NABPAC

National Association of Business Political Action Committees

September 13, 2002

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BY HAND DELIVERY

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

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

Dear Ms. Dinh:

The National Association of Political Action Committees ("NABPAC") respectfully submits these comments in response to the Federal Election Commission ("FEC") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on August 22, 2002.[1]

Founded in 1977, NABPAC is not a PAC, but a non-partisan trade association dedicated to promoting, defending, and improving PACs.[2] NABPAC members consist of corporations and trade associations throughout the country that maintain PACs of varying sizes. Nearly 250 PAC and government affairs professionals from 128 corporations and associations throughout the country participate in NABPAC. Some NABPAC members are U.S. subsidiaries of foreign parent corporations ("U.S. subsidiaries").

NABPAC is submitting these comments on its own behalf as well as on behalf of various NABPAC members and constituents to protect the rights of U.S. subsidiaries to maintain PACs, the rights of trade associations to maintain PACs, and the rights of employees of U.S. subsidiaries to participate in PACs. Accordingly, these comments will only discuss the portion of the NPRM that affects the issue of foreign nationals.

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

2 NABPAC's Internet site (www.nabpac.org) provides a detailed description of NABPAC and its activities.

On October 12, 1990, NABPAC submitted comments on this subject in an earlier rulemaking.[3] Those comments are incorporated and attached hereto.

INTRODUCTION

I. The NPRM

The NPRM was initiated to implement the contribution limitation and prohibition provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[4] In particular, the NPRM asks whether a minor change in terminology, with no attendant discussion in the Congressional Record, could have been intended to effect a major prohibition against the operation of U.S. subsidiary PACs and the thousands of Americans who contribute to them.

The NPRM examined the BCRA's language amending the prohibition against contributions by foreign nationals and noticed that the current language "through any other person" had been replaced with the word "indirectly."[5] Though it admitted that it "is unclear what Congress intended in changing the terminology," the NPRM suggested it may have been to "cover a foreign controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, when such corporation seeks to make ... federal contributions through a political action committee."[6] The effect of a regulation promulgated pursuant to this suggestion would be a prohibition of all PACs operated by U.S. subsidiaries.

II. Current Regulation of U.S. Subsidiaries

Prior to the effective date of the BCRA, November 6, 2002, federal law prohibits "a foreign national directly or through any other person to make any contribution of money or other thing of value . . . in connection with an election to any political office or in connection with any primary election, convention, or caucus held to

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3 55 Fed. Reg. 34280 (Aug. 22, 1990).

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

5 67 Fed. Reg. 54372.

6 *Id.*

select candidates for any political office . . . ."[7] "Foreign national," is defined by reference to section 611 of title 22 of the United States Code, as:

> [A] person outside of the United States, unless it is established ... that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
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> ... a 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.

FEC regulations promulgated pursuant to this prohibition provide:

> A foreign national shall not direct, dictate, control, or directly or *indirectly* participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person's federal or non-federal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.[8]

Therefore, foreign corporations and associations are forbidden from establishing PACs. However, a U.S. subsidiary may establish a PAC, so long as no foreign national is solicited by the PAC or involved in the PAC's decision-making process.[9] A U.S. subsidiary may establish a PAC even if a majority of the U.S. subsidiary's stock is owned by foreign nationals.[10] Moreover, a PAC established by a U.S. subsidiary may solicit contributions from the restricted class of the foreign parent

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7 2 U.S.C. § 441e(a).

8 11 C.F.R. § 110.4(a)(3) (emphasis added).

9 FEC Advisory Ops. 1978-21, 1980-100, 1989-29, & 1995-15.

10 FEC Advisory Op. 1990-8.

and of any affiliated domestic subsidiaries, provided those individuals are not foreign nationals.[11]

COMMENTS

The NPRM speculates that Congress may have intended to use the term "indirectly" in the BCRA to prohibit PACs established by U.S. subsidiaries. NABPAC submits that the term "indirectly" was not intended to effect any change in the regulation of U.S. subsidiaries.

I. The Word "Indirectly" Codifies the Current Regulatory Regime

As discussed in the Introduction, the current regulatory regime already regulates "indirect" contributions by foreign nationals. FEC regulations explicitly include a prohibition against foreign national political participation, "directly or indirectly." The regulations and Advisory Opinions issued pursuant to the regulations explain that "indirect" participation by foreign nationals occurs when they exert influence in the political decision-making process of U.S. subsidiaries. Such "indirect" political participation by foreign nationals is already prohibited. Therefore, Congress' use of the phrase "indirect" was an obvious codification of the current regulatory regime. The BCRA's silent legislative record suggests that Congress did not intend to significantly alter the status quo by making such a minor change that is already accounted for in the regulations. Furthermore, the fact that the BCRA left all other statutory provisions affecting PACs virtually unchanged lends further support to this claim.

II. BCRA Legislative History Supportive of PACs

Not only did Congress not debate the merits of prohibiting PACs by U.S. subsidiaries, but the principal co-sponsors of the BCRA, Senators McCain and Feingold, both extolled the virtues of PACs during the BCRA floor debate. These statements stand in stark contrast to the NPRM's suggested prohibition which, if enacted, will dramatically decrease the operation of corporate PACs. Had corporate PACs sponsored by U.S. subsidiaries been banned during the 1999-2000 election-cycle, approximately seven percent of all contributions distributed by corporate

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[11] FEC Advisory Op. 1999-28.

PACs to federal candidates would have been eliminated.[12] This could not have been the result intended by the BCRA co-sponsors who, as detailed below, are on record supporting PACs.

Senator McCain opened the second day of debate on the BCRA by stating:

> Well, Mr. President, we try to help political action committees because they provide us, generally speaking, with small donations that are an expression of small individuals' involvement, as opposed to the so-called soft money, which we are trying to attack. So we have tried to, in the past, make it as easy as possible for political action committees to function, rather than make it difficult.[13]

Senator Feingold responded shortly thereafter on the same day: "The problem is not PACs. The problem isn't how PACs raise their hard money contributions. We used to think PACs were the problem."[14]

Senator Bennett then summed up the comments by Senator Feingold to conclude:

> I was interested and pleased to hear the Senator from Wisconsin say we used to say PACs were a problem. I remember when the Senator from Kentucky and I were lonely voices here defending PACs as being a legitimate thing in the face of those who were attacking it in the name of campaign finance reform. So at least that debate is over and now PACs are good.[15]

The NPRM's suggestion that perhaps Congress intended to limit PACs established by U.S. subsidiaries flies in the face of this legislative history. As succinctly stated by Senator McCain, the BCRA's restrictions are not targeted to PACs, which

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[12] *See Rulemaking Raises Question About Foreign-Connected PACs*, POLITICAL FINANCE, Aug. 2002, at 1.

[13] 147 Cong. Rec. S2553.

[14] *Id.* at S2559.

[15] *Id.*

Congress has "tried to, in the past, make it as easy as possible ... to function," but to "the so-called soft money, which we are trying to attack."

III. Contrasting Regulatory Environments

As alluded to in the Senators' above quoted statements, PACs have not always enjoyed the congressional support that they do today. In 1990, the Senate voted to severely restrict the operation of PACs, which included a ban on PACs that were operated by U.S. subsidiaries that were fifty-percent owned by a foreign parent.[16] The FEC had simultaneously instituted a rulemaking to do the same.[17] Time has passed, and Congress' attitude toward PACs has changed markedly. While the FEC may have had reasons to propose eliminating PACs of U.S. subsidiaries in 1990, no justification exists in 2002. Therefore, the NPRM's suggestion that Congress may have intended in the BCRA to prohibit U.S. subsidiaries from sponsoring PACs is unfounded.

IV. Unintended Consequences

Finally, the NPRM's proposed ban will have a number of other relatively drastic unintended consequences that are neither contemplated by the NPRM, nor mentioned by Congress in passing the BCRA. In particular, PACs sponsored by trade associations will be deprived of two key sources of funding. First, trade association PACs routinely receive unsolicited PAC contributions from the PACs of member corporations since corporations are permitted to give prior authorization to solicit contributions to only one trade association per calendar year. To the extent that a member corporation is a U.S. subsidiary, that member corporation would no longer be permitted to have a PAC. This would therefore severely limit an actual source of funding for trade association PACs.

Second, taken to an extreme, if "indirectly" takes on a different meaning than under current precedent, U.S. subsidiaries could theoretically be prohibited from providing "prior approval" to a trade association to solicit PAC contributions from American employees of U.S. subsidiaries. Such a result would undermine Congress' intent to permit trade associations to maintain PACs. It would be illogical to assume that

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[16] 136 Cong. Rec. S11174-S11177.

[17] 55 Fed. Reg. 34280. See attached comments by NABPAC objecting to the proposed prohibition on PACs sponsored by U.S. subsidiaries in that rulemaking as well.

Congress intended to dramatically alter the operation of PACs, in ways both imagined and unimagined in the NPRM, without explicitly providing for the changes in the BCRA, or even mentioning them in the legislative record.

CONCLUSION

There is no basis in the legislative history of the BCRA to conclude that Congress intended to employ the term "indirectly" as a sweeping prohibition against the operation of PACs by U.S. subsidiaries. Rather, the current congressional attitude toward PACs is expressly very supportive. The FEC should interpret the BCRA's use of the word "indirectly" as a reaffirmation of the current regulatory regime utilizing the same word.

If the FEC decides to hold public hearings on this issue, NABPAC would like an opportunity to testify.

Respectfully submitted,

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October 12, 1990

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Dear Ms. Propper:

These comments are submitted on behalf of the National Association of Business Political Action Committees (NABPAC) in response to the "Notice of Proposed Rulemaking on Domestic Subsidiaries of Foreign Nationals", 55 Fed. Reg. 34,280 (August 22, 1990) (to be codified at 11 C.F.R. 110) issued by the Federal Election Commission ("FEC"). Also in response to that notice, NABPAC hereby requests an opportunity to testify at the commission's hearing on this matter scheduled for October 31, 1990.

NABPAC is a voluntary, non-profit and non-partisan association of corporate and trade association political action committee (PAC) executives. It was formed in 1977 to encourage the formation of PACs, to facilitate effective management and operations, to promote high standards of conduct and to serve as a public advocate for the continued existence of PACs. Among our 100 members are several PACs that would be adversely affected by the proposed rulemaking.

These comments are presented in three sections. The first section will address the preemption of the proposed Rule by Senate action. The second will present additional arguments against adoption of the Rule, incorporating comments on current law and means of assuring compliance therewith. The third contains concluding remarks.

I. FEC ACTION HAS BEEN PREEMPTED BY FEDERAL LEGISLATION.

America, according to the prevailing "wisdom" of Washington, is under siege from abroad. As foreign investments in the U.S. grow, we are warned, outside interests are daily gaining influence in our economy, our culture, and even our politics.

On Capitol Hill, concerns over "insidious foreign involvement in our political process" were recently

manifested in a letter sent to colleagues by Senate Finance Committee Chairman Lloyd Bentsen (D-TX). (1) In that letter, Sen. Bentsen urged passage of a measure designed to prevent U.S. subsidiaries of foreign corporations from operating PACs. Currently, Sen. Bentsen stated, the FEC permits "foreign companies to buy into our political process by acquiring U.S. subsidiaries and then creates inevitable pressures on employees to use their PAC muscle in ways acceptable to the corporate masters in London or Frankfurt or Tokyo." (2) On August 1, the Senate passed the "Senate Election Campaign Ethics Act of 1990," which would amend 2 U.S.C. 441e to forbid PAC activity by any U.S. corporation "if more than 50 percent of the entity is owned or controlled by a foreign principal." (3)

The same political climate which led to passage of S.137 may explain why the instant Notice of Proposed Rulemaking was originally issued. The stated purpose of the Rule "would be to further tighten the rules defining when domestic corporate subsidiaries of foreign nationals are engaging in prohibited election activities." (4) Yet the Rule would do no more than amend precisely the same regulation as the Senate bill, and to identical effect. Should the Senate bill eventually become law, of course, the Commission would be expected to ratify it. Sen. Bentsen acknowledged as much during debate over the bill, stating:

> just a few weeks ago, the FEC launched its own rulemaking procedure to resolve this matter in the same way as this amendment. I welcome the FEC action. It would be needed in any case to implement this provision after enactment. (5)

However, by adopting the Rule proposed, the Commission would clearly be exceeding its regulatory authority -- taking action in an area where Congress obviously believes legislation is necessary.

While this fact alone provides a compelling rationale for rejecting the proposed Rule, there are a number of additional, highly persuasive reasons for deciding against adoption.

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(1) "Dear Colleague" letter from Sen. Bentsen (May 8, 1990).

(2) Id.

(3) S.137, 101st Cong., 2d Sess., Sec. 225(2) (1990).

(4) 55 Fed. Reg. 34,280-81 (August 22, 1990).

(5) 136 Cong. Rec. S11,174 (daily ed. July 31, 1990).

II. THE PROPOSED RULE IS UNNECESSARY, UNFAIR, AND UNWORKABLE.

There is no rational basis for amending current law, which already provides a clear and enforceable bar to undue foreign involvement in domestic political processes. Foreign nationals are already prohibited from making any contribution to political conventions or caucuses, or to state and federal election campaigns, either directly or through another person (including a corporation or committee). (6) While any U.S. corporation may operate a PAC (7), PACs operated by U.S. subsidiaries of foreign corporation have been placed under a number of restrictions designed to ensure that "[a] foreign national shall not direct, dictate, control or participate in ... decisions concerning the making of contributions or expenditures in connection with elections." (8) For instance, members of a U.S. subsidiary's board who are foreign nationals may not participate in the selection of individuals to operate and direct expenditures of subsidiary PACs. (9) Individuals who are foreign nationals may not be solicited for contributions to PACs. (10) The PAC of a U.S. subsidiary may not contribute funds derived from the foreign principal to state or local election campaigns. (11) These restrictions apply equally and impartially to all U.S. corporations, whether 1 percent, 51 percent, or 100 percent foreign-owned. Vigilant enforcement, coupled with full disclosure of the sources and recipients of PAC contributions, are all that is needed to ensure compliance with both the letter and the spirit of laws governing PAC operation. The threshold at which "foreign influence" in election campaigns becomes excessive is best determined by the electorate:

> If contributions by foreign-owned PACs... rise too steeply, then candidates will attack their

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(6) 11 C.F.R. 110.4(a)(1) and (2).

(7) 22 U.S.C. 611(b)(2); Advisory Opinion 1990-8.

(8) 11 C.F.R. 110.4(a)(3).

(9) Advisory Opinion 1990-8.

(10) Advisory Opinion 1989-29.

(11) Advisory Opinion 1989-20. However, the administrative expenses of forming a PAC my be paid in part with foreign funds. Advisory Opinion 1989-111.

> opponents for being too dependent on foreigners, and voters can judge whether those accusations are correct. (12)

What the Rule would do, however, is discriminate against the thousands of American employees of foreign-owned U.S. companies whose rights will be directly infringed by the proposed PAC ban. Those employees will be denied the right to participate in the political process through PACs which directly represent their interests. In other words, the Rule would divide citizens into two unequal classes, with some "put on a different footing simply because they work for Toyota rather than Ford." (13) It would plainly be impossible to redress this injustice.

While the proposed rule focuses on the percentage of stock ownership of a U.S. subsidiary corporation, it ignores the fact that it would bar up to 100% of the executive or administrative personnel of affected U.S. companies from participation in a PAC which would advocate and represent their most immediate economic and political well-being. This proposal may be intended as a slap in the face of non-U.S. business interests, but it in fact mainly insults American citizens.

III. CONCLUSIONS

The U.S. Congress is actively considering legislation to forbid PAC formation by U.S. companies with majority foreign ownership. The FEC would be exceeding its regulatory authority in adopting the instant Rule, designed to accomplish the same end by the same means. Even absent the problem of redundancy, however, there are excellent reasons for deciding against the proposed Rule. Current law provides a clear and easily enforced "bright line" against undue foreign influence in U.S. elections. Further, the proposed Rule imperils the political rights of U.S. employees of targeted firms, threatening to deprive them of the opportunity to support campaigns through PACs which directly represent their interests.

In reviewing S.137, the Senate's comprehensive campaign reform package, Roll Call reserved its strongest condemnation for the "foreign PAC ban" provision:

> This xenophobic gesture was unnecessary since the Senate voted to ban all PAC contributions, but Senators obviously saw it as a way to win votes by Japan-bashing.

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(12) Roll Call, July 2, 1990 (editorial).

(13) 136 Cong. Rec. S11,176 (daily ed. July 31, 1990) (statement of Sen. McConnell).

It's an outrageous abridgement of the political rights of millions of Americans who work for companies in the U.S. that are foreign owned. (14)

The observation would serve as a fitting epitaph for the proposed Rule.

Sincerely,

Martin D. Garber, Jr.
President

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(14) Roll Call, August 6, 1990 (editorial).