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January 31, 2003

Mr. J. Duane Pugh, Jr.
Acting Special Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice 2002-28

Dear Mr. Pugh:

The Campaign and Media Legal Center respectfully submits these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking concerning "Leadership PACs" (Notice 2002-28). The Legal Center is a non-profit, non-partisan organization organized to represent the public interest in administrative and legal hearings and proceedings on campaign finance and media laws.

We welcome the Commission's interest in re-evaluating the legal status of "Leadership PACs." Indeed, we believe that the Leadership PAC phenomenon is an end-run around limits long imposed on contributions to Federal officeholders and candidates by the Federal Election Campaign Act of 1971. The Commission's permissive stance to date with respect to Leadership PACs has served to weaken safeguards against actual and apparent corruption. In light of the Commission's failure to treat Leadership PACs as affiliated with authorized committees, we are recommending the adoption of regulatory provisions designed to secure the end the use of Leadership PACs as a device to evade contribution limits.

The Commission's unwillingness to treat Leadership PACs as affiliated with authorized committees has resulted in a proliferation of these entities. According to press accounts, prior to the 2002 elections, more than 100 House Members and almost half of the Senate had set up Leadership PACs. This was double the number of Leadership PACs in 1998, a reflection of the perceived value of these entities to Federal candidates. Derek Willis, *Leadership PACs on the Rise*, CQ WEEKLY – ELECTION 2002, Oct. 26, 2002, at 2807, available at http://www.thescoop.org/clips/weekly102602.html.

1. Current Status of Leadership PACs

Federal campaign finance law sets limits on the amounts that individuals and Federal political committees may contribute to candidates. Under 2 U.S.C. § 441a(a)(1)(A), an individual may contribute no more than $2,000 per election to the authorized campaign committees of a Federal candidate. Under 2 U.S.C. § 441a(a)(2)(A), a multicandidate political committee may contribute no more than $5,000 per election to the authorized campaign committees of a Federal candidate.

Furthermore, as a general matter, committees considered "affiliated" are treated as a single committee for purposes of contribution limits. *See* 11 C.F.R. § 110.3(a)(1) ("For the purposes of the contribution limitations of 11 CFR 110.1 and 110.2, all contributions made or received by more than one affiliated committee, regardless of whether they are political committees under 11 CFR 100.5, shall be considered to be made or received by a single political committee."). The touchstone for affiliation analysis has long been whether committees have been "established, financed, maintained or controlled" by the same person, organization, or group.

Along these lines, the Commission's regulations specify certain arrangements or situations that would result in a *per se* finding of affiliation and thus common contribution limits. *See, e.g.,* 11 C.F.R. § 110.3(a)(2)(i) (committees established or controlled by a corporation and/or its subsidiaries). Moreover, in other circumstances, the regulations call for analysis of whether a committee has been established, financed, maintained or controlled by another committee or sponsoring organization based on the presence or absence of certain factors designed to explicate these concepts. *See* 11 C.F.R. § 110.3(a)(3)(ii). In certain contexts, the Commission has applied these factors and concluded that committees are affiliated. *See, e.g.,* Advisory Opinion 1997-13.

Affiliation is a critical campaign finance law concept. In its absence, ceilings on contributions enacted by Congress – aimed at guarding against corruption and the appearance of corruption -- could readily be undermined by, among other things, supplementing limited contributions to one entity with additional contributions made to a separately created, commonly controlled entity. The longstanding existence of affiliation regulations clearly signifies that the Commission understands the potential for evasion of contribution limits through well-planned proliferation of receptacles for making or receiving donations.

Under this legal, regulatory, and policy framework, Leadership PACs simply should not exist. After all, these are entities created and controlled by Federal candidates and officeholders precisely to avoid contribution limits. For example, an individual who donated $4,000 to a Federal candidate's authorized committees in one election cycle can donate an additional $10,000 to the candidate's Leadership PAC over a two-year House term – and $30,000 over a six-year Senate term. Though now prohibited by the Bipartisan Campaign Reform Act of 2002 (see discussion below), that individual could also have donated unlimited amounts to the Leadership PAC's "soft money" account (likewise, corporations and unions prohibited from making contributions to authorized committees were able to donate unlimited sums to Leadership PAC soft money

accounts). In short, the Leadership PAC serves as a major multiplier of the amount of funds at a Federal candidate's or officeholder's disposal.

The additional funds provided by Leadership PACs are largely used to pick up costs that could otherwise (and should) be fully borne by Federal candidates' and officeholders' authorized committees: contributions to other candidates and party committees, payments for direct mail, spending on get-out-the-vote activity, consultant fees, and travel expenses, among other things. Apart from supplying additional funds for expenditure on activities fully capable of being financed through authorized committees, Leadership PACs present a few advantages for pursuit of a Federal candidate's or officeholder's agenda. For example, while a Federal candidate may contribute $1,000 per election from her authorized committee to another Federal candidate, she may contribute $5,000 per election from her Leadership PAC to that candidate. Moreover, Leadership PACs are not subject to the rules prohibiting conversion of campaign funds to personal use by Federal candidates – providing greater latitude for expenditures on such items as sporting events and entertainment.

While the Commission surely confronts close questions in some contexts as to whether entities have been "established, financed, maintained or controlled" by the same person, group or organization, authorized committees and Leadership PACs patently fit that bill. Simply put, Federal candidates and officeholders have made no pretense about their ownership of Leadership PACs. For instance, in an article about Leadership PACs, a House Member was quoted as saying, "I've told business PACs: 'I prefer you give to my leadership PAC rather than my campaign.'" Derek Willis, *Leadership PACs on the Rise*, CQ WEEKLY – ELECTION 2002, Oct. 26, 2002, at 2807, available at http://www.thescoop.org/clips/weekly102602.html. Along these lines, it is hardly surprising that a substantial number of the affiliation factors listed in 11 C.F.R. § 110.3(a)(3) characterize the relationship between Federal candidates and officeholders, authorized committees, and Leadership PACs.

Despite the presence of affiliation regulations on the books, the Commission's application of these regulations in particular instances to determine that certain entities were affiliated, and the strong public interest in protecting the integrity of contribution limits specified in law, the Commission has failed to treat Leadership PACs as affiliated with Federal candidates' or officeholders' authorized committees. While the Commission has largely sidestepped the issue rather than expressly confronting it, certain Advisory Opinions suggest that the agency is inclined to affiliate a Federal candidate's "unauthorized" committee with his or her authorized committees only where it considers the "unauthorized" committee to be used and organized for the primary purpose of electing the candidate.

In this respect, the Commission's focus is misplaced. Donations to a Federal candidate or officeholder in excess of the contribution limits set by Congress at 2 U.S.C. §§ 441a(1)(A) and (2)(A), for use in furtherance of the candidate's or officeholder's political aims or for personal use, trigger the very concerns that these limits were intended to mitigate. Surely, the public does not parse the degree of access and influence it considers

secured through contributions to authorized committees versus that provided through donations to Leadership PACs. Rather, it is the combined giving from a donor that registers – with the large aggregate contribution (*e.g.*, $34,000 to a Senator per term from an individual) feeding what the Supreme Court characterized in *Nixon v. Shrink Missouri Government PAC* as a "cynical assumption that large donors call the tune." 528 U.S. 377, 390 (2000). The Commission should be guided here by the fundamental purposes of contribution limits – the limits whose integrity affiliation analysis is designed to protect.

2. New Rule

The Commission's current regulatory framework for affiliation analysis appears adequate on its face to affiliate Leadership PACs with Federal candidates' or officeholders' authorized committees. However, as indicated above, the Commission has nonetheless been unwilling to treat Leadership PACs as affiliated with authorized committees.

As such, we are proposing for the Commission's consideration an additional regulation specifically oriented towards Leadership PACs, designed to be more effective in securing Commission treatment of these entities as affiliated with authorized committees. The affiliation of a Leadership PAC with a Federal candidate's or officeholder's authorized committees would result in the application of one contribution limit to the two entities – the limit on giving to and by the candidate's authorized committees. This approach is faithful to Congress's judgment concerning the limits on contributions to Federal candidates necessary to guard against corruption and the appearance of corruption.

Our proposed additional regulation contains a framework similar to that in Alternative B developed by the Commission (to be added at 11 CFR § 100.5(g)(5)). Namely, there would be two categories of "affiliation" factors. For the first category of factors, the presence of any one of the listed factors in a particular instance would trigger a finding of affiliation between the authorized committees of a Federal officeholder or candidate and another political committee or Section 527 political organization. For the second category of factors, the presence of any three of the listed factors in a particular instance would trigger a finding of affiliation between these entities. Finally, there would be a third avenue for affiliation analysis in this context – permitting the Commission to evaluate the "totality of the circumstances" (including, but not limited to, reference to the factors specified in the previous two categories) in assessing whether a political committee or Section 527 political organization was established, financed, maintained or controlled by a Federal officeholder or candidate or his or her authorized committees and thus should be treated as affiliated with the authorized committees. Overall, the approach is calibrated to explicate the concept of affiliation and thereby serve the basic purposes of contribution limits – the prevention of actual or apparent corruption.

Our proposed regulation is as follows:

§ 100.5 Political Committee (2 U.S.C. 431(4), (5), (6)).

* * * * *

(g) * * *

(5) Notwithstanding paragraph (g)(4) of this section, the Commission will examine the relationship between a political committee or other political organization described in section 527 of the Internal Revenue Code and the authorized committee(s) of a candidate or officeholder. This examination will be conducted in accordance with this paragraph.

(i) A political committee or section 527 political organization is affiliated with the authorized committee(s) of a candidate or individual holding Federal office if the conditions set forth in either paragraph (g)(5)(i)(A), (g)(5)(i)(B), or (g)(5)(i)(C) of this section are satisfied.

(A) Any one of the following statements is true:

(1) The candidate or individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has signature authority on the checks of the political committee or section 527 political organization;

(2) The candidate or individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, authorizes one or more contributions or disbursements by the political committee or section 527 political organization;

(3) The candidate or the individual holding Federal office signs more than 25 percent of the solicitation letters or other correspondence on behalf of the political committee or section 527 political organization;

(4) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to approve, alter or veto the solicitations of the political committee or section 527 political organization;

(5) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to approve, alter or veto the contributions, donations, or disbursements made by the political committee or section 527 political organization, whether or not that authority has been exercised;

(6) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to approve, alter or veto the contracts made by the political committee or section 527 political organization;

(7) The name or nickname of the candidate or of the individual holding Federal office, or other unambiguous reference to the candidate or individual holding Federal office, appears on the stationery or letterhead of the political committee or section 527 political organization;

(8) The political committee or section 527 political organization pays for the travel of the candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, in excess of $5,000 per calendar year;

(9) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, had an active or significant role in the establishment of the political committee or section 527 political organization;

(10) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to direct or significantly participate in the governance of the political committee or section 527 political organization;

(11) The political committee or section 527 political organization has the authority to direct or significantly participate in the governance of the authorized committee of the candidate or individual holding Federal office; or

(12) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority or ability to hire, appoint, demote or otherwise control the officers, employees or agents of the political committee or section 527 political organization.

(B) Any three of the following statements are true:

(1) An immediate family member of the candidate or individual holding Federal office:

(i) has signature authority on the checks of the political committee or section 527 political organization;

(ii) authorizes one or more contributions or disbursements by the political committee or section 527 political organization;

(iii) signs more than 25 percent of the solicitation letters or other correspondence on behalf of the political committee or section 527 political organization;

(iv) has the authority to approve, alter or veto the solicitations of the political committee or section 527 political organization;

(v) has the authority to approve, alter or veto the contributions, donations, or disbursements made by the political committee or section 527 political organization, whether or not that authority has been exercised; or

(vi) has the authority to approve the contracts made by the political committee or section 527 political organization;

(2) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office, share, exchange or sell contributor lists, voter lists, or other mailing lists directly to or with each other, or indirectly through the candidate or individual holding Federal office to or with each other;

(3) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office share office space, staff, a post office box, or equipment;

(4) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office share common vendors;

(5) The political committee or section 527 political organization and the candidate or individual holding

Federal office, or an authorized committee of the candidate or individual holding Federal office, share common or overlapping officers or employees;

(6) The political committee or section 527 political organization refers to the candidacy or potential candidacy of the candidate or individual holding Federal office in 25 percent or more of its solicitations or other publicly disseminated materials;

(7) The political committee or section 527 political organization has officers, employees, or agents who were officers, employees or agents of the candidate or individual holding Federal office, or officers, employees, or agents of an authorized committee of the candidate or individual holding Federal office;

(8) An authorized committee of the candidate or individual holding Federal office has officers, employees or agents, or the candidate or individual holding Federal office has employees or agents, who previously were officers, employees, or agents of the political committee or section 527 political organization;

(9) An authorized committee of the candidate or individual holding Federal office, the candidate or individual holding Federal office, or an officer, employee, or agent thereof, provides funds or goods to the political committee or section 527 political organization on an ongoing basis;

(10) An authorized committee of the candidate or individual holding Federal office, the candidate or individual holding Federal office, or an officer, employee, or agent thereof, causes or arranges for funds to be provided in a significant amount or on an ongoing basis to the political committee or section 527 political organization (other than transfers of the allocated share of funds jointly raised under 11 CFR 102.17); or

(11) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office have

similar patterns of contributions or contributors that indicate a formal or ongoing relationship between the committees.

(C) The overall relationship between the political committee or section 527 political organization and either the candidate or individual holding Federal office, or the authorized committee(s) of the candidate or individual holding Federal office, based on a review of the totality of circumstances that includes but is not limited to the factors set forth in subparagraphs (A) and (B), indicates that the committee or section 527 political organization has been established, financed, maintained or controlled by the candidate or individual holding Federal office, or by the authorized committee of a candidate or individual holding Federal office.

(ii) Determinations by the Commission.

(A) A political committee, section 527 political organization, authorized committee of a candidate for Federal office, or individual holding Federal office may request an advisory opinion of the Commission to determine whether the political committee or section 527 political organization is affiliated with an authorized committee of the candidate or individual holding Federal office. The request for such an advisory opinion must meet the requirements of 11 CFR part 112.

(B) Nothing in this section shall require entities that are not affiliated as of [the effective date of these rules] to obtain an advisory opinion to confirm that they are not affiliated.

We wish to highlight three basic differences from Alternative B developed by the Commission (the closest analogy presented by the Commission):

- Subclause (A) of our proposal contains additional factors that, each on their own, would trigger a finding of affiliation. Some of these factors are not contained in Alternative B at all (*e.g.*, hiring authority by the candidate or officeholder), while others are listed in Alternative B in the category of factors requiring the presence of three to trigger affiliation (*e.g.*, candidate or officeholder's name appears on letterhead). We believe that the additional factors contained in subclause (A) of our proposal are each such strong indicia of association with the Federal officeholder or candidate as to warrant inclusion in this category.

- Subclause (B) of our proposal contains additional factors that, in combination, would trigger affiliation. Many of these additional factors were derived from current 11 C.F.R. § 100.5(g)(4). Although the Commission has not properly applied that regulation to Leadership PACs, the regulation itself is correct in identifying those factors as relevant considerations for affiliation analysis.

- Subclause (C) of our proposal supplies a third avenue for affiliation analysis which lacks a counterpart in Alternative B. Among other things, this subclause affords the Commission flexibility to address other manifestations of establishment, maintenance, financing or control.

While we largely agree with the factors listed in Alternative A (indeed, we have included forms of these factors in our category of factors that would on their own trigger affiliation, including some which were not listed as such factors in Alternative B), this proposal is insufficiently comprehensive to explicate having been "established, financed, maintained or controlled." As such, we have proposed a larger category of factors to guide affiliation analysis in this context, as well as provided the Commission flexibility to consider other manifestations of establishment, maintenance, financing or control. We have rejected Alternative C because, as the Commission indicated in its Notice of Proposed Rulemaking, it largely continues the status quo for Leadership PACs. We have explained our opposition to the status quo above.

3. Soft Money Leadership PACs

In its final rules to implement the party and candidate soft money provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission addressed the issue of soft money Leadership PACs. As the Commission recognized in 11 C.F.R. § 300.60(d), the prohibitions on the solicitation, receipt, and spending of soft money of 2 U.S.C. § 441i(e) apply not only to Federal candidates and officeholders but also, among other things, to any entities they directly or indirectly establish, finance, maintain or control, or that act on their behalf.

Applying these rules to soft money Leadership PACs, the Commission indicated in the soft money Explanation and Justification that "a Leadership PAC that comes within the definition of 11 CFR 300.2(c)" can accept funds only from sources and in amounts permitted under the Act. 67 Fed. Reg. 49,107 (Jul. 29, 2002). Accordingly, the key question under these rules is whether what is in fact a soft money Leadership PAC would be considered "a Leadership PAC that comes within the definition of 11 C.F.R. § 300.2(c)." If such an entity would be considered to fall within that definition, it would be prohibited under the regulations; if not, it could continue apparently to function under the regulations.

In turn, 11 C.F.R. § 300.2(c) restates the affiliation rule currently contained at 11 C.F.R. § 100.5(g)(4). Unfortunately, this is precisely the rule under which the Commission has long been unwilling to affiliate Leadership PACs with authorized committees. As such, there has been understandable concern that the Commission's soft money regulations do

not firmly shut the door on soft money Leadership PACs, despite the clear command of BCRA.

Following the adoption of the soft money regulations, a number of Commissioners indicated that the regulations banned soft money Leadership PACs. On one level, these statements could be interpreted as testifying to the obvious: of course Leadership PACs are "established, financed, maintained or controlled" by Federal candidates. However, as neither these comments nor the Commission's soft money regulations defines the term "Leadership PAC," an unnecessary lack of clarity remains. More generally, however the Commission's soft money regulations may be characterized, they still use the formulation "Leadership PAC that comes within the definition of 11 CFR 300.2(c)" to define the entity in this context that is banned from raising, receiving or spending soft money. As indicated above, the Commission's history of non-enforcement of the affiliation factors contained in 11 C.F.R. 300.2(c) to Leadership PACs raises serious questions about what these regulations have in fact accomplished regarding Leadership PACs.

Accordingly, the additional affiliation regulation that we have proposed would firmly shut the door on soft money Leadership PACs. Notably, the specified affiliation formula covers not only "political committees" (hard money Leadership PACs) but also "Section 527 political organizations" (soft money Leadership PACs). We do believe that the Commission would need to conform its soft money regulations – particularly the affiliation factors at 11 C.F.R. § 300.2(c) -- to reflect the adoption of this regulation.

We appreciate the Commission's interest in re-evaluating its treatment of Leadership PACs and hope these comments are of assistance as it pursues this rulemaking. If the Commission decides that it wishes to hold a hearing on February 26th on its proposed Leadership PAC rules, Glen Shor, Associate Legal Counsel for the Campaign and Media Legal Center, would be interested in testifying. Thank you in advance for your consideration.

Sincerely,

/s/ Glen Shor

Glen Shor
Associate Legal Counsel
The Campaign and Media Legal Center