September 13, 2002

VIA E-MAIL

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

Re: Notice 2002-14: Contribution Limitations and Prohibitions

Dear Ms. Dinh:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit the attached comments on the Notice of Proposed Rulemaking to implement the Contribution Limitations and Prohibitions in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), published at 67 *Fed. Reg.* 54366 (August 22, 2002).

Respectfully submitted,

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
Director
FEC Watch

Attachment

1101 14th Street N.W., Suite 1030, Washington, D.C. 20005-5635
tel: (202) 857-0044 fax: (202) 857-7809 www.fecwatch.org

BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2002-14

CONTRIBUTION LIMITATIONS AND PROHIBITIONS

Comments of FEC Watch and the Center for Responsive Politics

I. Introduction

FEC Watch and the Center for Responsive Politics submit these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") on Contribution Limitations and Prohibitions under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). FEC Watch is a project of the Center For Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

II. Comments

We have comments on several aspects of the NPRM. However, we want to state at the outset that we found the proposed rules to be well organized and well written. We compliment the Commission and the Commission's staff on its work.

Our specific comments are set forth below.

A. Increases in the contribution limits

1. General Comments

The proposed rules implementing the increases in the limits on contributions to candidates and party committees are consistent with BCRA. We support these provisions. We also support the proposed rules implementing the increased aggregate contribution limit, subject to additional comments set forth below regarding the time period for the limit and the indexing of the limit.

The proposed rules on party committee contributions to Senate candidates are also consistent with BCRA. We support the Commission's proposal to use the more inclusive version of the Consumer Price Index, and the proposal to publish the revised contribution limits in the *Federal Register*.

1101 14th Street N.W., Suite 1030, Washington, D.C. 20005-5635
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2. Time period for application of the indexed contribution limits

As the NPRM recognizes, BCRA presents a conflict regarding the indexing of the contribution limits. These problems are actually more extensive than the NPRM indicates, because they affect not only the biannual aggregate contribution limit, but also the limits on individual contributions to candidates and national party committees, and the limit on contributions from party committees to Senate candidates.

Briefly stated, BCRA applies the inflation-adjusted or "indexed" contribution limits to time periods that are different from the time periods of the underlying contribution limits. Under BCRA, the indexed limits apply from the day after a November election to the date of the next election. In contrast, the limit on individual contributions to national party committees applies on a calendar year basis. The biannual aggregate contribution limit is based on a two calendar year cycle. The limit on individual contributions to candidates applies to contributions made for a particular election, rather than to contributions made during a particular time period.[1] The limit on national party committee contributions to Senate candidates is a calendar year limit, although its application makes it somewhat like a per election limit.[2]

Section 110.5(b)(3) of the proposed rules would resolve one of these conflicts by shifting the application period for the biannual aggregate contribution limit to match the application period for the indexed aggregate contribution limits.

We believe the contribution limits in subsections (a) and (h) of section 441a should be viewed as the core provisions of that section. In contrast, the indexing provision in subsection (c) should be viewed as an accessory to the core provisions whose only function is to provide a method for adjusting the limits in the core provisions for the effects of inflation. The indexing provision should not alter the time period for applying the contribution limits. This should continue to be governed by the core provisions.

For these reasons, we urge the Commission not to adopt section 110.5(b)(3) of the proposed rules. Instead, we urge the Commission to issue rules making the time periods for application of the indexed contribution limits the same as the time periods for the underlying limits.

3. Indexing the first year contribution limits

The NPRM seeks comment on the question of whether BCRA should be interpreted to require the Commission to adjust the new contribution limits scheduled to go into effect on January 1, 2003 for the effects of inflation. We believe Congress

[1] Thus, contributions made to candidates after the date of an election can count towards the limit for that election, so long as the recipient candidate has debts outstanding from that election. 11 CFR 110.1(b)(3).
[2] Section 110.2(e) treats party committee contributions made in a year other than the year in which the recipient Senate candidate seeks election as though they were made in the election year. Thus, all contributions made during the six-year term count toward a single limit.

intended for the Commission to start indexing the contribution limits in 2005. It did not intend for the Commission to begin indexing the limits in 2003, before they are ever put into effect. Such an adjustment would amount to a unilateral increase in the limits by the FEC. We urge the Commission to defer the first indexing until 2005, consistent with the intent of Congress.

B. Contributions from minors

In general, section 110.19 of the proposed appears to be consistent with BCRA. We urge the Commission adopt it. We have these additional comments.

1. Entities established or controlled by federal candidates

We support the prohibition on contributions from minors to entities directly or indirectly established, financed, maintained or controlled by a federal candidate, as set out in section 110.19(a)(3). The purpose of the prohibition on contributions from minors is to ensure that the minor's parents do not circumvent the limits by funneling money through their children. This purpose would be undermined if the parent could funnel money through their children to an entity directly or indirectly established, financed, maintained or controlled by a candidate.

We have stated in the past that we believe the Commission's definition of the phrase "directly or indirectly established, financed, maintained or controlled," now set out in 11 CFR 300.2(c), is inconsistent with BCRA. We continue to believe this. However, we recognize that the phrase should have the same definition throughout the BCRA regulations. Therefore, the cross reference in section 110.19(e) is appropriate.

2. Other issues

The NPRM raises the question of whether emancipated minors should be exempt from section 441k. It also raises the issue of whether minor donations to state, district and local party committees, including the nonfederal accounts of those committees, should be prohibited.

We recognize that contributions by emancipated minors do not raise the same degree of concern regarding circumvention of the contribution limits as contributions by dependent minors. Similarly, contributions by minors to state and local party committees do not risk circumvention of any federal contribution limits, since there are no such limits.

However, the language of section 441k prohibits contributions based solely on the age of the contributor. It also applies that prohibition to "a contribution or donation to a political party," without limiting the prohibition to a national political party, or to a state or local party's federal account.

Finally, we note that section 441k's prohibition on nonfederal donations only applies to donations made to political parties. It does not prohibit direct donations to state and local candidates.

C. Redesignation and reattribution

The NPRM seeks comments on several proposals relating to the redesignation and reattribution of contributions. Generally, we support the Commission's efforts to update and streamline its rules in these areas. However, we have several specific comments on the proposals in the NPRM.

1. Redesignation of excessive pre-primary contributions

The NPRM seeks comments on whether the Commission should allow committees to presume that an undesignated excessive pre-primary contribution is to be divided between the primary and general election. This proposal is set out in alternative 1-A of section 110.1(b)(5)(B). The NPRM also contains an alternative approach that would allow the recipient committee to redesignate an excessive pre-primary contribution so long as it notifies the contributor within 30 days of receipt and gives the contributor the opportunity to request a refund. This proposal is in alternative 1-B of section 110.1(b)(5)(B).

We believe the rules should not allow committees to redesignate a portion of a pre-primary contribution for the general election without taking additional action. In some instances, a person who contributes to a candidate's primary campaign may plan to support a different candidate in the general election. In other instances, a person may cross party lines to contribute to a candidate in the hopes of giving his own party's candidate a more beatable opponent in the general election. To allow a candidate that receives an excessive pre-primary contribution to split the contribution without communicating with the donor could result in the funds being used against the contributor's interests. Therefore, we urge the Commission not to adopt alternative 1-A of the proposed rules.

We support the alternative approach of requiring the committee to notify the contributor within 30 days and provide the contributor with an opportunity to request a refund. This approach strikes the appropriate balance between the administrative burden imposed on committees and the need to protect donor intent. Thus, we support alternative 1-B, with one caveat to be explained further below.

We also believe this approach could be applied to an excessive post-primary contribution where the primary campaign has net debts outstanding. Requiring notification with an opportunity to request a refund will adequately safeguard the intent of donors in this situation.

2. Redesignations beyond the current election cycle

The NPRM raises the issue of redesignation of contributions beyond the election cycle in which they are received. Additional safeguards are needed to protect donor intent in these situations.

Inferring donative intent for a general election contribution based on a primary election contribution in the same cycle is reasonable, since both elections are part of a single process for electing a candidate in a given year. Requiring the committee to notify the contributor ensures that contributors know they may object to the redesignation.

In contrast, inferring donative intent in one election cycle based on a contribution made in another election cycle is much more problematic. A donor's degree of support for a candidate or committee can change significantly from one election to the next. Thus, additional steps should be taken to ensure that the redesignation does not result in funds being used against the contributor's interests.

For these reasons, we urge the Commission to require committees to obtain written authorization from the contributor before redesignating a contribution for an election outside the current election cycle.

We also believe that the Commission should apply this standard to all redesignations of contributions by multicandidate political committees. These political actors are sophisticated enough that the Commission should hold them to a higher standard of specificity in designating their contributions.

3. Reattribution

Reattribution is fundamentally different than redesignation in that it involves inferences regarding the donative intent of a second person.

In redesignating a contribution, a committee infers that a person who made a contribution for one election would also make a contribution for another election in that cycle. In these instances, the donor has shown a clear intent to make a contribution to that committee for at least one election.

In contrast, when a committee reattributes a contribution, it infers that a person who has not shown any intent to make contribution would make a contribution. This inference carries greater risk of error than the inference made in redesignation. The person to whom the contribution is reattributed may not support the committee or the committee's candidate. Or, the person may be entirely unaware that the underlying contribution has been made, and may independently make his or her own contribution to that committee, in which case, the reattribution could result in an excessive contribution.

In light of these considerations, we urge the Commission to require the committee to obtain a written confirmation from the person to whom the reattribution is being made before reattributing the contribution to that person. This will protect donor intent and prevent inadvertent excessive contributions.

5. Time periods

For redesignations requiring notification with opportunity to request a refund, the Commission should require committees to notify contributors of the redesignations within 30 days, and provide contributors with 30 days to request a refund.

Regarding reattributions and redesignations for which written confirmation is required, the Commission should continue to use the sixty day time period in current sections 103.3, 110.1 and 110.2.

7. Proof of redesignation or reattribution

In instances where committees are required to notify a contributor and provide the contributor with an opportunity to request a refund, the committee should be required to notify the contributor by letter or electronic mail of its intention to redesignate the contribution. The committee should also be required to retain either a hard copy of this notification, a scanned image of the notification, or an electronic copy in readable form.

In instances where the contributor's written confirmation is required, confirmation by letter or by electronic mail would be sufficient, so long as a hard copy, scanned image, or electronic copy is retained.

We urge the Commission not to allow redesignations or reattributions based on memorializations of telephone conversations by the committee. This method of retaining records is inherently unreliable and presents too great an opportunity for fraud or misrepresentation. The Commission should require committees to use written or electronic methods of communication for redesignations and reattributions.

8. Separate primary and general election accounts

We share the Commission's concerns about the use of general election contributions for primary expenses, and vice versa. This issue has arisen several times in the past, and will likely continue to come up in the future.

Requiring separate primary and general accounts would resolve many of these situations, and at worst would impose only a modest administrative burden on committees. Some committees may find it easier to maintain two accounts that to maintain separate books and records for each election.

Therefore, we believe it would appropriate for the Commission to require separate primary and general election accounts.

9. Recordkeeping

The notice raises several recordkeeping issues, most of which apply beyond the BCRA context. Changing the recordkeeping threshold so that committees are required to maintain records for contributions in excess of $50 would harmonize the threshold with the limit on anonymous contributions in 11 CFR 110.4(c)(3). We urge the Commission to make this change.

We also urge the Commission to require committees to retain either photocopies or electronic images of contribution checks received, and electronic records of credit or debit card contributions. The technology has advanced to a degree that this can be done easily and with minimal expense.

D. Foreign Nationals

1. General comments

Sections 110.20(a) and (b) are consistent with BCRA, and we support them. We also support the importation of the section 300.2(e) definition of "donation" into section 110.20.

We agree with Commission's analysis of the relationship between the terms "donation" and "disbursement" in the context of nonfederal election activity, and we support the proposal to treat these terms as parallel in a manner similar to the treatment of the terms "contribution" and "expenditure." We urge the Commission to include section 110.20(d) in the final rules.

2. U.S. subsidiaries of foreign national corporations

The NPRM seeks comments on the impact of BCRA on U.S. corporations that are controlled by foreign corporations. Specifically, the notice asks whether BCRA should be interpreted to prohibit (1) nonfederal donations of corporate treasury funds from these entities, or (2) federal contributions through a PAC.

The Center for Responsive Politics takes no position on these issues. However, if the Commission decides to allow donations and contributions from these entities, we urge the Commission to include proposed section 110.20(h) in the final rules. This will help to ensure that contributions and donations by a U.S. corporation are not controlled in any way by a foreign parent.

3. Expenditures and independent expenditures

The NPRM seeks comment on the proper interpretation of section 441e(a)(1)(C). The phrase "for an electioneering communication" should be read to modify the term "disbursement" but not the terms "expenditure" and "independent expenditure." Expenditure and independent expenditure should be considered general in scope, so that section 441e prohibits all expenditures and independent expenditures. Proposed sections 110.20 (d) and (e) correctly reflect this interpretation. We urge the Commission to adopt them.

4. Defining "knowingly"

The NPRM also contains a proposed definition of "knowingly" that would be used to determine liability for persons who solicit, accept or receive foreign national contributions. We generally support the proposed rule, along with the non-exhaustive list of pertinent facts that would trigger an inquiry about the source of funds received. However, we have comments on certain aspects of the definition, and on the questions raised in the NPRM.

First, the Commission should consider clarifying the nature of the "reasonable person" standard in the proposed rule. As we understand the rule, a recipient will only be liable when he or she has subjective knowledge of facts that would lead a reasonable person to either (1) conclude that the donor is a foreign national, or (2) inquire about the donor's status. We believe that once the recipient has knowledge of these facts, it should be no defense that the recipient did not understand the significance of the facts. For example, if a recipient knows that a donor holds a foreign passport, the recipient should not be able to avoid liability by saying that he or she did not realize the information created a duty to inquire about the status of the donor.

Stated another way, the "reasonable person" referred to in sections 110.20(g)(4)(ii) and (iii) should be a reasonable person who knows the basic requirements of the law. It should be assumed that this person knows that contributions and donations from foreign nationals are prohibited, and also knows that persons who receive contributions have at least a minimal obligation to identify the source and legality of the funds received.

Second, we believe the "substantial probability" standard in section 110.20(g)(4)(ii) is too high. It suggests a level of certainty in the range of 70% – 80%. This would allow recipients to accept a contribution even in the face of significant evidence that it came from a foreign national. We believe this should be a "preponderance of the evidence" or "more likely than not" standard. If the information available to the recipient indicates it is more likely than not the contribution came from a foreign national, the contribution must be returned.

Regarding the reasonable inquiry referred to in section 110.20(g)(4)(iii), we believe the rules should specifically state that the reasonable inquiry referred to in

section 110.20(g)(4)(iii) includes asking the donor directly whether he or she is a foreign national.

In our view, each of the facts listed in section 110.20(g)(5), standing alone, raises significant questions about the status of the donor. Therefore, knowledge of any one of these facts should trigger the obligation to conduct a reasonable inquiry. Political committees should be subject to the same standard. Knowledge of one of the listed facts, or of any other facts that would lead a reasonable person to inquire, should trigger an inquiry by the committee. Written in this manner, the rules would contain a safe harbor. A recipient who can document that he or she made a reasonable inquiry into the status of the donor would be protected.

6. Disgorgement

The NPRM raises several questions about the disgorgement of funds received from foreign nationals.

The Commission should require committees to disgorge foreign national contributions or donations promptly upon discovering their illegality, but no later than 30 days after discovery. Disgorgement should be mandatory in all situations, since the underlying funds are prohibited under the Act.

Liability for receipt of foreign national contributions should be determined using the knowledge standard in section 110.20(g)(4). If a committee does not know, under 110.20(g)(4), that funds received are from a foreign national, and then later discovers they are, the committee should not be held liable, so long as it disgorges the funds as soon as possible and no more than 30 days after discovery. In contrast, if the committee knows, under section 110.20(g)(4), that funds received are from a foreign national, but fails to disgorge the funds within 30 days of acquiring this knowledge, the committee should be held liable, and subsequent disgorgement should not absolve the committee of liability.

The degree of delay in disgorgement in the latter situation could be relevant to the size of the penalty imposed. Of course, if a committee knowingly retains prohibited funds until the Commission takes action against it, even a prompt response from the committee should not erase the underlying violation.

III. Conclusion

FEC Watch hopes that these comments are useful to the Commission as it implements the contribution limitations and prohibitions in BCRA.