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VIA ELECTRONIC MAIL

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

Re: Contribution Limitations and Prohibitions

Dear Ms. Dinh:

On behalf of the Democratic Senatorial Campaign Committee ("DSCC"), I write to comment on the Commission's proposed rules on Contribution Limitations and Prohibitions, 67 Fed. Reg. 54,366 (2002). The DSCC is a political committee established and maintained by a national political party as defined by Commission rules at 11 C.F.R. §§ 110.2(c)(2)(iii) (2002).

The DSCC believes that the Commission would most properly meet its rulemaking obligations by adhering to three broad goals. The first is to give effect to the Bipartisan Campaign Reform Act of 2002 as passed by Congress. The second is to provide maximum certainty and simplicity to parties and candidates, as they comply with a significantly different regulatory regime. The third is to avoid legal positions not considered and established by Congress in the new law.

From this perspective, the DSCC would offer the following observations:

First, in crafting the rules to index various contribution limits to inflation, the Commission should help parties and candidates deal with anomalies in the indexing process. As a general matter, donors and recipients will have to confront a situation where the applicable limits are not known until after a contribution is made.

For example, in the case of candidate contribution limits and donor annual aggregate limits, the increases "shall be in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the

year in which the amounts are increased." See 67 Fed. Reg. at 54,378 (proposed 11 C.F.R. § 110.17(b)(1)).

However, the limits will not be precisely known or formally published until well after January of the odd-numbered year. As a result, the Commission may wish to consider some sort of "safe harbor" for committees or donors who reasonably and appropriately rely on an increase in the limits before they are formally announced. For example, it might consider granting a period of time after publication of the new limits in which committees may refund de minimis excessive amounts without triggering enforcement. It is not reasonable to expect committees to wait for the formal announcement before raising the full measure of funds allowed. For example, changing political circumstances may affect a committee's fundraising ability over time.[1]

Second, the Commission should consider "updating and streamlining its rules for designating contributions for a particular election or attributing contributions to particular donors." 67 Fed. Reg. 54,371. While we generally believe that the Commission should avoid ancillary issues in the course of this rulemaking, efforts to simplify compliance for candidates in other areas will only improve their ability to comply with the new law, and are thus well timed.

The DSCC favors Alternative 1-A, set forth at 67 Fed. Reg. at 54,376. Donors who make large candidate contributions generally support the recipient strongly and want to provide the maximum help possible. Written redesignations thus most often serve as barriers to donor intent. By adopting Alternative 1-A, the FEC would significantly lessen burdens for campaign compliance staff, allowing them to devote more time and effort to complying with other aspects of the new law.

To the extent the Commission keeps redesignation or reattribution requirements, it should allow greater flexibility in their fulfillment. For example, it should allow them to be met by e-mail, memorialized oral communications, or

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[1] The Commission may also want to explicitly state what the statute and the proposed rules implicitly assume, and what the Commission itself has long sought to accomplish through legislative recommendation: that a contribution to a candidate counts against a donor's aggregate limit for the election cycle in which the contribution is made, and not for the calendar year in which the candidate seeks election.

transmissions of electronic data through a web site. See, e.g., Advisory Opinion 1999-9 (treating a donor's transmission of an electronic form as a "signature" for purposes of Presidential matching fund requirements).

Third, the Commission should not impose additional recordkeeping duties or requirements for segregating general election funds. See 67 Fed. Reg. at 54,371-72. Neither of these proposals is directly occasioned by the new law or would specifically aid compliance with new rules. Both seem unnecessary. For example, the impermissible use of general election funds can often be detected by reviewing Commission reports.

Fourth, the Commission should decline to use the new law as an opportunity to wholly reexamine the questions of what constitutes a contribution or donation from a foreign national, and under what circumstances a political committee may be held liable for receiving such a contribution.

The new version of 2 U.S.C. § 441e resulted from a very specific problem. In weighing criminal charges in the wake of the 1996 elections, at least one court had held that the current statute prohibits only "contributions" by foreign nationals and "therefore does not proscribe soft money donations by foreign nationals or by anyone else." United States v. Trie, 23 F. Supp. 2d 55, 60 (D.D.C. 1998). While this argument was ultimately rejected by the United States Court of Appeals for the District of Columbia Circuit in United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999), Congress nonetheless changed the language of § 441e to remove any doubt on this issue.

Yet some of the Commission's rulemaking proposals go beyond Congress' attempt to solve this specific problem. They would use the new statutory language to accomplish wholly different aims. For example, the Commission has long distinguished between "foreign principals" barred from establishing and administering political committees, and corporations organized under the laws of the United States which, despite ownership by a foreign parent, may still establish federal PACs. See, e.g., Advisory Opinion 1999-28. To remove this distinction would serve no evident Congressional intent, unnecessarily confuse the regulated community, and deny many thousands of individual American citizens an opportunity to participate in the political process that others enjoy.

Similar issues are raised by the Commission's request for comments on whether a "strict liability" standard should be adopted for the receipt of foreign national contributions. 67 Fed. Reg. at 54,374. Again, the statutory language and the legislative history offer no basis for such a requirement. The word "knowingly" is just as absent from the new version of § 441e as it is from the current one. To the extent that the Commission seeks to craft a different knowledge requirement, it should consider its own past refusal to take enforcement action against recipients of foreign national contributions without at least some evidence that the committee should have known the contribution was illegal.

Finally, the Commission should reject the notion that "political committees and their treasurers have an affirmative duty to investigate contributions and donations to confirm that they do not come from foreign sources." 67 Fed. Reg. at 54,375. The likely targets of such "investigations" would be U.S. citizens of "apparent" foreign origin. A poorly considered rule could have the unwitting effect of humiliating, alienating and disenfranchising American citizens whose political participation should be valued. The standard now set forth in 11 C.F.R. § 103.3 is the right one, and requires no supplement.

I appreciate the opportunity to comment on these matters, and respectfully request the opportunity to testify on them at the Commission's public hearing.

Very truly yours,

Robert F. Bauer
Counsel to the DSCC