




FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

**MEMORANDUM**

TO: The Commission  
General Counsel  
Staff Director  
Public Information  
Press Office  
Public Records

FROM: J. Duane Pugh Jr.   
Acting Special Assistant General Counsel

SUBJECT: Comment on Notice of Proposed Rulemaking on Leadership PACs

Attached please find one comment submitted late in response to the above Notice of Proposed Rulemaking, Notice 2002-28, published in the December 26, 2002 Federal Register (67 Fed. Reg. 78753). The comment period ended on January 31, 2003. The commenter has requested to the opportunity to testify in the event the Commission conducts a hearing.

As a result of the additional comment and request to testify, this Office intends to update language in the draft Notice of Public Hearing on Leadership PACs, which is currently on circulation. Accordingly, on page 2, line 6, "Seven" will be changed to "Eight"; on page 2, line 7, "Six" will be changed to "Seven"; and on page 2, line 8, "five" will be changed to "six".

Attachment

cc: Associate General Counsel for Policy  
Congressional Affairs Officer  
Executive Assistants

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**FOLEY L LARDNER**  
ATTORNEYS AT LAW

February 6, 2003

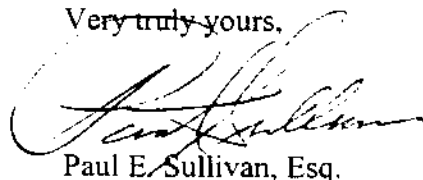
Mr. J. Duane Pugh, Jr.  
Acting Special Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2003 FEB -6 P 4: 56

Dear Mr. Pugh:

Attached are comments related to the leadership PAC Notice of Proposed Rulemaking. I recognize these are submitted late. Travel and faulty transmission of the document precluded filing on the 31<sup>st</sup> of January. If these comments could be considered, I would appreciate it.

Very truly yours,



Paul E. Sullivan, Esq.

PESU/trw  
Enclosures

Cc: Ellen L. Weintraub, Chairman  
Bradley A. Smith, Vice Chairman  
David M. Mason, Commissioner  
Danny L. McDonald, Commissioner  
Scott E. Thomas, Commissioner  
Michael E. Toner, Commissioner

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February 6, 2003

Mr. J. Duane Pugh, Jr.  
Acting Special Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20036

Dear Mr. Pugh:

Thank you for the opportunity to submit these comments in response to the Commission's Notice of Proposed Rulemaking ("NPR") relating to "Leadership PACs". In addition to these written comments, I would request the opportunity to testify, in the event the Commission conducts hearings on the issue.

These comments are not submitted on behalf of a specific client, but rather reflect my personal opinions on the subject. I have represented numerous so-called "leadership PACs" stretching back to the mid-1980s, including Presidential and incumbent Congressional members/candidates as the founders or participants in such organizations.

**Summary:** This subject is one that has required greater clarification for sometime now from the Commission and therefore I agree with the need for this NPR. That having been said, I do not necessarily agree with many of the proposed approaches suggested in the NPR.

The Commission should not create a new regulatory classification for these so-called leadership PACs. Rather, since these leadership PACs are merely non-connected committees, the determination of whether one is affiliated with a principal campaign committee should be determined by uniform standards. That applies to all non-connected committees. The basic guidelines for those standards are contained in the current structure of the FECA and the basic integrity of that approach should remain in place. The focus of the Commission's actions should be limited to expanding those indicia to determine affiliation at 11 C.F.R. §100.5 without utilizing *per se* standards, rebuttable presumptions or the fulfillment of a certain number (one or three) of the stated indicia.

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As noted above, I would welcome a more extensive and definitive group of indicia, though not a more restrictive group as proposed in the NPR to clarify these points to the regulated community.

The NPR also fails to consider those situations in which a board of directors of an incorporated PAC constitutes the legal authority that "controls" the incorporated committee. The NPR appears to only deal with situations in which a single officeholder "controls" the committee. I submit that such a corporate board could include a single or multiple group of officeholders, though no single officeholder would have legal authority to control the board of directors, and therefore it would not be "affiliated" with any officeholder's principal campaign committee.

### Discussion

1. Leadership PAC: The term "leadership PAC", as noted in the NPR, is not defined in the FECA, nor in the current regulations. It, like the term "soft money" is not a term of art, but one that has surfaced as a slang term in the regulated community, resulting in an overly broad use of the term. Therefore, I do not favor the use of the term or its inclusion in the regulations. Notwithstanding the fact a definition could be created for the term, I do not believe a sufficiently narrow definition could be constructed. And if so, (e.g. a committee controlled by an officeholder) the term and its definition would be superfluous.

These committees must be viewed as political committees, not connected to a corporation, labor organization or political party and not authorized or affiliated with a principal campaign committee<sup>1</sup>. Whether or not an officeholder participates in the organization does not change the character of the committee for FECA purposes. There is no need for a sub-category of non-connected committees. Utilizing an affiliation analysis is a much clearer method and enables integrating the balance of the Commission's regulations rather than developing what will undoubtedly be an extensive and a more confusing new area of regulations for leadership PACs.

2. Current Input of BCRA: An example of this confusion is reflected in the current NPR. It notes that the recently issued regulations addressing non-federal funds would limit "officeholders to soliciting, receiving", etc. funds up to an aggregate of five thousand dollars (\$5,000.00) per person for a "leadership PAC's" federal and non-federal account.

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<sup>1</sup> I would generally reference these types of committees as a "non-connected committee" but that term is not generally defined as a political committee in 11 C.F.R. §100.5, but only in §106.6 for limited purposes of that section. Perhaps utilizing and defining the more generic term of "non-connected" is the better point to start in resolving the more limited question of "leadership PACs".

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If it is the Commission's position there is a five thousand dollar (\$5,000.00) aggregate limit<sup>2</sup>, then it would apply not just to leadership PACs, but to all committees that maintain federal and non-federal accounts/committees. That solicitation restriction could not be limited to leadership PACs but by making that reference in the NPR, it is a basis of confusion to the community. Could a member solicit in excess of five thousand dollars (\$5,000.00) for a non-connected committee that was not a leadership PAC? Similar confusion is inevitable and superfluous regulations would result if a new "leadership PAC" section is developed. There is no need for a separate labeling as a leadership PAC.

3. Per Se Affiliation: The NPR poses the question of a "*per se* affiliation". I do not believe there are any circumstances that would justify such a classification but for the specific recognition by a candidate<sup>3</sup>, and that would require the candidate to file the PAC as an authorized committee. Absent such recognition, an affiliation analysis should be applied. If affiliated then the conclusion must be that it is an authorized committee of the candidate.

4. Affiliation: As a preface to this discussion, the Commission starts down a foggy road when referencing standards in the NPR such as officeholders that are "closely associated" with committees<sup>4</sup>. I would submit that a federal officeholder can sit on the board of directors of a federal or state political organization, or a non-profit organization that maintains a separate segregated fund without those respective political entities being deemed affiliated with the candidate's committee. The standard to apply is already found at §100.5(g). Those committees "established, financed, maintained or controlled" ("EFMC") by the same person or group are considered affiliated. That standard should apply for all affiliation issues and a separate standard of review is not needed, nor is it justified for so-called leadership PACs. Participation in organizations or PACs is not a basis to conclude that there is affiliation with an officeholder's principal campaign committee.

A candidate/officeholder may sit on the board of such political organizations without "controlling" the group. For this reason, I specifically disagree with that suggestion in

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<sup>2</sup> I happen to disagree with the position and believe the BCRA would permit five thousand dollars (\$5,000.00) to each the federal and non-federal accounts, though the latter would be subject to FECA limits and prohibitions per the BCRA.

<sup>3</sup> For example when a draft committee (another type of committee not specifically defined in the regulations) files with the Commission the potential candidate is asked if it is an authorized committee.

<sup>4</sup> See NPR Section II Proposed Rules, 2 Affiliation. Being "associated" with an organization falls short of "controlling" the organization.

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Alternative A, claiming the mere inclusion of an officeholder's name on a letterhead would cause affiliation. This would cause a number of unforeseen problems.

For example, since the enactment of BCRA, I have explored with clients the formation of committees that would have a geographical emphasis (e.g. "The Arizona" or "The Far West" Political Association). In those cases, a board could include multiple officeholders in addition to numerous non-officeholders from that geographic region. Under the provisions of the NPR Alternative A, would the mere listing of the board members' name on a letterhead cause affiliation with *EACH* principal campaign committee of those board members who were also officeholders? Clearly, that listing in and of itself would not evidence "control" and therefore would not evidence affiliation. I submit even their membership on the board would not cause affiliation absent evidence of their respective showing they "EFMC" the group. A similar argument applies to the provision of merely signing a fundraising letter as set out in Alternative B. That is not an indication of "control" of the committee.

The indicia in Alternative A (and those same points overlapping in Alternative B) such as a candidate signing checks or the candidate vetoing disbursements, contracts, etc. are legitimate indicia to consider to evidence whether one has "control" of the PAC. However, I would also submit those are each activities that can be easily circumvented. This raises a secondary issue, and one raised in the NPR.

As was the case in the proposed regulations regarding the prohibition on officeholders soliciting non-federal funds under BCRA, one of the major issues for the officeholder related to these indicia of affiliation is the question of who is deemed to be acting as an "agent" for the officeholder. This issue must be dealt with as directly and clearly as it has been in the regulations related to non-federal funds. Clarifying this agency relation is and will continue to be a critical issue for enforcement and for notice of the appropriate parameter to the regulated community. I submit it must be an expressed, not implied, standard.

In summary, I disagree with the general structure suggested by alternative A, since no one single indicia is sufficient to prove affiliation absent an expressed authorization by the candidate.

5. Alternative B: In the case of the structure proposed in Alternative B, though I concur that most of the eight (8) indicia listed should be considered<sup>5</sup> to determine

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<sup>5</sup> I would not include the exchange/sale/rental of a mailing list since that represents an arms length transaction. Nor would I include the mere payment of travel since that disbursement does not evidence EFMC; the authority to approve/reject such disbursements would be an acceptable indicia of affiliation.

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affiliation, setting a specific number (in this case three (3)) could present problems for the Commission and the regulated community.

For example, I could envision a situation in which a board of directors of a PAC (of which the officeholder is not a member) could pay for an officeholder's travel, or multiple officeholders' travel, use common mail/event vendors and use a common mailing list without it being controlled by the officeholder. None of those three indicia individually or collectively constitute "control" by the officeholder. In that example, the board would still maintain the authority to disburse funds, enter/void contracts and conduct the day to day business of the PAC, etc., therefore control the PAC.

6. Alternative C: This section proposes to continue the current approach by the Commission, but that system fails to properly consider affiliation. The mere fact that the PAC does not attempt to influence the specific officeholder's election should not be conclusive evidence that the principal campaign committee and the PAC are not affiliated. I come back to the application of EMFC of the PAC by the officeholder. Under Alternative C, an officeholder could literally exercise full control over the PAC and yet if no funds are disbursed to influence the election of that officeholder, then it would not be considered affiliated with the officeholder's principal campaign committee; and that flies in the face of the definition of affiliation.

Because I disagree with this general structure, I would also disagree with the other underlying provisions presented in Alternative C.

7. Presidential: With respect to Presidential candidates, absent affiliation, there should not be a basis for reimbursement of PAC expenses. Also confining this approach to PACs of Presidential candidates presents unequal treatment for those Presidential candidates who do not use a PAC, but rather utilize a non-profit corporation vehicle exempt under IRC §501(c)(4) or (c)(6) for accomplishing their desired activities. Those vehicles are beyond the jurisdiction of the Commission in most situations.

**Conclusion:** For the reasons suggested above, the structure that will provide integrity to the Act and one that does not restrict an officeholder's participation in other organizations should be based upon the current affiliation criteria with the analysis to consider "non-connected" committees as a whole and not in a special "leadership PAC" category.

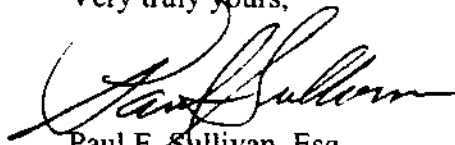
Attention should also be directed to multiple officeholders participating in an organization though no single one controls the organization. In addition, these affiliation indicia should be viewed in those cases in which the organization is incorporated and governed by a board of directors.

FOLEY ■ LARDNER

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Thank you for the opportunity to express these comments to the Commission.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paul E. Sullivan".

Paul E. Sullivan, Esq.  
Attorney at Law

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