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September 25, 2003

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

Re: Notice 2003-13: Notice of Proposed Rulemaking as to Biennial Contribution Limits

Dear Ms. Dinh:

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

Our comments are limited to the application of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and the proposed revisions to the calculation of the biennial aggregate contribution limit for individual donors. The pre-BCRA§441a(a)(3) language specifically provided that, for purposes of the $25,000 annual limitation, any contribution made to a candidate "in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held." The regulation language clarified the proper method for counting contributions made in a non-election year: "any contribution to a candidate or his or her authorized committee with respect to a particular election made in a non-election year shall be considered to be made during the calendar year in which such election is held." 11 C.F.R. §110.5(c)(2) As a result, an individual could contribute no more than $25,000 to candidates running in a particular election cycle regardless of when they made their contributions.

The BCRA amendments changed the aggregate annual limit to a biennial limit and raised the individual aggregate election cycle candidate contribution limit to $37,500.[1] The final regulations implementing these changes were issued by the Commission almost a year ago. See

[1] "During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than $37,500 in the case of contributions to candidates and the authorized committees of candidates." 2 U.S.C. §441a(a)(3).

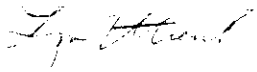
were made before or after the effective date. This transition will be even more awkward because of the indexing of both the contribution limits to candidates and the biennial aggregate limit.

Finally, if this change is made, we urge the Commission to give clear public guidance as to the counting of contributions made during the transition period and to adopt a policy of lenience for individuals who in good faith incorrectly count the contributions subject to the limit during the transition period.

Conclusion

We thank the Commission for the opportunity to provide these comments and respectfully urge the Commission to not revise 11 C.F.R. §110.5(c). The Commission has the authority to maintain the rule as is, and we are concerned with the impact that the proposed revisions would have if adopted at this time.

Sincerely,



Lyn Utrecht
Eric Kleinfeld
Pat Fiori
James Lamb

Contribution Limitations and Prohibitions; Final Rules, 67 FR 69928 (November 19, 2002). BCRA deleted the §441a(a)(3) subsection that explained the method for determining how to count contributions to candidates, but did not insert any new language. The Commission retained 11 C.F.R. §110.5(c)(2) which specifically addressed contributions made in non-election years when it issued its Final Rules on this matter.

Two months later, in February 2003, the Commission issued a statement on the front page of its monthly newsletter, the Record, clarifying the application of the new biennial limit and warning donors that they "must abide by the current regulations" which continue to state that "any contribution to a candidate or his or her authorized committee with respect to a particular election made in a non-election year shall be considered to be made during the calendar year in which such election is held." 11 C.F.R. §110.5(c)(2). The Commission explained that "[i]ndividuals who make contributions now to federal candidates running in a future election cycle (e.g. 2005-06) must count those contributions against the biennial limit for that future cycle." "Clarifying Application of Biennial Limit," Federal Election Commission Record, p. 1 (February 2003).

The proposed regulation, however, would change the method of calculating the election-cycle limit for contributions made to candidates. Although Congress deleted the language about contributions to candidates in future cycles, we believe that the Commission has the authority to retain 110.5(c)(2) as it is currently in the regulations and recommend that the Commission retain the provision for the following reasons:

1. This provision is primarily related to candidates for the U.S. Senate and changing it would have an adverse impact on Senate candidate fundraising.

The proposed regulation will have the effect of limiting a Senator's ability to raise funds in the first four years (two biennial periods) of his or her term because a contributor who intends to contribute $37,500 every biennial period will be disinclined to contribute to a 2006 candidate during the 2004 election cycle if it counts against his or her 2004 aggregate biennial limit rather than the 2006 cycle limit. To ensure that a contributor can maximize the ability to support as many federal candidates as possible over a six-year period, he or she is likely to make contributions only to candidates running in the current election-cycle period. As a result, Senators in future election cycles will be forced to compete with House and other Senate candidates running in the current biennial period for individual contributions. Under the current rules, candidates from the same state are not competing with each other for the same pot of money because contributions to them count in different election cycles for purposes of the aggregate biennial limit.

In addition to raising funds for direct election-related activity, U.S. Senators and Congressman must raise contributions throughout their terms to finance political and campaign expenses they incur. Senators, in particular, incur significant campaign related expenses over the course of their six-year terms. For example, the costs related to producing the required FEC reports include office rent and utilities, staff salaries and health care costs, computer and data base maintenance expenses that all must be paid for over the entire six-year period. Under

Senate Ethics rules, Senators are also permitted to use campaign funds to defray "officially connected" expenses with campaign funds.

The current regulation ensures that Senators will be able to raise necessary funds without competing with, or limiting the ability of individuals to contribute to, House and other Senate candidates running in the first two biennial periods of the Senator's six-year term. The proposed regulation, however, would significantly limit their ability to raise the funds necessary to pay for, among other things, the cost of complying with FEC reporting and record keeping requirements incurred during the first four years (two biennial election periods) of their six-year term.

2. Under BCRA the limits on contributions to candidates will be increased at the beginning of their election cycle, and if the proposed change is made, contributors may have multiple contributions to the same candidate that would count toward different biennial limits.

Under the current regulations, all contributions by an individual to a candidate count in the same election cycle. Under the proposed change, however, contributions made to a 2006 Senate candidate could conceivably apply to as many as three different biennial limits. This may be very confusing to the contributors, and this confusion could be aggravated by the fact that the contribution limit to these candidates is likely to change every two years. An individual who makes a $2,000 contribution to a 2006 candidate in 2004 will be able to make an additional contribution to the same candidate in 2005 when the contribution limit goes up. Thus, when calculating his or her biennial limit, the individual's $2,000 contribution would apply to his or her 03/04 limit and the additional contribution to the same candidate in 2005 would apply to the 05/06 limit. This could cause additional confusion among donors.

3. If the Commission adopts the proposed regulation the transition will be difficult, because the Commission will have to figure out how to count contributions that have already been made for future election cycles under the current regulation.

When drafting the §110.5 regulations implementing the BCRA amendments, the Commission proposed and adopted amendments to sections (a), (b), (d), and (e). The Commission had the opportunity at that time to change (c), but it did not. In February 2003, the Commission issued a statement clarifying that individuals must abide by the current regulation at §110.5(c).

Individuals have acted in reliance on the current regulation and the Commission statement. As a result, some individuals made contributions in 2003 to candidates in the 2006 and 2008 election cycles with the understanding that those contributions would count against their $37,500 biennial limits for the 2006 and 2008 election cycles. If the Commission adopts the proposed regulation, the Commission must treat those contributions as subject to the future biennial limit. After the effective date of the proposed regulation if adopted, however, contributions to candidates would not count in the future cycle but would count during the cycle when made. This will make for an extremely awkward transition, because for a period of up to four years, contributions to candidates will be counted differently depending on whether they