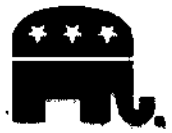

Republican
National
Committee

Counsel's Office

May 23, 2003

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

VIA E-MAIL: pubfund2004@fec.gov

Dear Ms. Dinh:

These comments on the Federal Election Commission's ("the Commission") Proposed Rules relating to Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 18484 ("Proposed Rules" or "Rulemaking") are submitted on behalf of the Republican National Committee ("RNC").[1] The RNC thanks the Commission for the opportunity to comment in writing on these Proposed Rules, and we request that because of the relative brevity of our comments, the failure of the RNC to answer any specific question asked by the Commission in the Rulemaking should not be interpreted as having any implication on the merits of the question. When the Commission holds hearings on the Proposed Rules, we wish to testify and will be pleased to clarify any questions you may have at that time.

As a threshold matter, the Commission asks how the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002), in its amendments to the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455 ("FECA"), along with the Commission's implementing regulations related to BCRA, "may affect the public funding rules." Very simply, the BCRA has no impact whatsoever on the issues at hand. The BCRA was in no way targeted at public funding issues, nor does the voluminous law ever even mention, for example, national nominating conventions or "host committees." Congress had ample opportunity to change the law on

[1] These comments are submitted on behalf of the RNC alone.

these issues, but chose to do nothing. The Commission has no authority to now create law where Congress did not.

To the extent, however, that any Member of the Commission may be laboring under the notion that the rules for public funding (including those for nominating conventions, host committees, etc.) have been impacted by the BCRA, the RNC herein extends its remarks regarding overall concepts to which the Commission should adhere when undertaking these Rulemakings, along with referencing our litigation in the District Court for the District of Columbia challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA") from our previous May 29, 2002 Comment on "Proposed Rules relating to Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money." In addition, we now direct the Commission's attention to the May 2, 2003 *per curiam* opinion of the three-judge Court in *McConnell et al. v. FEC et. al.*. Specifically with regard to Title I of the BCRA, Judges Henderson and Leon agreed that sections 323(a), (b), and (c) could not stand as written. In light of the Court striking down these restrictions on non-federal fundraising by the national political party committees, it would be bizarre for the Commission to now base restrictive new rules on these very sections of the law that the Court found to be unconstitutional. The better alternative, especially in light of the Commission's emphatic concerns stated in recent litigation about "confusion" as to what the law is, would be to simply stick with the status quo Regulations that are currently being followed and have been relied upon by all parties preparing for the nominating conventions and 2004 Presidential election cycle.

I. Presidential Candidates Winding Down Costs

The concept of "winding down costs," 11 C.F.R. 9034.4(3), has traditionally been tied to the use of public funds and the use of contributions and matching payments. *See generally* 11 C.F.R. 9034.4. Conceptually, winding down costs are relevant when responding to audit and repayment type issues. We encourage the Commission, however, to clarify that none of these primary election concepts are relevant when dealing with a Presidential campaign that has not accepted public funding.

II. Primary Expenditure Limitations and Repayments

The Commission makes reference to audits from the 1996 and 2000 election cycles, where issue advertisements run by the national party committees were evaluated by the Commission, which then declined to make repayment determinations based upon, among many reasons, the fact that the Commission had no authority over these non-express advocacy advertisements. To the extent that the constitutionality of expanded regulatory power over the political parties' ability to communicate with voters and the public on important issues is currently under intense challenge in *McConnell et al. v. FEC et. al.*, we respectfully caution the Commission to tread lightly here.

III. GELAC Funds

The Commission's proposed revision to replace the reference to "excess campaign funds" in 11 C.F.R. 9003.3(a)(2)(iv) with "funds remaining in the GELAC" is a helpful clarification. The Commission should make clear that past practice will be continued regarding permissible uses for the funds remaining in the GELAC. Specifically, funds remaining in the GELAC should continue to be able to be used for any permissible purpose under 2 U.S.C. § 439a and 11 C.F.R. 113.

The Commission has sought comment on whether it should continue to use June 1 of the presidential election year as the starting date for GELAC solicitations and most deposits to a GELAC. Although the original selection of the June 1 date was somewhat arbitrary, in practice it has served as a date that balances the competing interesting of allowing candidates to solicit ample GELAC resources, yet not focusing those solicitations during the primary season. We consequently see no reason to change the "June 1 of the presidential election year" starting date.

The Commission has proposed to revise 11 CFR 9003.3(a)(1)(i), (a)(1)(i)(C) and (a)(1)(v) to permit publicly funded presidential candidates to presume that excessive contributors to primary campaigns would consent to the redesignation of their contributions to the candidate's GELAC. Consistency of qualification for presumed redesignation is exceedingly helpful to the regulated community, therefore the Commissions proposal to use the requirements of 11 C.F.R. 110.1(b)(5)(ii)(B) to determine that a contribution is considered designated for the GELAC is appropriate.

IV. Other Presidential Candidate Issues

G. Expenditures by a Multicandidate Political Committee for Qualified Campaign Expenses of a Candidate

The general approach by the Commission found in proposed new paragraph 11 C.F.R. 110.2 and proposed new section 11 C.F.R. 9034 is an appropriate effort to clarify that qualified campaign expenses paid for by a multicandidate political committee – no matter when during the election cycle those expenses are paid – must be treated as in kind contributions to the candidate benefited. If polling expenses would otherwise be considered qualified campaign expenses under that current definition, then they should in this context also, even if the poll does not specifically reference a Presidential candidate. The limitation of the "look back" period of the proposed rules to January 1 of the year immediately following the last Presidential election year is a temporal limitation that provides both a bright line standard and focuses the Regulations on the full period directly relevant to the current practice of using so-called "leadership PACs" to fund what would otherwise be considered qualified Presidential campaign expenses.

V. National Nominating Conventions

The following sections of this Comment deal with some of the Commission's specific Proposed Rules related to National Nominating Conventions. First, however, it must be emphasized that the Commission has no authority over – and the BCRA no impact upon – the solicitation of funds by Host Committees and or Municipal Funds. Host Committees are, of course, creations of the cities that wish to submit bid proposals to host large events. Cities create host committees for bids to host the Olympics, the Super Bowl, the NCAA Final Four Basketball Tournament, the Democratic and Republican National Conventions, and a wide variety of other events. Additionally, numerous cities create Host Committees to compete for these different events. In the case of the 2004 Republican National Convention, for example, more than five different cities created Host Committees and submitted bids to host the convention. As evidenced by the fact that they were competing with one another, it is obvious that none of these competing committees was "established, financed, maintained, or controlled" by the RNC.

Before a Host Committee (or Municipal Fund) could come under the regulatory scope of the BCRA prohibition on national party committees and their agents soliciting non-federal money, that entity must meet the threshold of the requirement at 2 U.S.C. § 441i(a) that the committee be established, financed, maintained, or controlled by a national party committee. The Commission set forth specific factors at 11 C.F.R. 300.2(c) to be applied when making a determination whether any entity is established, financed, maintained, or controlled by a national party committee. The RNC's knowledge is limited to the current New York City Host Committee and past Host Committees from Philadelphia, San Diego, Houston, etc. Based upon RNC Rules and historical interaction between the RNC and Host Committees for Republican conventions, it is abundantly clear that the factors set forth at 11 C.F.R. 300.2(c) are not met by the relationship between the RNC and respective Host Committees and/or Municipal Funds. The Commission should, in fact, clarify the longstanding practice that Host Committees and Municipal Funds are *not* presumed to be directly or indirectly established, financed, maintained or controlled by the national party committees.

VI. Impact of BCRA on Convention Committees

The Commission seeks comment on whether the BCRA's ban in 2 U.S.C. § 441i(a)(1) on national parties soliciting, receiving, directing, and using non-federal funds should apply to "many of the in kind donations typically provided by host committees and municipal funds" to convention committees. In reality, however, the FECA has always banned federal political committees – including convention committees – from receiving non-federal funds, including in-kind contributions. 2 U.S.C. § 441b. The Commission, however, has historically (and correctly) treated funds used by host committees to defray convention expenses as "commercially" rather than politically motivated. *See Explanation and Justification for Regulations on Federal Financing of Presidential Nominating Convention and the Presidential Election Campaign Fund*, 44 *Fed. Reg.* 63036 (Nov. 1, 1979). The Commission has never considered these goods and

services provided to convention committees to be an "in-kind donation" to the convention committees, and nothing in the BCRA changes this analysis. The Commission should not use the BCRA as a disingenuous pretext to change this longstanding practice.

VII. Solicitation of Funds for Host Committees and Municipal Funds Under the BCRA

The RNC as a historical practice has not solicited funds for Convention Host Committees, is not currently, and has no plans to solicit funds for the New York City Host Committee. That being made clear, we opposed on principal the Commission's *sua sponte* attempt through this Rulemaking to expand the scope of 2 U.S.C. 441i(d). If Host Committees had, as the Commission asserts here, been considered to make expenditures and/or disbursements "in connection with an election for Federal office," then those Host Committees would have had to be treated as political committees subject to 2 U.S.C. 441b. That has not been the historical treatment, and once again, there is no evidence whatsoever that the BCRA was intended to change this practice. Under decades of advisory opinion and enforcement precedent, the Commission has not treated Host Committees as spending funds "in connection with a federal election" (or else they would have committed countless violations of 2 U.S.C. § 441b). Consequently, even if the NPRM's assertion that the BCRA reaches beyond expenditures and requires only "disbursements" in connection with an election for federal office is correct, that begs the question of whether the supposed disbursements are "in connection" with a federal office in the first place. This same analysis extends to the issue of federal officeholder solicitation for Host Committees and municipal funds, which are similarly not impacted by the BCRA. Specifically, 2 U.S.C. § 441i(e)(1) in no way restricts federal candidates or officeholders from soliciting funds for Host Committees or municipal funds.

VIII. Effect of BCRA on Commercial Vendor Activities Related to Nominating Conventions.

Current Commission rules at 11 C.F.R. 9008.9 recognize that convention committees may receive goods and services from commercial vendors in return for promotional consideration, or of *de minimis* value. As the Commission explained in Advisory Opinion 1988-25, corporations (in that case, General Motors) often provide complimentary goods or services (in GM's case, use of GM cars) to a variety of non-political organizations and events in return for promotional consideration proportionate to the commercial value of the donated good or service. Once again the Commission, in a classic "solution in search of a problem," suggests that the prohibition in 2 U.S.C. § 441a(a) of the BCRA against the receipt of non-federal funds "may necessitate" a change to the current Regulation. The problem with this suggestion is that if accepting complimentary use of automobiles from GM constitutes "the receipt of non-federal funds," then it would have been illegal even pre-BCRA! The Commission has recognized, however, that the promotional consideration granted in return for the receipt of goods or services in this context means that no non-federal funds have been received by the convention committee. The BCRA has no impact on this longstanding practice, and the Commission should not change it.

IX. Permissible Expenditures by Convention Committees, Host Committees and Municipal Funds

The premise of this section of the Rulemaking appears to be that there is "confusion" surrounding the current Regulations with regard to permissible expenditures by convention committees, Host Committees, and Municipal Funds and/or a need for "additional guidance on the scope of expenses that may be paid." Nothing could be further from the truth. The current Regulations are working well, and the RNC and the Committee on Arrangements for the 2004 Republican National Convention Committee understand the rules. What would cause confusion and disruption would be to adopt these proposed new regulations. All the players have relied upon the current rules to establish their contractual obligations for the 2004 Republican Convention, and to make these unnecessary changes midstream would be ill advised.

Substantively, it is imperative that any action the Commission take be coupled with retention of the "catch all" provision found at 11 C.F.R. 9008.52(c)(xi), allowing for "other similar convention-related facilities and services." Creating an exclusive list of allowable expenditures for Host Committees would unnecessarily remove flexibility that the Host Committees have traditionally had to determine how best to utilize resources to promote commerce and good will for the host city. It is folly for the Commission to presume that it can anticipate in advance and comprehensively delineate permissible expenditures for Host Committees. That is a case-by-case determination that the Commission should continue to allow to be made by the Host Committees themselves, within the parameters of the current 11 C.F.R. 9008.52.

Finally, to the extent that the Proposed Rules purport to be based on the results of audits of the 1996 Host Committees and decisions that the Commission made in response to those audits, the RNC respectfully suggests that this Commission recognize that many of these audit findings were not ultimately supported even by the Commission itself when it considered the findings in the context of the totality of the circumstances surrounding particular 1996 expenditures. Just as those results were fact specific and cannot be used to generalize, the Commission should maintain flexibility for future determinations. New restrictions on the permissible value of hotel rooms to be donated by Host Committees, for example, should be abandoned for this reason.

X. Definition of "Local" Businesses, Labor Organizations, Other Organizations, and Individuals

The RNC supports the Commission's proposal to eliminate the local presence requirement for contributors to Host Committees currently found at 11 C.F.R. 9008.52(c)(1) and 9009.53(b). This elimination should occur regardless of what the

Commission decides on the categories of expenses that Host Committees and municipal funds may pay.[2]

The key consideration for this issue must be whether there is a commercial purpose in promoting the city for how the Host Committee spends the money it has collected. The statute does not and should not reach the motivations of contributors to the Host Committee, and to the extent that there is any statutory authority for the Commission to inquire into the motivation of contributors to a Host Committee, then the proper question is whether they are making the contributions for commercial reasons. Any business contact whatsoever between the contributor and the convention city and or the audience of the Host Committee's spending should satisfy this requirement. There is no necessary linkage between the physical location of a contributor and the commercial benefit they may hope to gain through a contribution, so the artificial "local" restriction should be abandoned.

XI. Host Committee and Municipal Fund Registration and Reporting Requirements

The FECA gives the Commission authority to conduct automatic audits of Presidential and Vice-Presidential candidate committees and national party committees that receive public funding. 2 U.S.C. §§ 9007(a), 9038(a). The statute does not, however, vest the Commission with authority to conduct automatic audits of Host Committees. The current extra-statutory Regulation found at 11 C.F.R. 9008.54, however, provides for automatic audits of Host Committees. The Commission's attempt to bootstrap an automatic audit of Host Committees under the false umbrella of publicly funded national party committees and presidential campaigns should be repealed, and 11 C.F.R. 9008.54 stricken from the books. This false automatic audit authority should also not be extended to municipal committees. If a specific factual circumstance in the future should warrant a Commission audit, the Commission will, of course, retain the ability to audit political committees found at 2 U.S.C. § 438(b).

XII. Effective Date

The RNC believes that the Commission should, for reasons stated above, abandon the instant Rulemaking related to the financing of National Nominating Conventions. If, however, the Commission should decide to promulgate new rules that in any way restrictively change the current Rules, then it is imperative that the effective date for the new Rules be after the conclusion of the 2004 conventions. With the 2004 conventions a little more than a year away, major elements of the conventions (contracts and finance plans for Host Committees, for example) are already in place, and it would be extraordinarily disruptive for the Commission to impose new regulatory restrictions so soon as a year prior to the actual events.

[2] Although eliminating the requirement would arguably be a "change midstream" that the RNC would ordinarily oppose at this late date, in this case there is no harm because no person or entity would be adversely impacted by having made plans based upon the current Regulations.

The RNC looks forward to answering questions and expanding upon any issues that the Commission deems relevant at the upcoming hearing.

Respectfully Submitted,

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