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BY ELECTRONIC MAIL

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

Re: Comments on Notice 2002-28: Leadership PACs

Dear Mr. Pugh:

I am writing on behalf of Common Cause and Democracy 21 to comment in response to the Commission's Notice of Proposed Rulemaking, published at 67 Fed.Reg. 78753 (December 26, 2002), which addresses the issue of "leadership PACs."

We appreciate the Commission's consideration of the comments set forth below. Although we do not request that the Commission hold a hearing in this matter, we would appreciate the opportunity to testify if the Commission decides to do so.

1. The problem with Leadership PACs.

Simply put, leadership PACs operate as a means to subvert the contribution limits in federal law. They allow donors to funnel funds to elected officials far in excess of the amount that is otherwise allowed under the federal contribution limits.

For instance, an individual can contribute (under current limits) a total of $4,000 per six year election cycle to a Senator's authorized campaign committee ($2,000 for the primary and $2,000 for the general election). 2 U.S.C. 441a(a)(1)(A). Yet if that Senator also has a leadership PAC, the donor can contribute to that "unauthorized" committee an additional $5,000 *per year* – a total of an additional $30,000 in the same six year period. 2 U.S.C. 441a(a)(1)(C). In effect, a donor who contributes the maximum amount to a Senator's authorized committee is

able to exceed the permissible contribution limit to that officeholder *by more than seven times the lawful amount* through the artifice of donating funds to the officeholder's leadership PAC. Much the same is true for a House Member, who can receive $4,000 for his authorized committee and another $10,000 for his leadership PAC in the same two-year election cycle.

Given this, *Roll Call* correctly noted in a recent editorial that leadership PACs "are a naked attempt to skirt campaign finance laws that limit the amount of money individuals, PACs and, in some cases, unions and corporations can contribute to candidates. Their existence also inflates the importance of fundraising as a qualification for leadership posts and increases the amount of time leaders spend grubbing for cash." "Slush Storm," *Roll Call* (August 16, 2001).

Like the broader problem of soft money, the development and growth of leadership PACs have been premised on a legal fiction: that such PACs are not affiliated with the officeholder with whom they are associated.

As a practical matter, they of course are affiliated – and the identity between the officeholder and his or her leadership PAC is obvious and public. Published reports routinely identify the officeholder who is affiliated with a particular leadership PAC, and in any event the affiliation is clearly known to "the closed universe of PAC managers and lobbyists who receive – and respond – to their fundraising solicitations...." E. Zuckerman, "Leaders and their ATM PACs," *Political Finance and Lobby Reporter* (May 12, 1999). When a donor contributes to a leadership PAC, the donor is plainly making a contribution to the officeholder publicly associated with that PAC.

Nor is it an adequate answer that an officeholder's authorized committee and his leadership PAC are raising money for different purposes – the former to influence the officeholder's own election, and the latter to pay for various travel or other political expenses of the officeholder, or to influence the election of other candidates through funds contributed by the leadership PAC. The focus should not be on why these various committees are raising funds. The focus should be on the fact that the funds are being raised by these two entities for the political benefit of the same officeholder and are under the control of the same officeholder. Given that the purpose of the contribution limits is to deter both the corruption and the appearance of corruption that arise from large gifts of money from a single donor to a single officeholder, the "double giving" opportunity provided by leadership PACs directly implicates the core purpose of contribution limits – and the use of leadership PACs directly undermines the integrity of those contribution limits.

The evasion associated with leadership PACs has grown enormously. At first established only by a small group of legislative "leaders," the practice of setting up these entities has spread widely in recent years. According to a recent published report, more than 170 House and Senate members – almost one third of the Congress – now have a leadership PAC, including many freshmen legislators. A. Bolton, "FEC threat would kill key PACs," *The Hill* (Jan. 8, 2003). Indeed, as if there were any doubt about the purpose of leadership PACs, this same article notes that the proposed rule published in this NPRM "would destroy the rationale for operating a

leadership PAC, which is to permit politicians to raise far more than personal campaign accounts are allowed." *Id.*

In addition to serving as a vehicle for evading contribution limits, leadership PACs undermine the campaign finance laws in other ways as well, by operating as proto-campaign committees for the early stages of the presidential campaign. As one published report recently noted, "All of the Democratic presidential hopefuls are using their so-called 'leadership PACs' to gain favor in such early primary states as Iowa and New Hampshire. It is a way of building goodwill among state officials who hold sway over grass-roots organizations that help turn out voters in early primary states." Schatz, "Presidential hopefuls give at the Grassroots," *The Atlanta Journal and Constitution* (Oct. 10, 2002).

This article noted that the leadership PAC for Senator John Edwards (D-N.C.), called the "New Optimist Fund" has donated more than $100,000 in cash and $65,000 worth of computer equipment to the Iowa Democratic Party. The "Responsibility, Opportunity, Community" political action committee (ROCPAC) of Senator Joseph Lieberman (D-CT) had given more than $268,000 to federal candidates through mid-2002. *Id.* In effect, leadership PACs allow presidential candidates to begin their presidential campaigns in key primary states without regard to the contribution or spending limits that apply to their subsequent presidential campaign committee.

2. <u>The need for a new rule</u>.

To date, the Commission's determination of whether a candidate's leadership PAC is "affiliated" with his or her authorized campaign committee has been governed by the regulations at 11 C.F.R. 100.5(g)(4). Although these regulations, on their face, appear adequate to affiliate a candidate's authorized committee with his or her leadership PAC, they have failed in practice to meet this goal.

In determining whether entities are affiliated, the regulations, for instance, assess whether an entity "has the authority or ability to direct or participate in the governance of" another entity (subsection (B)), whether an entity has authority to "hire, appoint, demote or otherwise control" the officers or decision-makers of another entity (subsection (C)), whether an entity "arranges for funds in a significant amount or on an ongoing basis to be provided" to another entity (subsection (H)), or whether an entity or its agent "had an active or significant role in the formation of another" entity (subsection (I)) – all characteristics of the *de facto* relationship between an officeholder and his authorized committee, on the one hand, and the officeholder's leadership PAC, on the other.

Yet in application of these factors, the Commission has rarely – if ever – found that a leadership PAC is affiliated with the officeholder who establishes it, who controls it, who fundraises for it, who is publicly associated with it and who receives the benefit of its activities.

The current regulation notes that the Commission will examine "the circumstantial factors" described in the existing rule "in the context of the overall relationship" between committees "to determine whether the presence of any factor or factors is evidence" that one committee is affiliated with another. The Commission has used this form of broad examination as an excuse to sidestep any meaningful enforcement of the affiliation standard. As a practical matter, the Commission's permissive scrutiny of the relationship between an officeholder and his or her leadership PAC has allowed such entities to flourish without a finding of affiliation – and thus to become an increasingly widespread means for officeholders and donors to evade the contribution limits on funds raised by, and given to, federal officeholders.

Given this, we support the general thrust of this NPRM to create more effective rules to govern leadership PACs. Any new rules, however, must recognize the reality that a leadership PAC is "established, financed, maintained and controlled" by the federal official who is associated with it. As such, the officeholder's leadership PAC and his or her authorized committee should be under a single, common contribution limit. That limit should be the one applicable to the officeholder's authorized campaign committee, because that is the limit set by federal law on the total amount of funds that can be given to a federal candidate or officeholder consistent with the overriding goal of deterring corruption or the appearance of corruption in the federal political process.

3. The problem of leadership PACs and soft money.

We are far less sanguine than the Commission that the recent Title I rules promulgated under the Bipartisan Campaign Reform Act (BCRA) by themselves adequately address the provision of the BCRA that bans federal candidates and officeholders from raising soft money through leadership PACs. The BCRA provides that a Federal candidate or officeholder "or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more candidates or individuals holding Federal office" shall not solicit, receive or spend soft money. 2 U.S.C. 441i(e)(1).

The Commission's Title I rules implementing this provision simply incorporate the existing affiliation rules for leadership PACs that – for the reasons discussed above – have not served in practice to affiliate leadership PACs with the officeholder associated with them. As a result, and absent effective new rules promulgated through this rulemaking, we are deeply concerned that the Commission will continue to allow *de facto* leadership PACs to raise soft money -- notwithstanding the clear statutory Title I ban against their doing so -- on the ground that those leadership PACs are not considered affiliated with their associated federal officeholder under the existing regulations set forth in section 100.5(g)(4) that are now also incorporated into the Commission's Title I rules.

Thus, the Commission notes in this NPRM that "leadership PACs that support Federal and non-Federal candidates would be...banned from soliciting, receiving, directing, transferring or spending funds that do not comply with FECA (i.e., non-Federal funds)." 67 Fed.Reg. 787658. But if such "leadership PACs" for purposes of this rule are defined to exclude the very

entities that today exist as leadership PACs associated with federal officeholders, then such committees will be able to continue to raise soft money under the same legal fiction that allows them to operate as unaffiliated committees in the first place.

The structure of the recently promulgated Title I rules threaten precisely this result. Sections 300.61 and 300.62 prohibit a federal officeholder or candidate from raising or spending non-federal funds in connection with either a federal or non-federal election. These prohibitions apply as well to "entities that are directly or indirectly established, financed, maintained or controlled by, or acting on behalf of" federal officeholders and candidates. Section 300.60(d).

Yet section 300.2(c) defines the phrase "directly or indirectly establish, finance, maintain or control" to include *only the very same factors* as are set forth in existing section 100.5(g)(4) – the very regulation which to date has failed under the Commission's administration of that regulation to affiliate leadership PACs with an associated officeholder. In other words, the same entities that today operate as leadership PACs for almost one-third of the Members of Congress, but have been treated by the Commission as not affiliated under the existing section 100.5(g)(4) standards, are thus *also* not affiliated with those same federal officeholders for purposes of the sections 300.61 and 300.62 ban on raising and spending soft money. Accordingly, these leadership PACs may be able to continue to raise and spend soft money under existing FEC regulations, in violation of the BCRA. 2 U.S.C. 441i(e)(1).

The Commission may assert as a formal matter that a "leadership PAC" as defined by the current section 100.5(g)(4) standards will not be able to raise soft money under sections 300.61 and 300.62. But the fact is that there currently are no "leadership PACs" as defined by section 100.5(g)(4). All existing "leadership PACs," as commonly understood, are viewed by the Commission to fall outside those standards -- and thus under section 300.2(c) they are now defined to fall outside the Title I ban on soft money as well. Under the Title I rules, therefore, these leadership PACs will continue to enjoy the legal fiction of being unaffiliated, and will thus not be treated by the regulations as covered by the soft money ban.

This is a critical problem that threatens to dangerously undermine the Title I provisions of BCRA. This problem can be addressed in this rulemaking by adopting effective new rules that affiliate federal officeholders with the associated committees that they establish, finance, maintain and control. These new rules must be cross-referenced to apply to entities "established, financed, maintained or controlled" by a federal officeholder or candidate under Title I, and section 300.2(c) of the Commission's Title I regulations must be modified to include the new and more effective standard for affiliation. It is crucial for the Commission to do this in order to ensure that leadership PACs do not raise and spend soft money in violation of the BCRA.

Further, in order to ensure that the new rules apply to all political organizations that control non-federal funds, the rules should encompass not only political committees but also any other organization described in section 527 of the Internal Revenue Code. Thus, any section 527 entity which meets a new standard for affiliation as proposed below – and thus operates as a leadership PAC -- would be subject to the Title I ban on raising or spending soft money.

4. Comment on the proposed rule.

We support the structure, but not the specific language, of Alternative B of the Commission's proposed rule. This Alternative provides the framework for the most comprehensive coverage of the multiple factors that should be assessed by the Commission in making a determination of affiliation. The proposed rule in Alternative B does so by dividing the various factors into two categories – those factors which are so strongly indicative of affiliation as to trigger a *per se* determination, and those factors which do not in themselves establish affiliation but which in combination with other listed factors do so.

We would add a third prong to the test – a catch-all provision that provides the Commission the supplemental flexibility to find affiliation based on a review of the "totality of circumstances" in the relationship between a political committee or section 527 organization and a particular candidate or Federal officeholder, or his authorized committee. This would provide authority to the Commission in the event that the various factors of the first two prongs prove in practice not to be an exhaustive list of the means of affiliation.

We suggest specific language for the entire rule we support, including this new prong, in a draft rule appended to these comments.

While we support many of the factors listed in the Commission's Alternative A, we believe the more inclusive and flexible structure of Alternative B is necessary to create an effective rule to address the patent abuse that has developed through the proliferation of leadership PACs.

We strongly disagree with the approach taken in Alternative C. This proposed rule would simply replicate the *status quo* by setting the key factor to be whether the leadership PAC's "primary purpose" was to influence the election of the officeholder affiliated with the PAC. As the Commission correctly notes in its commentary, this approach "would largely continue the Commission's treatment of leadership PACs" – and is for that reason plainly objectionable. Adoption of this alternative would accomplish nothing.

Although we support the structure of Alternative B, we do not support the specific language of that rule as proposed in the NPRM. Our proposed modification of Alternative B, like the Commission's proposal, finds affiliation based on whether one of two tests is met: either any <u>one</u> factor in a list of 12 factors set forth in proposed section 100.5(g)(5)(i)(A), or any <u>three</u> factors in a list of 11 factors set forth in proposed section 100.5(g)(5)(i)(B). (As noted above, we also suggest a supplemental catch-all authority be provided in a third prong of the rule as well).

The subsection (A) factors are, in our view, each so substantial as to establish *per se* affiliation between an officeholder and his leadership PAC when any one of them is present. Thus, for instance, if an officeholder has check-signing authority for a committee, or the

authority to authorize the disbursements made by a committee, that committee should be deemed affiliated with the officeholder.

Our proposal includes, in substantially the same form, all six of the *per se* factors listed in the NPRM's Alternative B, but then adds an additional six factors not included in the Commission's Alternative B version – some of which are included in Alternative A. These additional *per se* factors in our proposal are: (1) the name of the officeholder appears on the committee's stationery or letterhead, (2) the committee pays for a substantial portion of the travel of the officeholder, (3) the officeholder or his agent had "an active or significant role" in the establishment of the committee, (4) the officeholder directs or "significantly participates" in the governance of the committee, (5) the committee directs or "significantly participates" in the governance of the officeholder's authorized committee, and (6) the officeholder has authority to hire, fire and control employees of the committee.

Each of these factors describes an important characteristic of the relationship between an officeholder and his leadership PAC, and each of these should trigger a finding of affiliation between an officeholder and a political committee. Two of the factors listed above – payment for an officeholder's travel in substantial amount and the use of the officeholder's name on a committee's letterhead – appear in subsection (B) of the Commission's proposed Alternative B as factors that trigger affiliation only in combination with other factors. We believe these two factors are each so substantial as to warrant a *per se* affiliation alone, and we thus include them in our subsection (A).

Similarly, the Commission's proposal includes in its subsection (B) factors the activities of a candidate's campaign or office staff in authorizing contributions, disbursements and contracts for a committee. We believe that staff operates as an agent of the officeholder and that their authorization to perform key tasks for an outside committee should be attributed to the officeholder himself, and thus trigger *per se* affiliation in the same cases where such affiliation is triggered by the actions of the officeholder.

Subsection (B) of our proposed rule lists 11 factors that would constitute affiliation when any three of them are met. These include variations of the factors listed in the Commission's comparable section of Alternative B, plus several additional factors largely derived from existing section 100.5(g)(4)(ii). These additional factors include common vendors between the officeholder or his authorized committee and the other committee, common officers or employees (both past or present), reference to the officeholder in a significant percentage of the committee's solicitations or "similar patterns of contributions or contributors that indicate a formal or ongoing relationship between the committees."

As in the Commission's Alternative B proposal, none of these factors singly would trigger affiliation. But a combination of three factors would establish a sufficiently close relationship between an officeholder or his authorized committee and another committee as to warrant that finding.

5. Conclusion

The Commission has undertaken an important rulemaking that can close a significant loophole in the federal contribution limits that has resulted from the implementation of the current affiliation rules. The Commission can also solve a serious problem created by the Commission's Title I rules on soft money. Leadership PACs have increasingly become a vehicle through which special interest donors seeking to buy access and influence with federal officials make contributions to those officials well in excess of the amount that federal law permits. This loophole is predicated on the blatant fiction that such committees are not established, financed, maintained or controlled by those officeholders -- when in reality they clearly are, and it is widely known that they are.

This wink-and-nod pretense that leadership PACs are not affiliated with their associated federal officeholder should be ended, and this loophole closed. The Commission should adopt new affiliation regulations for leadership PACs in the form attached here, as discussed above.

We appreciate the opportunity to comment on these proposed regulations.

Respectfully submitted,

/s/ Donald J. Simon

Donald J. Simon

§ 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 subsection.

a) 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)(a)(A), (g)(5)(a)(B) or (g)(5)(a)(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% 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% 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% 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 such individuals, 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.

(b) 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.