

RYAN, PHILLIPS, UTRECHT & MACKINNON

ATTORNEYS AT LAW

NONLAWYER PARTNER

1133 CONNECTICUT AVENUE, N.W.

SUITE 300

WASHINGTON, D.C. 20036

(202) 293-1177

FACSIMILE (202) 293-3411

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2003 JAN 31 P 3:51

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

2003 JAN 31 P 2:31

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ELECTION
COMMISSION
GENERAL COUNSEL

*Re: Notice 2002-28; Notice of Proposed
Rulemaking as to Leadership PACs*

Dear Mr. Pugh:

We are submitting these comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM") regarding Leadership PACs. These comments are submitted by the undersigned attorneys at Ryan, Phillips, Utrecht & MacKinnon and not on behalf of any of the Firm's clients.

As an introductory matter, please note that our comments are limited to the Federal accounts of Leadership PACs and the activities undertaken by them in connection with Federal elections, particularly given the treatment of non-Federal activities by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Specifically, we question the necessity of this particular rulemaking proposal as it relates to activities by Leadership PACs in connection with Federal elections. However, should the Commission proceed with this rulemaking, we urge the rejection of any *per se* characterization or rebuttable presumption that would result in the disqualification of certain entities from operating as Leadership PACs, beyond what is contained in the existing regulations. Based on our experience, we believe that only a case-by-case analysis of the facts and circumstances can realistically and fairly determine if an entity that is holding itself out as a Leadership PAC is, in fact, operating as an authorized committee.

The Role of BCRA

With respect to the Commission's specific question concerning the generation of this rulemaking, we do not believe that BCRA requires or even suggests that the Commission change the way it has proceeded in this area. Leadership PACs were fully contemplated during the consideration and passage of this legislation, and, despite the emphasis on the elimination of soft money and the restriction on soft money fundraising by Federal candidates and their agents, no provision of BCRA or its legislative history

mandates the types of changes to the Federal accounts of Leadership PACs that the Commission is proposing. We believe that the provisions cited by the Commission as justification are clearly relevant to soft money fundraising and spending by Leadership PACs, as demonstrated by BCRA's legislative history. However, we also believe that using the same provisions to unduly restrict hard money activities is simply not explicitly or implicitly authorized by BCRA and is a misunderstanding of that legislation and its goals. Indeed, the sponsors of BCRA specifically endorsed the activities of Leadership PACs. See 148 CONG. REC. S2140 (daily ed. March 20, 2002)(statement of Sen. McCain).

The Commission itself noted repeatedly throughout its NPRM that the issue of a proposed rulemaking with respect to Leadership PACs was considered in 1988. See NPRM at 78755. At that time, the Commission declined to adopt any revisions to its regulations, concluding that "this complex area is better addressed on a case-by-case basis." Id. We believe that nothing has occurred either through the enactment of BCRA or during the intervening years that should change the Commission's treatment of Leadership PACs' activities in connection with Federal elections. Specifically, we believe that (1) no provision of BCRA mandates or even authorizes such changes, (2) no policy goal of BCRA would be furthered by enacting revisions to the Commission's current regulations, (3) no egregious abuses have occurred since 1988 that the Commission could not have addressed through its current policy, and (4) none of the NPRM's proposals would further the policy goals of BCRA or otherwise curb any actual or perceived abuses by Leadership PACs in connection with Federal elections.

For the Purpose of Influencing Other People's Campaign

We believe the crux of the issue is whether the particular activities of a Leadership PAC are for the purpose of influencing the election of the individual who is connected with that PAC or are, in fact, for the purpose of influencing the elections of others. In our view, the purpose of Leadership PACs with respect to their Federal activities actually furthers the goals of BCRA, in that it increases both "hard money" participation and grass roots campaigning in Federal elections. This may be accomplished through a variety of legitimate activities, such as making direct contributions to candidates within the limitations and prohibitions of the Federal Election Campaign Act, providing assistance through in-kind contributions within those limitations and prohibitions, traveling to appear at another candidate's event and campaigning on his or her behalf, or providing policy, issue or legislative background to other candidates, among other items.

By its very nature, the analysis as to whether a particular activity is for the purpose of influencing one election or another must be determined on a case-by-case basis, depending on the facts and the circumstances of the specific case. Using one of the proposed factors as an example, the role of a particular individual – be he or she an officeholder or candidate for office – in no way is determinative of the answer. Leadership PACs actually provide an appropriate mechanism so that campaigning on behalf of others will not be attributable to one's own authorized committee. Thus, to

simply declare that disbursements for travel expenses outside an officeholder's own state or district must be related to his or her own authorized committee is an exercise in arbitrary line drawing without regard for the facts.¹ Such travel could be for fundraising for the Leadership PAC or for fundraising for another candidate's campaign, neither of which should be attributed to the officeholder.

Unfortunately, the Commission's NPRM makes the broad brush conclusion that certain activities that are clearly for the purpose of influencing the elections of candidates who are not in any way associated with a particular Leadership PAC will be impermissible, simply by virtue of the Leadership PAC's association with another candidate. Such a conclusion does not further any possible policy goals, and with respect to the alternatives proposed by the Commission, each of them would – to varying degrees – severely restrict, if not eliminate, these entities as sources of hard money for campaigns. Thus, we do not believe that the Commission should establish either a *per se* affiliation standard between a Leadership PAC and a candidate's authorized committee or a rebuttable presumption that such committees are affiliated.

Proposed Alternative A

The consequences of the Commission's Alternative A whereby the presence of any one of a number of factors would *per se* establish affiliation would, in our opinion, eliminate Leadership PACs, going far beyond even what the authors of BCRA anticipated as evidenced by, among other items, their statements on the Floor of the Senate. If the authors had desired to explicitly ban Leadership PACs, they could have done so; such legislation had been considered in the past. Since this was not done, the Commission should not adopt any rule that would have the effect of eliminating these entities.

A prime example of a proposed factor that is completely unrelated to which election the activity is furthering is the proposed factor whereby the candidate or officeholder or his or her agent approves funds to be contributed to other candidates. If the fundamental purpose of a Leadership PAC is to influence the elections of candidates other than the candidate or officeholder involved, then the most obvious way to do so is by making direct contributions thereto. These expenditures are in no way used to further any other election but the recipients and serve the additional goal of providing another source of hard money to these candidates. The fact that another candidate or officeholder approves these expenditures does not change the fact that a contribution made by a Leadership PAC to a candidate is for the purpose of influencing the recipient's campaign not that of an authorizing officeholder.

As an additional example of activity that is not indicative of which election the activity is furthering is the factor whereby the candidate or officeholder appears on the letterhead. A letter raising funds for the PAC whereby such funds are used to make

¹ In fact, if the purpose of a Leadership PAC is to support other candidates, then travel to the officeholder's own district is, by definition, contrary to the stated purpose.

contributions to other candidates is activity that should be fostered not prohibited. A letter of endorsement by the PAC and signed by its "Honorary Chair" can be of great assistance to other candidates in their own elections. To simply ban such activity is not only chilling, it would have a real and practical effect on other campaigns that are trying to motivate their own supporters. A letter from a well-known officeholder will assist in this effort.

We should be encouraging candidates and officeholders to campaign for one another. This is an important source of hard money federal contributions, as well as, a critical aspect of party building. The Commission's current rules are more than adequate to safeguard against abuse. If an individual who is a candidate expressly advocated his or her own election or raises funds for own campaign, then travel costs must be paid by his or her campaign. This presents abuse of travel by Leadership PACs.

However, the most disturbing factor is probably the one whereby the candidate or officeholder exceeds \$10,000 in travel per calendar year. A laudable goal of Leadership PACs is to encourage grass roots campaigning. The limitation proposed hardly permits more than a handful of trips and simply does not reflect the realities of the current cost of travel. Furthermore, if, based on all of the facts and circumstances, the candidate or officeholder's appearance is truly to campaign for the "host" candidate, the Commission is simply discouraging old-fashioned campaign stops and rallies, and there are no policy goals to be furthered by this chilling proposal.

Thus, we recommend that the Commission reject Alternative A of the NPRM.

Proposed Alternative B

Similarly, the Commission's Alternative B is simply a more burdensome version of Alternative A whereby any one of a number of factors or any three of a different set of factors would *per se* establish affiliation. It suffers from the same defects as Alternative A in that it would result in the elimination of most, if not all, Leadership PACs.

Examples of factors which would have adverse affects are those whereby the candidate or officeholder signs letters or correspondence on behalf of the Leadership PAC, whereby the candidate or officeholder may approve or either solicitations or contributions, whereby the Leadership PAC engages in the sale or exchange of lists, whereby the Leadership PAC pays for the candidate's or officeholder's travel except to his or her home state or district, and whereby the Leadership PAC shares a common vendor with the candidate's authorized committee.

All of these factors miss the underlying point: if the purpose of the Leadership PAC is to assist in the election of persons other than the candidate or officeholder involved in the entity and the activities undertaken actually further such a purpose, than there is no reason to prevent the candidate or officeholder from engaging in the activities through the PAC. All of these factors also seem to indicate that the Commission already presumes that Leadership PACs are operating as authorized committees rather than as

multicandidate committees. We urge the Commission to reverse this presumption. Simply because some would argue that there is a political benefit to helping other members of one's own political party, does not, in and of itself, mean that the activity meets the test of "for the purpose of influencing" one's own election.

Thus, for example, for the candidate or officeholder to sign correspondence on behalf of the Leadership PAC is a legitimate political activity separate and apart from his or her own authorized activities. The content of such correspondence could cover any number of topics that are not for the purpose of influencing one's own election, including fundraising for the PAC, fundraising for another candidate, endorsing another candidate, seeking or motivating supporters or volunteers for another candidate, or providing policy or issue assistance to another candidate. The NPRM would make all of this campaign activity by the signer of the correspondence, even in the face of clear and convincing language that it is related to the campaign of the recipient or subject of the correspondence. Such an approach simply does not reflect the reality of today's campaigns.

Similarly nonsensical is the idea that a Leadership PAC should only pay for travel to a candidate's or officeholder's home state or district. If the purpose of the PAC is to assist in other elections, it should be the travel outside the home state or district that is permitted. If Senator X from Maryland has a Leadership PAC that pays for him/her to travel to San Francisco, Portland, Cleveland, and Chicago to campaign for other candidates, the Commission's NPRM would affiliate the PAC with Senator X's own campaign – even though he or she was not campaigning in his/her home state or for himself/herself. The fact is that travel outside the home state or district is, on its face, less likely to appear tied to that candidate's or officeholder's own election – but the only analysis where this can be appropriately determined is a case-by-case one.

Thus, we recommend that the Commission reject Alternative B of the NPRM.

Proposed Alternative C

While we applaud the goals of Alternative C as stated in the NPRM, that is, to retain the current treatment of Leadership PACs unless they engage in activities for the purpose of influencing the election of the candidates or officeholders involved, we believe that proposed conditions are cumbersome and burdensome and do not significantly improve the Commission's current regulatory framework. Again, the NPRM presumes that these committees are not established to help other candidates. We suggest that Leadership PACs that contribute to other candidates, provide appearances through officeholder/candidate travel on behalf of other candidates, or provide political or policy support for other candidate be presumed unaffiliated, unless they engage in activities for the purpose of influencing the election of the individual whose Leadership PAC it is.

Furthermore, Alternative C is vague and raises more questions than it settles. For example, the term "direct purpose" is used but not defined. Does this term include hiring

staff to schedule travel and appearances on behalf of other candidates; does it include hiring staff to write letters of endorsement or to develop a website on the upcoming elections and the candidates that have been endorsed; does it include the training of individuals who would then go to work for other candidates?

Rather than to take the approach of placing this unnecessary burden on the regulated community, the Commission could amend 11 c.f.r. § 100.5(g) to expand the current language. We suggest that the Commission could state that it would examine the relationship between an unauthorized committee that is established, controlled or maintained by a candidate or officeholder with his or her authorized committees, as well the disbursements made by such an unauthorized committee, to determine if the activities were for the purpose of influencing his or her own election. The Commission could reasonably take the approach that Leadership PACs which provide support to other candidates would be deemed to be not affiliated, as long as they did not engage in activities for the purpose of influencing the election of the individual associated with the PAC.

Conclusion

We thank the Commission for the opportunity to provide these comments and respectfully urge the Commission – if it chooses to adopt any changes to its regulations at all – to make such revisions that are consistent with these comments.

Sincerely,



Lyn Utrecht
Eric Kleinfeld
Jim Lamb
Pat Fiori