



January 31, 2003

**VIA E-MAIL**

J. Duane Pugh Jr.  
Acting Special Assistant General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Re: Notice 2002-28: Leadership PACs

Dear Mr. Pugh:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit the attached comments on the Notice of Proposed Rulemaking on Leadership PACs, published at 67 *Fed. Reg.* 78753 (December 26, 2002).

If the Commission decides to hold a hearing, Lawrence Noble, Executive Director of CRP, and Paul Sanford, Director of FEC Watch, request an opportunity to testify.

Respectfully submitted,

Lawrence Noble  
Executive Director  
Center for Responsive Politics

Paul Sanford  
Director  
FEC Watch

Attachment

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

**BEFORE THE FEDERAL ELECTION COMMISSION**

**NOTICE 2002-28**

**LEADERSHIP PACS**

**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 Leadership PACs. 67 *Fed. Reg.* 78753 (Dec. 26, 2002). 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**

**A. General comments**

We welcome the Commission's decision to consider changes in its policy regarding the relationship between leadership PACs and authorized committees of federal candidates. We believe this effort is long overdue, since the Commission's past policy of treating the leadership PACs of federal candidates as separate from and unrelated to the candidate's authorized committees has ignored reality. Many leadership PACs are controlled in whole or in part by the candidate or officeholder and operate almost exclusively to further the interests of that candidate or officeholder. In some instances, leadership PACs are, in effect, stealth campaign committees serving as additional mechanisms for promoting the candidate's election, or for laying the groundwork for a future campaign for higher office.

We urge the Commission to adopt rules that accomplish two goals. First, the rules should make it clear that the Commission will examine the relationship between any political committee or section 527 political organization and a federal candidate or officeholder's authorized committees, to determine whether these entities are affiliated. Second, the rule should set forth a list of factors to be used to make these determinations.

We have prepared an alternative draft rule that would achieve these goals. The draft rule is attached and is described in detail below.

**B. Threshold questions raised in the NPRM**

The NPRM raises several threshold questions regarding leadership PACs and the Commission's current rules. We have the following comments on these questions.

1. Effect of existing rules

The NPRM asks "whether BCRA's inclusion of the phrases 'directly or indirectly' and 'acting on behalf of' in 2 U.S.C. 441i(e)(1) requires the Commission to consider, or permits the Commission to disregard, the authorized or unauthorized status of political committees in determining whether they are affiliated." 67 *Fed. Reg.* 78755. Determining whether a leadership PAC is working "directly or indirectly" for a candidate or is "acting on behalf of" a candidate should be based on more than just the self-selected status of the committee. It should be based on a wide range of factors, some of which the Commission has articulated in its proposed rules, and others that we have added in our alternative draft. The authorized or unauthorized status of the committee should not be determinative, particularly since this would allow a committee that is otherwise closely related to a candidate to negate this relationship through the simple act of registering as an unauthorized committee.

The NPRM also asks whether the Commission's existing regulations are adequate for addressing the potential for abuse presented by leadership PACs. While some portions of these rules should be incorporated into the new rules, the existing rules as a whole are inadequate for several reasons. First, the rules predate the widespread emergence of leadership PACs. As a result, the rules do not take into account the ways in which leadership PACs are being used, and the factors that should be analyzed to determine whether they are affiliated with a candidate's authorized committees. In addition, the language of some provisions of the rules is directed primarily at separate segregated funds and their connected organizations. Thus, the rules may be awkward or difficult to apply to leadership PACs. Finally, the Commission has historically been unable or unwilling or to apply these rules to leadership PACs in a meaningful way. Promulgating new rules would be the best way for the Commission to show a renewed commitment to applying the affiliation principle to these entities.

Finally, the NPRM claims that the recently promulgated Soft Money rules clearly prohibit the leadership PAC of a federal candidate from raising and spending soft money. The effect of these rules is not so clear to us. The Explanation and Justification for the Soft Money rules states that leadership PACs **that fall within 11 CFR 300.2(c)** are subject to the soft money prohibitions applicable to federal candidates. 67 *Fed. Reg.* 49063, 49107 (July 29, 2002) (emphasis added). Section 300.2 contains affiliation factors that are based on the factors in the Commission's existing affiliation rules. See 11 CFR 100.5(g)(4). As noted above, the Commission has not applied these rules to leadership PACs. Thus, some may seek to assert that there is ambiguity regarding the status of soft money leadership PACs under BCRA. The Commission should resolve any remaining ambiguity by issuing new rules.

2. Definition of leadership PAC

The NPRM asks whether the rules should contain a definition of the term "leadership PAC." Presumably, this definition would have the effect of limiting the application of the new affiliation factors rules to certain types of entities. This limitation is impractical and unnecessary. Leadership PACs come in many different shapes and sizes. This will make it difficult to formulate a definition that is not simultaneously both over inclusive and underinclusive.

The FECA applies the affiliation principle to any person or group of persons. Consistent with this principle, the Commission should apply the affiliation rules broadly. Any

organization that is a political committee or political organization under 26 U.S.C. § 527 should be subject to the affiliation analysis. If the purpose of the definition of leadership PAC is to limit the application of the affiliation analysis to entities that are in some way associated with a candidate or officeholder, the affiliation factors themselves perform this function. For these reasons, the Commission should not attempt to define "leadership PAC" in the final rules.

### C. Structure of the rule

The NPRM contains three alternative versions of the proposed rule. Alternative B is the best of the three alternatives, because it uses two lists of factors to determine affiliation. The first list contains factors that so strongly indicate a relationship exists between the political committee and the candidate or the candidate's authorized committees that the existence of any one of these factors is enough to make the two committees affiliated.<sup>1</sup> The second list contains factors that indicate a relationship exists, but not strongly enough that they are, by themselves, proof of affiliation. Instead, if any three of the factors on this list are satisfied, the committees will be affiliated.<sup>2</sup> This structure is preferable to the other alternatives because it takes into account both the strong indicators of affiliation and the indicators that are weaker but still highly relevant. The Commission should reject Alternative A because it contains only a *per se* list, and thus it ignores numerous factors that indicate a relationship exists between the two committees.

The Commission should reject Alternative C for two reasons. First, Alternative C creates an exception to the statutory definition of affiliation where no exception exists. Alternative C would allow a committee that is established, financed, maintained or controlled by a candidate or officeholder to avoid being affiliated by showing that it satisfies four criteria. The statute contains no exception based on these criteria. See 2 U.S.C. § 441a(a)(5). Thus, the Commission does not have the authority to exempt an organization on this basis.

Second, Alternative C states that unauthorized committees that are established, financed, maintained or controlled by, or acting on behalf of, a candidate, are affiliated. This does little more than restate the statutory definition of affiliation. Thus, it provides no additional guidance as to when a political committee will be considered established, financed maintained or controlled by, or acting on behalf of, a candidate. Instead, it presumably would rely the existing affiliation factors in 100.5(g)(4) which, as discussed above, have not been effective. For these reasons, the Commission should not adopt Alternative C.

### D. Text of the rule

While Alternative B serves as a good starting point, we have comments regarding the specific language of the rule. We also recommend that additional factors be added to both the *per se* and multiple factor lists to make the rule more complete, and that some factors currently on the multiple factor list be moved to the *per se* list. These recommendations are explained in detail below.

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<sup>1</sup> In the discussion that follows, we will refer to the first list as the "*per se*" list.

<sup>2</sup> We will refer to the second list as the "multiple factor" list.

1. Introductory text of Alternative B

The introductory text of Alternative B says that the rule applies to an "entity associated with an individual holding Federal office or a candidate for Federal office." This phrase is too broad because it would likely encompass charitable organizations formed by federal officeholders under 26 U.S.C. § 501(c)(3), thereby subjecting these entities to the affiliation analysis. Although these entities may become a vehicle for avoiding the contribution limits and disclosure requirements in the future, the focus of this rulemaking is on leadership PACs, which typically are either political committees under the FECA or political organizations under 26 U.S.C. § 527. For these reasons, we recommend that the Commission replace the word "entity" with the phrase "political committee or section 527 political organization."

The introductory text also states that the Commission "may" examine the relationship between committees in order to determine whether they are affiliated. Use of the word "may" suggests that the Commission would not apply section 100.5(g)(5) in some situations. Instead, it would apply some other standard or would make no effort to determine whether the committees are affiliated. The rule should state that section 100.5(g)(5) will be the test for determining affiliation between two committees. It should not allow the Commission to apply some other, undefined test or ignore the issue of affiliation entirely. "May" should be replaced with "will" so that the rule affirmatively states that the Commission will use these factors to determine affiliation for all political committees and section 527 political organizations.

2. The *per se* list

We have comments on several aspects of the *per se* list. First, the Commission should make one global change to the list. Under Alternative B in the NPRM, the authorities held by the candidate's campaign staff are part of the multiple factor list. These factors should be moved to the *per se* list and broadened to include the officeholder's office staff. Members of the candidate's campaign staff and office staff are invariably agents of the candidate or officeholder, and thus are treated as the equivalent of the candidate or officeholder under BCRA. 2 U.S.C. § 441i(e). Therefore, these persons should be on the *per se* list.

Paragraph (g)(5)(i)(A)(1) of our draft rule is the same as paragraph (g)(5)(i)(A)(1) of Alternative B.

Paragraph (A)(2)<sup>3</sup> of our draft rule is somewhat broader than paragraph (A)(2) of Alternative B in the NPRM. Alternative B would only be satisfied if the candidate or officeholder's authorization were required for disbursements over a set amount. In contrast, our version of paragraph (A)(2) would be satisfied if the candidate or officeholder authorizes any contribution or disbursement by the political committee or political organization. If the candidate or officeholder is able to authorize the disbursements of the political committee or organization, this indicates that the candidate or officeholder has some degree of control over the organization. Under the statutory definition of affiliation, committees that are controlled by the same person are affiliated committees.

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<sup>3</sup> In the interests of brevity, references to the rules in the discussion that follows will omit the preceding "(g)(5)(i)" from the section number.

Paragraph (A)(3) of Alternative B would affiliate the two committees whenever the candidate or officeholder signs solicitation letters or other correspondence for the political committee or organization. This rule sets the threshold for affiliation too low. Federal candidates and officeholders have been known to sign a solicitation letter for a PAC with which they have no ongoing relationship in order to assist the PAC with its fundraising efforts. Under the proposed rule, the candidate's signature on a single solicitation would cause the PAC to be affiliated with the candidate's committees, even if candidate has no other involvement with the PAC. Instead of triggering affiliation with a single signature, paragraph (A)(3) of our alternative draft would allow candidates and officeholders to sign up to 25% of a committee's correspondence without causing the two committees to be affiliated. If a candidate signs more than 25% of the committee's correspondence, the Commission can justifiably conclude that the candidate or officeholder has a formal and ongoing relationship with the committee. In these circumstances, the two committees should be affiliated.

Paragraph (A)(4) of our draft rule is the same as paragraph (A)(4) of Alternative B.

Under paragraph (A)(5) of Alternative B, the committees are affiliated if the candidate or officeholder has the authority to approve, alter or veto the entity's contributions, donations or disbursements. This provision properly recognizes that a candidate who has the authority to control the political committee's spending effectively has control over the committee, since most committee activities involve some type of disbursement. Our version of this provision takes the same approach but contains additional language. Under our rule, the two committees are affiliated even if the candidate or officeholder has never actually exercised his or her authority to approve, alter or veto specific disbursements made by the committee. This would have the effect of affiliating committees over which a candidate or officeholder has ultimate control, even if the candidate or officeholder appoints someone else to serve as a director or to make the committee's day-to-day decisions.

Paragraph (A)(7) of our draft rule moves paragraph (B)(8) of Alternative B from the multiple factor list to the *per se* list. Alternative B would treat the appearance of the candidate or officeholder's name, nickname or other ambiguous reference on the committee's stationery or letterhead as one factor indicating that the committees are affiliated. This should be a *per se* factor. The appearance of the candidate or officeholder on the committee's stationery or letterhead strongly suggests that the committee was established or is controlled by the candidate or officeholder. Under these circumstances, the two committees should be affiliated.

Similarly, paragraph (A)(8) moves paragraph (B)(5) of Alternative B to the *per se* list and lowers the dollar threshold to \$5000. If a political committee or section 527 political organization spends more than an amount equal to the multicandidate contribution limit on the travel expenses of a candidate or officeholder, this indicates that the organization is financing a significant amount of the candidate or officeholder's activities. Under these circumstances, the organization and the candidate's authorized committees should be affiliated.

Paragraphs (A)(9) through (A)(12) of our draft rule are drawn from the current list of affiliation factors at 11 CFR 100.5(g)(4)(ii). Where the candidate or officeholder has an active or significant role in the establishment of the political committee, the two committees have been established by the same person, and should be affiliated. Similarly, in situations where the candidate, officeholder, his or her staff members or agents have the authority to

direct or significantly participate in the governance of the political committee, or vice versa, the two committees are controlled by the same group of persons, and should be affiliated. Finally, where the candidate, officeholder, staff or agents have the authority to hire, appoint, demote or control the officers, employees or agents of the political committee, they effectively have control over the committee. Under these circumstances, the two committees should be affiliated.

### 3. The multiple factor list

The multiple factor list in our draft of section 100.5(g)(5) first addresses the authorities held by immediate family members of candidates and officeholders. Under Alternative B of the NPRM, the factors involving a family member of the candidate would not be enough, standing alone, to affiliate the two committees. Our draft adopts the same approach. Family members should be able to engage in political activity without automatically being treated as part of the candidate or officeholder's campaign operation. However, the involvement of a family member in the activities of a political committee or section 527 political organization should be considered one indicator in determining whether the committee or organization is affiliated with the candidate or officeholder's authorized committees.

Paragraph (B)(1) of our draft sets out this rule. It combines elements of paragraphs (B)(1), (B)(2), and (B)(3) of Alternative B of the NPRM, and also adds provisions for family members that parallel the factors for candidates, officeholders and staff in paragraphs (A)(1) through (A)(6) of the *per se* list. Under paragraph (B)(1), if a family member of the candidate or officeholder has any or all of the listed authorities, or signs more than 25% of the committee's correspondence, one factor out of the three required for affiliation would be satisfied. If two factors from the remaining portions of the multiple factor list are satisfied, the committees would be affiliated.

Paragraph (B)(2) of our version is the same as paragraph (B)(4) of Alternative B.

Paragraph (B)(3) of our version is the same as paragraph (B)(6) of Alternative B.

Paragraph (B)(4) is the same as paragraph (B)(7) of Alternative B.

Paragraph (B)(5) is based on section 100.5(g)(4)(ii)(E) of the current rules.

Paragraph (B)(6) is a new provision covering references to the candidacy of the candidate or officeholder in materials prepared by the political committee or section 527 organization. Recurring references to the candidacy in materials produced by the political committee are an indication that the committee is working to promote the candidate. Thus, they serve as evidence that the committee should be affiliated with the candidate's authorized committees. This provision uses a 25% threshold similar to paragraph (A)(3) of the *per se* list, relating to candidate signatures on committee correspondence. Below this 25% threshold, references to the candidacy would not be considered evidence of affiliation. Above this threshold, they would satisfy one factor. If the committee also satisfies two other factors, it would be affiliated with the candidate's authorized committees.

Paragraphs (B)(7) through (B)(10) are derived from sections 100.5(g)(4)(ii)(F), (G), (H) and (J) of the current rules.

#### **E. Consequences of affiliation**

The NPRM asks several questions about the effect of determining that a leadership PAC is affiliated with a candidate's authorized committees. The effect of affiliation is that the two committees share a single limit for contributions made and contributions received. If this were not the case, the affiliation rules would serve no purpose. The FECA leaves the Commission very little discretion once this determination is made.

In addition, the lower contribution limit applicable to authorized committees must apply to both entities. Otherwise, the rules would create a significant incentive for candidates to form leadership PACs in order to increase the contribution limits applicable to their authorized committees.

However, affiliated committees receive one benefit. They may make unlimited transfers of funds between and among themselves, without regard to the contribution limits. 11 CFR 110.3(a).

#### **III. Conclusion**

FEC Watch and the Center for Responsive Politics hopes that these comments are useful to the Commission as it considers issuing new rules regarding leadership PACs. As indicated in our cover memo, if the Commission decides to hold a hearing on the proposed rules, Lawrence M. Noble and Paul Sanford would like to testify at the hearing.

§ 100.5 Political Committee (2 U.S.C. 431(4), (5), (6)).

\* \* \* \* \*

(g)

(5) Notwithstanding paragraph (g)(4) of this section, the Commission will examine the relationship between a political committee or other political organization described in section 527 of the Internal Revenue Code and the authorized committee(s) of a candidate or officeholder. This examination will be conducted in accordance with this subsection.

(i) A political committee or section 527 political organization is affiliated with the authorized committee(s) of a candidate or individual holding Federal office if the conditions set forth in either paragraph (g)(5)(i)(A) or (g)(5)(i)(B) of this section are satisfied.

(A) Any one of the following statements is true:

- (1) The candidate or individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has signature authority on the checks of the political committee or section 527 political organization;
- (2) The candidate or individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, authorizes one or more contributions or disbursements by the political committee or section 527 political organization;
- (3) The candidate or the individual holding Federal office signs more than 25% of the solicitation letters or other correspondence on behalf of the political committee or section 527 political organization;
- (4) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the

- authority to approve, alter or veto the solicitations of the political committee or section 527 political organization;
- (5) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to approve, alter or veto the contributions, donations, or disbursements made by the political committee or section 527 political organization, whether or not that authority has been exercised;
- (6) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to approve, alter or veto the contracts made by the political committee or section 527 political organization;
- (7) The name or nickname of the candidate or of the individual holding Federal office, or other unambiguous reference to the candidate or individual holding Federal office, appears on the stationery or letterhead of the political committee or section 527 political organization;
- (8) The political committee or section 527 political organization pays for the travel of the candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, in excess of \$5,000 per calendar year.
- (9) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, had an active or significant role in the establishment of the political committee or section 527 political organization;
- (10) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority to direct or significantly participate in the

governance of the political committee or section 527 political organization;

(11) The political committee or section 527 political organization has the authority to direct or significantly participate in the governance of the authorized committee of the candidate or individual holding Federal office; or

(12) The candidate, individual holding Federal office, his or her campaign staff, office staff, or any agent thereof, has the authority or ability to hire, appoint, demote or otherwise control the officers, employees or agents of the political committee or section 527 political organization;

(B) Any three of the following statements are true:

(1) An immediate family member of the candidate or individual holding Federal office:

(i) Has signature authority on the checks of the political committee or section 527 political organization;

(ii) Authorizes one or more contributions or disbursements by the political committee or section 527 political organization;

(iii) Signs more than 25% of the solicitation letters or other correspondence on behalf of the political committee or section 527 political organization;

(iv) Has the authority to approve, alter or veto the solicitations of the political committee or section 527 political organization;

(v) Has the authority to approve, alter or veto the contributions, donations, or disbursements, made by the political committee or section 527 political

- (v) organization, whether or not that authority has been exercised; or
  - (vi) Has the authority to approve the contracts made by the political committee or section 527 political organization;
- (2) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office, share, exchange or sell contributor lists, voter lists, or other mailing lists directly to or with each other, or indirectly through the candidate or individual holding Federal office to or with each other;
- (3) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office share office space, staff, a post office box, or equipment;
- (4) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office share common vendors;
- (5) The political committee or section 527 political organization and the candidate or individual holding Federal office, or an authorized committee of the candidate or individual holding Federal office, share common or overlapping officers or employees;
- (6) The political committee or section 527 political organization refers to the candidacy or potential candidacy of the candidate or individual holding federal office in 25% or more of its solicitations or other publicly disseminated materials;

- (7) The political committee or section 527 political organization has officers, employees, or agents who were officers, employees or agents of the candidate or individual holding Federal office, or officers, employees, or agents of an authorized committee of the candidate or individual holding Federal office;
- (8) An authorized committee of the candidate or individual holding Federal office has officers, employees or agents, or the candidate or individual holding Federal office has employees or agents, who previously were officers, employees, or agents of the political committee or section 527 political organization;
- (9) An authorized committee of the candidate or individual holding Federal office, the candidate or individual holding Federal office, or an officer, employee, or agent thereof, provides funds or goods to the political committee or section 527 political organization on an ongoing basis;
- (10) An authorized committee of the candidate or individual holding Federal office, the candidate or individual holding Federal office, or an officer, employee, or agent thereof, causes or arranges for funds to be provided in a significant amount or on an ongoing basis to the political committee or section 527 political organization (other than transfers of the allocated share of funds jointly raised under 11 CFR 102.17);  
or
- (11) The political committee or section 527 political organization and an authorized committee of the candidate or individual holding Federal office have similar patterns of contributions

or contributors that indicate a formal or ongoing relationship between the committees.

(ii) Determinations by the Commission.

- (A) A political committee, section 527 political organization, authorized committee of a candidate for Federal office, or individual holding Federal office may request an advisory opinion of the Commission to determine whether the political committee or section 527 political organization is affiliated with an authorized committee of the candidate or individual holding Federal office. The request for such an advisory opinion must meet the requirements of 11 CFR part 112.
- (B) Nothing in this section shall require entities that are not affiliated as of [the effective date of these rules] to obtain an advisory opinion to confirm that they are not affiliated.