Neil Reiff <reiff.n.sandlerreiff.com> on 09/22/2003 06:56:33 PM

To: multicand03@fec.gov
cc:

Subject: Comments on Proposed Rulemaking

Attached please find comments from Joseph Sandler and Neil Reiff in connection the Comission's NPRM regarding changes to Section 110.5(c) of its regulations. Although comments were due on Friday September 19th, the recent weather events in the Washington, DC area prevented our firm from completing the comments until today. Therefore, we respectully request that the Commission consider these late comments and include them in the public record regarding this matter.

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September 22, 2003

Via Facsimile

Mai T. Dinh, Esq.
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: Multicandidate Committees and Biennial Contribution Limits

Dear Ms. Dinh:

This comment is submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 68 Fed. Reg. 50488 (August 21, 2003), proposing amendments to the Commission's regulations relating to multicandidate committees and the biennial contribution limits for individuals. We are submitting this as practitioners who represent donors and a variety of political committees. These comments are not submitted on behalf of, and do not necessarily represent the views of, any particular client of our firm.

Specifically, we would like to respond to the question posed by the Commission as to when proposed revisions to 11 C.F.R. § 110.5(c) should become effective. As a general matter, we believe that the revised regulation properly tracks the intent of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and should have been included in the original revisions to Commission's rules regarding contribution limits, which revisions were published in the Federal Register in November 2002. See Contribution Limitations and Prohibitions; Final Rule, 67 Fed. Reg. 69928 (November 19, 2002). In that rulemaking, the Commission failed to make the appropriate conforming amendment

to section 110.5(c) of its regulations. That conforming amendment is contained in this proposed rulemaking and should now be adopted to properly implement section 441a(a)(3)(A) of the Federal Election Campaign Act as amended by the BCRA.

Upon review of the record of that rulemaking, we cannot locate any discussion as to whether the failure to amend this section was intentional or an oversight on the Commission's part. Thus, for purposes of this comment we will assume that the failure to amend section 110.5(c) was inadvertent.

In January 2003, our firm brought this apparent error to the attention of Commission staff, as well as members of the Commission. It is our understanding that, in January 2003, the Commission discussed this issue internally and, as a result, published an article in the February 2003 *Record* regarding this issue. Ultimately, instead of clarifying that the Commission's regulation was not in accordance with the statute, the Commission stated that it would continue to enforce the prior rule regarding contributions to federal candidates, i.e., the old rule requiring attribution of a contribution to the individual donor's aggregate limit for the calendar year in which a candidate was running for federal office.

Thus, instead of clarifying what the appropriate methodology should be, the Commission published a statement that clearly contradicted the statute. This statement has caused considerable confusion and concern in the donor and regulated community. It is our understanding that donors have been given contradictory advice from several sources regarding the proper attribution of such contributions. For example, it is our understanding that federal candidates who do not have elections in the 2003-04 cycle have been representing to prospective donors that their contributions would count not in the 2003-04 cycle, but in the cycle for which that candidate is running for office. Presumably this representation was a direct result of the Commission's statement in the February 2003 *Record.* Accordingly, many donors have likely made contributions in 2003 to candidates not up for office in the 2003-04 cycle, which contributions, if counted against the donor's aggregate limit for the 2003-04 cycle, would cause them to exceed the $37,500 limit for this 2003-04 cycle. .

Therefore, as a matter of fundamental fairness, the Commission should not penalize donors who may have inadvertently exceeded the $37,500 limit for the 2003-04 cycle, to the extent that the has donor exceeded the limit as a result of contributions made—before the effective date of the Commission's proposed new rule--to candidates that are not running in the 2003-2004 election cycle. Consequently, the Commission's proposal to amend section 110.5(c) of its regulations should be made prospective, i.e., should apply only to contributions made on or after the effective date of the new regulation. Although this may result in the anomalous situation where certain donors may be able to legally exceed the $37,500 limit in the 2003-2004 election cycle, such a result would simply be the logical outgrowth of the Commission's statement in the February 2003 *Record* which was contrary to the statute. By the same token, the Commission should not count contributions made—before the effective date of the proposed new rule--to a candidate not running in the 2003-04 cycle, against the donor's

aggregate limit for the cycle in which the candidate is running, since such an application of the limit would clearly be contrary to section 441a(a)(3)(A).

For the reasons stated above, to the extent that a donor has made a contribution to a candidate who is not running for office in the 2003-04 cycle prior to the effective date of proposed section 110.5(c), we urge the Commission to make proposed section 110.5(c) applicable only to such contributions made on or after the effective date of the final new regulation, as published in the Federal Register.

Respectfully submitted,

Joseph E. Sandler
Neil P. Reiff