AGENDA DOCUMENT NO. 13-21-I

FEDERAL ELECTION COMMISSION
Washington, DC 20463

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June 26, 2013

AGENDA ITEM

MEMORANDUM

For Meeting of 6-27-13

TO: The Commission Secretary

FROM: Anthony Herman
General Counsel

SUBMITTED LATE

SUBJECT: Department of Justice's Proposed Changes to the FECA

Attached is the July 3, 2006 memo from Lawrence H. Norton to the Commissioner regarding Department of Justice's Proposed Changes to the FECA. The Commission has requested the document be placed on the agenda for June 27, 2013.

Attachment

Dove
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11:00

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUL 03 2006

MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

James A. Kahl
Deputy General Counsel

BY: Rhonda J. Vosdingh
Associate General Counsel

SUBJ: Department of Justice's Proposed Changes to the FECA

Attached is a facsimile from the Department of Justice (DOJ), including a letter to the Director of the Office of Management and Budget (OMB) transmitting DOJ's proposed letter to Congress recommending several legislative changes to the Federal Election Campaign Act. According to our contacts at DOJ, their goal in proposing these changes "is to make the current enforcement situation better for both [DOJ] and the Commission."

Because of the FEC's independence, OMB typically would not send this type of package to the Commission. In this case, however, DOJ has expressly asked that OMB do so.[1] DOJ has advised us that when OMB sends a proposal to an agency, OMB provides a deadline for any comments, and, if there are any comments, forwards them back to the drafting agency for review and comment. DOJ has suggested that because its proposals have not yet been forwarded to Congress, it might be premature for the Commission to send comments directly to Congress, though this decision would be up to the Commission. In the meantime, DOJ has invited the FEC to comment informally on these recommendations.

Attachment: Facsimile dated, 6/23/2006 from Nancy Simmons (enclosing Letter from William E. Moschella, Assistant Attorney General, to the Honorable Rob Portman, Director, OMB, dated 6/22/06)

cc: Robert Costa
Tina Van Brakle

[1] As of June 26, no such package has been received in the Office of General Counsel.

DOCS OPEN #24480

FEDE[illegible]TION
C[illegible]
OFFICE [illegible]ERAL
COUNSEL

2006 JUN 26 A 11: 54

IMPORTANT: This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this transmission or it's contents is strictly prohibited. If you have received this transmission in error, please notify us by telephoning and return the original transmission to us at the address given below.

FROM: Nancy Simmons

U.S. Department of Justice
Criminal Division, Public Integrity Section
Bond Building, Room 12100
1400 New York Ave. NW
Washington, DC 20005
Fax No. [redacted] Voice No. [redacted]

Total # pgs: 21 (including cover)

DATE: June 23, 2006

TO: Assoc. Gen. Counsel Rhonda Vosdingh

FAX: (202) 219-1993

SUBJECT: DOJ's proposed amendments to FECA

Rhonda, here are our proposed amendments, which have just been sent to OMB for review and clearance. We welcome the FEC's input.

Nancy

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 22, 2006

The Honorable Rob Portman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Director:

Enclosed is a copy of a proposed communication to be transmitted to the Congress relative to a draft legislative proposal in the form of amendments to the Federal Election Campaign Act, 2 U.S.C. §§ 431-455.

Please advise this office as to the relationship of the proposed communication to the program of the President.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

*To coordinate clearance, please contact: Adrien Silas, 514-7276.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, DC 20530*

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am transmitting herewith a legislative proposal, in the form of amendments to the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455. The amendments are largely technical in nature. They are designed to eliminate statutory loopholes, make the sentencing for FECA offenses more uniform, and improve the effectiveness of the Justice Department's criminal law enforcement responsibilities under the campaign financing laws.

Most of the amendments we propose are the result of three decades of experience in enforcing the FECA. In addition, several of the proposals arose out of our more recent work with the United States Sentencing Commission, which was directed by Congress to promulgate a sentencing guideline for FECA offenses and to submit legislative recommendations regarding the enforcement of these laws. *See* Bipartisan Campaign Reform Act of 2002 ("BCRA"), § 314. In response to these congressional mandates, the Sentencing Commission promulgated a specific guideline for FECA crimes, U.S.S.G. § 2C1.8. It also submitted legislative recommendations to eliminate inconsistencies in the penalties for FECA offenses and to reduce the felony threshold for two FECA offenses. *See* REPORT TO THE CONGRESS: INCREASED PENALTIES FOR CAMPAIGN FINANCE OFFENSES AND LEGISLATIVE RECOMMENDATIONS (May 2003).

Our main proposal is to harmonize sentencing for FECA offenses by combining the two FECA felony provisions in the BCRA into a single felony provision that would apply to all FECA offenses involving $10,000 or more. The Sentencing Commission included this recommendation in its 2003 report to Congress. The Justice Department concurs with the Sentencing Commission's other two recommendations regarding felony exposure for two particularly aggravated violations of of FECA: coercion of certain contributions in violation of 2 U.S.C. § 441b(b)(3) and misrepresentation of campaign authority to damage an opponent's campaign in violation of 2 U.S.C. § 441h(a).

In addition, the Justice Department recommends four steps to close inadvertent or unwarranted statutory gaps or loopholes: 1) amending the prohibition in 2 U.S.C. § 441f against conduit contributions, so that it includes non-Federal donations; 2) amending the prohibition in 2 U.S.C. § 441g against contributing cash, so that it includes accepting cash; 3) amending the prohibition in 2 U.S.C. § 441h(b) against fraudulent solicitations concerning candidates or political parties, so that it includes fraudulent solicitations concerning political committees; and 4) amending the prohibition in 2 U.S.C. § 439a against converting contributions to candidates, so that it includes contributions to political committees.

We also are transmitting two minor proposals arising from the 2002 campaign financing reforms. The first is adding to the FECA a definition of "donation." The significance of this term under FECA has increased as a result of the BCRA and now is included in the FECA's criminal penalty provision, 2 U.S.C. § 437g(d). The second proposal is to extend FECA's mandatory period for retaining of records, from three years to five years. *See* 2 U.S.C. § 432(d). This change would harmonize the FECA's retention period with the BCRA's new five-year statute of limitations for prosecuting FECA offenses. *See* 2 U.S.C. § 455.

The final category of our proposals addresses the serious difficulties that have arisen as a result of the overlapping jurisdiction of the Department of Justice and the Federal Election Commission ("FEC") over knowing and willful violations of the FECA. As discussed below, FECA's current structure imposes significant and frequently detrimental obstacles that prevent the FEC from sharing with Federal prosecutors information in the FEC's possession suggesting that Federal crimes have occurred. Our proposals are designed to remove these obstacles and facilitate the FEC's reporting of criminal intelligence to the Justice Department. They would increase the Department's ability to investigate and prosecute FECA offenses as well as other Federal crimes involving schemes to obstruct the FEC's administrative, enforcement, and disclosure duties.

The FEC's position is, that under current law, it can inform the Justice Department of information in the FEC's possession suggesting that an offense under FECA has occurred only after the FEC (1) has determined that there is "reason to believe" a FECA violation has occurred; (2) has conducted an investigation of the matter; (3) has determined that the investigation indicates that there is "probable cause to believe" a FECA violation has occurred *and* that the violation was "knowing and willful;" and (4) then determines that the matter should be referred to the Department of Justice for prosecutorial evaluation. *See* FECA, subparagraphs 437g(a)(2), (5)(C). Not only do these multiple determinations take considerable time, at least four FEC commissioners must vote affirmatively to take each step. *See* FECA, subsection 437c(c). Given this procedure, it is not surprising that the FEC has made less than 20 criminal referrals since the FEC was created in 1975, and that, of this number, many were referred too close to the expiration of the statute of limitations to afford an opportunity for appropriate investigation by the Justice Department.

In addition, when a formal referral has been made to the Justice Department, the FECA requires that the Justice Department furnish the FEC with monthly status reports. *See* FECA, Subsection 437g(c). This reporting requirement is contrary to the Department's usual policy of not commenting on pending criminal investigations.

These statutory impediments to sharing criminal intelligence with the Justice Department are aggravated by the FEC's interpretation of a statutory provision, FECA, subparagraph 437g(a)(12)(A), that bars certain enforcement-related disclosures to the public. Subparagraph 437g(a)(12)(A) states that "any notification or investigation made under [FECA's administrative enforcement provisions] shall not be made public by the Commission or by any person . . ." Violators of this prohibition are subject to monetary fines. Since its inception, the FEC has taken the position that the words "made public" include sharing with Justice Department prosecutors facts suggesting criminal offenses that are developed in the course of the FEC's administrative enforcement proceedings. As thus interpreted by the FEC, subparagraph 437g(a)(12)(A) has resulted in the FEC's general refusal to share criminal intelligence with the Justice Department except through the time-consuming and uncertain formal referral procedure outlined above.[1]

We disagree with the FEC's broad reading of the critical phrase "made public." We believe that the sole intent of this provision was to prevent the FEC and its staff from leaking the substance of pending enforcement matters to the media or the general public. During the past several years the FEC has begun to adopt a more fluid interpretation of this provision and on occasion has shared information with us. This trend should be recognized and encouraged. However, we believe that the statutory provision remains an obstacle to effective communications, partly because section 437g(a)(12)(B) may cast upon the Commissioners and Commission staff the shadow of individual liability for violating the prohibition and partly because referral of criminal intelligence to appropriate law enforcement authorities is among the FEC's enumerated "powers" but not among its enumerated "duties." *Cf.* FECA, Subparagraph 437d(a)(9) (the FEC has the "power" to report apparent criminal offenses to "appropriate law enforcement authorities") with FECA, Subsection 438(a) (the FEC has no corresponding "duty" to make such referrals).

Although a Federal law enforcement agency, the FEC has no criminal law enforcement authority and this is the only circumstance of which we are aware in which a Federal law enforcement agency may be shielded by statute from the usual duty to report to the Justice

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[1]Where the Justice Department has become aware of a FECA offense, the FEC has been willing to make enforcement-related information available in response to a grand jury subpoena. However, the FEC does not believe that it has a duty to alert criminal law enforcement authorities to possible campaign financing crimes about which law enforcement authorities may not be aware.

Department information suggesting the commission of Federal crimes.[2] The efficient administration of the Federal campaign financing laws demands a requirement that agencies such as the FEC bring facts suggesting Federal criminal offenses to Federal prosecutors for appropriate prosecutorial evaluation in a timely fashion.

In sum, the proposals we transmit will increase the coverage and effectiveness of the Federal campaign financing laws. They build upon the significant law-enforcement advances achieved through the BCRA. We believe that they will enhance the scope and effectiveness of all of the Federal campaign financing laws.

Thank you for the opportunity to present our views. We have transmitted an identical letter to the President of the Senate. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

IDENTICAL LETTER SENT TO THE HONORABLE RICHARD B. CHENEY, PRESIDENT OF THE SENATE

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[2] *Cf.* Misprision of felony at 18 U.S.C. § 4 (subjecting a person who fails to report a crime to three years of imprisonment).

AMENDMENT ONE:
COMBINING FECA'S TWO FELONY PROVISIONS
AND INCREASING CRIMINAL FINES

I. Amendment:

Section _____. Criminal penalties for violations of the Federal Election Campaign Act

(a) Subsection (A) of section 309(d)(1) of the Federal Election Campaign Act (2 U.S.C. § 437g(d)(1)(A)) is amended to read as follows:

> "(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, reporting, or non-reporting[1] of any contribution, donation, or expenditure –
>
> "(i) aggregating $10,000 or more during a calendar year shall be –
>
> "(I) imprisoned for not more than 5 years,
>
> "(II) fined not less than 500 percent of the amount involved in the violation and not more than the greater of $100,000 or 2,000 percent of the amount involved in the violation, or
>
> "(III) both imprisoned under clause (I) and fined under clause (II); or
>
> "(ii) aggregating $2,000 or more (but less than $10,000) during a calendar year shall be imprisoned for not more than 1 year, fined under clause (II), or both."

(b) Subsection (D) of section 309(d)(1) of the Federal Election Campaign Act (2 U.S.C. § 437g(d)(1)(D)) is repealed and is replaced by the following:

> "(D) Criminal violations of the Act are subject to the fining provisions of subsection (A) and are not subject to the provisions of section 3571(e) of title 18, regardless of the amount involved in the violation."

II. Analysis:

The 2002 Bipartisan Campaign Reform Act ("BCRA") added two felony penalties to the Federal Election Campaign Act's ("FECA") misdemeanor provision, one for conduit crimes (contributions laundered through "straw" people or organizations in violation of 2 U.S.C. § 441f) and one for all other FECA crimes. This has resulted in unwarranted sentencing disparities for FECA offenses. We believe there should be a single felony provision for all FECA offenses.

Currently, all FECA felonies other than conduit violations have a $25,000 monetary threshold and are subject to a five-year term of imprisonment and fines imposed pursuant to

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[1] We suggest adding the phrase, "or non-reporting" to remove any doubt that nonreporting violations also are covered.

18 U.S.C. § 3571 (with maximum fines of $250,000 for individuals and $500,000 for organizations; there is no mandatory minimum fine). 2 U.S.C. § 437g(d)(1)(A). In contrast, conduit offenses have a lower threshold, varying prison terms, and generally higher fines. *See* 2 U.S.C. § 437g(d)(1)(D). Specifically, conduit offenses involving amounts between $10,000 and $24,999 are felonies subject to a two-year term of imprisonment, while those aggregating $25,000 or more are subject to five-year terms. Conduit violations also have a special fining provision, which provides for a mandatory minimum fine of 300% of the amount of the violation and a maximum fine of the greater of $50,000 or 1,000% of the amount of the violation. Conduit misdemeanors, on the other hand, are fined under title 18 of the United States Code, as are FECA misdemeanors not involving conduits (maximum fines of $100,000 for individuals and $200,000 for organizations, with no mandatory minimum fine). Thus, not only are conduit crimes treated differently than all other FECA offenses, the fining provisions for conduit felonies and conduit misdemeanors differ.

Conduit violations arise when the donor attempts to disguise a substantive FECA violation, such as a contribution from a corporation or foreign national. In other words, they are a means to an illegal end. Treating these violations differently than the substantive violation they are used to achieve is both confusing and, in our view, unwarranted. We recommend eliminating the sentencing inconsistencies resulting from these two felony provisions by combining them into a single provision providing for a $10,000 threshold, a five-year term of incarceration, and the fining structure that, under current law, is limited to conduit felonies. We note that Sentencing Commission also made this recommendation.

We also recommend increasing the mandatory minimum fine for all FECA offenses to 500% of the amount involved in the violation and the maximum fine to the greater of $100,000 or 2,000% of the amount of the violation. We believe these increases are warranted. In addition, they would decrease the number of cases in which the correct criminal fine for conduit violations was unclear. *See* 18 U.S.C. § 3571(e) (requiring fines under title 18 where the substantive statute provides for a lower fine, unless the statute expressly exempts the title 18 fines).

The FECA's felony conduit provision does not exempt the title 18 fines. As a result, these fines would apply to some – but not all – conduit crimes, depending on the amount involved in the violation. For example, if the violation was under $25,000, the FECA fine would be lower than the title 18 fine, arguably triggering application of subsection 3571(e), which would trump the FECA fine. However, in such cases, another issue arises: whether the mandatory minimum fine for conduit felonies also is trumped. If it is, the result is a fining anomaly. Some conduit felonies would be subject to a mandatory minimum fine and some would not. This is not a rational sentencing result.

We believe the applicable fining formulae should be the same for all FECA crimes. To achieve this result, the FECA's criminal provision should expressly exempt the title 18 fines. The amendment we propose would ensure fining consistency for campaign financing offenses and also resolve current issues regarding the applicable fine in particular cases.

The amendment would subject all FECA offenses to the same felony and fining provisions, it would resolve issues regarding the applicable criminal fines, and it would eliminate the existing sentencing disparities and inconsistencies.

AMENDMENT TWO:
CONFORMING THE CONDUIT PROHIBITION TO PROHIBITIONS BARRING NON-FEDERAL DONATIONS BY FOREIGN NATIONALS, NATIONAL BANKS, FEDERAL CORPORATIONS, AND NATIONAL PARTIES

I. Amendment.

Section ____. Strengthening ban on contributions in the name of another.

Section 320 of the Federal Election Campaign Act (2 U.S.C. § 441f) is amended to state the following:

> **"Sec. 320. Contributions and Donations in Name of Another Prohibited.**
>
> "(a) Federal Contributions. No person shall make a contribution in the name of another person, or knowingly permit his or her name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.
>
> "(b) Non-Federal Donations.
>
> "(1) No foreign national, national bank, federally chartered corporation, or national committee of a political party (including a national congressional campaign committee of a political party), shall make a donation in the name of another person, or knowingly permit his or her name to be used to effect such a donation, and no person shall knowingly accept a donation from a foreign national, national bank, federally chartered corporation, or national committee of a political party (including a national congressional campaign committee of a political party) in the name of another person.
>
> "(2) As used in this subsection, the term "donation" means a donation as defined by section 308(27) of this Act (2 U.S.C. § 431(27))."

II. Analysis:

The FECA prohibits the use of straw people or organizations, or conduits to disguise illegal "contributions," such as those from illegal sources or those in excess of the Act's limits. 2 U.S.C. § 441f. Because the term "contribution" is limited to funds to influence *Federal* elections (*see* 2 U.S.C. § 431(8)), this prohibition does not reach schemes to launder funds to State or local candidates. However, three important FECA prohibitions extend to non-Federal donations: Section 441e and subsection 441b(a) prohibit foreign nationals, and national banks or Federal corporations, respectively, from making donations to any Federal, State, or local candidate or committee, and Section 441i prohibits national party committees from accepting so-called "soft

money" donations, *i.e.*, "non-Federal" funds that are given ostensibly for State or local candidates. The current conduit statute does not apply to funds laundered from these entities to non-Federal candidates.

Thus, for example, if a foreign national used "straws" to disguise donations to a State candidate, this would violate section 441e,[2] but it would not violate section 441f. Where a substantive FECA prohibition reaches non-Federal donations, the use of conduits to circumvent that prohibition should be a FECA offense. The failure of the conduit statute to reach these donations should be remedied.

The amendment would close the existing gap in the conduit statute and make the use of conduits to violate a FECA prohibition addressing non-Federal donations a separate offense, as is the case now for conduit violations relating to Federal elections.

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[2]Section 441e prohibits indirect donations as well as direct donations, and hence the conduit donation would be a prohibited indirect donation by a foreign national.

AMENDMENT THREE:
PROHIBITING THE RECEIPT OF CASH CONTRIBUTIONS IN EXCESS OF $100

I. Amendment:

Section ___. Strengthening ban on cash contributions.

Section 321 of the Federal Election Campaign Act (2 U.S.C. § 441g) is amended by –

(a) inserting "(a)" before the existing text and adding the following text at the end thereof:

> "(b) No candidate, agent of a candidate, or authorized political committee of a candidate shall knowingly accept any contribution in excess of the limit imposed by this section."; and

(b) inserting the phrase "and acceptance" in the caption after the word "contribution".

II. Analysis:

The FECA prohibits a person from contributing cash to the campaign of a Federal candidate aggregating in excess of $100. 2 U.S.C. § 441g. The limit is cumulative and applies to the entire campaign, including the primary and general election. However, the statute does not prohibit the campaign from *receiving* such cash contributions.

The limitation on cash contributions is intended to decrease circumvention of the Act's contribution limits, prohibitions, and reporting requirements. 2 U.S.C. § 441a, § 441b, § 441c, § 441e, § 434(b). We see no reason why the acceptance of cash contributions in excess of the $100 limit should not also be a substantive violation.

The amendment would criminalize the actions of a candidate or agent of a candidate who accepted a cash contribution aggregating over $100 during the candidate's campaign for Federal office, as the FECA currently criminalizes the actions of the donor.

AMENDMENTS FOUR THROUGH NINE: FACILITATING THE REPORTING OF CRIMINAL INTELLIGENCE BY THE FEDERAL ELECTION COMMISSION

I. Amendments and Explanations[3]

Amendment Four:

> Subsection 307(a) of the Federal Election Campaign Act ("Powers of the Commission, Specific authorities," 2 U.S.C. § 437d(a)(9)) is amended by repealing the phrase ", and to report apparent violations to the appropriate law enforcement authorities."

Explanation: This amendment would eliminate the discretionary authority of the Federal Election Commission ("FEC") to refer criminal matters[4] to the Department of Justice. *See* Amendment 5, below, which would make such referrals mandatory.

Amendment Five:

> Subsection 311(a) of the Federal Election Campaign Act ("Duties of the Commission," 2 U.S.C. § 438(a)) is amended by inserting the following as a new Subsection (a)(11):
>
> > "(a)(11) report information suggesting that a criminal violation of the Act has occurred to appropriate law enforcement authorities."

Explanation: This amendment would provide that the FEC has a duty to report criminal FECA matters to appropriate law enforcement authorities, namely, to the Justice Department, which has exclusive jurisdiction over criminal violations of the FECA.

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[3]We have grouped together our proposals relating to enforcement issues concerning the FEC. Each amendment is followed by a brief explanation. A more detailed explanation is provided after the amendments.

[4]Subsection 437d(a)(9) states: "[The Commission has the power] to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and *to report apparent violations to appropriate law enforcement authorities*" (emphasis added).

Amendment Six:

Subsection 309(a) of the Federal Election Campaign Act ("Administrative and judicial practice and procedure," 2 U.S.C. § 437g(a)) is amended by repealing Subsection 437g(a)(5)(C).

Explanation: Subparagraph 437g(a)(5)(C) provides that the FEC "may" formally refer criminal matters to the Justice Department, but only after the Commission pursues a time-consuming and uncertain administrative process. This provision no longer would be necessary if subsection 438(a) were amended, as proposed in Amendment 5, *supra*, to change this discretionary referral power to a statutory duty.

Amendment Seven:

Subsection 309(c) of the Federal Election Campaign Act ("Reports by Attorney General of apparent violations," 2 U.S.C. § 437g(c)) is repealed.

Explanation: Subsection 309(c) of the Federal Election Campaign Act requires that the Justice Department periodically report back to the FEC on the status of matters referred to the Department by the Commission. Such reports are unnecessary as well as inconsistent with the Department's long-standing policy of not commenting on pending criminal investigations. The amendment would repeal this reporting requirement.

Amendment Eight:

Subsection 309(a) of the Federal Election Campaign Act ("Administrative and judicial practice and procedure," 2 U.S.C. § 437g(a)) is amended by adding the following text to subsection (12)(A) thereof:

"This subsection shall not apply to the Commission's duty to report information suggesting that a criminal violation has occurred to the appropriate law enforcement authorities pursuant to subsection 311(a)(11)."

Explanation: Subsection 437g(a)(12)(A) states that any notification of an investigation by the FEC shall not be "made public" by the FEC or any other person without the written consent of the person receiving the notification. The proposed amendment would clarify that this provision does not bar the FEC from providing criminal intelligence information to law enforcement authorities.

Amendment Nine:

Subsection 306(c) of the Federal Election Campaign Act ("Voting requirements; delegation of authorities," 2 U.S.C. § 437c(c)) is amended by adding the following to the end thereof:

"The provisions of this section shall not apply to the discharge of the Commission's duty to report information suggesting that a criminal violation of the Act has occurred to appropriate law enforcement authorities as required by subsection 311(a)(11)."

Explanation: Subsection 437c(c) requires that at least four of the six FEC Commissioners vote in favor in order to take substantive action. The amendment would require the Commission to refer information suggesting a Federal crime to law enforcement authorities, including the Justice Department, without making the discharge of that duty contingent upon a vote by the Commission.

II. Analysis:

During the past 30 years, the statutory provisions discussed above have presented unwarranted obstacles to the exchange of criminal intelligence between the Commission and criminal law enforcement authorities.

As an initial matter, the Commission believes that it can bring to the Justice Department information in its possession that suggests a FECA crime has occurred only after the FEC: (1) has determined that there is "reason to believe" a FECA violation has occurred; (2) has conducted an investigation of the matter; (3) has determined that the investigation indicates there is "probable cause to believe" a FECA violation has occurred *and* that the violation was "knowing and willful;" and (4) has determined that the matter should be referred to the Department of Justice. 2 U.S.C. §§ 437g(a)(2), (5)(C). Not only do these multiple determinations take considerable time, each must be made by the affirmative votes of at least four of the six Commissioners. 2 U.S.C. § 437c(c). As a result, some potential criminal matters never get referred to the Department and others may be referred too late for effective prosecution.

These numerous statutory impediments to the reporting of criminal intelligence have been aggravated by the FEC's past interpretation of a FECA provision that bars certain enforcement-related disclosures to the public, *see* 2 U.S.C. § 437g(a)(12)(A) ("any notification or investigation made under [FECA's administrative enforcement provisions] shall not be made public by the Commission or by any person"). Since its inception, the FEC has interpreted the words "made public" to include sharing information with Justice Department prosecutors.[5] Recently, the FEC

[5]We disagree with the FEC's interpretation. We believe the provision was intended merely to prevent the Commission or its staff from leaking facts regarding its pending civil

has begun to modify its past interpretation on an informal case-by-case basis. However, the existing statutory text remains an obstacle to useful law enforcement communications and should be clarified.

Finally, the Commission does not believe it has a duty to alert law enforcement authorities to possible campaign financing crimes about which law enforcement authorities may be unaware, although it has been willing to make certain enforcement-related information available in response to a grand jury subpoena. We are aware of no other circumstance where a Federal law enforcement agency may be shielded by statute from the usual duty to report information suggesting Federal crimes to the Justice Department.[6]

The amendments are designed to increase the efficient administration of the Federal campaign financing laws, by eliminating unwarranted obstacles to Justice Department communications with the FEC and by requiring the Commission to bring facts suggesting Federal criminal offenses to Federal prosecutors for appropriate criminal evaluation in a timely fashion.

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enforcement matters to the media or the general public.

[6] *Cf.* 18 U.S.C. § 4 (misprision of felony).

AMENDMENT TEN:
ELIMINATING MISDEMEANOR PENALTY FOR CAMPAIGN MISREPRESENTATION AND FRAUDULENT SOLICITATIONS

I. Amendment:

Section 309(d)(1) of the Federal Election Campaign Act (2 U.S.C. § 437g(d)(1)) is amended by striking section 309(d)(1)(C) (§ 437g(d)(1)(C)) and inserting the following:

"(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in subsection (A)(i) shall apply without regard to the amount involved in the violation."

II. Analysis:

In addition to its contribution limits and source-prohibitions, the FECA contains a statute that addresses fraudulent activities involving campaigns and fundraising, 2 U.S.C. § 441h. Because the focus of section 441h is on fraudulent conduct and not on monetary limitations, criminal violations of the statute have no monetary floor. In contrast, all of the other FECA offenses have a monetary floor that must be satisfied before a violation may constitute a potential crime.

As a result of the BCRA, section 441h now contains two prohibitions, one addressing so-called campaign "dirty tricks," and the other fraudulent solicitations. Subsection 441h(a) prohibits the misrepresentation of authority by a candidate or an agent of a candidate in a manner that is damaging to any other candidate or political party. In light of the substantial damage that can occur to the campaign of a candidate who is the target of this type of offense, the United States Sentencing Commission recommended in its May 2003 Report to Congress that this offense be a felony, regardless of the amount involved in the violation. We agree with this recommendation.

Section 441h's second provision, enacted by the BCRA, prohibits a person from fraudulently misrepresenting himself or herself as acting on behalf of a candidate or political party for the purpose of soliciting contributions or donations. 2 U.S.C. § 441h(b). We believe the rationale behind the Sentencing Commission's recommendation regarding the penalty for campaign misrepresentations also applies to the statute's new prohibition against fraudulent solicitations. In both cases, the amount of harm occasioned by the defendant's fraudulent conduct is not dependent upon the amount of funds the defendant obtains or spends.

The amendment would remove the misdemeanor penalty for misrepresentation of campaign authority in violation of subsection 441h(a) and for misrepresentation of authority to solicit contributions in violation of subsection 441h(b), so that all such violations would be felonies.

AMENDMENT ELEVEN: EXTENDING THE FRAUDULENT SOLICITATION PROHIBITION TO CONTRIBUTIONS TO POLITICAL COMMITTEES

I. Amendment:

Section 322(b) of the Federal Election Campaign Act (2 U.S.C. § 441h(b)) is amended by adding the phrase ", political committee," after the phrase "on behalf of any candidate."

II. Analysis:

As noted above, subsection 441h(b) is a new FECA provision that prohibits fraudulent solicitations on behalf of a candidate or political party. However, the statute does not apply to fraudulent solicitations on behalf of a political committee. We believe it should. The amendment would extend the statute to reach fraudulent solicitations by an agent of a political committee, so that all fraudulent solicitations, whether ostensibly on behalf of a candidate, political party, or political committee, would be covered by the statute.

AMENDMENT TWELVE: EXTENDING PROHIBITION AGAINST CONVERTING CONTRIBUTIONS TO CANDIDATES TO REACH CONTRIBUTIONS TO POLITICAL COMMITTEES

I. Amendment:

Section 314(a) of the Federal Election Campaign Act (2 U.S.C. § 439a) is amended by inserting the phrase ", or by a political committee," after the phrase "accepted by a candidate."

II. Analysis:

The FECA regulates, *inter alia*, contributions that are made to any candidate for Federal office as well as contributions that are made to any political committee that raises or spends funds to influence a Federal election. *See, e.g.*, 2 U.S.C. § 431(2) (definition of "candidate"), § 431(4) (definition of "political committee"), § 434 (reporting requirements), § 441a(a) (contribution limits). In addition, in the case of contributions to a Federal candidate, FECA prohibits the candidate or any other person from converting such contributions to his or her personal use. 2 U.S.C. § 439a. However, section 439a does not apply to contributions that are made to a political committee that is not an authorized committee of a Federal candidate.

Thus, if an official or agent of a political committee that was not a candidate's campaign committee – or any other person – embezzled funds that were contributed to the political committee, section 4391 would not be violated.[7] Although in such cases the conduct might be prosecuted under other legal theories (such as mail fraud), we believe that the FECA's conversion statute also should reach embezzlement of funds that have been contributed to a political committee. The amendment would accomplish this.

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[7]We currently have such a matter under investigation.

AMENDMENT THIRTEEN: ADDING A DEFINITION OF THE TERM "DONATION"

I. Amendment:

Section 301 of the Federal Election Campaign Act ("Definitions," 2 U.S.C. § 431) is amended by adding the following at the end thereof:

> "(27) the term "donation" means a gift, subscription, loan, advance, deposit of money, or anything of value made for the purpose of influencing or in connection with an election other than an election for Federal office, but such term does not include those items set forth in section 301(8)(B) of the Act (2 U.S.C. § 431(8)(B))."

II. Analysis:

Several important provisions of the FECA, including its criminal provision, utilize the term "donation." While this term generally is understood to mean a political gift that is made for a non-Federal political purpose – in other words, for the benefit of a State or local candidate or political committee – the term is not defined in the Act. As a result of the BCRA, campaign financing violations involving "donations" now may be subject to prosecution. We believe it would assist law enforcement to have a statutory definition of the term. Our proposal would add a definition of "donation" to the Act.

AMENDMENT FOURTEEN: EXTENDING PERIOD FOR RETENTION OF RECORDS TO FIVE YEARS

I. Amendment:

Section 302(d) of the Federal Election Campaign Act ("Preservation of records and copies of reports, " 2 U.S.C. § 432(d)) is amended by deleting the phrase, "for 3 years" and inserting the phrase "for 5 years."

II. Analysis:

The campaign reforms contained in the Bipartisan Campaign Reform Act of 2002 included a number of significant tools to assist the Department's efforts to prosecute campaign financing crimes. Most notably, the BCRA created two new felony penalties for FECA crimes, and directed the Sentencing Commission to promulgate a strong sentencing guideline for these crimes, which is now in place, U.S.S.G. §2C1.8. 2 U.S.C. § 437g(d); BCRA, § 314.

The BCRA also assisted criminal law enforcement efforts by extending the FECA's special three-year statute of limitations to prosecute FECA crimes to five years. 2 U.S.C. § 455 (2003). However, the BCRA did not similarly extend FECA's three-year retention period for FECA records to five years. 2 U.S.C. § 432(d) (2003).

Hence, although the Department now has five years to prosecute FECA crimes – many of which are punishable as felonies – records relating to two of these five years are not required to be maintained. These campaign records play an important part in the investigation and prosecution of FECA crimes, and the three-year retention period has presented problems for us in the past. The amendment would harmonize the FECA's records retention period with its criminal statute of limitations.