



Wiley Rein & Fielding LLP

RECEIVED
FEC MAIL
OPERATIONS CENTER

2002 SEP 13 P 2:26

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
SUITE 6200
MCLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

September 13, 2002

Jan Witold Baran
202.719.7330
jbaran@wrf.com

BY HAND DELIVERY

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments of BIPAC and the Chamber of Commerce of the United States to Notice 2002-14 (Foreign Nationals)

Dear Ms. Dinh:

The Business Industry Political Action Committee of America ("BIPAC") and the Chamber of Commerce of the United States ("Chamber") respectfully submit these comments in response to the Federal Election Commission ("FEC") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on August 22, 2002.¹

BIPAC is an independent, non-profit organization founded in 1963. Since its inception, BIPAC has conducted nonpartisan political research and analysis on behalf of American business and promoted the effective political participation by business men and women nationwide. BIPAC's supporters range from a majority of the Fortune Fifty, prominent national business and trade associations to small, family-run companies. The BIPAC non-connected political committee, registered with the FEC, was the nation's first business PAC.²

Founded in 1912, the Chamber is the world's largest not-for-profit business federation representing over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and industries, 96 percent of which are small businesses with 100 or fewer employees. The Chamber furnishes a myriad of services for its members including: research, issue briefings, policy forums, small business resources, government and

¹ 67 Fed. Reg. 54366 (Aug. 22, 2002) (to be codified at 11 C.F.R. 110).

² BIPAC's Internet site (www.bipac.org) provides a detailed description of BIPAC and related entities.

SEP 13 3 28 PM '02

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Ms. Mai T. Dinh
September 13, 2002
Page 2

grass roots lobbying, litigation, and electoral activity.³ The Chamber sponsors a political committee that is registered with the FEC as the USChamberPAC.

Both the Chamber and BIPAC have members that are U.S. subsidiaries of foreign corporations ("U.S. subsidiaries"). The Chamber and BIPAC are submitting these comments to protect: (1) the rights of U.S. citizens employed by U.S. subsidiaries to continue to contribute to PACs sponsored by their employers; and (2) the rights of U.S. subsidiaries to contribute in state and local elections where permitted by law.

INTRODUCTION

I. The NPRM

This NPRM has been instituted to implement changes in the political contribution limitations and prohibitions enacted by the Bipartisan Campaign Reform Act of 2002 ("BCRA").⁴ One of the BCRA's changes, which will be the subject of these comments, is to slightly alter the language found in the prohibition against contributions by foreign nationals by substituting the phrase "through any other person" with the word "indirectly."⁵

The NPRM states that it is "unclear what Congress intended in changing the terminology."⁶ The NPRM suggests that the word "indirectly" may be construed to dramatically broaden regulation of U.S. subsidiaries.⁷ Specifically, the NPRM seeks comment on whether the word "indirectly" should "cover a foreign controlled U.S. corporation, including a U.S.

³ The Chamber's Internet site (www.uschamber.com) provides a comprehensive view of these services as well as other relevant information.

⁴ Pub. L. No. 107-155, 116 Stat. 83 (2002) ("BCRA").

⁵ BCRA § 303 (to be codified at 2 U.S.C. § 441e(a)).

⁶ 67 Fed. Reg. at 54372.

⁷ *Id.*

Ms. Mai T. Dinh
September 13, 2002
Page 3

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.”⁸ The effect of such a broad reading of “indirectly” would be to prohibit U.S. subsidiaries from maintaining federal PACs and from contributing in state and local elections where permitted by law.

II. Current Regulation of U.S. Subsidiaries

Until the effective date of the BCRA, November 6, 2002, federal law prohibits “a foreign national directly or through any other person to make any contribution of money or other thing of value . . . in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office.”⁹ The term “foreign national” includes a corporation “organized under the laws of or having its principal place of business in a foreign country,” but does not include a corporation that “is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States.”¹⁰

The FEC has interpreted this prohibition to allow U.S. subsidiaries to engage in political giving, so long as 1) state law permits, and 2) foreign nationals neither exercise any decision-making authority over contributions or expenditures made by the subsidiary or its PAC, nor are solicited for contributions.

Specifically, FEC regulations provide:

A foreign national shall not direct, dictate, control, or directly or *indirectly* participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person’s federal or non-federal

⁸ *Id.*

⁹ 2 U.S.C. § 441e(a).

¹⁰ *Id.* § 441e(b) (referring to 22 U.S.C. § 611(b)).

Ms. Mai T. Dinh
September 13, 2002
Page 4

election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.¹¹

A series of FEC Advisory Opinions specifically permit U.S. subsidiaries to establish PACs so long as foreign nationals are not solicited by the PAC or involved in the PAC's decision-making process.¹² This holds true even when a majority of the U.S. subsidiary's stock is owned by foreign nationals.¹³ Moreover, a PAC established by a U.S. subsidiary may solicit contributions from the restricted class of the foreign parent and of any affiliated U.S. subsidiaries, provided those individuals are not foreign nationals.¹⁴

Furthermore, FEC Advisory Opinions explicitly permit a U.S. subsidiary to make political contributions to state and local candidates either directly, or through its PAC, to the extent permitted by state and local laws, provided that no foreign nationals participate in any way in the decision-making process regarding the contributions.¹⁵ If a U.S. subsidiary is predominantly funded by its parent, or if the U.S. subsidiary's officers and directors are all foreign nationals, then it may not make contributions in connection with state or local elections.¹⁶ However, a U.S. subsidiary may make contributions to state and local races despite receiving subsidies from its foreign parent, so long as the parent does not increase subsidies to reimburse the U.S. subsidiary's political contributions, and the U.S. subsidiary can demonstrate through reasonable

¹¹ 11 C.F.R. § 110.4(a)(3) (emphasis added).

¹² FEC Advisory Opinions 1978-21, 1980-100, 1989-29, & 1995-15.

¹³ FEC Advisory Opinion 1990-8.

¹⁴ FEC Advisory Opinion 1999-28.

¹⁵ FEC Advisory Opinions 1982-10, 1983-31, 1985-3, & 1989-20.

¹⁶ *Id.*

Ms. Mai T. Dinh
September 13, 2002
Page 5

accounting methods that it had sufficient U.S. funds to cover its contributions.¹⁷

COMMENTS

As discussed in the Introduction *supra*, the NPRM's proposal to exclude U.S. subsidiaries from state and local politics and prohibit them from sponsoring federal PACs hinges precariously on Congress' use of the term "indirectly" in the BCRA. Yet, FEC regulations already prohibit foreign nationals from "indirectly" participating in federal and non-federal elections. The exact meaning of "indirectly" has been fleshed out by the FEC in the above cited body of Advisory Opinions to prohibit foreign national decision-making and funds. If Congress intended to effect a sweeping change in the regulatory regime by employing the very same term that is used to describe the current state of the law, there should be clear, unambiguous congressional expression of such intent. There is not.

The NPRM, however, suggests that it "is unclear what Congress intended in changing the terminology." To the contrary, the legislative history of the BCRA suggests that the import of the term "indirectly" is merely a recognition of FEC regulations governing U.S. subsidiaries. Furthermore, previous legislative history confirms that Congress did not intend the word "indirectly" to prohibit non-federal contributions from U.S. subsidiaries or the maintenance of federal PACs.

I. Legislative History of the BCRA

On the morning of the Senate's first day of debate on the BCRA,¹⁸ Senator Specter, a supporter of the bill, took to the Senate floor to discuss possible amendments that he might propose.¹⁹ In his discussion of one of his proposed amendments, Senator Specter summed up the current state of the law: "Under current law, it is illegal for a foreign national to contribute money or

¹⁷ FEC Advisory Op. 1992-16.

¹⁸ Bipartisan Campaign Reform Act, S. 27, 107th Cong. (2001).

¹⁹ 147 Cong. Rec. S2421.

Ms. Mai T. Dinh
September 13, 2002
Page 6

anything of value, including loan guarantees, either directly or *indirectly* through another person, in connection with an election to any political office.”²⁰

In addition, the House debated an amendment that would broaden the scope of regulation of foreign nationals by prohibiting contributions from permanent resident aliens.²¹ That debate made no mention of prohibiting U.S. subsidiaries from sponsoring PACs. The amendment was roundly defeated by a vote of 160 to 268,²² evincing the House’s aversion to broadening the application of the foreign national prohibition, and disputing the notion that Congress intended to increase regulation by employing the term “indirectly.”

As discussed above, U.S. subsidiaries may make non-federal campaign contributions and maintain a PAC as long as foreign nationals do not participate in the decision-making processes. That is the stringent manner in which U.S. subsidiaries of foreign corporations are currently regulated as foreign nationals; as explained by Senator Specter, such regulation restricts contributions by foreign nationals “directly [and] indirectly.” Therefore, the NPRM’s suggestion that the BCRA’s use of the word “indirectly” is an invitation for the FEC to promulgate rules more restrictive than those currently in place is unfounded. The use of the term “indirectly” is nothing more than a recognition of the current regulations which prohibit foreign nationals from “indirectly” contributing to political campaigns by funding or taking part in the decision-making process to do so.

II. The Breaux Amendment to the Congressional Campaign Spending Limit and Election Reform Act of 1992

The above described meaning of the BCRA is also consistent with past legislative debate on this issue. In the Senate version of the Congressional Campaign Spending Limit and Election Reform Act of 1992,²³ Senator

²⁰ *Id.* at S2423 (emphasis added).

²¹ 148 Cong. Rec. H448-H452.

²² *Id.* at H451.

²³ This bill was ultimately vetoed. See 138 Cong. Rec. S6417-6418 (Disapproval of S.3 – The Congressional Campaign Spending Limit and Election Reform Act of 1992).

Ms. Mai T. Dinh
September 13, 2002
Page 7

Bentsen introduced an amendment that would have prohibited contributions to federal candidates by PACs of U.S. subsidiaries that are more than fifty percent owned or controlled by foreign corporations.²⁴ In so doing, Senator Bentsen did not mince words, nor did he employ a vague term such as “indirectly” to attain his amendment’s goal to “put those PAC’s out of business.”²⁵

The Bentsen amendment would have changed the definition of “foreign national” to include “any partnership, association, corporation, or subsidiary corporation organized under or created by the laws of the United States, a State, or any other place subject to the jurisdiction of the United States if more than 50 percent of the entity is owned or controlled by a foreign principal.”²⁶ It also amended the foreign national prohibition so that it would explicitly apply to “any separate segregated fund or nonparty multicandidate political committee of a foreign national.”²⁷

Senator Breaux subsequently offered a substitute to the Bentsen amendment that would essentially codify the existing FEC regulation. Senator Breaux made this point explicit by stating that his amendment would codify the rights of employees of U.S. subsidiaries to participate in the political process “through the political action committees that their companies have set up to allow them to have a greater voice in the selection of the candidates that they would like to see serve them in a national Congress and also in other areas as far as State and local governments are concerned.”²⁸

The Breaux amendment stated: “A foreign national shall not direct, dictate, control, or directly or *indirectly* participate in any person’s decision-making concerning the making of contributions or expenditures in connection with elections for any Federal, State, or local office or decision-making concerning

²⁴ 137 Cong. Rec. S6182.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at S6185.

Ms. Mai T. Dinh
September 13, 2002
Page 8

the administration of a political committee.”²⁹ In addition, the “Findings and Declarations” of the Breaux amendment also included the word “indirectly” stating: “Congress does not intend and has never intended to permit foreign nationals to participate, directly or *indirectly*, in the decision-making of political committees.”³⁰

The Senate voted to substitute the Breaux amendment for the Bentsen amendment and included the language of the Breaux amendment in the Senate’s final bill.³¹ At Conference Committee, the Breaux amendment language was slightly changed to: “A foreign national shall not directly or *indirectly* direct, control, influence or participate in any person’s election-related activities, such as the making of contributions or expenditures in connection with elections for any local, State, or Federal office or the administration of a political committee.”³² The Conference Report stated: “It was felt that the conference substitute will adequately protect the political process from undue foreign influence, such as that perceived by some in a time of foreign ownership of many American corporations, while still safeguarding the political rights of employees of such business.”³³

Remarkably, it is Senator Breaux’s amendment that employs the word “indirectly,” and does so for the purpose of expressing Congress’ intent to allow U.S. subsidiaries to continue to engage in political activities within the confines of current FEC regulation. If Congress had intended to dramatically further restrict U.S. subsidiaries by using the term “indirectly” in the BCRA, Congress could have simply looked to the language of Senator Bentsen’s amendment to make its intentions clear. Instead, the use of the word “indirectly” in the BCRA has the same intended effect as that stated by Senator Breaux—to codify existing FEC regulations in which the word

²⁹ *Id.* at S6184 (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ *Id.* at S6186-S6187.

³² Congressional Campaign Spending Limit and Election Reform Act, S. 3, 102d Cong. (1992) (emphasis added).

³³ 138 Cong. Rec. H2458.

Ms. Mai T. Dinh
September 13, 2002
Page 9

“indirectly” only restricts foreign national funds and influence in the political decision-making process of U.S. subsidiaries.

III. The Bipartisan Campaign Reform Act of 1998 and Representative Shay’s Support of the Gillmor-Tanner Amendment and Opposition to the Kaptur Amendment

Again, in the 1998 House debate on the Bipartisan Campaign Reform Act, the House passed an amendment codifying the right of U.S. subsidiaries to maintain PACs.³⁴ One of the co-sponsors of the amendment, Representative Paul Gillmor, stated that the amendment was necessary to head-off “proposals [that] would deny American citizens who work for American subsidiaries of companies which are headquartered abroad an avenue of political association and participation that is guaranteed all other Americans, namely, the right to voluntarily contribute money to political candidates through political action committees sponsored by their employers.”³⁵ Representative Christopher Shays spoke in favor of the amendment saying: “I just want to speak on behalf of the Meehan-Shays supporters, that we do support this amendment. It is a right of American citizens today.”³⁶ The amendment passed with no opposition.³⁷

Eleven days later Representative Marcie Kaptur summarized the current state of the law: “[W]hile foreign nationals and foreign citizens cannot directly or *indirectly* contribute to U.S. elections, foreign-controlled corporations and trade associations, including those based in the United States, can contribute.”³⁸ She simultaneously proposed an amendment that would prohibit political activity by U.S. subsidiaries beyond the current restrictions on those made “directly or indirectly.” The Kaptur amendment stated that “no multicandidate political committee or separate segregated fund of a

³⁴ Bipartisan Campaign Reform Act, H.R. 2183, 105th Cong. (1998).

³⁵ 144 Cong. Rec. H4862.

³⁶ *Id.*

³⁷ *Id.* at H4864.

³⁸ *Id.* at H6838 (emphasis added).

Ms. Mai T. Dinh
September 13, 2002
Page 10

foreign-controlled corporation may make any contribution or expenditure with respect to an election for Federal office.”³⁹

Representative Shays rose in opposition to the Kaptur amendment stating: “Our concern is that a company like, for instance, Chrysler, that now has significant ownership by German interests, that the employee [*sic*] still be allowed to organize a political action committee, still be allowed to contribute, still be allowed to fight for things they think are important for Chrysler and its workers....”⁴⁰ The Kaptur amendment was modified to exclude the prohibition and to only require additional reporting by U.S. subsidiaries. Representative Shays thereafter provided his support and the amendment was approved in a roll call vote.⁴¹

Like the experience in the Senate six years earlier, the House explicitly debated the merits of a prohibition on PAC contributions by U.S. subsidiaries and decided to maintain the status quo—limiting regulation of contributions by foreign nationals to those that are made “directly or *indirectly*.” Of particular relevance is the fact that Representative Shays, one of the co-sponsors of the BCRA, spoke out against the proposed PAC prohibition.

CONCLUSION

Given the extensive legislative history to the contrary, the NPRM’s proposed prohibitions are completely unjustified. The BCRA’s use of the term “indirectly” can be most reasonably understood as acceptance of current FEC regulation which only prohibits foreign national involvement in the decision-making and funding of political activities conducted by U.S. subsidiaries. The FEC should maintain that longstanding regulation.

If the FEC decides to hold public hearings on this issue, we would like an opportunity to testify.

³⁹ *Id.* at H6837.

⁴⁰ *Id.* at H6839.

⁴¹ *Id.* at H6839-H6840, H6860.

Wiley Rein & Fielding LLP

Ms. Mai T. Dinh
September 13, 2002
Page 11

Respectfully submitted,



Jan Witold Baran
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000
jbaran@wrf.com

Of Counsel:

Stephen A. Bokat
Senior Vice President & General Counsel
Chamber of Commerce of the United States
1615 H Street, NW
Washington, DC 20062
202.463.5337
sbokat@uschamber.com

cc: Gregory S. Casey
President and CEO
BIPAC
888 16th Street, NW
Washington, DC 20006
202.833-1880
casey@bipac.org