DAIMLERCHRYSLER

September 13, 2002

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

Re: Comments to Notice 2002-14: Proposed Rulemaking (Contribution Limitations and Prohibitions) – Foreign Nationals

Dear Ms. Dinh:

These comments are submitted on behalf of DaimlerChrysler North America Holding Corporation ("DaimlerChrysler"), DaimlerChrysler Corporation ("DCC"), and the DaimlerChrysler Corporation Political Support Committee ("DCC PAC") in response to the Federal Election Commission ("FEC") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on August 22, 2002.[1]

DaimlerChrysler is the U.S. subsidiary of a foreign parent. DaimlerChrysler, DCC, and the DCC PAC submit these comments to protect: (1) the right to sponsor the DCC PAC, and (2) the rights of DaimlerChrylser U.S. employees to freely associate and participate in the political process as members of the DCC PAC.

DaimlerChrysler and its employees have been cited in congressional debates as reasons why U.S. subsidiaries of foreign companies ("U.S. subsidiaries") should be allowed to sponsor PACs. Accordingly, we believe the following comments to be of particular relevance to this proceeding.

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[1] 67 Fed. Reg. 54366 (Aug. 22, 2002) (to be codified at 11 C.F.R. 110).

INTRODUCTION

I. Chrysler Corporation and DaimlerChrysler

Chrysler's storied history is well known to almost all Americans. In 1920, Walter P. Chrysler resigned from General Motors to join the company that would later bear his name. By 1929, Chrysler Corporation joined General Motors and Ford to become the "Big Three," the three biggest American automobile manufacturers. Along with the other members of the "Big Three," Chrysler Corporation grew to be a classic American icon. With the onset of World War II, Chrysler Corporation ceased civilian production of automobiles in order to aid in the war effort. After the war, Chrysler Corporation resumed manufacturing automobiles and even assisted NASA in the construction of its rocket launch vehicles. By the late 1970s, the American automobile industry was in a rapid decline, but Chrysler Corporation was on its way toward a major revival. In 1978, Lee A. Iacocca joined Chrysler Corporation and was subsequently heralded as one of America's most successful and capable corporate leaders. Under Mr. Iacocca, Chrysler Corporation returned to prominence in the 1980s. Finally in 1998, the German company Daimler-Benz and Chrysler Corporation agreed to combine their businesses in a "merger of equals." The result was the creation of DCC as the successor to Chrysler Corporation.

Since the merger, DaimlerChrysler and DCC have continued to conduct themselves as model corporate citizens and remain a significant force in the U.S. economy. DaimlerChrysler employs approximately 100,000 people nationwide. In 2001, DaimlerChrysler had net sales, operating receipts, and revenues of over $81 billion, $658 million of which was paid in taxes to all fifty states and the District of Columbia. DaimlerChrysler maintains major plants, parts depots, and offices in twenty-eight states.

In 1976, Chrysler Corporation formed a PAC that is currently registered as the DCC PAC. Over 2,000 DaimlerChrysler employees participate in the DCC PAC which supported candidates in 179 federal races during the 2000 election cycle. In addition, many DaimlerChrysler employees are members of the United Auto Workers and participate in their union sponsored PAC.

II. The NPRM

This NPRM was instituted to implement changes in the contribution limitations and prohibitions enacted by the Bipartisan Campaign Reform Act of 2002 ("BCRA").[2] In particular, the NPRM observed that the BCRA slightly alters the language of the prohibition on contributions by foreign nationals by substituting the language "or through any other person" with the word "indirectly."[3] The NPRM suggests that this ever-so-slight modification might be a manifestation of Congress' intent to dramatically increase restrictions on U.S. subsidiaries by prohibiting them from sponsoring PACs.[4] The NPRM expresses no indication that union sponsored PACs would be similarly prohibited.

The NPRM failed to note that FEC regulations already regulate "indirect" contributions by foreign nationals. Under existing FEC regulations, foreign nationals may not "*indirectly* participate in the decision-making process of any person such as a corporation, labor organization, or political committee, with regard to ... decisions concerning the administration of a political committee."[5] In addition, an entire body of FEC Advisory Opinions going back to 1978 flesh out the exact parameters of this regulation.[6]

COMMENTS

The NPRM suggests that it "is unclear what Congress intended in changing the terminology" from "or through any other person" to "indirectly."[7] The legislative record of BCRA is silent. However, it is doubtful that Congress intended to effect

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2 Pub. L. No. 107-155, 116 Stat. 83 (2002).

3 67 Fed. Reg. 54372.

4 *Id.* In the 1999-2000 election-cycle, this would have had the effect of eliminating approximately seven percent of all contributions distributed by corporate PACs to federal candidates. *See Rulemaking Raises Question About Foreign-Connected PACs*, POLITICAL FINANCE, Aug. 2002, at 1.

5 11 C.F.R. § 110.4(a)(3) (emphasis added).

6 *See, e.g.*, FEC Advisory Opinions 1999-28, 1995-15, 1990-8, 1989-29, 1980-100, 1978-21.

7 67 Fed. Reg. 54372.

any change in the ability of U.S. subsidiaries to operate PACs. Rather, the BCRA's use of the word "indirectly" merely tracks that of a preexisting FEC regulation, and is likely intended to codify the current regulatory scheme.

As emphasized in past legislative debates regarding this issue, Congress has not sought to discriminate against U.S. corporations because they are owned or controlled by a foreign parent. U.S. corporations, regardless of the nationality of their parent entities, employ U.S. citizens and pay federal and state taxes. Additionally, Congress has singled out DaimlerChrysler as a prime example of why such discrimination would be profoundly irrational. As will be detailed below, a regulation allowing PAC participation by Americans employed by the other members of the "Big Three," but denying that same opportunity to Americans employed by DaimlerChrysler is ungrounded in any mandate from Congress. Furthermore, such discrimination is unconstitutional.

I. Legislative History and DaimlerChrysler

During the House debate on the Bipartisan Campaign Reform Act of 1998, the House passed an amendment to explicitly codify the right of employees of U.S. subsidiaries to participate in corporate PACs.[8] The amendment stated: "Nothing in this Act may be construed to prohibit any individual eligible to vote in an election for Federal office from making contributions or expenditures in support of a candidate for such an election (including voluntary contributions or expenditures made through a separate segregated fund established by the individual's employer or labor organization)."[9] After introducing the amendment, the amendment's co-sponsor Representative Paul Gillmor stated that the amendment was necessary to clarify that Congress does not intend to "deny American citizens who work for American subsidiaries of companies which are headquartered abroad an avenue of political association and participation that is guaranteed all other Americans, namely, the right to voluntarily contribute money to political candidates through political action committees sponsored by their employers."[10] The amendment passed with no opposition.[11]

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8 Bipartisan Campaign Reform Act, H.R. 2183, 105th Cong. (1998).

9 144 Cong. Rec. H4862.

10 *Id.*

11 *Id.* at H4864.

Of particular relevance to DaimlerChrysler, and all similarly situated corporations, were the following statements by Representative Gillmor:

> [I]n my home State of Ohio, more than 218,000 Ohioans are employed by American subsidiaries of companies headquartered abroad, and there are more than 5 million Americans nationwide. That number is growing daily. It will get larger still as soon as the merger between Chrysler and Daimler-Benz is completed to form a new Daimler-Chrysler corporation.
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> It makes no sense to tell these Americans that today they may contribute to their company's political action committee, but the day the merger is completed they instantly become second class citizens and are denied this avenue of political participation. Even though the name on the paycheck may change, these employees remain American citizens, and the vagaries of corporate mergers should not be permitted to deny them their rights as Americans.[12]

Similarly, Representative Vic Fazio expressed his support for the amendment and the ability of DCC to maintain its PAC even after its merger:

> We are part of a global economy, and increasingly who we work for is going to change during the time in which we work for them. [Representative Gillmor] pointed out the Daimler-Benz-Chrysler merger as a good example of a long-standing American corporation where its employees have contributed both to its union's political action fund and its corporate PAC, and under some proposals that have been made their rates [*sic*] will be truncated and eliminated.
>
> It seems to me the American people ought to be able to participate in politics regardless of the vagaries of who they work for at any given time.[13]

The debate surrounding the Gillmor Amendment applies with equal strength to analysis of the BCRA. Representative Christopher Shays, a co-sponsor of the

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12 *Id.* at H4862.

13 *Id.*

BCRA, rose in favor of the Gillmor Amendment to say: "I just want to speak on behalf of the Meehan-Shays supporters, that we do support this amendment. It is a right of American citizens today.... [W]e do support it and would urge others to support it as well."[14]

During subsequent legislative debate on an amendment that would have nullified the Gillmor Amendment by prohibiting U.S. subsidiaries from sponsoring PACs, Representative Shays made his own reference to protecting the rights of DaimlerChrysler and its employees:

> Our concern is that a company like, for instance, Chrysler, that now has significant ownership by German interests, that the employee [*sic*] still be allowed to organize a political action committee, still be allowed to contribute, still be allowed to fight for things they think are important for Chrysler and its workers.[15]

Congress expressly sought to protect the rights of DaimlerChrysler, and other U.S. subsidiaries and their American employees, and sought to treat them the same as U.S. corporations that are not foreign owned or controlled. The NPRM's suggestion that Congress may have intended in the BCRA to prohibit the operation of PACs by U.S. subsidiaries like DCC is belied by the numerous past comments to the contrary by multiple members of Congress, including one of the BCRA's co-sponsors.

Furthermore, Congress' equitable concerns logically apply with equal force to the fact that the NPRM's proposal will permit unionized employees of a U.S. subsidiary to participate in a union sponsored PAC, but will prohibit restricted class members from participating in a corporate sponsored PAC. To use Representative Gillmore's language above, Congress surely did not intend to treat restricted class members as "second class citizens."

II. Constitutionality of Discriminating Against Employees of U.S. Subsidiaries

The NPRM's proposal to prohibit U.S. subsidiaries from sponsoring PACs potentially violates the fundamental constitutional rights of millions of American

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14 *Id.*

15 *Id.* at H6839.

employees. Such a proposal, if implemented, would place American employees of U.S. subsidiaries on unequal footing vis-à-vis American employees of other U.S. corporations in derogation of their right to freedom of association as protected by the First Amendment. Any implementation of this proposal would be subject to an Equal Protection challenge, invoking strict scrutiny; therefore, any proposal must be able to overcome this challenge from the outset. The NPRM's proposal cannot.

Freedom of association is a constitutional right arising out of the First Amendment. The Supreme Court observed in *NAACP v. Alabama*: "It is beyond doubt that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[16]

The Supreme Court has afforded First Amendment protection to activities of PACs. "The First Amendment protects political association as well as political expression."[17] In *FEC v. National Conservative Political Action Committee*, the Court observed that PACs "are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify[y] the voice of their adherents.'"[18] The Court went on to state that "the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."[19] "[C]ollective action in pooling . . . resources to amplify their voices" is to be accorded full First Amendment protection because any lesser protection would "subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources."[20]

As a result, freedom of association in the political arena in general, and in the campaign finance arena specifically, is protected by virtue of the First Amendment. Although there may be limits to the right of freedom of association (just as there are limits to free speech), governmental action that may curtail this freedom is "subject

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16 378 U.S. 449, 460 (1958).

17 *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)

18 470 U.S. 480, 494 (1985) (quoting *Buckley*, 424 U.S. at 22).

19 *Id.* at 495.

20 *Id.*

Respectfully submitted,

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to the closest scrutiny."[21] A court will uphold a significant interference with the right of political association only if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[22]

The NPRM's proposal interferes with the right of association of American employees by eliminating their ability to participate in the PAC of a U.S. subsidiary that employs them. The employees' ability to further political goals based upon their shared interests (which emanate from their common employment) strips them of the rights enjoyed by American employees of U.S. corporations without a foreign parent. The proposal discriminates against the employees because they are treated differently than other similarly situated Americans.

The NPRM's proposed prohibition fails to satisfy strict scrutiny. First, the proposed prohibition is not narrowly drawn. It severely curtails the First Amendment rights of American citizens, and has no application to foreign nationals who are already prohibited from participating in a PAC.

In the same vein, the justification for such a proposal does not implicate any vital government interest. Current regulations already prohibit the involvement of foreign nationals in the political arena. To the extent that this proposal would theoretically prevent circumvention of those regulations, no person has made a legitimate showing that circumvention by foreign parent corporations takes place through their American subsidiaries and, therefore, needs to be addressed. Nevertheless, any such circumvention can be addressed by stricter enforcement of the current foreign national ban.

CONCLUSION

The NPRM's suggestion that the BCRA's modification of the current law should be interpreted to foreclose the First Amendment rights of millions of Americans is neither supported by legislative history, nor constitutional. The FEC should retain its longstanding regulations that comport with Congress' express intent that U.S. subsidiary PACs be permitted.

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21 *NAACP v. Alabama*, 357 U.S. at 461.

22 *Buckley*, 424 U.S. at 25.