Congress of the United States

Washington, DC 20510

September 13, 2002

VIA FAX and E-MAIL

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
Washington, DC 204630

Re: Notice 2002-14

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Ms. Dinh:

We appreciate the opportunity to comment on the Commission's proposed rules to implement the contribution limitations and prohibitions of the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "Act"), issued as Notice 2002-14, and published in the Federal Register at 67 Fed. Reg. 54366 (August 22, 2002). We do not request to testify at a public hearing.

Attached please find our specific comments on the proposed regulations and our answers to certain questions the Commission raised in the commentary to the proposed rules. We look forward to continuing to work with the Commission throughout this rulemaking process.

Sincerely,

John McCain
United States Senator

Christopher Shays
Member of Congress

Russell D. Feingold
United States Senator

Marty Meehan
Member of Congress

Comments of BCRA Sponsors Senators John McCain and Russell Feingold, and Representatives Christopher Shays and Marty Meehan.

Proposed 11 CFR §§ 110.1, 110.2, 110.5, 110.17 Contribution limits and indexing

The Commission asks whether indexing contribution limits at the beginning of an odd-numbered year would raise contribution limits for elections that have already occurred. Despite confusion created by the indexing provision that provides that limits increased on January 1 of an odd numbered year would apply to contributions made during the last few months of a previous year, the answer is no.

To avoid confusion, limits on contributions applicable to a given election of any Federal candidate should not change, regardless of whether the contribution is made before or after the election. In other words, using the Commission's example, if the contribution limit is inflation adjusted from $2,000 to $2,100 in January 2005, contributor X who has made a $2,000 contribution in October 2004 to candidate Y, should not be able to contribute an additional $100 to candidate Y after November 3, 2004, to help discharge candidate Y's outstanding debts, even though the indexing increase is effective for contributions to the candidate made after November 3, 2004.

Similarly, because contributions made before or after a given election should be subject to the same limit, if contributor X has not made a contribution to candidate Y prior to the November 2004 election, and wants to make a contribution after that date to help candidate Y discharge her outstanding debt for the 2004 election, contributor X's contribution should be limited to $2,000. (This would and should be the case whether the contribution is made in December 2004 or February 2005.) Contributor X would, however, be able to contribute $2,100 after November 3, 2004, to each of Candidate Y's 2006 elections.

The Commission is correct that BCRA contains an inconsistency with respect to determining the time period during which the bi-annual aggregate contribution limits apply. The Commission should elect the period specified in the aggregate contribution limit provision (January 1 of an odd-numbered year to December 31 of the following even-numbered year) rather than the period specified in the indexing provision (general election to general election). Thus, we disagree with the Commission's proposal contained in 11 CFR § 110.5.

The provision in BCRA that sets out the new bi-annual aggregate contribution limits is clear that it should apply from January 1 of an odd-numbered year to December 31 of the next even-numbered year. In contrast, the indexing provision is not specific to the aggregate limit and therefore should not take precedence over it. A sounder principle of statutory construction to apply in this case than the one chosen by the Commission in the proposed rule is to assess the relative legislative significance of the conflicting provisions. The provision that establishes the fact and amount of the aggregate contribution limit should prevail over the provision that merely provides for the inflation adjustment of such limit. Moreover, pre-BCRA, the aggregate limit has been based on calendar years, and both contributors and recipients have become accustomed to this approach. Furthermore, because most of FECA's contribution limits are annual, the

aggregate limit will be much easier to administer if the time period runs for two calendar years, as specifically provided in 2 U.S.C. § 441a(a)(3).

In addressing these questions, it might be helpful for the Commission to consider the genesis of the "reach back" component of the indexing provision. The language first arose in the contribution limits amendment offered by Sen. Thompson on March 27, 2001. *See* Cong. Rec. S2958 (Mar. 27, 2001) (Amdt. 149). The purpose of the language was to contrast the new indexing of contribution limits with the annual indexing of presidential public funding amounts and coordinated expenditures limits. *See* 2 U.S.C. § 441a(b), (d). The language ensured that there would be a single increase after each election for the individual contribution limit to candidates rather than an annual increase that would create a great deal of confusion. When a compromise on the Thompson amendment was reached that included the new election cycle aggregate limit, the original indexing language was retained, without recognizing the conflict that it created. *See* Cong. Rec. S. 3028 (Mar. 28, 2001) (Amdt. 149, as modified). Thus, the conflict can fairly be considered more in the nature of a drafting error.

We agree with the Commission's proposal to apply the increased contributions limits in BCRA to the 2004 elections and index them for the first time in January 2005 for the 2006 elections.

Proposed 11 CFR §§ 110.19 Contributions by Minors

The Commission asks whether minors who are emancipated under state law should be exempt from BCRA's prohibition on contributions by individuals 17 years old or younger. Emancipated minors should be so exempt. The intent of prohibiting contributions from minors was, as the Commission noted in its commentary, to avoid evasion of FECA's contribution limits by parents who funnel contributions through their children. The opportunity for parental control of the child, however, is not present in the case of an emancipated minor who has sought and obtained from a state court a determination that he or she is sufficiently independent to be relieved of parental control and be given the rights and responsibilities of an adult.

The Commission's proposed rule 110.19(a) is consistent with BCRA in so far as the prohibition on contributions by minors applies only to contributions to Federal candidates. BCRA does not prohibit minors from contributing to State, district, or local candidates.

Proposed 11 CFR § 110.20 Contributions by Foreign Nationals

The Commission asks whether BCRA addresses contributions by foreign-controlled U.S. corporations, including U.S. subsidiaries of foreign corporations. It does not. As the legislative record makes clear, the widely acknowledged problem BCRA addressed with respect to foreign nationals was the massive and scandalous funneling of foreign soft money to political parties. The issue of whether foreign-controlled U.S. corporations should be barred from making non-federal donations of corporate treasury funds in states that permit such donations, or establishing a federal political action committee, is a controversial one that would have been addressed explicitly had BCRA intended to address it.

While the Commission's proposed regulation is in many respects broad enough to capture BCRA's intent of closing obvious channels for funneling soft money from foreign nationals, the Commission's proposed use of the ineffectively narrow definition of "to solicit" at 11 CFR § 300.2(m) threatens to undermine this otherwise sound regulatory prohibition. We therefore urge the Commission to reconsider that ill-advised definition.