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AGENDA ITEM
For Meeting of: 10-31-02

SUBMITTED LATE

MEMORANDUM

To: The Commission

From: Commissioner Bradley A. Smith

Date: October 30, 2002

Re: Amendments to Draft Final Rules and Explanation and Justification
for Contribution Limitations and Prohibitions, Agenda Document No. 02-76

The following amendments address the definition of "Solicit" in the context of contributions from foreign nationals.

1944
1945
1946

1947
1948
1949

At page 74, line 5, incorporate, through page 75, line 14, the added and deleted language as follows:

9. 11 CFR 110.20(g) Solicitation, Acceptance or Receipt of Contributions and Donations from Foreign Nationals

BCRA prohibits any person from soliciting, accepting, or receiving from a foreign national a contribution or donation made in connection with a Federal, State, or local election, or made to a party committee. 2 U.S.C. 441e(a)(2). Proposed section 110.20(g)(1) sought to prohibit the knowing solicitation, acceptance or receipt of contributions or donations from foreign nationals. As noted above, the final rule at section 110.20(g) contains the same prohibition.

The Commission's additions of a knowledge requirement and of knowledge standards with regard to the solicitation, acceptance or receipt of foreign national contributions and donations are discussed above in connection with 11 CFR 110.20(a)(5). The Commission in the NPRM also sought comment on whether it should create safe harbors within which political committees would be deemed to have satisfied their duty to investigate contributions or donations in order to confirm that they do not come from foreign sources. One commenter requested that the Commission expressly create such a safe harbor if "reasonable efforts" have been made to follow guidelines in the regulations.

Whether a person has the requisite knowledge under 11 CFR 110.20(a)(4) and whether a contributor or donor is a foreign national are fact-intensive determinations. Given the wide range of factual situations that could arise, and the likelihood that some foreign donors or contributors will take steps to conceal the illegal nature of their actions, it is not possible to craft appropriate safe harbors to safeguard recipient committees who

do not and cannot know of the illegality while at the same time holding accountable those who do or should know. Consequently, the final rules do not include a safe harbor provision.

In addition, the NPRM sought comments as to whether the Commission should incorporate into the regulations at 11 CFR 110.20 the definition of "solicit" at 11 CFR 300.2(m), whether it should leave the term undefined, or whether it should give the term a more expansive or a narrower reading in this context. The term "to solicit" is defined in 11 CFR 300.2(m) as "to ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 FR 49064, 49122 (July 29, 2002).

Two of the comments received strongly urged the Commission not to incorporate the definition of "solicit" at 11 CFR 300.2(m), deeming it too narrow. One such commenter characterized the definition as "radically-underinclusive" and inferred that it would allow "a broad range of solicitations to escape [regulation,]" and, if adopted in Part 110, would allow candidates and officials to "suggest or request that foreign nationals make contributions to their campaigns." In promulgating 11 CFR 300.2(m), however, the Commission was advised of the need for clear definitions to avoid ambiguity, vagueness and confusion as to what activities or conversations would constitute solicitations. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 FR at 49086-87 (July 29, 2002). By using the term "ask," the Commission defined "solicit" to require some affirmative verbalization or writing, thereby providing members of Congress, candidates and committees with an understandable standard. It is the

impressionistic or subjective aspects of the terms "suggest" and "request" that the Commission rejected in the Title I rulemaking. The Commission also notes that while the terms "suggest" or "request" recommended by one commenter encompass a wide array of activity, it is not clear that they would cover more direct verbalizations or writings captured by terms such as "demand," "instruct" or "tell," which the Commission believes are captured by the term "ask."

The Commission believes that the need to craft clear and understandable definitions marking the boundary between permissible and impermissible solicitations by candidates, parties or their agents in the realm of non-Federal funds, applies equally to the realm of foreign national funds. A single definition has the added benefit of reducing confusion among those who solicit campaign funds often, and from a variety of individuals. Accordingly,

The definition of "solicit" at 11 CFR 300.2(m) applies only to 11 CFR part 300, not to 11 CFR part 110. The term "solicit" in the final rules in at 11 CFR part 110.20 do not include a definition. has the same meaning as in 11 CFR 300.2(m).

At page 102, between lines 5 and 6, add the following language:

- (6) Solicit has the same meaning as in 11 CFR 300.2(m).