably contrary to the strict language of the indexing provision, it is clearly compliant with the strict language of the contribution limit in section 441a(a)(3) itself. Where one has to yield to the other, the more important provision should take precedence.

For similar reasons, the Commission should continue to apply the individual contribution limit in section 441a(a)(1)(A) on a "per election" basis, without any "multiple" indexing of that limit for a given election. Contribution limits should be increased by indexing on a <u>prospective</u> basis only, and the increased limit under the indexing provision should apply only to elections to be held in the future. The limit on contributions to a given election should not be increased retroactively.

Thus, for example, if the contribution limit for the 2006 election is indexed to $2100 in January, 2005, the Commission should apply this new, indexed limit to <u>all</u> contributions made for the primary and general elections in 2006, both before and after the elections. Even if the contribution limit is again indexed upward in January 2007, that indexing should apply only

prospectively to the 2008 election, and should not retroactively provide a new, higher limit for the 2006 election, nor permit individuals who previously maxed-out to a 2006 campaign committee to then make additional contributions for debt-retirement purposes under the new, higher limit.

In other words, a given contribution limit should adhere to a given election, and should apply to all contributions made for that election, no matter when the contribution is made. There should be one contribution limit for the 2002 elections, one for the 2004 elections, and so forth. The fact that a contribution to the 2002 elections might be made in 2004 (assuming debt in the 2002 committee) should not alter the limit applicable to the 2002 committee, even if the limit for a 2004 committee is different.

The NPRM's alternative treatment of this issue – by conforming the time frame of the contribution limit to the time frame of the indexing provision, instead of the other way around – yields the odd result that, between the day after a given election and at least January 1 of the following year, a person has the right to make a contribution at a new, higher, indexed limit, yet has no idea what the limit is, since the indexing does not occur until after January 1. This implementation of the statute creates a sort of phantom contribution limit from November to January every two years, an approach that surely will cause confusion to campaign committees and to donors alike.

In response to a question posed by the Commission, we also urge that the new limit of $2,000 per election for contributions to federal candidates, section 441a(a)(1)(A), go into effect in January, 2003 and stay in effect for the entire 2004 election cycle. The new statutory limit should not both go into effect and be indexed at the same time. The first application of the indexing provision should take place in the first subsequent odd-numbered year, 2005, and be applicable to the 2006 cycle.

2. Reattributions/Redesignations. The Commission proposes to revise its regulations concerning the reattribution and redesignation of contributions. It is important to note, as the NPRM does, that these revisions are not grounded in the BCRA – which does not address these topics in any way – but rather are proposed as an independent effort for "updating and streamlining" the Commission's existing rules. 67 Fed.Reg. 54371.

For redesignations, we support Alternative 1-B to section 110.1(b)(5)(ii). This Alternative requires that a candidate committee notify a contributor that a portion of his or her contribution is being redesignated from the primary to the general election, and gives the contributor an opportunity to request a refund. This procedure is clearly preferable to the alternative where the contributor receives no notification, and thus would never know that he has made a general election contribution. In addition to giving a contributor the opportunity to "opt-out" of the redesignation and receive a refund of the amount of his excess primary election contribution, such mandatory notification is likely to also prevent the contributor from making an excess contribution to the general election because of his lack of knowledge.

Any presumption of redesignation should be limited to elections within a single election cycle, whether forward- or backward-looking. Even with notification, a committee should not be permitted to redesignate an excess contribution made for the general election of one cycle to the primary or general election of the next cycle. The connection between the contribution and the election becomes too attenuated to sufficiently presume donor intent once the boundaries of an election cycle are transgressed.

Similarly, the Commission should not permit any presumption of reallocation of an excess contribution from one spouse to the other, even where a contribution is made by an instrument which contains the names of both spouses. Thus, we oppose both Alternatives 2-A and 2-B to section 110.1(k)(3)(ii). Reallocation of a contribution from one spouse to another should occur only with the express written consent of the spouse to whom the contribution is to be reallocated. Absent such notice and specific consent, there is a high risk that the spouse could subsequently violate the candidate or aggregate contribution limits. Further, it is only through express consent that the spouse can be found to have the donative intent to make a contribution to a particular federal candidate. Opt-out notification does not adequately protect this interest where a spouse has to affirmatively request a refund. Rather, the burden should be borne by the committee, which should be required to obtain written consent of the spouse to have a portion of the contribution reallocated to him or her.

Where consent from the contributor is required, a writing from the contributor is necessary to demonstrate that consent. The Commission should allow contributors to express their intent by email, where the recipient committee maintains a record of the communication, but should not allow a purely oral authorization by the contributor, even if the committee memorializes the conversation in writing. The latter process would be too easily subject to fraud and abuse, which should not be risked in an area as important as the preservation of donor intent, a matter fundamental to the integrity of the contribution limits.

3. <u>Contributions by minors</u>. The Commission should interpret the ban on contributions by minors, section 441k, to apply only to unemancipated minors. The intent of the provision was to close a means of evading contribution limits where parents funnel their funds through contributions in the name of a minor child. Congress found substantial evidence that such intra-family conduit contributions were being used to avoid the parental limits.

But if the minor is legally independent of his or her parents through a formal declaration of emancipation under state law, the risk that the parents could evade their contribution limits by funneling funds through their child is substantially diminished. In this situation, the funneling of funds through an emancipated minor poses no greater risk than any other illegal conduit contribution.

The section 441k ban prohibits a contribution to a "candidate" – a defined term in the FECA that means candidates for federal office. 2 U.S.C. 431(2). Thus, minors are free under this provision to contribute to any non-federal candidates, consistent with state law.

4. Contributions by foreign nationals. Congress in the BCRA intended to strengthen the ban on contributions by foreign nationals in section 441e in order to make clear that foreign nationals cannot make soft money contributions to the political parties, an issue that had been raised by a contrary district court decision. *See United States v. Trie*, 23 F.Supp.2d 55 (D.D.C. 1998). Congress further intended that funds from foreign nationals could not be used to pay for "electioneering communications" under Title II of the Act. In strengthening section 441e in both ways, Congress further intended to retain the pre-existing scope of section 441e in prohibiting contributions and expenditures by foreign nationals in connection with all local, state and federal elections.

Congress in the BCRA did not address the question raised in the NPRM of whether section 441e prohibits the U.S. subsidiary of a foreign corporation from establishing a political action committee, or from otherwise making non-federal donations. In our view, nothing in the BCRA speaks to this question one way or the other.

We agree with proposed section 110.20. In particular, we agree that the ban applies to "donations" as well as contributions, and that it applies to all committees of a political party. We also agree that the ban applies to donations by foreign nationals to inaugural committees and to buildings funds.

We agree, further, that the ban applies separately to "expenditures," "independent expenditures" and "disbursements for an electioneering communication." (The contrary reading of the BCRA language that is discussed, but rejected, in the NPRM makes no sense given the phrasing and punctuation of section 441e(a)(1)(C)). We also agree that the ban should apply to contributions and expenditures in connection with federal elections, and donations and disbursements in connection with non-federal elections, as proposed by the rule. Nothing in the language of the BCRA or in the legislative history would suggest that Congress intended to disturb parallelism between the treatment of federal and non-federal elections in banning both contributions/donations and expenditures/disbursements.

In response to a question raised by the NPRM, we strongly object to the Commission using in this provision the definition of the term "solicit" that was adopted in the Title I regulations. *See* 11 CFR 300.2(m). That definition is contrary to law in that it is radically under-inclusive and allows a broad range of solicitations-in-fact to escape the Title I regulation of solicitations. The Commission should reverse the decision made in the Title I rules and should promulgate a stronger and more inclusive definition of the term "solicit," and then incorporate that definition here. To repeat in this context the same mistake that the Commission made in the Title I rulemaking would weaken the longstanding prohibition on solicitation of donations from foreign nationals, and open the door to permitting federal candidates and officials to suggest or request that foreign nationals make contributions to their campaigns, in direct contravention of the FECA and the BCRA.

Finally, the NPRM raises the issue of intent in determining whether a recipient committee has violated section 441e by accepting a donation or contribution from a foreign national. We agree with the three-part test in the proposed rules at section 110.20(g)(4), with the exception that the standard in subclause (ii) that a "reasonable person" must have been aware of facts sufficient to conclude "there is a substantial probability" that the source of funds was a foreign national is too high a threshold, and should be modified.

The standard in subclause (iii) establishes an important "duty to inquire" where the recipient becomes aware of facts that would suggest to a "reasonable person" that an inquiry is warranted. The Commission should retain this proposed standard.

We appreciate the opportunity to comment on these proposed rules.

Respectfully submitted,

/s/ Donald J. Simon

Donald J. Simon