National Republican Congressional Committee

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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments to Proposed Rulemaking [Notice 2002-28]

Dear Mr. Pugh:

By and through the undersigned counsel, the following Republican Members of the United States House of Representatives hereby submit these comments on the Federal Election Commission's (the "Commission") proposed rulemaking regarding so-called "Leadership PACs": Tom DeLay, Roy Blunt, Deborah Pryce, David Dreier, John Doolittle, Jack Kingston, Tom Reynolds, Bob Ney, Tom Davis, Phil English, Greg Walden, Buck McKeon, Hal Rogers and Pete Sessions. Also by and through the undersigned counsel, the following non-connected political action committees also submit these comments: American Liberty PAC; American Success PAC; Federal Victory Fund; Help America's Leaders PAC; Pacific Northwest Leadership Fund; People for Enterprise, Trade, and Economic Growth; Together for Our Majority PAC; and the 21st Century Fund.

I. INTRODUCTION

The Commission has issued a Notice of Proposed Rulemaking regarding so-called "Leadership PACs," which, for lack of a formal definition, we will define for the purposes of this proposed rulemaking to mean a federal PAC that is somehow associated with a Member of the House, the Senate or another elected official.

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In the Commission's Notice, there are three alternatives proposed. As an initial matter, the Bipartisan Campaign Reform Act of 2002 ("BCRA") does not specifically speak to the issue of Leadership PACs, and the Commission's current position is consistent with the Federal Election Campaign Act ("FECA"). We find Alternative A to be contrary to FECA, and not mandated by BCRA. We find that Alternative B suffers the same fatal flaws. In the event the Commission wishes to clarify existing law and practice, Alternative C provides a useful starting place for further discussion.

The intent of these comments is to assist the Commission in understanding how Leadership PACs operate, at least those associated with Republican Members of the House of Representatives. Such PACs are not used to facilitate the unfettered whims of a particular Member, let alone his or her own reelection campaign. Instead, such PACs contribute funds primarily to those to whom others would not contribute: challenger and open seat candidates, state and local candidates and political parties. Given the Commission's recent rulemaking with respect to a candidate's ability to receive a salary from campaign funds, it simply makes no sense to cut off funding of those very same candidates. Ultimately, contributions made by Leadership PACs encourage more people to become involved in our government, and allow people who would not otherwise be viable to become viable candidates for office.

II. ANALYSIS

A. BCRA Does Not Support the Abolition of Leadership PACs.

There is no evidence of any Congressional intent to abolish so-called hard dollar "Leadership PACs." On the contrary, in what appears to be the only reference to the issue, Senator McCain made clear that:

> A federal officeholder or candidate is prohibited from soliciting contributions for a Leadership PAC that do not comply with federal hard money source and amount limitations. Thus, the federal officeholder or candidate could solicit up to $5,000 per year from an individual or PAC for the federal account of the Leadership PAC and an additional $5,000 from an individual or PAC for the non-federal account of the Leadership PAC.

Cong. Rec. S2140 (March 20, 2002).

In fact, McCain himself explicitly drew a distinction between a principal campaign committee and a Leadership PAC when he said: "One important restriction in the bill applies to fundraising for so-called Leadership PACs, which are political committees, other than a principal campaign committee, affiliated with a Member of Congress." Cong. Rec. S2140 (March 20, 2002) (emphasis added).

The conduct of the principal sponsors, supporters, discharge petition signators and those who voted for final passage of BCRA also undercuts any intent to abolish

Leadership PACs.[1] Several Republican Members who voted for BCRA maintain some sort of association with a Leadership PAC. In fact, even the bill's primary sponsor, Chris Shays, has his Americans for Common Sense Government PAC.[2] The same is true of the Democrats. Representatives Gephardt, Hoyer, Frost and Pelosi[3] are all associated with different PACs, and all voted for BCRA.

Next, Senator McCain's *ex parte* communication with the Commission is simply inconsistent with both his own words, his actions, and the actions of his like-minded colleagues. Critically, McCain does not say that BCRA was intended to abolish Leadership PACs – he does not (and cannot) cite anything in the statute itself to support this statement. Instead, he merely says that it would be "consistent" with BCRA's "concern" for the influence of contributions on Federal candidates and officeholders. But BCRA is not concerned with the influence of direct contributions on Federal candidates and officeholders – the individual contribution limits were doubled by BCRA! What BCRA was most concerned with – or at least what the sponsors claimed it was concerned with at the time of passage – were so-called "soft money" and so-called "sham issue ads," not hard money Leadership PACs.[4]

Finally, nothing in current law mandates a change – in fact, the Commission's current position is clearly consistent with what Congress has actually passed with respect to what constitutes an authorized committee. An authorized committee must be authorized in writing, pursuant to 2 U.S.C. § 432(e)(1). This ought to be read (and has been read) in conjunction with the general proposition regarding in-kind contributions: Contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his or her behalf shall be considered to be contributions made to such candidate. When read together, it appears that Congress was very explicit in the draftsmanship, specifically that it is not a contribution to a candidate unless made to an committee authorized by that candidate. Thus, in light of this

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[1] Soon after the Senate voted to pass McCain-Feingold, Roll Call ran an article chronicling some Senators' surprise that their so-called "soft-money" PACs would have to be terminated. *Soft Money PACs Banned*, Roll Call (4/5/01) ("That [Members cannot raise soft money, even for a PAC] came as news to some Senate leaders who have opened leadership political action committees that operate outside of federal regulations and take large contributions directly from corporations, unions and wealthy individuals."). However, there is no contemporaneous press reports of any discussions, rumors, innuendo or anything of the sort that could in any way be interpreted to mean that BCRA was intended to eliminate hard money PACs.

[2] In addition to Shays, other supporters of BCRA have some sort of association with a Leadership PAC (according to www.tray.com): Curt Weldon and the Committee for a United Republican Team (or CURT PAC); Mark Foley and the Florida Republican Leadership PAC; Mary Bono and Mary' PAC; Doug Ose and the Sacramento Valley Leadership Fund; Sherwood Boehlert and the Science Leadership PAC; Fred Upton and the Team Republicans for Utilizing Sensible Tactics (or TRUST PAC); and Tom Petri and the Wisconsin Leadership PAC.

[3] News reports indicated that Representative Pelosi had multiple PACs.

[4] *See* George Will, *Free Speech Getting Squeezed*, Chicago Sun-Times (12/1/02) ("The late Sen. Paul Wellstone (D-Minn.): 'These issue advocacy ads are a nightmare.' Sen. Maria Cantwell (D-Wash.): McCain-Feingold 'is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves.' Sen. Tom Daschle (D-S.D.): 'Negative advertising is the crack cocaine of politics.' Sen. John McCain (R-Ariz.): Negative ads 'do little to further beneficial debate and a healthy political dialogue,' and McCain-Feingold will 'raise the tenor' of elections.'").

congressional clarity, Leadership PACs and authorized committees cannot now be merged simply by regulatory fiat.

B. The Timing of the Proposed Rule Raises Concern

The enactment of BCRA has created a legal minefield for the unwary (and, given the lack of consensus among the election law bar, a legal minefield even for those who wish to comply with BCRA). First, there is BCRA itself – almost 100 pages in length. Then there are the new Commission regulations implementing BCRA. Adding to the confusion is a lawsuit challenging those regulations. Then there is the facial challenge to BCRA. Media stories that purport to explain the new law are even more confusing (and in many instances, wrong). In fact, just recently *The Hill* editorialized against BCRA, and provided a very candid assessment of the confusion that exists. Simply put, to attempt to foist more change – particularly in an area that is not mandated by BCRA – would cause more problems than it would solve.

C. Leadership PACs Associated With Members of the United States House of Representatives Do Not Create the Appearance of Corruption.

1. Contributions to and from Leadership PACs are limited.

At least with respect to Leadership PACs associated with Members of Congress, such PACs have not been an engine for large contributions in Washington. First, such PACs are limited both with respect to what they can accept and what they can contribute. An individual can only contribute a maximum of $5,000 per year to such a PAC (perhaps limited further by the bi-annual aggregate limit), and in turn the PAC can only contribute $5,000 per election (assuming it enjoys multi-candidate status). These sorts of figures can hardly be seen as "large contributions."

2. Not All Leadership PACs are directly controlled by a Member of Congress, and are distinguishable from an authorized campaign committee.

The Commission ought not fall prey to an over simplistic view of Leadership PACs – a Member controls his campaign, and he or she controls a PAC, therefore the two must be affiliated, so goes the faulty argument (which appears to be the basis for Alternate A, and to a lesser extent, Alternative B). Such an analysis assumes the common misconception that Members of Congress have direct, unfettered control over Leadership PACs. At least with respect to Leadership PACs associated with Members of the House, this is not entirely true. First, the Member generally serves as Honorary Chairman, and he or she does not necessarily control the spending of a PAC simply because he or she may serve as Honorary Chairman. In fact, some Members insist on not being a part of the PAC's final decision on spending. Some PACs have separate boards or some other form of governance that prevents the PAC from being subject to the simple whim of the Member. This is in stark contrast to a Member's authorized campaign committee, the central mission of which is the Member's election. We are not saying that

a Member has no say over a Leadership PAC – he or she certainly has some. But the sort of control exerted by a Member over a Leadership PAC is a far cry from the kind of control imposed over his or her campaign committee.

Second, to the extent the Commission wishes to focus on Leadership PACs, the focus ought to be on how the funds raised by the PAC are spent (which appears to be the focus of Alternative C). Most Leadership PACs, and certainly ones associated with Members of the House, are designed to raise funds using the fundraising capability of someone who happens to be a leader in Congress, or some other well-known official or person. The funds are used to help others in the party get elected. Occasionally, Leadership PACs make contributions directly to the party committees themselves. What is clear about Leadership PACs is that they do not benefit the Member of Congress with whom they are associated.[5] Critically, they do not undertake re-election activities; they do not perform so-called "shadow activities" designed to help the person get elected. Ultimately, the House Leadership PACs are separate and distinct entities from the authorized campaign committees, each with their own unique mission.

3. *The abolition of Leadership PACs is inconsistent with public policies adopted by the Commission in other contexts.*

Recently, the Commission voted to change the personal use rules, and allow candidates to pay themselves salaries. The policy rationale for this change was sound. Given the ever-lengthening campaign season, coupled with the ever-increasing time commitments necessary for a viable candidacy, it was becoming all-but-impossible to run for federal office, and still maintain full-time employment. Unless one was sufficiently wealthy, potential candidates faced an uneven playing field: attempt to run for Congress full-time against an incumbent who received a government paycheck. Unfortunately, many potential candidates opted to not run due to this inequity. The Commission addressed this problem by promulgating its recent rule, one that is decidedly anti-incumbent, and is designed to encourage more people to be involved in our system of government, and hopefully to run for office.

But these same candidates are the biggest beneficiaries of contributions from Leadership PACs. An analysis of Leadership PAC contributions show that they contribute to candidates that other PACs and donors do not initially contribute to, namely open seat candidates or challenger candidates. Everyone likes a winner, and political donors are no exception. Incumbents are rarely defeated; challenger candidates rarely win; and contributions to those sorts of candidates are seen as the proverbial poor bet. Leadership PACs, however, being driven by a desire to increase the ranks among one's party, routinely contribute to candidates that other donors consider poor bets. Leadership PAC funds are in many instances critical to the early viability of a challenger or open seat candidate.

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[5] Thus, because a Leadership PAC is not designed to benefit or be used for a Member's own campaign, there is no argument that Leadership PACs are a way around the campaign contribution limits.

A review of the contribution history of House Republican Leadership PACs supports this. For example, in competitive House challenger and open seat races, candidates who eventually lose are considerably more dependent on Leadership PAC money than candidates who eventually win. For example, in the past election cycle, nearly 36% of all PAC money for competitive Republican House candidates who eventually lost came from Leadership PACs. With respect to these sorts of candidates who eventually win, 28% of their PAC money came from Leadership PACs.

Moreover, the contribution history of the two largest House Republican Leadership PACs (Keep Our Majority PAC and Americans for a Republican Majority PAC) certainly support the premise. Nearly half of the funds raised by these Leadership PACs went to open seat and challenger candidates. Moreover, these two PACs are almost exclusively focused on House elections – less than 5% of all their contributions to campaigns went to candidates running for an office other than the House of Representatives.

With respect to the beneficiaries of Leadership PAC funds, Congressman Rob Simmons of Connecticut is a case in point. Then-candidate Simmons ran for Congress in 2000, and defeated a well-entrenched Democrat incumbent. He received over ten percent of his total receipts from Leadership PACs. Similarly, Leadership PAC funds constituted almost one third of his total PAC receipts. Critically, the Leadership PAC funding came early in his campaign, long before the majority of his funding was raised. The same is true in the cases of Congressman Mike Rogers of Michigan and Congressman Chris Chocola of Indiana. Congressman Rogers was elected in 2000 after a very close election to fill a seat vacated by an incumbent Democrat. Of his total receipts, almost 10% came from Leadership PACs – much of which was contributed almost one year prior to his election. Chris Chocola first ran in 2000, but narrowly lost to a well-entrenched incumbent. In that election, over 50% of his PAC receipts came from Leadership PACs. He ran again in 2002, this time winning. Of his total receipts, almost one third came from Leadership PACs.

To abolish Leadership PACs would put the Commission (some would argue yet again) squarely on the side of incumbent protection. Any benefit the Commission believes its rule regarding salaries would have had would be negated. The very same candidates for whom the Commission attempted to level the playing field (albeit slightly) would then be denied critical funding in the early stages of a campaign. Absent this funding, it becomes exponentially more difficult for a challenger or open seat candidate to be seen as viable.

C. To the Extent the Commission Wishes to Act, Its Focus Ought to Be Narrow, and Be Designed to Simply Clarify Existing Law.

To the extent the Commission wishes to correct a problem, it ought to at least focus on what may actually be a problem: the belief that some Leadership PACs have really crossed over into an operation that is designed to help the individual get elected in some fashion, perhaps even to another office. Even in that situation, though, the process

has been very self-regulating; the ever-growing field of Democratic Presidential nominee hopefuls continues to grow, and shows that when one is serious about running, it is best to simply declare one's candidacy and work through an authorized committee. Although the Commission ought not abolish Leadership PACs, there are two areas where perhaps some clarity may be in order: (1) use of a Leadership PAC to facilitate running for another office, such as President; and (2) use of a Leadership PAC in one's own re-election campaign.

1. Leadership PACs for Presidential Aspirants.

The media has spilled much ink over the activities of certain elected officials, and their newfound affinity for states such as New Hampshire and Iowa. It does not require the trained eye of a political scientist to realize what this is. Alternative C addresses this in a thoughtful manner. Specifically, it would require that a presidential campaign committee reimburse specified expenses if the office holder does in fact become a presidential candidate.

Of course, the Commission could just consider this activity to be either "testing the waters" or an in-kind contribution – which of course would be subject to the candidate contribution limits and have to be eventually reported by the presidential campaign. Perhaps, though, the Commission feels that current "testing the waters" regulations are insufficient in this respect, and that contribution limits can be avoided by some creative accounting. The audit of at least one presidential hopeful from the 2000 election cycle certainly provides a basis for this view. It appeared that Senator McCain's PAC, the Straight Talk Express, and his presidential campaign were at times used interchangeably. That practice is certainly at odds with how other PACs are run and operate.

2. Use of a Leadership PAC for one's own reelection.

A second area for potential abuse is the use of Leadership PACs for one's own reelection. Based on our experience, this is not and will not be a problem. We are unaware of this sort of problem actually occurring. In fact, we go to great lengths to ensure that there can be no question on the point, and in actual fact, essentially adhere to the Commission's prior draft rules regarding such PACs.

However, in the event that an elected official chose to create a PAC which then was used to assist his or her reelection campaign, it ought not be permitted. Again Alternative C, to the extent the Commission wishes to clarify this issue, provides a useful starting point. However, any rule ought not assume affiliation unless proven otherwise (certainly Alternatives A & B are fatally flawed due to, *inter alia*, their notion of *per se* affiliation). Moreover, much of the activity that such a rule would cover would already be regulated by 2 U.S.C. § 441a(a)(7)(B)(i) (regarding in-kind contributions).

III. CONCLUSION

For the foregoing reasons, we ask that the Commission reject Alternatives A and B, and use Alternative C only as a starting point for further clarification of current law. We also request to testify before the Commission, by and through the undersigned counsel.

Respectfully submitted,

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