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VIA E-MAIL

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

Re: Notice of Proposed Rulemaking: "Contribution Limitations and Prohibitions"

Dear Ms. Dinh:

This comment is submitted on behalf of Abitibi-Consolidated Sales Corporation, a domestic subsidiary of Abitibi-Consolidated Inc., a Canadian company, in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") titled "Contribution Limitations and Prohibitions."[1] The NPRM proposes new regulations pursuant to specific statutory sections of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[2] which amended the Federal Election Campaign Act of 1971 ("FECA").[3]

Our comments focus on the Federal Election Commission ("FEC" or "Commission") proposal to impose new restrictions on the First Amendment free speech and association rights of United States citizens and permanent legal residents employed by domestic subsidiaries of foreign corporations. Specifically, we ask the Commission to reject Commissioner Michael Toner's proposal to prohibit "foreign controlled corporations, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making federal contributions from their PACs, or both."[4]

We believe that the promulgation of such a regulation unfairly discriminates against American citizens by virtue of their employer. In addition, there is no indication that Congress, in amending the FECA, intended to reverse the longstanding regulatory and statutory interpretation of 2 U.S.C. § 441e. Finally, we see no legitimate public policy reason to eliminate the ability of American employees to participate in federal, state and local elections through a

[1] 67 Fed. Reg. 54366 (Aug. 22, 2002).

[2] P.L. 107-155, 116 Stat. 81 (Mar. 27, 2002).

[3] 2 U.S.C. § 431, *et. seq.* (as amended).

[4] 67 Fed. Reg. at 54372 (*see also*, FEC Agenda Doc. No. 02-57-B (Aug. 14, 2002)).

federal corporate PAC simply because they are employed by a U.S. company owned or "controlled" by a foreign corporation.

We look forward to the opportunity to provide oral testimony if the Commission conducts a formal hearing.

I. Introduction

Abitibi-Consolidated, Inc. is the world's largest producer of newsprint, uncoated groundwood papers and lumber, with mills located in Québec, Ontario, British Columbia, Arizona, Alabama, Georgia and Texas. Along with its wholly-owned United States subsidiaries, Abitibi-Consolidated Sales Corporation and Donohue Industries, Inc., the company currently has ownership interests in 27 paper mills in Canada, the U.S., the U.K. and Asia, in 22 sawmills, a market pulp mill and several recycling centers. The company markets over 6 million tons of newsprint, nearly 2 million tons of value-added papers, approximately 440,000 tons of high-quality market pulp, and has the capacity of producing 2.2 billion board feet of lumber.

Abitibi-Consolidated Sales Corporation currently employs more than 2,000 American employees in the United States. Domestic manufacturing, recycling and sales operations are located in nine (9) states -- Alabama, Arizona, Georgia, Illinois, Kansas, Missouri, New York, Oklahoma and Texas -- covering thirty-five (35) congressional districts.

Like many domestic corporations owned by U.S. companies as well as foreign parents, Abitibi-Consolidated Sales Corporation contributes significantly to the local economies of small and mid-size communities throughout the South, Southwest and the Western United States. In Texas alone, Abitibi-Consolidated Sales Corporation employs nearly 1,000 American workers, and is one of the largest employers in the community of Lufkin, Texas. Across the U.S., the company has made an estimated $666 million in positive economic contributions through employee salaries, state and local taxes and purchases of supplies and services.

An estimated 350 employees plan to support elected officials at the national, state and local level through the company's federal PAC. The Commission should recognize that the PAC's employee-contributors, all Americans or permanent legal residents, view their contributions as an important vehicle to communicate their political views. The PAC's support of U.S. Senators and congressional candidates enables the company's "restricted class" employees to speak with a collective "political voice" in connection with federal elections, the

only legal means of doing so under federal law. The Commission's new regulations should apply the PAC establishment and contribution provisions consistently to all American workers and domestic corporations, regardless of the company's parentage.

II. Background: The Foreign National Contribution Prohibition Prior to Enactment of the BCRA

As part of the Bipartisan Campaign Reform Act of 2002, Congress amended the Federal Election Campaign Act by prohibiting, *inter alia*, the solicitation or receipt of "soft money" donations, increasing candidate contribution limits for individual donors, placing new restrictions on contributions to national, state and local political parties and requiring that "electioneering communications," formerly known as "issue advertisements," are paid for with funds subject to the restrictions and limitations of the new law.

The BCRA also amended 2 U.S.C. § 441e, which governs the political activities of foreign national individuals and foreign corporations, including those companies with domestic subsidiaries doing business in the United States. The statutory provision prohibits a foreign national from making, and any person from accepting or receiving, a contribution in *any* election – federal, state or local. Specifically, the statute states that foreign nationals may not, "directly or through any other person" make any contribution or "promise expressly or impliedly" to make a contribution "in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office."[5] Similarly, it is unlawful for any person to "solicit, accept or receive" a contribution from a foreign national.

Section 441e defines the individuals and entities covered by the foreign national contribution ban. The phrase "foreign national" includes individuals who are neither United States citizens nor permanent legal residents; the governments of foreign countries; foreign political parties, and any "partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[6]

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[5] 2 U.S.C. § 441e.

[6] *Id.* (referencing 22 U.S.C. § 611(b)).

While foreign corporations are clearly prohibited by section 441e, their domestic subsidiaries are specifically excluded from the statute's coverage. Any entity "organized under or created by" the laws of any State within the United States, with its "principal place of business" in the United States, is not considered a foreign national.

Consistent with the statutory language, the FEC's interpretation of section 441e historically has permitted a domestic subsidiary to establish and support a federal PAC, to solicit contributions to the PAC from employees within the company's restricted class, and to make contributions in state and local elections from corporate treasury funds in jurisdictions where such contributions are permissible.[7]

II. BCRA Amendments to the Foreign National Prohibition of Section 441e

In amending section 441e, Congress primarily sought to codify federal court decisions that came as a result of investigations of foreign donors in the 1996 presidential elections.[8] The new statutory language retains the existing prohibition on the solicitation, acceptance, or receipt of a contribution from a foreign national, and further expands it by banning foreign national contributions for issue advertisements (now known as "electioneering communications"), independent expenditures, political party contributions, or any other "expenditure" as that term is statutorily defined. Specifically, section 303 of BCRA states:

> "(a) Prohibition. – It shall be unlawful for –
>
> (1) a foreign national, directly or indirectly, to make – "(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee or a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication. . .; or
> (2) a person to solicit, accept or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national."

[7] FEC A.O.'s 1979-59, 1982-34, 1989-20, 1989-29, 1990-8, 1992-7, 1992-16, 1995-15, 1999-28.

[8] *See, e.g., U.S. v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999).

As illustrated by the amended statutory text, the BCRA modified certain phrases of section 441e. Prior to enactment of the BCRA, the FECA established penalties for contributions from foreign nationals "directly *or through any other person*." That statutory language has been altered slightly to prohibit foreign nationals from making contributions "directly or *indirectly*" in U.S. elections.[9] Based on this statutory change, the FEC proposes to abolish the ability of domestic subsidiaries of foreign corporations to support a federal PAC and to make corporate contributions in state and local elections in jurisdictions where such contributions are permitted. As a result, employees of such corporations would lose their right to speak collectively, in "political unison," by making contributions to the company's PAC.

Importantly, Congress retained the existing definitions of "foreign national" corporations and individuals, thereby continuing the exemption for domestically-domiciled corporations from application of the section 441e prohibition.

III. The FEC Should Reject the Proposed Regulation of Domestic Subsidiaries of Foreign Corporations.

As noted above, the NPRM proposes to reverse its longstanding interpretation of section 441e in light of the amended statutory language. "Specifically, the Commission seeks comment on whether BCRA's new statutory language prohibits foreign-controlled U.S. corporations, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making federal contributions from their PACs, or both."[10]

We urge the Commission to reject this proposal and retain the current interpretation of the foreign national definition. Our recommendation is based on the plain language of the statute, the complete absence of legislative history to support such a drastic change, and the failure of the Commission to present a legitimate public policy rationale for the elimination of the rights statutorily granted to foreign-owned domestic subsidiaries and the individuals they employ.

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[9] 2 U.S.C. § 441e(a)(1)(as amended).

[10] 67 Fed. Reg. at 54372.

1. The Plain Language of the Statute Reflects Congress' Intention to Retain the Current Definition of a "Foreign National" for Statutory Purposes.

As noted above, the BCRA did not in any way alter the specific legal definition of a "foreign national" entity. The section 441e ban still excludes domestically-domiciled subsidiaries of foreign corporations with their principal places of business in the United States. While the statutory phrase "through any other person" was replaced with "indirectly," there is absolutely no evidence that Congress intended to further restrict the rights of such companies with the addition of a single word – "indirectly"– "to be construed to have a broader meaning than 'through any other person.'"[11] To the contrary, by retaining the specific definitional exception, Congress re-established its intent to extend the statutory rights of such companies to participate in American elections by establishing PACs and making contributions in federal and non-federal elections. That fact is clear from the retention of section 441e and the defining terms of 22 U.S.C. § 611(b).

The Administrative Procedure Act places an obligation on federal regulatory agencies, including the FEC, to promulgate formal rules consistent with congressional mandate.[12] Agency interpretations of a federal statute may not be contrary to statutory mandate, in excess of statutory authority or "arbitrary, capricious [or] an abuse of discretion."[13] In this case, the Commission proposes the promulgation of a regulation that clearly contradicts the statutory exceptions set forth in section 441e.

2. There is No Evidence of Legislative Intent to Remove the Existing First Amendment Rights Granted to this Group of American Employees and the Companies that Employ Them.

Looking beyond the face of BCRA into congressional intent, we find no support in the legislative history to justify the Commission's proposal.

During the BCRA floor debate, Senator Feingold entered into the congressional record a section-by-section analysis of the Senate's version of the legislation. The narrative describing the amendments to section 441e simply stated:

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[11] *Id.*

[12] 5 U.S.C. §§ 553, 706 (2002).

[13] 5 U.S.C. § 706.

> "Sec. 303. Strengthening Foreign Money Ban. Prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with federal, state or local elections, including any electioneering communications. This clarifies that the ban on contributions to foreign nationals applies to soft money donations."[14]

As a primary sponsor of the Senate legislation, Senator Feingold's statements indicate no express, implied, or implicit effort to eliminate the rights of "restricted class" employees from participating in the company's PAC, or otherwise removing the rights granted equally to all domestic corporations organized under State law that transact business in the United States.

Congress consciously revised section 441e solely to clarify specific factual situations – foreign national funds used for soft money donations, political party contributions, independent expenditures and "electioneering communications."[15] In the absence of a direct statutory nexus and a legitimate rationale for this dramatic reversal in agency policy, the new regulation should be rejected.

3. The Commission's Proposal Lacks a Legitimate Public Policy Rationale

The Commission puts forth no legitimate public policy rationale as the impetus for the new rule.

As Senator Feingold's and other Members of Congress' comments indicate, the 1996 elections and the judicial decisions that followed presented very serious allegations of foreign national interference in American elections.[16] However, in none of those cases, nor in the congressional debate of the BCRA, do we find any indication of concern with the status of domestic corporations owned or operated by foreign parent companies.

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[14] 2002 Cong. Rec. S1994 (Mar. 18, 2002).

[15] The House of Representatives considered and rejected an amendment to the "Shays-Meehan" House version of the BCRA that would have permitted only American citizens and U.S. nationals to make contributions in domestic elections, thereby eliminating the ability of permanent legal residents to contribute. 148 Cong. Rec. H369-01 (Feb. 13, 2002).

[16] *See, e.g., U.S. v. Kanchanalak*, supra.

The proposed regulation is an unnecessary draconian action, especially in light of the fact that the FEC's current regulations impose legitimate and necessary safeguards to prevent the flow of foreign corporate dollars from the parent to its domestic subsidiary.[17] FEC advisory opinions have interpreted section 441e and the regulatory provisions to prohibit the transfer of funds from a foreign parent corporation to its domestic subsidiary for any political purpose whatsoever. Domestic subsidiaries of foreign parents may, however, pay for PAC overhead and administrative costs and make corporate contributions in state and local elections, so long as the company could prove, by a "reasonable accounting method," that it had produced sufficient domestic revenues to cover its political contributions.[18]

Similar safeguards have been imposed on foreign national individual contributions. Foreign national individuals may not serve as PAC officers; they may not vote on decisions related to federal or non-federal candidate endorsements or contributions, and they are prohibited from participating in decisions related to corporate PAC solicitation programs.[19]

Abitibi-Consolidated Sales Corporation employees' PAC contributions pose no threat to the American political system. These individuals should be afforded equal rights granted to other American workers. Similarly, the company's foreign parentage should not be viewed as "foreign interference" into U.S. elections. To the extent that there may be a threat of foreign corporate influence, the FEC's existing regulatory policies have proved sufficient to prevent the influx of foreign corporate dollars, and therefore should be retained.

4. <u>If the Commission Approves the Proposed Regulation, it Should Seek Additional Public Comments and Further Define the Regulatory Terms</u>.

If the Commission determines that additional restraints on domestic subsidiaries are necessary, the agency should publish a second Notice of Proposed Rulemaking and seek further public comment.

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[17] 11 C.F.R. § 110.4.

[18] FEC A.O.'s 1989-20 (prohibiting a domestic subsidiary from making corporate contributions because the company was "predominantly funded" by its foreign parent); 1989-29, 1992-16.

[19] FEC A.O.'s 1990-8, 1992-16, 1995-15, 2000-17 (*Cf.*, dissenting opinion of Commissioner Scott Thomas).

The NPRM proposes to restrict the rights of foreign "controlled" corporations. However, the Commission provides no draft regulatory language, nor does it attempt to define the terms "indirectly" or "controlled" as they apply to the foreign parent's relationship to U.S. subsidiaries.

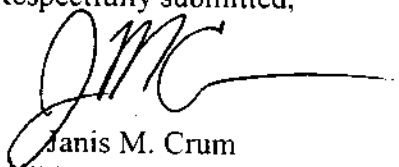
We believe that attempting to define these terms, then enforcing any regulation of foreign "controlled" corporations will prove a very difficult endeavor. In the case of public corporations, a company may be "controlled" primarily by virtue of stock ownership. On any given day, the company's ownership status may change. Would the Commission define the term "controlled" for public corporations depending on the nationality of the majority shareholders? If a corporation is located in a foreign country, but the majority of its stock is owned by Americans, would the Commission deem it exempt from the foreign national contribution ban?

IV. Conclusion

We appreciate the challenge the Commission faces in promulgating regulations pursuant to the BCRA. With regard to the proposed rule, Abitibi-Consolidated Sales Corporation believes that its restricted class employees should be afforded First Amendment political rights equal to those granted to other individuals employed by "American" companies. Abitibi's employee contributors, like many Americans, look forward to the opportunity to participate in national, state and local elections through contributions to the company's federal PAC. We see no reason to abolish their rights; in fact, the Commission should seek to encourage the participation of all Americans in electoral politics.

While we recognize the significant threat of foreign influence in domestic politics, we believe that the FEC's current regulatory safeguards work effectively to prevent such interference. We therefore urge the Commission to reject the proposed regulation and retain the current rules applicable to domestic subsidiaries of foreign parent companies.

Respectfully submitted,



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