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Commissioners
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Title 26 NPRM

Dear Commissioners:

On behalf of the law firm of Perkins Coie LLP, I am submitting the following comments in response to the Commission's request for comments on its Title 26 Notice of Proposed Rulemaking (NPRM). Our firm has substantial experience representing publicly financed Presidential candidates and is currently representing three Presidential candidates who would be significantly affected by the proposed changes in the Title 26 regulations. Although these comments are made in the name of Perkins Coie, the comments address known concerns of our clients, past and present, regarding the proper administration of the Presidential public financing system. Each of the concerns expressed below reflects true and, in some instances, very serious reservation about the direction taken by the Commission in the NPRM.

As a preliminary matter, I would suggest that in the very uncertain regulatory environment occasioned by the Bipartisan Campaign Reform Act (BCRA) and the court tests of that law, the Commission would be wise not to impose any major new and unnecessary regulatory obligations on candidates. Flexible rather than rigid new rules would better serve everyone as candidates seek to comply with the new legal and regulatory requirements of the BCRA.

The comments are organized and presented in the order in which the subjects are presented in the NPRM. If the Commission decides to hold a hearing on this matter, I would be interested in testifying.

I. Winding Down Costs

A. Restrictions on Winding Down Costs

In the NPRM, the Commission proposes new restrictions on the use of public funds to pay for winding down expenses. As a general matter, the new proposed restrictions are both unnecessary and unjustified. The apparent premise of the draft rules is that publicly funded Presidential campaigns have an incentive to inflate their expenses and to extend their winding down activity. In fact, the opposite is almost always the case.

From a Presidential candidate's perspective, there is seldom any benefit in paying unnecessary expenses and delaying closure on the campaign. It is difficult to identify why a Presidential candidate would continue raising money past his date of ineligibility to pay unnecessary expenses. It would be better from the candidate's perspective to employ his or her fundraising prowess for a political or charitable endeavor

where the benefits are palpable. If a primary candidate had a surplus in his or her campaign account at the conclusion of his campaign, it would make more sense from the candidate's perspective to repay the Treasury the portion of the surplus attributable to the candidate's receipt of public funds. This would provide the candidate with far greater flexibility in expending the remaining surplus.

If it is hard to find a rationale for a primary candidate to inflate his or her winding down costs, the incentive for a publicly funded general election Presidential candidate is even more elusive. Unlike a primary candidate who must budget his available funds over a series of elections, a general election candidate plans for only one election. Every dollar that the general candidate keeps in reserve to pay winding down expenses is a dollar that is unavailable to persuade the electorate to vote for him or her. It simply would make no sense to inflate his or her winding down expenses.

Nor should the Commission in adopting regulations in this area lose sight of the fact that the burden is on the candidate to demonstrate and document that each claimed expense is a qualified campaign expense. Unreasonable or unsubstantiated expenses can result in a repayment order. Fraudulent claims can result in criminal prosecution. The specter of either of these remedies is a substantial deterrent to incurring unreasonable winding-down expenses.

Turning to the specifics of the Commission's proposal, the problems with the Commission's proposed regulations are evident in the proposed percentage cap on the amount of winding-down expenses permitted. For candidates receiving public funds in the general election, the Commission proposes a cap of 2.5% of the expenditure limit or, in the case of candidates receiving partial funding, 2.5% of the candidate's actual

expenses. If the winding down costs exceeded these percentage caps, the Commission would allow those expenses to be paid from the candidate's GELAC account. The purpose of publicly funding general election candidates is to reduce reliance by candidates on private funding. The odd consequence of the Commission's proposal is to create an incentive for candidates to engage in and more heavily rely upon private funds to meet what the Commission would concede are legitimate and often unavoidable campaign expenses.

Further, as the Commission's own experience shows, the general election cap is unnecessary. General election candidates have not been incurring winding down expenses that would exceed the cap. As argued above, general election candidates have every incentive to minimize post-election administrative costs. Money expended to end a campaign is money not available to win a campaign. The situations in which a candidate might desire to exceed these percentage caps are almost always situations that the candidate would prefer to avoid. For example, a candidate might find herself incurring extraordinary legal expenses because of an unwarranted complaint charging that the candidates improperly received substantial in-kind contributions that were not disclosed. Responding to the complaint is not something that the candidate elects to do but is a political and legal necessity. Imposing an arbitrary cap on payment of such expenses is simply unjustified.

The proposed cap on primary candidates should similarly be rejected. The Commission proposes a cap of the lesser of 5% of the primary expenditure limit and 5% of the candidate's actual qualified expenditures. The Commission recites figures demonstrating that many primary candidates greatly exceed this figure. The Commission makes no attempt to explain why this happens. An examination of typical winding-down

expenses offers an explanation. Winding-down costs are more akin to fixed costs of a campaign than to marginal costs. Whereas media costs become an increasingly larger percentage of a campaign's expenditures as money becomes available; expenditures for accounting and legal services, office space and supplies diminish as a percentage of costs. These latter expenses are often provided at a fixed price for the anticipated duration of the service. The cost of the service is not directly dependent upon the purpose for which it is being rendered. For example, a contract for accounting services may require the same monthly fee for closing down the campaign as it does for advising an ongoing campaign. Even if less is charged, the lesser charge is not a function of the total amount of expenditures made by campaign.

This explains why one sees such great variation in the percentage of costs that primary candidates incur as winding-down costs. The unique circumstances of each candidate must be taken into consideration. For example, a candidate who enters a race late, relies on volunteer assistance, and then loses eligibility may find herself in need of professional assistance to reconstruct what the formerly enthusiastic volunteers have left in their wake. The fact that a larger percentage of such a candidate's expenditures would be winding down expenses is unremarkable. If the Commission undertook an historical review of the variation in winding-down costs of primary candidates, one suspects that the Commission would discover that the difference amongst candidates would have less to do with extravagance and more to do with contractual obligations and the unique circumstances confronting each candidate.

In addition to the proposed caps the Commission seeks comment on whether the existence of compliance matters should be considered as a factor in determining winding down costs. It is an unfortunate fact that the compliance process is

often invoked by political participants to achieve political ends. It is also unfortunate that the law's complexity regularly results in disputes between candidates and the Commission over the proper interpretation of the law's provisions. Candidates have no choice but to respond to these legal challenges. Candidates do not elect to incur these expenses. That is why the Commission has treated these expenses as qualified campaign expenses. There is no reason for the Commission now to depart from that sound judgment.

In fact, the Commission should build on that judgment to give candidates even greater flexibility in responding to compliance matters and legal proceedings. By their very nature, such proceedings do nothing to advance a person's candidacy. They are unwanted diversions from the mission of the campaign. Primary candidates should be given the choice of treating these expenses as qualified campaign expenses or as non-qualified expenses that can be paid from a separate account, similar to the GELAC account, maintained for legal defense purposes[1]. This would help to deter frivolous complaints in response to which the campaign must spend precious campaign resources. It would reduce the need to use public resources to pay for attorneys and would free those resources for their best use, that is, communicating with the electorate.

As an alternative to imposing a cap, the Commission proposes a flat prohibition on using public funds for winding down costs. Winding-down costs are an unavoidable expense of a campaign. The purpose of public funding is to decrease

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[1] Legal costs incurred in response to a complaint or other legal proceeding should not be conflated with legal and compliance costs that are incurred as part of the normal course of a campaign. Those costs are predictable and easily budgeted for. The extraordinary costs that are often product of mischievous complaints are not.

candidate's reliance on private contributions. It would defeat this purpose if the Commission changed the rules to require candidates to spend more time raising private contributions to pay for costs that the candidate cannot avoid. Because losing candidates have difficult raising money, limiting the funds available to pay winding down costs would unnecessarily prolong the life of their committees.

As a second alternative, the Commission asks whether it should delineate in the regulation expenses that qualify as winding down costs. As a general matter, such a list could be useful as long as it is not intended to be exhaustive. There is always the possibility of an expense arising that is indisputably a bona fide winding down cost that no one foresaw. To treat it as unqualified expense, because no one had anticipated it, seems unnecessary and arbitrary.

B. Candidates Who Run in the Primary and General Elections

Existing Commission regulations prohibit candidates who receive general election public funding from paying for winding down expenses of a public-funded primary until thirty days after the general election. The purpose of the rule is to prevent primary election receipts from being used to subsidize general election activity. The Commission seeks to extend this rule to candidates who do not receive any general election public funding. The Commission is right to point out that there is no underlying policy justification for the disparate treatment. The danger that primary funds are supporting general election activity is present in both cases.

The problem with the Commission's approach is its incompleteness. If the problem exists, it is equally present in a situation where the candidate only receives

public funds in the general election. The candidate in that situation could also defray some portion of his general election expenses using funds from his primary account. Such candidates are not entitled to more lenient treatment. Whatever approach the Commission chooses to address this concern, it should result in uniform treatment of candidates. No candidate who is still pursuing election should be able to pay primary winding down costs until thirty days past the general election.

The Commission also asks what is the best method for allocating winding down expenses between a primary and general election. The Commission should allow candidates to choose any reasonable method. A reasonable method would require expenses that are indisputably related to one election to be paid for as winding down expenses of that election. For example, costs that only related to matching fund submissions would have to be paid for as primary winding down expenses. On the other hand, costs that are shared, such as legal fees, could be allocated on any reasonable basis reflecting a good-faith estimate of the work involved.

C. Use of GELAC Funds to Pay Winding Down Expenses

The Commission proposes allowing GELAC funds to be used to pay for the primary and general election winding down expenses of candidates who participate in both elections. This proposal interjects a degree of unfairness into the process. Candidates who only participate in the primary election are compelled to return any GELAC funds received, but the candidate who prevails in the primary could use GELAC funds to pay expenses that are identical to those expenses that his erstwhile opponent is prohibited from paying. As discussed more fully in Section III (C) of these comments,

primary candidates ought to be put on the same footing as general election candidates in their use of GELAC funds.

The Commission needs to ask whether the payment of a primary winding down expense by the GELAC fund is a campaign expenditure that counts against the primary's expenditure limit. If it is, the Commission must then come up with a method for allocating winding down expenses between the elections. In doing so, it would explode the fiction that GELAC funds are not being used for primary expenditures. As a result, it would undermine any justification for the requirement that defeated primary candidates disgorge any GELAC contributions that have been received. If GELAC funds are going to be allowed to pay for primary winding down expenses, the option should be available to primary and general election candidates alike.

D. Convention Expenses of Ineligible Candidates

The Commission proposes to incorporate into the regulations the specific advice provided to Senator McCain and former Senator Bradley regarding convention expenses that each anticipated incurring at their respective party's national nominating conventions in 2000. In AO 2000-12, the Commission advised these two publicly funded Presidential candidates that they could treat the two classes of expenses that were described in their request as qualified campaign expenses. Specifically, the Commission concluded that the expenses of certain meetings and receptions held to thank and delegates and supporters could be treated as qualified campaign expenses under 11 CFR 9034.4(a)(5) provided that certain conditions were met. The Commission also permitted the candidates to pay the costs of fundraising events held at the convention if the event was for the purpose of raising funds to pay for any outstanding campaign obligations.

Codifying the interpretation of its regulations found in AO 2000-12 is a good idea. The circumstances that Senator McCain and former Senator Bradley faced in 2000 are not unique. Future candidates will have similar if not precisely the same questions. Adopting a general rule that addresses convention expenses of candidates would be beneficial to all of them. The interpretation that the Commission gave to its regulations in AO 2000-12 is the most natural reading of the regulation. At a minimum any new regulation should expressly treat such expenses as qualified campaign expenses.

The Commission should seriously consider going beyond the proposal and extending the regulation to cover more convention expenses of candidates. In this regard, the Commission asks how would the inclusion of additional convention expenses be reconciled with the statutory limitation that a qualified campaign expense must be made "in connection with [a candidate's] campaign for nomination for election." Reconciling an expansion of the class of allowed expenses with the statutory language is not difficult. The election that the statute is referencing is the convention. It is easy to describe the convention expenses of a candidate who continues to campaign past his or her eligibility date as qualified campaign expenses. In fact, it is more difficult to arrive at a legally sound justification for denying these expenses. The better reading of the law would recognize that reasonable convention expenses are indeed in connection with a candidate's campaign for nomination.

If convention expenses of ineligible candidates are qualified campaign expenses then extending this treatment of convention expenses to candidates who have "suspended" their campaigns or "withdrawn" from the race is not illogical. Candidates publicly "withdraw" from the campaign usually for political and not legal reasons.

Candidates often out of party loyalty withdraw from active campaigning. It allows the focus of the election to be directed to the other party's likely nominee. If for some reason, for example, the frontrunner withdraws for health reasons or stumbles dramatically because of some unexpected revelation, a candidate who had suspended his or her campaign might restart it. There is no compelling policy reason for treating candidates who continue to campaign differently from those who choose to publicly announce that they are not actively seeking the nomination. Both will incur convention expenses and both should be entitled to use the same funds for defraying those expenses. The Commission should not create a disincentive for candidates to exercise their own best political judgment on how to publicly characterize the state of their campaigns.

Like other winding down expenses, the Commission should consider reasonable convention expenses to be a necessary and appropriate component of the campaign. To control such costs the Commission could put a reasonable ceiling on these expenses. These costs are unlike other winding down expenses insofar as the candidate can exercise greater control over them and in some instances, a candidate may have a political purpose unrelated to his or her current campaign to incur the expense. Therefore it would not be unreasonable to choose a figure between $100,000 and $250,000.

II. Primary Expenditure Limitations and Repayments

A. In-Kind Contributions Count Toward the Expenditure Limits

The Commission proposes to clarify its regulations to identify those circumstances under which an in-kind contribution counts against the expenditures of a publicly financed Presidential candidate. Essentially the proposed regulation would

include within the expenditure limits only those in-kind contributions that the candidate has accepted or received under Part 109 of the regulations. This is a common sense extension of the existing rules. Those rules provide that a person may constructively make an excessive in-kind contribution but the intended beneficiary will not violate the law unless the candidate or his or her committee accepts or receives the contribution. The rules are based on a generally accepted legal principle that liability is the consequence of one's own acts and not the act of others. The principle is equally applicable in determining whether the candidate has received an excessive contribution or made an excessive expenditure. Explicitly including this principle in the regulations is sound and appropriate.

B. In-Kind Contributions in the Repayment Ratio

The proposed regulations would revise current regulations to add in-kind contributions to total deposits for the purposes of calculating the repayment amount. This change would operate in practice to reduce the amount that candidates would have to repay to the Treasury. This change examined in a vacuum, although not compelled, is consistent with the statute and the regulations. It needs to be evaluated, however, in the context of Commission's application of its repayment regulations. The Commission needs to publicly state whether it is going to require repayments for expenditures in excess of the ceiling. It is difficult to discern what public good is served by tinkering with the repayment calculation if the Commission leaves unresolved generally the issue of repayments.

In the general election context, the Commission's application of its repayment rules is sufficiently well understood to require no change. Unless the receipt

of an in-kind contribution resulted in the candidate exceeding the expenditure limitation, there would be no basis for a repayment.

III. GELAC Funds

A. Funds Remaining in the GELAC

The Commission proposes revising its regulations to prevent GELAC funds from being disbursed for non-GELAC purposes until the completion of the audit and repayment process. To the extent that the rule prevents candidates from satisfying any repayment obligation it is a sound change.

B. Primary Repayments

The Commission seeks comments on a proposed revision to its regulations that would require GELAC funds to be used to make primary repayments before any surplus GELAC funds could be expended for any of the purposes identified in 2 U.S.C. 439a. Provided that the proposal is not extended to prevent other permissible uses of GELAC the proposed requirement is justified.

C. Solicitation of GELAC Funds

Current regulations prevent Presidential candidates from soliciting GELAC contributions prior to June 1 of the calendar year in which a Presidential election is held. The Commission seeks comments as to whether establishing an earlier starting point is justified. Moving the date to May 1 or earlier from June 1 would provide candidates with

greater flexibility in managing their schedules. Providing an additional time to raise GELAC funds introduces little opportunity for abuse. Since these GELAC funds have to be separately deposited and accounted for, it is highly unlikely those funds raised and received in April or May could be successfully diverted to the benefit of the primary campaign. This minor danger pales in the presence of the greater threat that primary expenditures get delayed and recharacterized as general election expenditures. Since this latter threat has not been materialized, there is little appreciable risk in taking the relatively insignificant step of extending GELAC fundraising period.

It should be noted that GELAC fundraising is very self-regulating. Given the choice between raising funds for activities with direct electoral benefit and funds to defray lawyer and accountant fees, Presidential candidates will always prefer the former. Helping a state committee to raise money for exempt get-out-the-vote activity almost always will trump raising money for GELAC.

One question that Commission does not ask but deserves comment is whether the requirement that unsuccessful candidates disgorge GELAC funds furthers any significant public policy objective. If the current regulations governing GELAC accounts do not subvert the underlying policies of the law, and experience strongly suggests that they do not, why not allow unsuccessful candidates to retain these contributions and use them in the same manner as the successful candidate. The contributions are no more corrupting in the hands of the loser than in the hands of the winner. It would also mean that additional funds might be available to comply with any repayment order.

D. Redesignation of Excessive Contributions and GELACs

The Commission proposes to allow publicly funded candidates to redesignate excessive primary contributions to GELAC. This change would permit candidates to redesignate excessive contributions received during the primary as GELAC contributions under the same conditions that would apply to non-publicly funded federal candidates seeking to redesignate excessive primary contribution to a general election. This change should be made and no additional restrictions should be imposed. The treatment of publicly funded candidates should be the same as for other Presidential candidates. Forbidding redesignation or treating classes of Presidential candidates differently advances no identified public policy. On the other hand, consistent treatment would reduce the need for candidates to engage in future fundraising to defray GELAC expenses, which does serve important public policy objectives.

IV. Other Presidential Candidate Issues

A. Quarterly and Monthly Reporting Requirements

Under current law the principal campaign committees of Presidential candidates may elect to file campaign reports in non-election years on either a monthly or a quarterly basis. The proposed rules would fill in a gap in the regulations and provide a procedure for switching the basis on which the candidate is reporting. The proposed procedures are similar to those existing in the regulations for unauthorized committees. Although Presidential candidates in all likelihood will seldom switch, it is beneficial to have established the procedure for those who choose to do so.

B. Election Cycle Reporting-Matching Fund Submission

The Commission proposal to extend election cycle reporting to matching fund submissions appears to be uncontroversial and aimed at reconciling the statute and the various governing regulations.

C. Billing the Press for the Costs of Reconfiguring an Aircraft

The Commission asks whether the costs of reconfiguring an aircraft to accommodate or better meet the needs of the press should be a press reimbursable expense. Current regulations allow reimbursement only for the expenses specified in the White House Press Corps Travel Policies and Procedures. (The White House Manual). It is not surprising that the issue of aircraft reconfiguration is not addressed in the manual because the needs of the press have already been taken into consideration when the craft is originally designed or during a reconfiguration. Candidates who do not have the luxury of traveling on a government aircraft (which have been designed with press needs taken into consideration) should be able to make the necessary changes to an aircraft and seek press reimbursement.

For example, if a new technology were introduced that facilitated high-speed video transfers during flight and the press desires to employ that technology in the coverage of campaign, the costs of reconfiguring a plane for this purpose should be reimbursable. Because the government does not seek reimbursement from the press when it introduces the technology into its aircraft should not bar candidates from seeking reimbursement when the technology is added to private planes.

As a general rule, the use of the White House Manual to determine the expenses for which a candidate can seek press reimbursement is a wise policy. Nevertheless, as the above example suggests, there are exceptions. Beyond allowing aircraft reconfigurations, there should be a mechanism for candidates to seek from the Commission an exception from the general rule. If a candidate can demonstrate that an expense was incurred at the request of and to accommodate the press, the candidate should be allowed to seek an exception from the Commission. It needs to be recognized that there are items that the press requires or demands that only the candidate is in a position to provide. Through an exceptions process, the Commission could consider and allow appropriate requests.

D. Candidate Salary

The Commission seeks comments on whether the payment of a salary to a publicly financed candidate should be considered a qualified campaign expense. Before the Commission allows public funds to be used to pay a candidate a salary, the Commission should be confident that its decision is consistent with congressional intent and would not have an adverse impact on the public financing system. The threshold for qualifying for public funds is relatively low. Fringe candidates have regularly qualified. Allowing candidates with little public support and whose views are anathema to large segments of the public to be personally enriched by a public grant may have a depressing effect on public participation in the tax check-off system. The legal logic that would allow public funds to be used to pay for salary but not to pay mortgages household expenses and tuition for family members from public funds is elusive. Allowing candidates to convert public grants to personal income whether the candidate receives the income directly as salary or indirectly as payments of personal expenses is not a course

that the Commission should lightly venture down. Providing a publicly funded salary incentive for people of lesser means to run for President is a policy question that seems best left to Congress to decide.

E. Gifts and Bonuses

The Commission is considering revisiting its regulation governing the payment of gifts and bonuses as qualified campaign expenses. Unfortunately it is necessary for the Commission to police this area so that candidates that have surplus funds do not avoid what otherwise would be a repayment obligation by disbursing funds remaining in his account in the form of gifts and bonuses. In the notice the Commission has not identified any problems with the current rules that suggest any change is merited. Unless the Commission is experiencing problems in this area, the Commission should not modify its existing rules. If the Commission is encountering problems, the Commission should precisely identify the nature of the problem and propose a specific solution that would enable the public to speculate less and to comment more meaningfully. The lack of a proposed rule in this area suggests that the Commission is seeking comments on the numerous questions posed to sharpen its own thinking on these issues. A change in the rule should be proposed only after the Commission's own views are more fully developed. Any significant change in the rule that would come from this proceeding would be an unexpected surprise. It would be fashioned without the full benefits of public comments and therefore is best avoided.

G. Shortfall exemption

The Commission proposes a new "shortfall exemption" from a primary candidate's expenditure limit to take into consideration the additional costs that result from a delay in the payment of matching funds due to a shortage in the fund. The new exemption would be 5% of the amount delayed or deficient. It is undoubtedly true that there are additional costs such as costs of bridge loans that result from any extended delay in the payment of matching funds. If the Commission can adopt a rule that fairly reflects those costs, it would be beneficial.

The difficulty for the Commission is in choosing a formula that is fair to the candidate whose payment is delayed but is not unfair to candidates who are less dependent on public funds. One candidate's expenditure limit should not be raised significantly compared to the other candidates unless the figure truly and accurately reflects costs actually incurred by the candidate. Therefore the Commission should be confident that its 5% exemption or any other formula that its adopts is a fair, experienced-based estimation of additional costs associated with delayed or deficient payments. The solution to a real problem should not be accompanied by real unfairness. As an alternative, the Commission could identify items such as interest on bridge loans that would be excluded from the expenditure limit.

In closing, I want to thank the Commission and its staff for the thorough and thoughtful presentation of issues in the NPRM. Although, in some instances, I have taken issue with a proposed change in the rules and, in other instances, I have suggested that the Commission needs to go further, I appreciate the fact that NPRM has sincerely sought to engage the public and, most specifically, those most affected by these rules in a dialogue.

I am confident that the Commission's effort in this regard will pay dividends and the new rules will be better informed and more practical because of it.

Very truly yours,

Robert F. Bauer

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