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AGENDA ITEM
For Meeting of: 8-15-02

MEMORANDUM

SUBMITTED LATE

DATE: August 14, 2002

TO: The Commission

FROM: Commissioner Michael E. Toner *MT*

RE: Proposed Amendments to Agenda Document 02-57 Draft Notice of Proposed Rulemaking on Contribution Limitations and Prohibitions

Attached please find amendments that I am considering offering on August 15, 2002 to amend Agenda Document 02-57 Draft Notice of Proposed Rulemaking on Contribution Limitations and Prohibitions.

On page 19, line 12, after "indirectly" add the following:

Comment is also sought on whether "indirectly" should cover a foreign controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, when such corporation seeks to make (1) non-federal donations of corporate treasury funds, or (2) federal contributions through a political action committee. Specifically, the Commission seeks comment on whether BCRA's new statutory language prohibits foreign controlled U.S. corporations, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making federal contributions from their PACs , or both.

On page 31, delete lines 13-21

On page 29, line 16 add the following after "issue":

Current Commission regulations provide that political committee treasurers shall examine all contributions received for evidence of illegality. See 11 C.F.R. § 103.3(b). Contributions that "present genuine questions" as to whether they were made by corporations, labor organizations, foreign nationals, or other prohibited sources may, within 10 days of receipt, either be deposited or returned to the contributor. Id. If any such contribution is deposited, the treasurer has an affirmative duty to investigate the contribution and use best efforts to determine the legality of the contribution. 11 C.F.R. § 103.3(b)(1). If, despite such due diligence, the treasurer is unable to determine the legality of the contribution within 30 days, the treasurer is required to refund the contribution to the contributor. Id.

If a treasurer of a political committee later discovers that a contribution is illegal based on new information that was not available at the time the contribution was received and deposited, the treasurer must refund the contribution to the contributor within 30 days of the date in which the illegality is discovered. 11 C.F.R. § 103.3(b)(2). This provision applies "to contributions from foreign nationals or Federal contractors when there is no evidence of illegality on the face of the contributions themselves." Explanation and Justification, 52 Fed. Reg. 760, 768-69 (Jan. 9, 1987).

In light of BCRA's new statutory provisions regarding the foreign-national ban, the Commission seeks comment on when political committees and their treasurers have an affirmative duty to investigate contributions and donations to confirm that they do not come from foreign sources? Specifically, the Commission seeks comment on whether such an affirmative duty is limited to circumstances when contributions and donations

“present genuine questions” as to whether they are lawful, as outlined in 11 C.F.R. § 103.3. Are there additional circumstances when such an affirmative duty arises? Are the circumstances limited to when there is “evidence of illegality on the face of the contributions themselves” (Explanation and Justification, 52 Fed. Reg. at 768-69) or when the political committee otherwise has specific, credible information at the time of the contribution indicating that the contribution may be from a foreign source? See proposed 11 C.F.R. § 100.20(g)(5) (identifying specific factual circumstances). Should the Commission consider creating any safe harbors within which political committees are deemed to have satisfied whatever affirmative duty exists to investigate contributions or donations to confirm that they do not come from foreign sources? One possible safe harbor could be for political committees who acquire proof of U.S. citizenship (such as copies of U.S. passports) for donors who reside outside the United States or who list a foreign address or who make a contribution or donation through a foreign bank. If a political committee later discovers that a contribution or donation is illegal based on new information that was not available at the time the contribution or donation was received and deposited, is the political committee immunized from civil and criminal liability under Sec. 303 of BCRA, provided that the political committee refunds the contribution or donation within 30 days of the date in which the illegality is discovered pursuant to 11 C.F.R. § 103.3(b)(2)? Comments are sought on all of these issues.

Page 38, line 21: after "aggregating more than" insert the phrase "\$95,000, including:"