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A·C·L·I AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

September 8, 2002

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

Dear Ms. Dinh:

This letter is submitted on behalf of the American Council of Life Insurers ("Council") The Council is a national trade association with 399 member life insurance companies, which account for 76% of the life insurance business and 75% of the annuity business in the United States. A number of our member life insurers are subsidiaries of, or controlled by, foreign companies. We are, therefore, very interested in assuring that U.S. life insurers with foreign affiliations can participate in the financing of state, federal, and local political campaigns to the same extent as other U.S. corporations.

## Summary of Proposal

The Bipartisan Campaign Reform Act of 2002[1] ("BCRA") revised the Federal Election Campaign Act of 1971.[2] To implement certain statutory modifications, the Federal Election Commission ("FEC") published a proposed rulemaking in the Federal Register on August 22, 2002[3], that addresses increases in contribution limits, a prohibition on contributions and donations by minors to certain political committees, and a prohibition on contributions,

[1] Public Law 107-155, 116 Stat. 81 (March 27, 2002)
[2] 2 U.S.C. 431 *et seq.*
[3] FEC Notice 2002-14 (Aug. 16, 2002); 67 Fed. Reg. 163 at 54366 (Aug. 22, 2002).

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donations, and certain expenditures by foreign nationals. Our comments focus on those aspects of the proposal dealing with the activities of foreign nationals.

## Prohibition on Contributions, Donations, Expenditures and Disbursements by Foreign Nationals (11 CFR 110.20)

The BCRA bans foreign national contributions and donations made "directly or indirectly." Former Section 2 U.S.C. 441e(a) of the Federal Election Campaign Act of 1971 banned foreign national contributions made directly "or through any other person." The release acknowledges that it is unclear what Congress intended in changing the terminology.[4] The FEC release explains that "while both phrases would address contributions made through conduits, the term 'indirectly' could have a broader scope because the general purpose of Section 303 of BCRA is to strengthen the ban on contributions and donations by foreign nationals." The release invites comment on whether "indirectly" should be construed to have a broader meaning than "through any other person" and if so, whether the rules should explicitly reflect this interpretation by defining "indirectly." The proposed rule does not define the term "indirectly."

Proposed paragraph 110.20(a) would explicitly state that foreign nationals shall not, directly or indirectly, make contributions or donations in connection with any election for Federal, State, or local office. The release explains that because BCRA retains the provision on express or implied promise, proposed paragraph (a) would also include that language. Additionally, proposed paragraph (a) would define "election" in accordance with 11 CFR 100.2 and proposed 11 CFR 110.20(j). While current Section 100.2 addresses Federal elections, proposed paragraph (j) would define "election" generically so that it would include State and local elections.[5]

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[4] *Id.*

[5] The release notes that in BCRA, Congress added the "donation" of funds by foreign nationals to its prior ban on "contributions" by foreign nationals. In 2000, the Commission included in its legislative recommendations to Congress a proposal that 2 U.S.C. 441e be amended to clarify that the statutory prohibition on foreign national contributions extends to State and local elections. The FEC noted that this could be accomplished by changing "contribution" to "donation." The

The FEC release specifically invites comment on whether the term "indirectly" should cover a foreign controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, when such corporation seeks to make (1) non-federal donations of corporate treasury funds, or (2) federal contributions through a political action committee. Specifically, the FEC 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.

## Administrative Procedure Issues

Several considerations warrant extension of the comment period. The newly proposed rule changes are significant. The recent modifications to the proposal merit thorough discussion and analysis. Procedurally, several aspects of the proposal raise significant concerns under the Administrative Procedure Act. Additionally, the proposal may have an unwarranted and disproportionate impact on life insurers that have foreign ownership or control.[6]

The 21-day comment period is insufficient to address the issues raised in the release. As a practical matter, most observers will have significantly fewer than 21 days to digest the proposal after accounting for time consumed in postal delivery of the Federal Register following its August 22, 2002 printing date. Moreover, because the proposal was published at the peak of the summer vacation season and prior to the Labor Day holiday, many interested parties would not have meaningful notice of the proposed rulemaking.

Industry groups like our trade association circulate regulatory proposals, elicit membership input, develop a consensus, and circulate a draft letter of comment before submission. This is a worthwhile but time intensive process that is difficult to execute in 21days.

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release states that in BCRA, Congress chose to retain "contribution" and to add "donation" as a prohibited activity, while also explicitly listing "a Federal, State, or local election" as the elections in connection with which such contributions and donations must not be made. By means of this two-fold approach, FEC states its belief that Congress left no doubt as to its intention to prohibit foreign national support of candidates and their committees for all Federal, State, and local elections.

[6] The impact of the short notice period would have an equally negative impact on *any* U.S. company that has foreign ownership or control.

The special time burdens confronting regulated industries and large organizations in digesting regulatory proposals were explicitly recognized by the Administrative Conference of the United States in its publication entitled *A Guide to Federal Agency Rulemaking* which observes:

> The 60-day period established by Executive Order 12044 for significant regulations (and no longer in effect unless adopted by agency rule) is a more reasonable *minimum* time for comment. However a longer time may be required if the agency is seeking information on particular subjects or counter-proposals from regulated industry. "Interested persons" often are large organizations and they need time to coordinate and approve an organizational response or to authorize expenditure of funds to do the research needed to produce informed comments.[7]

The Commission itself had five months (approximately 150 days) to develop its proposal after March 27, 2002, the date the BCRA was signed into law. In light of this lengthy time period for the FEC to develop its proposal, industry commentators should be entitled to a reasonable period of comment longer than 21 days. After the nominal 21 day comment period, the FEC has reserved approximately three and ½ months (114 days) to digest comments and adopt a final rule. The disparity between the total time period allocated for FEC rule development and time period allocated for public comment is striking. The scant 21 day comment period provides little meaningful opportunity for interested parties to constructively review and comment on the rule proposal. Fair and equitable federal rulemaking demands more.

FEC representatives were unreceptive to ACLI's request for a reasonable extension of the comment period, and stated that letters coming after the deadline would be designated "late," and perhaps receive lesser consideration.[8] In light of this position, ACLI files these initial comments in order to have a place in the rulemaking file, and specifically reserves the opportunity to supplement its submission with a subsequent filing it will make after the putative comment deadline. We request that the FEC conduct a hearing on the record, and specifically request an opportunity to appear and participate in such a hearing.

## Summary of Position

[7] *See, A Guide to Federal Agency Rulemaking*, Administrative Conference of the United States (1983) at 124 [republished in 1990].

[8] September 4, 2002, ACLI contacted Mai T. Dinh, Acting Assistant General Counsel, by phone to explore a short extension of the comment period.

- The FEC should unequivocally jettison from its proposal any determination that the "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 contributions from their PACs , or both."[9] Several compelling considerations augur against the FEC taking such a position, including:

    - The dearth of legislative history on the meaning of the term "indirect" in the BCRA does not justify the FEC substituting its judgment for Congress. Further, to do so would be an invalid usurpation of legislative branch functions.[10]

    - If Congress intended this interpretation, it could have done so. Indeed, in 1990 a bill in Congress would have established such a prohibition on foreign controlled U.S. corporations, including a U.S. subsidiary of a foreign corporation. The 1990 bill was not enacted by Congress. Given this legislative background, it is *ultra vires* for the FEC to attempt something by administrative rulemaking that Congress had considered doing in the past, but declined to do explicitly in the BCRA.

- The interpretation is wholly unnecessary because current FEC laws and regulations[11] unequivocally preclude involvement of foreign nationals in campaign contributions or decision making, financial contributions, or PAC operations.[12] Effective regulations are already in place to keep foreign nationals out of the state and federal election process. In effect, the possible FEC interpretation amounts to "guilt by association" for U.S. businesses with foreign owners. This is an inadequate basis on which to promulgate such a profound change of position.

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[9] 67 Fed. Reg. 163 (August 22, 2002) at 54372. To its credit , the FEC acknowledged that "is unclear what Congress intended in changing the terminology." *Id.*

[10] This practice contradicts the principles addressed by the Supreme Court's in the *Chevron* case.

[11] 2 U.S.C. 441e(a)(2) prohibits persons from soliciting, accepting, or receiving contributions and donations from foreign nationals.

[12] Indeed, the FEC's release acknowledges that current law provides a full barrier to campaign financing by foreign nationals. 67 Fed. Reg. 163 (August 22, 2002) at 54372.

- The sources and uses of political campaign contributions are fully disclosed and publicly accessible pursuant to FEC regulations. Participants, donors and contributors are not hidden. The possible FEC interpretation on the scope and intent of "indirect" provides no meaningful added value to this current structure of campaign finance disclosure. The current bar on foreign national contributions is clear and effective.

- The possible FEC administrative position contradicts the financial services modernization of the Gramm-Leach-Bliley law, which sought to tear down artificial regulatory and global barriers to competition. As U.S. corporations become more globally engaged, the possible FEC interpretation on the meaning of "indirect" would have a dramatically broad scope and a draconian impact.

- The possible FEC interpretation on the scope and intent of "indirect" would disenfranchise U.S. businesses, and their employees who participate in the employers' PACs, of the ability to participate fully in the election process. Such a broad and Congressionally unintended result should be strongly avoided.

- The FEC should not attempt to define the term "indirectly" in the proposed rule. Such action would speculate on the intent of Congress, and would risk impairment of essential rights of U.S. businesses and their employees to participate in the political and campaign process.

- The FEC does not need to interpret further, because proposed paragraph 110.20(a) would explicitly state that foreign nationals shall not, directly or indirectly, make contributions or donations in connection with any election for Federal, State, or local office. This barrier is clear and effective. These proposed changes should be interpreted to have the same scope and meaning that has been applied to contributions made directly "or through any other person."

## Conclusion

The FEC should not take any position in the final rule stating that the 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 contributions from their PACs , or both.

Thank you for your attention to our views. We would be happy to address any questions that you may have concerning our submission.

Sincerely,

Carl B. Wilkerson

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