



September 27, 2002

VIA E-MAIL

John C. Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2002-15: Disclaimers, Fraudulent Solicitations, Civil Penalties And Personal Use Of Campaign Funds

Dear Mr. Vergelli:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit the attached comments on the Notice of Proposed Rulemaking (NPRM) relating to Disclaimers, Fraudulent Solicitations, and Personal Use Of Campaign Funds under the Bipartisan Campaign Reform Act of 2002 (BCRA). This notice was published at 67 *Fed. Reg.* 55348 (August 29, 2002).

Respectfully submitted,

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
Director
FEC Watch

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2002-15

DISCLAIMERS, FRAUDULENT SOLICITATIONS, CIVIL PENALTIES AND PERSONAL USE OF CAMPAIGN FUNDS

Comments of FEC Watch and the Center for Responsive Politics

I. Introduction

FEC Watch and the Center for Responsive Politics submit these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") on Disclaimers, Fraudulent Solicitations, Civil Penalties and Personal Use of Campaign funds under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). FEC Watch is a project of the Center For Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

II. Comments

Our comments are limited to two aspects of the proposals implementing the revised personal use prohibition in BCRA.

A. Section 113.2(d) and "any other lawful purpose"

The NPRM seeks comments on a proposal to make no revisions in section 113.2 of the current rules. Section 113.2 lists the purposes for which excess campaign funds may permissibly be used. The first four uses, set out in paragraphs (a) through (d), closely track the language of pre-BCRA section 439a. These provisions allow campaign funds to be used for (a) ordinary and necessary expenses incurred in connection with the duties of a holder of Federal office; (b) contributions to a 26 U.S.C. § 170(c) organization; (c) transfers to a national, state or local party committee; or (d) any other lawful purpose, except that they may not be converted to any personal use, other than to defray officeholder expenses or repay loans made by the candidate for campaign purposes.

BCRA changes section 439a by breaking it into two subsections. Paragraph (a) contains a revised version of the list of permissible uses in pre-BCRA section 439a. Paragraph (b) states the rule that campaign funds may not be converted to personal

use. Paragraph (b) also sets out a general definition of personal use, and lists several things that will be considered *per se* personal use.

The BCRA revisions to the list of permissible uses, now in section 439a(a), have a direct bearing on the "any other lawful purpose" clause. As revised, section 439a(a) states:

- (a) **PERMITTED USES-** A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual--
 - (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
 - (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
 - (3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986; or
 - (4) for transfers, without limitation, to a national, State, or local committee of a political party.

BCRA, section 439a(a). Thus, BCRA continues to allow the use of campaign funds for (1) ordinary and necessary expenses of a holder of Federal office; (2) contributions to a section 170(c) organization; and (3) transfers to a political party committee. Since paragraphs (a), (b) and (c) of section 113.2 list these permissible uses, it is appropriate to leave these three paragraphs in the rule without revision.¹

In contrast, BCRA deletes the fourth permissible use in pre-BCRA section 439a. Campaign funds may no longer be used for "any other lawful purpose." Thus, paragraph (d) of section 113.2(d) implements a provision that will no longer be in the statute after the effective date of BCRA. For these reasons, it would be inappropriate to leave section 113.2(d) in the regulations without alteration.

According to the NPRM, the Commission "believes that Congress's continuing intent is to allow only lawful uses of campaign funds and donations." 67 *Fed. Reg.* 55353. This suggests that the Commission reads "any other lawful purpose" as a **restrictive** phrase that prevents the use of excess campaign funds for unlawful purposes.

This misreads the effect of the phrase "any other lawful purpose." When read in context, it is clear this is a **permissive** phrase. It allows the use of excess campaign funds for any purpose other than the three enumerated purposes, so long as the

¹ BCRA also adds a fourth provision allowing the use of funds for "authorized expenditures in connection with the campaign for Federal office of the candidate or individual," which was implied in pre-BCRA section 439a. See BCRA section 439a(a)(1).

purpose is lawful and does not result in a conversion of campaign funds to personal use.

BCRA deletes this permissive phrase, and limits the use of excess campaign funds to the four uses listed in new section 439a(a). Section 113.2(d) should be revised accordingly. To leave the "any other lawful purpose" provision in the regulation would disregard the statutory revision.

Furthermore, even if the "any other lawful purpose" language has no substantive effect, its presence in section 113.2(d) could create confusion about the types of uses that are permissible. This is reason enough to delete it from the rules.

Therefore, we urge the Commission to delete the "any other lawful purpose language" from section 113.2(d), and revise the rule to parallel BCRA section 439a.

B. Travel related to the duties of a holder of Federal office

BCRA codifies a list of *per se* personal uses in section 439a(b)(2). Under section 439a(b)(2)(E), the use of campaign funds for "a vacation or other noncampaign-related trip" is a conversion to personal use. The NPRM seeks comments on whether the language of section 439a(b)(2)(E) should be interpreted to prohibit the use of campaign funds for travel that is not campaign-related, but is related to the ordinary and necessary duties of a holder of Federal office. 67 *Fed. Reg.* 55353.

The use of campaign funds for campaign-related travel and for officeholder-related travel have historically been treated the same for purposes of the personal use prohibition. Both have been permissible, and the language of paragraph (a) makes this explicit by listing both campaign expenditures and officeholder-related expenses as permissible uses of campaign funds.

Presumably, if Congress had intended to change this longstanding treatment, it would have done so explicitly. BCRA gives no direct indication that Congress intended to change this treatment. The *per se* list does not specifically **include** officeholder-related travel expenses. Rather, it should have **excluded** them, but does not. Thus, if it prohibits this use, it does so only by negative inference.

In all likelihood, Congress's failure to exclude the expenses of officeholder-related travel from section 439a(b)(2)(E) was inadvertent. The assessment stated by the Commission in the NPRM is correct. "It does not appear that Congress intended to eliminate the discretion of candidates and Federal officeholders to use these excess campaign funds 'for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.'" *Id.*

The Commission should exercise its discretion by excluding both officeholder-related travel and campaign-related travel from section 113.1(g)(1)(i)(K). The language of section 113.1(g)(1)(ii)(C) should be adjusted to conform to this revision.

III. Conclusion

FEC Watch hopes that these comments are useful to the Commission as it implements the personal use provisions in BCRA.