Perkins Coie

Robert F. Bauer
PHONE: 202-434-1602
FAX: 202-654-9104
EMAIL: RBauer@perkinscoie.com

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

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Commissioners
Federal Election Commission
999 E Street, NW
Washington, DC 20463
Re: Multi-Candidate Committee NPRM

Dear Commissioners:

On behalf of the law firm of Perkins, Coie LLP, I am submitting the following comments in response to the Commission's request for comments on proposed changes to its rules covering: (1) multi-candidate political committee status; (2) annual contributions by persons other than multi-candidate committees to national party committees; and (3) biennial contribution limits for individuals. I would like to request an opportunity for me, or one of my colleagues representing our firm, to testify on this matter and the other matters on which the Commission intends to take testimony at a hearing currently scheduled for October 1.

I. Proposed Change to Multi-Candidate Status

A. Contributions by multi-candidate political committees

As the Commission points out in the NPRM, the Bipartisan Campaign Reform Act (BCRA) raised the limit on contributions to candidates from $1000 to $2000 per election. This limit applies to individuals and political committees other than multi-candidate committees. Contributions from multi-candidate committees were left unchanged at $5000 per election. BCRA provided that the new limit be adjusted for inflation. The law did not provide for a similar adjustment for contributions from multi-candidate committees. As a consequence, unless the law is changed, the contribution advantage enjoyed by multi-candidate committees will be eroded and will eventually become a disadvantage. This prospect has prompted the Commission to ask whether

multi-candidate status is elective or mandatory. The Commission's preliminary conclusion reflected in the proposed rule is that a political committee automatically assumes multi-candidate status once the statutory criteria are satisfied.

A close examination of those criteria reveals why the Commission's proposed reading of the statute would be misguided. To qualify as a multi-candidate committee, a political committee must be in existence for six months, receive contributions from more than fifty individuals and make contributions to five or more candidates. On their face, these criteria cannot be rationally employed to identify committees that pose a greater risk of corrupting candidates and officeholders. Originally selected by Congress to identify committees entitled to preferred treatment, the criteria are ill suited to distinguish committees that are to be disfavored.

Congress chose these criteria as the standard for multi-committee status because it believed that committees with these attributes were less likely to be employed by individuals for the purpose of circumventing the individual contribution limit. By requiring a committee to contribute to several candidates, to have a significant number of contributors, and, to be in existence for some reasonable period of time, Congress acted to discourage easy schemes for avoiding the contribution limits. Reasonably suited for that task, these same criteria would not provide a rational basis, the lowest level of constitutional scrutiny, for handicapping a committee in the allocation of contribution limits.

There is no rational basis for allowing a committee with a handful of contributors to give a candidate a larger amount than a committee with tens of thousands of contributors. Similarly, elusive would be an acceptable purpose for preferring committees of short duration over the well established, or for preferring committees that donate to a single candidate over those that contribute to scores of candidates. It is true, as the Commission observes, that the preferred position currently enjoyed by multi-candidate committee may be eventually eliminated by the inflation adjustment. The proper legal response to that eventuality is to affirm the discretionary character of multi-candidate status--not to use that possibility as a present and compelling reason to impose a future encumbrance on broad-based well-established political committees.

The difficulties of the proposed position are apparent also in its treatment of state committees of political parties. For the purposes of the contribution limitations, every state committee is treated as multi-candidate committees regardless of the number of candidates to which the committee contributes. Under the Commission's proposed

rule, this exception to the general rule, clearly designed as a benefit of state committee status, becomes an active liability.
The legislative history is clear that multi-candidate status was intended to be advantageous not detrimental. Congressman Brademas, one of the principal authors of the Federal Election Campaign Act Amendments of 1974 (FECA), explained during the House debate the purpose of treating multi-candidate committees more generously.

> By providing higher limits on contributions by multi-candidate committees, our committee recognized the important role of broad-based citizen interest groups –whether conservative, such as the Americans for Constitutional Action, or liberal, such as the National Committee for an Effective Congress.

Congressional Record, H7810, August 7, 1974. Before turning this legislative judgment on its head, the Commission should be extremely confident that is the result that Congress intends. To assume, based merely on the how the inflation adjustment will operate over time, that Congress intends to place a legislative millstone on the thousands of "broad-based citizen interest groups" while enhancing the role of short-lived, narrow special-interest groups would unnecessarily open the regulations to constitutional challenge.

It is true that under current law political committees that have not qualified for multi-candidate status may contribute more to national committees of political parties than those that have qualified. This unexplained different treatment is more likely the result of a political compromise than it is a product of a considered judgment on the relative virtues of the two types of committees. This statutory anomaly would be a weak foundation upon which to base wholesale discrimination against long active, widely supported citizen groups.

The NPRM suggests that the Commission may appreciate the constitutional precariousness of its proposed rule but protest that its position is not of its own makings. The Commission asks whether the language of the statute limits its discretion. When a statute is intending to confer a benefit on party, the law regularly provides a means by which that benefit can be declined. If multi-candidate status is understood to be a benefit, there is no reason to read the statute to compel acceptance of the benefit contrary to the self-identified interest of the intended beneficiary.

When the law intends to impose a liability, the liability will normally attach when the statutory conditions are satisfied. Here there is no clear legislative intent to impose a liability on multi-candidate committees and Congress will have many opportunities to address the hypothetical disadvantage before it actually arises. If on or before that date, a multi-candidate committee wants to reregister as a political committee without that status, it is unclear why the Commission would seek to prevent it. Currently the Commission permits a principal campaign committee as defined by statute to reregister as non-connected political committee in order for the committee to enjoy the benefits of that status. The Commission should not foreclose a similar opportunity to multi-candidate committees.

Notwithstanding the absence of clear legislative direction, the NPRM suggests that the Commission should change its long-standing position. Political committees should not be able to elect multi-candidate status, but it should be imposed upon them by "operation of law." The term "operation of law" expresses the manner in which rights and liabilities devolve on a person. It is not an independent legal doctrine, but a legal conclusion to be supported by precedent and accepted principles of statutory interpretation. Normally regulatory agencies are given discretion to interpret their governing statutes in a manner that would avoid unnecessary constitutional issues.

Nothing in BCRA removes the normal discretion accorded to the agency to interpret its governing statute. If the Commission's review of existing case law suggests that it lacks discretion in this instance, the Commission should identify the legal authority that it believes strips it of any discretion to make a constitutionally sound decision and allow the public to comment on its reading of the applicable law.

B. Certification of multi-candidate status

Consistent with its proposal to make multi-candidate status automatic, the Commission proposes to change its regulations to require a political committee to certify to the Commission once it satisfies the statutory conditions. Current regulation mandates that a political committee certifies its qualification for multi-candidate committee status prior to making a contribution at the higher limit. Until a political committee certifies its multi-candidate status, it is bound by the limits that would otherwise apply to a political committee.

The proposed change is a subtle but important change. It is consistent with the Commission's proposed rule to make multi-candidate status mandatory but is

inconsistent with allowing a political committee the choice of status. For example, a political committee that desires to direct a greater portion of its activities to supporting national committees of political parties would be denied that opportunity once it meets the qualifications as a multi-candidate committee. It looses this flexibility even if it never certifies its has satisfied the criteria.

The Commission proposes to enforce this rule by making failure to file a certification a violation of the reporting provisions of FECA. The Commission should avoid creating a regulatory duty where no statutory obligation exists. This is particularly true where Congress could have easily created the obligation had it found it a necessary adjunct to enforcing the law. It can be reasonably inferred that Congress did not include such a reporting obligation because it was unnecessary to the statutory scheme. Only if the Commission concludes that Congress's attitude towards multi-candidate committees has changed from positive to negative, are there grounds for the change proposed by the NPRM. Yet as explained above, changing course is legally problematic.

II. Conforming Change to Contributions by Persons Other Than Multi-Candidate Political Committees

The proposed change is merely a necessary amendment to conform the regulations to the statute. By increasing the amount that political committees other than multi-candidate committees may contribute to national party committees the statute provides an incentive for some committees that may prefer to weigh their contributions more heavily to political parties than to individual candidates to forego-multi-candidate status. For our political system this is not necessarily an unhealthy prospect. As discussed previously, the Commission should not foreclose this possibility without clear legislative direction.

III. Aggregate Biennial Contribution Limit for Individuals

The Commission proposes changing its rule that requires for the purpose of the biennial contribution limit that contributions be attributed to the two-year period in which the contribution is actually made. The proposed rule changes the longstanding rule that a contribution made to a candidate is to be attributed to the year in which the election is held. In a rulemaking last year and in recent publications has affirmed the existing rule. Consequently, contributors have been advised to and are complying with that rule.

To change the rule in the middle of an election cycle would unnecessarily confuse both contributors and recipients. Contributors could find themselves having inadvertently

and unknowingly violated the law. Committees might be asked to return contributions that were lawful when made. The Commission should fully consider the reliance interest that contributors, candidates and political committees have in the existing rule. If the Commission decides to adopt the proposed rule, the Commission should also adopt a transition rule that fairly treats those who have reasonably relied upon the existing regulation. The Commission may want to consider delaying any rulemaking in this area until the end of the election cycle.

Very truly yours,

Robert F. Bauer

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