May 23, 2003

VIA E-MAIL

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

Re: Notice 2003-8: Public Financing of Presidential Candidates and Nominating Conventions

Dear Ms. Dinh:

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 Public Financing of Presidential Candidates and Nominating Conventions, published at 68 *Fed. Reg.* 18484 (April 15, 2003).

If the Commission decides to hold a hearing, Paul Sanford, Director of FEC Watch, requests an opportunity to testify.

Respectfully submitted,

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
Director
FEC Watch

Attachment

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BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2003-8

PUBLIC FINANCING OF PRESIDENTIAL CANDIDATES AND NOMINATING CONVENTIONS

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) entitled Public Financing of Presidential Candidates and Nominating Conventions. 68 *Fed. Reg.* 18484 (Apr. 15, 2003). 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. Convention and Host Committee Issues

The Center for Responsive Politics has submitted a Petition for Rulemaking urging the FEC to revise its rules governing host committees. We continue to urge the Commission to revise its rules for the reasons stated in the Petition. We have additional comments on the convention and host committee issues raised in the NPRM.

1. Impact of *McConnell v. FEC*

The Commission's *Federal Register* notice extending the comment deadline invites comments on the impact of *McConnell v. FEC,* Civ. No. 02-582 (CKK, KLH, RJL)(Order of May 2, 2003), in which the U.S. District Court declared some portions of the Bipartisan Campaign Reform Act of 2002[1] unconstitutional.

This decision has since been stayed by the District Court. *Id.* (Order of May 19, 2003). It has also been appealed to the United States Supreme Court, which will make the final determination as to whether BCRA is constitutional. Consequently, we believe the best course of action is for the Commission to assume, as it did during its 2002 BCRA rulemakings, that the statute will be upheld as constitutional, and issue rules that assume BCRA remains in effect and must be enforced. Promulgating rules on this basis will provide the regulated community the guidance it will need to comply with the law should the Supreme Court uphold the statute's validity. Should the Court invalidate portions of the

[1] Pub. L. No. 107-155 (2002) (BCRA).

statute, the Commission will be able to repeal the regulations implementing those portions of the statute in a relatively short time.

Additional comments on the impact of *McConnell v. FEC* on specific issues raised in the notice are set forth below.

2. Status of Host Committees and Municipal Funds under BCRA

a. Agency

The NPRM seeks comments on whether host committees and municipal funds are agents of the national party committees. Although host committees and municipal funds are generally created by the municipalities they represent, they are agents of the party committee within the definition in 11 CFR 300.2(b) when they solicit or receive funds for convention expenses.

Under section 300.2(b)(1)(i), host committees and municipal funds are agents of the national party committee if they have actual authority, either expressed or implied, to solicit, direct, or receive any contribution, donation or transfer of funds on behalf of the party committee. Section 300.2(b)(1)(i). The party's selection of a city as the convention site has the effect of authorizing that city's host committee[2] to raise money for the expenses listed in section 9008.52(c). This list includes some expenses that are also convention expenses under section 9008.7(a)(4).[3]

When a host committee raises money for convention expenses, the committee is, in effect, raising money on behalf of the party, because the convention is inherently a party activity, and the convention expenses paid by the host committee reduce the cost of the convention to the party. In addition, as illustrated in the news articles submitted with our Petition for Rulemaking, the host committee's fundraising enables the parties to conduct more elaborate conventions than they would be able to if they were required to rely solely on public funding. Consequently, host committees are agents of the party committee under section 300.2(b)(1)(i) when they raise money for convention expenses.

The regulations also treat host committees and municipal funds as agents of the national party committee if they have actual authority, either expressed or implied, to solicit funds for a tax-exempt section 501(c) organization, where the solicitation is made on behalf of a national party committee. 11 CFR 300.2(b)(1)(ii). Host committees are nonprofit entities that are, in many instances, section 501(c) tax-exempt organizations. *See* 11 CFR 9008.52(a). When such a host committee raises money for itself, it is raising money for a 501(c) organization. As explained above, host committee fundraising for convention

[2] For the purposes of this comment, references to host committees are meant to include municipal funds unless otherwise specified.

[3] These include: (1) the costs of providing the use of an auditorium or convention center for the convention, and the costs of construction and convention-related services for that venue, sections 9008.52(c)(1)(v) and 9008.7(a)(4)(i); (2) the costs of local transportation services, including the provision of buses and automobiles, sections 9008.52(c)(1)(vi) and 9008.7(a)(4)(vii); and (3) the costs of law enforcement services necessary to assure orderly conventions, section 9008.52(c)(1)(vii) and 9008.7(a)(4)(vi).

expenses is, in effect, fundraising on behalf of the party committee, because the convention is an essential party function and the host committee's fundraising reduces the party's out-of-pocket costs. Consequently, host committees would also be agents of the party under section 300.2(b)(1)(ii).

For these reasons, the host committee should be considered an agent of the national party committee when it solicits and receives funds for convention expenses, as defined in 11 CFR 9008.7(a)(4). As an agent of the party committee, the host committee would not be a separate political committee from the party committee. Instead, its efforts to raise and spend money for convention expenses would be deemed actions of the party committee, and any amounts raised or spent for this purpose would be subject to the prohibitions and limitations of the FECA and BCRA. Amounts raised by the host committee for convention expenses would count toward the expenditure limitations in 11 CFR 9008.8, and would result in an equivalent adjustment in the amount of public funds to which the convention committee would be entitled under 11 CFR 9008.4. *See* 11 CFR 9008.5(b).

These effects flow from the conclusion that host committees are agents of the national party committee when they raise funds for convention expenses. Although this conclusion is not explicitly mandated by BCRA, it is required by the definition of agency promulgated by the Commission to implement BCRA.

While this would be a change from the Commission's current policy, it would not completely incapacitate a host committee that is not otherwise affiliated with the party. The committee could continue to raise federal funds for convention expenses, and could also raise both federal and nonfederal funds for the purpose of promoting the host city and its commerce. The Commission could preserve a substantial area in which host committees could operate by revising the rules to more clearly distinguish between the expenses for which federal and nonfederal funds may be used. The list of expenses for which nonfederal funds could be used in section 9008.52(c) should be revised to eliminate expenses that are also convention expenses under section 9008.7(a)(4). Host committees should be required to pay for convention expenses from an account containing only federal funds. With these changes, the Commission would ensure that host committee activities are consistent with the FECA and BCRA, while at the same time allowing host committees to continue raising nonfederal funds to promote the image of the host city.

b. Affiliation

The NPRM seeks comment on whether host committees are directly or indirectly established, financed, maintained or controlled by the national party committees. The Commission's rules list ten factors to be considered in determining whether an entity is directly or indirectly established, financed, maintained or controlled by another entity. 11 CFR 300.2(c). Although host committees are generally established by municipalities seeking to attract a convention to their city, two of the ten affiliation factors exist with nearly all host committees, and other factors may exist in some circumstances.

Under 300.2(c)(2)(vii), one factor is whether the national party committee, directly, or through its agent, causes or arranges for funds to be provided to the host committee in a significant amount or on an ongoing basis. The parties do this in two ways. First, the party's selection of the city as the convention site creates an immediate windfall for the host committee that typically lasts through the convention. Furthermore, after selecting the city,

the party often solicits donations to the host committee to pay for convention expenses. This enables the host committee to raise more money, thereby allowing it to subsidize a larger portion of the convention costs.

Under 300.2(c)(2)(x), another factor is whether the national party committee and the host committee have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the two entities. In many instances, the party committees urge their donors to make additional donations to the host committee. As a result, the two entities often have common donors. Furthermore, since the host committee pays some convention expenses, the two entities will often have similar patterns of disbursements.

In addition to these two factors, other factors may also be present. Representatives of the party committee may be members of the host committee's governing body, or the party may have some type of influence over the host committee's hiring decisions. 11 CFR 300.2(c)(2)(ii) and (iii). In some instances, the two entities may have common officers, or the party committee may employ former officers of the host committee. 11 CFR 300.2(c)(2)(v) and (vi).

In short, this is a fact-based inquiry the outcome of which depends on the circumstances surrounding a particular convention. The Commission's rules should not presume the two entities are not affiliated. Instead, the rules should acknowledge that the affiliation factors in 11 CFR 300.2(c) apply to host committees, and that the two entities will be deemed to be affiliated if enough of the factors are present.

If the host committee is affiliated with the party committee, the donations it receives are subject to the same prohibitions that apply to the party committee. In addition, the two entities share a single contribution limit. Section 441i of BCRA prohibits party committees from soliciting, receiving, directing, transferring or spending nonfederal funds. If applied as enacted, section 441i would preclude the host committee from raising any nonfederal funds, even if those funds were to be used solely for purposes other than to pay convention expenses.

If section 441i were applied as narrowed by the district court in *McConnell v. FEC* prior to issuance of the stay, the end result would be similar to the result for host committees that are agents of the party committee, as discussed above. The court held that Congress may prohibit national party committees from raising nonfederal funds for public communications that promote, support, attack or oppose a federal candidate, but may not prohibit party committees from raising nonfederal funds for other purposes. Because conventions are, by definition, federal elections, host committees may be prohibited from raising nonfederal funds for convention expenses under *McConnell*. However, they may not be prohibited from raising nonfederal funds for other purposes. *Id.* This would allow the host committees to raise nonfederal funds to promote the image of the host city, and to promote commerce in the host city.

3. Corporate and labor organization donations for convention expenses

The current rules allow corporations and labor organizations to donate funds to host committees for use in defraying convention expenses. As explained in the Petition for Rulemaking, these rules are contrary to law in two ways. First, they allow corporations and labor organizations to make donations in connection with a federal election, in violation of

2 U.S.C. § 441b. Second, they allow national party committees to receive in-kind donations paid for with corporate and labor organization funds, in violation of 2 U.S.C. § 441i.

a. Corporate/labor organization donations under 2 U.S.C. § 441b

Section 441b of the FECA prohibits corporations and labor organizations from making donations of funds, goods or services in connection with a federal election. 2 U.S.C. § 441b. Section 431(1)(B) includes conventions within the definition of "election."

In contrast, the Commission's regulations allow corporations and labor organizations to make donations to host committees for convention expenses. The NPRM explains that these donations have historically been considered "commercially motivated," and therefore not subject to the prohibition in section 441b. The NPRM reviews the history of this rule, and concludes that the Petition for Rulemaking contradicts this history

The Petition contradicts the Commission's historic treatment for two reasons. First, the Commission's original conclusion that donations for convention expenses are commercially motivated was contrary to law. Second, even if the Commission's original conclusion was justified *ab initio*, the rules allowing donations for convention expenses have been revised substantially since they were first promulgated. As a result, the Commission's reliance on its original justification is no longer warranted.

i. Origin of the rules allowing nonfederal donations to host committees

A thorough review of the history of the Commission's rules allowing corporate and labor organization donations to host committees for convention expenses is needed in order to fully understand why these rules are contrary to law.

The rules can be traced to the 1977 rulemaking implementing the 1976 amendments to the FECA. Section 121.7 of the 1977 rules allowed local private businesses and labor organizations to "donate or offer at a reduced rate to the host committee office space, supplies, furniture, transportation, and the like for use by the host committee for administrative purposes." 11 CFR 121.7 (1977). The E & J explained that

> [t]his section permits local private businesses and labor organizations to contribute office space, typewriters, and the like to the host committee for its administrative use. Such in-kind contributions are presumably not politically motivated but are undertaken chiefly to promote economic activity and good will of the host city.

Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, H.R. Doc. No. 95–44, 136 (1977) (FEC E & J Compilation at 83) (hereinafter referred to as the 1977 E & J). Thus, section 121.7 established a limited exception for in-kind donations of office equipment to the host committee for its own administrative use. The E & J for section 121.7 appears to be the origin of the "commercially motivated" rationale for exempting corporate and labor organization donations to host committees from the section 441b prohibition.

The exception for in-kind donations was extended to donations of funds in section 121.8. Section 121.8 said "local businesses (whether incorporated or not) and labor

organizations may donate funds to a citizen's host committee." 11 CFR 121.8 (1977). The E & J explained that these funds were to be used to promote a good image of the host city to convention attendees. 1977 E & J at 136-37. The rationale for the exception was the same as the rationale for section 121.7.

> This section permits local businesses and labor organizations to make donations of money to the host committee to be used for purposes designed to promote a good image of the host city to the convention attendees. . . . As provided in the explanation for § 121.7, these donations are presumably commercially motivated rather than politically, and thus will not be considered an unlawful contribution.

Id.

Section 121.9 listed the types of expenses that could be paid by the host committee. Paragraph (a) listed the following expenses:

> (a) Funds donated to the host committee may be used –
> (1) To defray those expenses incurred for the purpose of promoting the suitability of the city as a convention site;
> (2) To defray those expenses incurred for welcoming the convention attendees to the city, such as expenses for information booths, receptions and tours;
> (3) To defray those expenses incurred in facilitating commerce, such as providing the convention and attendees with shopping and entertainment guides and distributing the discount coupons and samples specified in § 121.6; and
> (4) To defray the administrative expenses incurred by the host committee, such as salaries, rent, travel and liability insurance.

11 CFR 121.9(a) (1977). The E & J explained that section 121.9(a) "allow[ed] the host committee to use the contributed funds to defray expenditures made for the purpose of promoting a good image of the city to the convention attendees." 1977 E & J at 137.

Paragraph (b) of section 121.9 expanded the list of expenses for which corporate and labor organization donations could be used to include convention expenses, but only under certain circumstances.[4]

> (b) If the host committee has received funds from an incorporated local retail business in an amount proportionate to the commercial return reasonably expected by that business during the life of the convention, and if the committee maintains such funds in a separate account (along with funds donated by unincorporated businesses if any), the funds may be used to pay for what would otherwise be a convention expense by the national committee, such as the renting or refurbishing of the convention hall or the rental of seats, lights, and

[4] The sad fate of the conditions originally placed on donations for convention expenses will be discussed in detail below.

> like equipment. No other corporate funds may be used to pay such expenses.

11 CFR 121.9(b) (1977).

It is apparent from the language of section 121.9(b) that the Commission knew it was creating an significant exception from section 441b by allowing corporate and labor organization funds to be used for expenses that would otherwise be covered convention expenses of the national party committee. In order to limit the exception to situations where donations made by these entities were commercially motivated, the Commission imposed three conditions: (1) only funds donated by incorporated local retail businesses could be used; (2) only donations that were proportionate to the donor's expected commercial return could be used; and (3) funds donated for convention expenses were to be kept in a separate account.

ii. Validity of the exception for donations for convention expenses

Section 9008.52(c) is contrary to law for two reasons.

First, allowing donations of nonfederal funds for convention expenses is an unjustified expansion of the exception for donations to promote the image of the host city and its commerce. Donations to promote the image and commerce of the host city can reasonably be considered "commercially motivated" because donations for this purpose can be expected to generate some commercial return. Amounts spent by the host committee for this purpose presumably encourage convention attendees to patronize local businesses, and also increase the city's ability to attract other conventions, thereby further enhancing business opportunities in the host city.

In contrast, donations to defray convention expenses, as defined in 11 CFR 9008.7(a)(4), primarily benefit the party committee by defraying a portion of the convention costs. The convention is inherently a party function. It is also a federal election under 2 U.S.C. § 431(1). By paying part of the convention costs, the host committee reduces the parties' expenses and allows the parties to sponsor more elaborate events. While this may result in increased commerce in the host city, the primary beneficiary is the party committee. There is no basis for treating these donations as though they are commercially motivated.

Second, even if the Commission was justified in concluding that some donations for convention expenses are commercially motivated, this conclusion is no longer valid. When it was first promulgated, the exception in section 121.9(b) applied only when three conditions were met. These conditions served as safeguards to ensure that donations made to a host committee for convention expenses were commercially motivated. These safeguards have since been eliminated. As a result, the Commission's continuing assumption that donations for convention expenses are commercially motivated is no longer justified, and the exception itself is now contrary to law.

As explained above, section 121.9(b) only allowed nonfederal funds to be used for convention expenses when (1) the funds were donated by an incorporated local retail business; (2) the amount donated was proportionate to the donor's expected commercial return; and (3) the funds used for convention expenses were kept in a separate account. The E & J provided the following explanation:

> Subsection (b) further expands the scope of host committee activity to allow the committee, if it so chooses, to use its funds to defray convention expenses of the national party committee, **provided that** the source of the funds was local retail businesses (whether incorporated or not) and **provided further that** the amount contributed was proportionate to a reasonably expected commercial return. Funds used in this fashion shall be made from a separate account maintained by the host committee.

1977 E & J at 137 (emphasis added).

The Commission emphasized the importance of these conditions when it recodified the host committee regulations in 1979. In distinguishing donations to host committees for convention expenses from donations to promote the host city and its commerce, the Commission said

> [a] wide variety of persons including individuals, local businesses, local government agencies, and union locals are permitted to donate funds to the host committee for use in promoting the city and its commerce. No limitations are placed on the size of such donations. **Far greater restrictions are . . . placed on funds received and expended to defray convention expenses.**

44 *Fed. Reg.* at 63037 (emphasis added). The Commission went on to say that

> [t]he restrictions concerning who may donate funds to defray convention expenses and the amounts which may be donated **are necessary to insure that such donations are commercially, rather than politically motivated**. . . . While incorporated businesses are prohibited by 2 U.S.C. § 441b from making contributions or expenditures in connection with a federal election, donations by [incorporated businesses] to a host committee in accordance with restrictions set forth in [11 CFR 9008.7(d)(3) (1979)[5]] are sufficiently akin to commercial transactions to fall outside the scope of that prohibition.

Id. at 63038 (emphasis added). The Commission also said "[d]efrayal of convention expenses by a host committee is intended to be a very narrow exception to the statutory limit on convention expenses." *Id.*

Notwithstanding its own statements about the importance of these restrictions, the Commission has eliminated all three of them. The Commission expanded the definition of "local" to include any corporation or labor organization with offices or facilities located in the metropolitan area of the convention. 11 CFR 9008.52(c)(2). "Local" also includes corporations and labor organizations with no local office or facility if they can show that their activities would be "directly affected" by the presence of the convention. *Id.* As a result, the locality requirement now means virtually nothing. Very few corporations and labor organizations with the resources to make large donations to a host committee are precluded from doing so.

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[5] The 1979 regulations recodified section 121.9(b) in section 9008.7(d)(3). In 1994, the remaining provisions of section 9008.7(d) were moved to section 9008.52.

In addition, the rules no longer require the amount of a corporation or labor organization's donation to be proportionate to the commercial return reasonably expected during the life of the convention. The Commission eliminated this requirement during the 1994 rulemaking. 59 *Fed. Reg.* 33606, 33615 (June 29, 1994) (FEC E & J Compilation at 421) ("1994 E & J"). The 1994 E & J offers no specific explanation for the elimination of this requirement for donations to host committees. Regarding municipal funds, the 1994 E & J says the current rules "recognize that local businesses and organizations that donate to municipal funds are motivated by commercial and civic reasons, rather than election-influencing purposes." *Id.* In other words, the rules now presume that all donations, of any amount, are commercially motivated, even if the amount exceeds the most wildly optimistic expectations of commercial return from the convention.

Finally, the rules no longer require host committees to segregate donations received and used for convention expenses in a separate account. This requirement was eliminated in the 1994 rulemaking, without explanation or justification.

Without these limitations, there is no basis for assuming that donations to host committees for convention expenses are commercially motivated. Without a meaningful locality limitation, there is no reason to assume that the donation is tied to increased commercial activity in the host city.[6] Similarly, without an amount limitation, it cannot be assumed that the size of a donation reflects the amount of commercial activity the donor expects the convention to generate. Without the segregation requirement, there is no way to ensure that amounts donated to promote the image of the host city and its commerce are not being used for convention expenses, and vice versa.

Without any linkage to expected return from commercial activity in the host city, the Commission must treat donations for convention expenses the same as any other donation in connection with a federal election. Section 441b prohibits these donations, even when they are commercially motivated. Many corporations and labor organizations would consider a contribution to a federal candidate to be a good way to further their economic interests. For example, a local union or incorporated contractor might want to contribute to its local representative in the hope that it would bring federal spending to the district, thereby creating new jobs and new business opportunities. Contributions made in these circumstances are undoubtedly commercially motivated.[7] Nevertheless, they are prohibited by section 441b.

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[6] It has been suggested that all remaining traces of the locality requirement should be eliminated so that small and mid-sized cities would have a better chance of attracting a convention. This amounts to saying that the Commission's partial exemption from section 441b disadvantages some entities, so it should be changed to a total exemption from section 441b. While helping small and mid-sided cities attract a convention may be a worthy goal, the Commission cannot ignore an express statutory prohibition in order to achieve it. Furthermore, given the expansiveness of the current definition of "local," it is difficult to discern who is excluded by the existing rule. Any corporation or labor organization with offices or facilities in the host city is local with the current definition. This includes any corporation with a branch office, a franchise or even a licensed dealer within the metropolitan area of the host city. Under this rule, Mountain Surf, a maker of paddle sports apparel located in Friendsville, Maryland, would be a local business for a party convention held in Anchorage, Alaska, and a donation from Mountain Surf to the Anchorage host committee would be assumed to be commercially motivated. *See* <http://www.mountainsurf.com/>.

[7] Indeed, the corporation's shareholders or the union's members might be entitled to object to the contributions if they were made for any other reason.

The Petition for Rulemaking offers ample evidence of the consequences of eliminating the safeguards originally included in section 121.9(b). It cites reports that, by mid-December 2002, at least ten corporations had pledged $1 million or more to the host committee for the Democratic National Committee's convention in Boston.[8] These reports also indicate that eight corporations had pledged $500,000 or more,[9] and numerous others had pledged $100,000 or more.[10] S. Ebbert, "Many Convention Donors Have Interests Before City," *The Boston Globe* (December 11, 2002) (Petition Exhibit B). Many of these donors are large national or international corporations that are local to the Boston area only in the sense that they exist everywhere. Thus, their generosity cannot be presumed to reflect any expectation of increased business from convention attendees who spend money in the Boston area. Furthermore, it is unlikely that the size of these donations bears any relationship to the amount of commercial activity generated by the convention and convention attendees, or the amount of revenue that will be realized by businesses in the Boston area as a result of the convention.[11]

The Commission may be justified in treating some corporate and labor organization donations made in relation to a convention as exempt from the section 441b prohibition. If so, the rules should reflect the rationale for this exemption by limiting its application to the specific donations for which the exemption is justified. The current rules do not reflect the

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[8] These were John Hancock Financial Services, $2,000,000, FleetBoston Financial, $1,250,000, Blue Cross Blue Shield of Mass., $1,000,000, Boston Foundation, $1,000,000, Citizens Bank, $1,000,000, Fidelity Investments, $1,000,000, Gillette Company, $1,000,000, Liberty Mutual Group, $1,000,000, Raytheon Company, $1,000,000,

[9] New Balance Athletic Shoe, Inc., $750,000, Boston Scientific Corporation, $500,000, AmGen, Inc., $500,000, Glaxo, $500,000, International Data Group, $500,000, Merck, $500,000, Novartis, $500,000, Sovereign Bank New England, $500,000.

[10] Beacon Capital Partners, $250,000, Bristol Myers, $250,000, Coca-Cola, $250,000, Corcoran Jennison Companies, $250,000, Dunkin' Donuts, $250,000, Genzyme Corporation, $250,000, Linnar Development, $250,000, Staples, Inc., $250,000, Boston Capital Corporation, $150,000, Boston Properties, $150,000, EMC Corporation, $150,000, Reebok International LTD, $150,000, Arnold Worldwide Partners, $100,000, Boston Red Sox Baseball Club, $100,000, Carpenter & Company, Inc., $100,000, Druker Company, $100,000, Equity Office Properties Trust, $100,000, Ernst & Young, $100,000, Foley Hoag LLP, $100,000, Global Petroleum Corporation, $100,000, Goodwin Procter, $100,000, Hill, Holliday, Connors, Cosmopulos, Inc., $100,000, Hilton Hotels Corporation, $100,000, Marriot, $100,000, Millennium Properties, $100,000, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, Inc., $100,000, Serono, Inc., $100,000, Spaulding & Slye Colliers International, $100,000, Steven B. Belkin, $100,000, Starwood Hotels, $100,000.

[11] Some of these corporations may receive promotional consideration at the convention that will generate commercial return. However, the Commission has generally treated the sale of an asset by an ongoing political committee as a form of fundraising for political purposes, with the resulting receipts being contributions subject to the FECA. *See* 11 CFR 100.52(d), Advisory Opinions 1992-40, 1991-34, 1990-26, 1990-3, 1981-12, and 1982-2. The sale of promotional opportunities at the convention should be subject to this rule. Even where the Commission has allowed sales of assets to incorporated entities, it has imposed strict conditions: (1) The asset must have "an ascertainable fair market value;" (2) The sale must be "at the usual and normal charge in a bona fide, arm's length transaction, and the [asset] must be used in a commercially reasonable manner consistent with such an arms-length agreement;" and (3) The asset must be used within a reasonable period of time, in the ordinary course of the purchaser's business, and in a manner consistent with the fair market price paid. Advisory Opinion 2002-14. The regulations allowing donations to host committees for convention committees do not contain any of these safeguards.

"commercially motivated" rationale. Instead, they effectively exempt all corporate and labor organization donations to host committees for convention expenses. For this reason, the rules are contrary to section 441b.

d. Host committee disbursements for convention expenses

The NPRM says that the Commission historically viewed convention expenses as exempt from section 441b because "they lacked an election-influencing purpose." It notes the definitions of "contribution" and "expenditure" are limited to disbursements for the purpose of influencing an election for federal office, and asks whether the Commission should conclude that expenses that are not contributions and expenditures are also not "in connection with an election for Federal office." 68 *Fed. Reg.* at 18504. Later, the NPRM compares convention expenses to election administration expenses incurred by political parties in states where the parties are required to pay the costs of conducting the primary election. The notice cites Advisory Opinion 1991-33, in which the Commission concluded that certain election administration expenses were not covered by the pre-BCRA allocation rules. *See* 11 CFR 106.5. The notice then invites comments on the question of whether convention expenses are regulated by the FECA at all.

A careful review of Advisory Opinion 1991-33 frames our response to these questions. The opinion establishes a much narrower precedent than the NPRM suggests. In that opinion, the Commission concluded that in situations where a political party acts as an agent of a state government in performing "the ministerial function of administering the primaries, *i.e.*, providing for the mechanics of filing for candidacy, ensuring that there is adequate information as to filing, and providing the necessary equipment and personnel for voting," these activities were not allocable activities within the meaning of pre-BCRA 11 CFR 106.5(a)(2), and therefore need not be allocated. The expenses covered by the opinion were described as follows:

> These expenses entail making the arrangements for county-designated polling places and for the use, as polling places, of other public or private buildings; the procurement and distribution of necessary election supplies such as ballots, ballot boxes, and voting machines; education and payment of election clerks and judges; arrangements for data tabulation personnel and equipment; payment of personnel responsible for primary administration; and allocable costs for office space, office equipment, utilities, and furniture.

Advisory Opinion 1991-33.

Advisory Opinion 1991-33 does not provide a basis for exempting convention expenses from section 441b. The parties are not acting as the agent of any government when they conduct their nominating conventions. They are fulfilling a party function. As such, the costs of the convention cannot be equated with the administrative costs of conducting a primary election. Although a host committee or municipal fund may be an agent of the city government, it is not conducting a municipal election when it pays convention expenses for the party. Instead, it is subsidizing the party's own activities. Thus, the reasoning of AO 1991-33 does not apply.

The conventions differ from party-administered primary elections in another significant way. The conventions are much more than just "ministerial" events held for the

purpose of collecting and counting the votes of delegates. They are elaborately-staged and highly-produced showcases of the nominee and the political party that are targeted not just to the delegates sitting inside the convention hall, but to the general public watching on television. They seek to generate excitement about the candidate and the party, and give them a powerful bounce with the public at the start of the general election campaign. Thus, while the conventions may include the ministerial tasks of collecting and counting delegate votes, they also include many other activities that seek to promote the nominee in the general election, and therefore have an election-influencing purpose.

Treating all host committee disbursements as unrelated to a federal election would ignore the obvious nexus between these disbursements and the convention itself, which is an election. It would also ignore the connection between convention expenses and the general election, which some convention expenses seek to influence. For these reasons, the Commission should not put host committee payments for convention expenses entirely outside the scope of the FECA. As will be discussed below, the Commission should seek to draw a clearer line between expenses for promoting the host city and expenses for convention costs.

c. Party committee receipt of corporate/labor organizations under 2 U.S.C. § 441i

Section 441i, added by BCRA, prohibits the national party committees from soliciting, receiving, directing, transferring or spending funds from corporations and labor organizations. However, the Commission's regulations currently allow the party committees to receive in-kind donations from the host committees in the form of host committee payments for convention expenses. The rules also allow host committee to pay for these expenses with donations from corporations and labor organizations. As explained in the Petition for Rulemaking, these regulations are contrary to section 441i.

i. Historic treatment

The Commission has historically allowed party committees to receive in-kind donations from host committees that are paid for with nonfederal funds because, as explained above, it considered these donations commercially motivated rather than politically motivated. The 1979 E & J said

> [w]hile incorporated businesses are prohibited by 2 U.S.C. § 441b from making contributions or expenditures in connection with a federal election, donations by [incorporated businesses] to a host committee in accordance with restrictions set forth in [11 CFR 9009.7(d) (1979)] are sufficiently akin to commercial transactions to fall outside the scope of that prohibition.

44 *Fed. Reg.* 63038 (Nov. 1, 1979). Apparently, the Commission extended this rationale to apply to the party committee's receipt of the in-kind donation, in addition to the corporation or labor organization's act of making the donation. Presumably, the Commission concluded that because the donations were not prohibited contributions made by the corporation or labor organization, they were likewise not prohibited contributions received by the party committee. Alternatively, the Commission may have viewed these as in-kind nonfederal donations, which the national party committees could permissibly receive prior to November 6, 2002 so long as they were segregated in a nonfederal account.

ii. Validity of the exception for receipt of in-kind donations

For the reasons stated above regarding the exception for corporate and labor organization donations for convention expenses, we believe allowing national party committees to receive in-kind donations paid for with funds from these entities is contrary to section 441i. The Commission's conclusion that corporate and labor organization donations to host committees are commercially motivated is not justified when donations are made for the purpose of paying convention expenses. Furthermore, even if it were justified, the Commission has eliminated the safeguards that ensure these donations are, in fact, made for commercial purposes.

Nor was the Commission justified, prior to BCRA, in treating in-kind donations of convention expenses as the equivalent of cash donations of nonfederal funds that could be deposited in a party committee's nonfederal account. Unlike cash donations made to a party committee in the context of general fundraising activities, in-kind donations of convention expenses are inextricably linked to a federal election. There is no way these donations can be used solely for a nonfederal purpose, or for the nonfederal portion of an allocable expense.

In any event, BCRA eliminates the national party committees' nonfederal accounts, and prohibits them from soliciting or receiving anything of value from corporations, labor organizations and other entities. 2 U.S.C. § 441(a). The existing rules allowing party committees to receive the equivalent of in-kind contributions from corporations and labor organizations through the host committees cannot be reconciled with this prohibition.

Even under the district court decision in *McConnell v. FEC*, the Commission is not required to allow party committees to receive in-kind nonfederal donations of convention expenses. Conventions are, by definition, federal elections. Under the reasoning of Judge Leon's opinion, host committees may be prohibited from raising nonfederal funds for convention expenses.

4. Recommendations

For the foregoing reasons, we urge the Commission to revise its rules regarding corporate and labor organization donations to host committees for convention expenses, and the subsequent receipt of these donations by the national party committees. Specifically, we urge the Commission to revise its rules in two ways.

First, we urge the Commission to issue rules that prohibit host committees from using nonfederal funds for convention expenses. To achieve this, the rules should be revised to require host committees that pay for convention expenses to set up a separate account for that purpose, as was originally required under the 1977 regulations. These rules should state that only federal funds may be deposited in the convention expenses account, and should require the host committee to pay for all convention expenses, as defined in current 11 CFR 9008.7(a)(4), from this account. Host committees that wish to continue raising and spending nonfederal funds for other purposes should be required to deposit these funds in another account.

In addition, current section 9008.52(c) should be revised so that it no longer allows host committees to use nonfederal funds for expenses that are also convention expenses

under section 9008.7(a)(4). Specifically, the host committee should be required to use the convention account to pay the costs of providing the use of an auditorium or convention center for the convention, and the costs of construction and convention-related services for that venue. *See* section 9008.52(c)(1)(v). These are convention expenses under section 9008.7(a)(4)(i). Similarly, the costs of local transportation services, including the provision of buses and automobiles, should be paid for with federal funds, section 9008.52(c)(1)(vi), since these are convention expenses under section 9008.7(a)(4)(vii). Finally, nonfederal funds should be used for the costs of law enforcement services necessary to assure orderly conventions, *see* section 9008.52(c)(1)(vii). These are convention expenses under section 9008.7(a)(4)(vi).

Adopting this approach would still allow a host committee to raise and spend nonfederal funds for several types of convention-related expenses. For example, the host committee could use nonfederal funds for the costs of promoting the suitability of the city as a convention site, (section 9008.52(c)(1)(i)), and of providing accommodations and hospitality to members of the site selection committee (section 9008.52(c)(1)(x). In addition, the host committee could use donations from corporations and labor organizations to welcome convention attendees to the host city (section 9008.52(c)(1)(ii)), to encourage attendees to patronize local businesses (section 9008.52(c)(1)(iii)), to provide central housing services (section 9008.52(c)(1)(viii)), and to provide reduced rate hotel rooms. Section 9008.52(c)(1)(ix). As the NPRM notes, these services most directly benefit individual attendees, rather than the party committee, so the rules could allow corporations and labor organizations to donate funds for these expenses.

5. Effect of BCRA on private events

The NPRM seeks comments regarding the impact of BCRA on private events, which it describes as events sponsored by corporations and labor organizations that are held outside the convention venue. Generally, BCRA does not require regulation of these events, nor does it prevent candidates, officeholders and party agents from attending or speaking at these events. However, if such an event is, in reality, a fundraiser for the party or for a particular candidate, the costs of the event should be considered an in-kind contribution to the party or candidate. Furthermore, the exception from the prohibition on federal officeholder statements made at state and local party fundraising events (*see* 2 U.S.C. § 441i(e)(3), 11 CFR 300.64), does not apply to these hospitality events. Thus, federal candidates and officeholders that attend these events may not solicit nonfederal funds.

B. Other comments

1. GELAC

The NPRM seeks comments on proposals to allow GELAC funds to be used for primary repayments and primary winding down costs incurred after the expenditure report period. We believe the GELAC rules are already too permissive, and are no longer faithful

to the limited purpose for which the GELAC was created, so we urge the Commission to reject any further expansion of these rules.[12]

2. Leadership PACs

The NPRM seeks comments on proposals to treat certain expenditures by multicandidate committees as qualified campaign expenses subject to the expenditure limit if they are incurred on behalf of a presidential candidate and are in connection with that candidate's campaign for nomination. We support this proposal as a way to address the impact of leadership PACs in presidential campaigns. However, as we said in our comments and testimony on the Leadership PAC NPRM, this is an incomplete solution, since it does not address the impact of leadership PACs in congressional and senatorial campaigns. We urge the Commission to implement a comprehensive solution in the Leadership PAC rulemaking.

III. Conclusion

FEC Watch and the Center for Responsive Politics hope that these comments are useful to the Commission as it considers issuing new rules regarding publicly financed presidential candidates and nominating conventions. As indicated in our cover memo, if the Commission decides to hold a hearing on the proposed rules, Paul Sanford would like to testify at the hearing.

[12] Our views on the current state of the GELAC should not be read as an endorsement of the original concept. The Center previously urged the Commission to repeal the GELAC rules. *See* Petition For Rulemaking, Notice of Availability, 59 *Fed. Reg.* 14794 (March 30, 1994).