September 13, 2002

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

Re: Comments on Proposed Rulemaking Regarding Foreign Nationals

Dear Ms. Dinh:

These comments on the Federal Election Commission's Proposed Rules relating to new contribution limitations and prohibitions in the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), are submitted on behalf of the National Republican Congressional Committee ("NRCC"). Established in 1866, the NRCC is composed of Republican Members of the U.S. House of Representatives, and concerns itself with the election of Republicans to House as well as other state and local offices.

As we have stated in prior rulemakings, we are not going to rehash the numerous constitutional problems with the BCRA. However, these issues need to be considered by the Commission, particularly with respect to due process, in addition to the usual First Amendment and federalism issues. As discussed more fully below, vague standards, particularly with respect to matters that could constitute criminal conduct, are unacceptable. We ask that the Commission be mindful of the legion of cases that discuss what sort of knowledge is required in such instances, and that any rules promulgated comport with such precedent.

A. Contributions from Foreign Nationals

The critical issue before the Commission is the level of knowledge required to hold a person liable for unlawfully accepting a contribution from a foreign national. The Commission's prefatory comments raise the possibility that strict liability could serve as the appropriate standard. A strict liability standard would hold liable even the most careful individual vetting contributors for their eligibility to make contributions, regardless of whether the innocent recipient is duped by a skillful imposter.

The legislative history of the BCRA on this point is virtually non-existent. But the Supreme Court has held that proof of actual congressional intent is required to impose the unforgiving strict liability standard. *See, e.g., Staples v. United States*, 511 U.S. 600, 606 (1994) ("[W]e have stated that offenses that require no mens rea generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime.") (citation omitted); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) ("We start with the familiar proposition that '[the] existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'") (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)); *Morissette v. United States*, 342 U.S. 246 (1952) (holding that the mere omission from the federal criminal statute of any mention of intent should not be construed as eliminating knowledge as a requisite element of the crime); *United States v. Osguthorpe*, 13 F. Supp. 2d 1215, 1218 (D. Utah 1998) (holding that although an earlier version of a statute prohibited "willfully allowing" livestock to enter upon such lands and the new version of the statute omitted the word "willfully," the government failed to show that this statutory history eliminated the intent requirement).

In those instances where the statute is silent and legislative intent is ambiguous or nonexistent, the federal courts will read a mens rea into the statute. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 114 n. 9 (1990) (holding that state statute prohibiting child pornography was not unconstitutionally overbroad because although the statute did not specify a mens rea, recklessness rather than strict liability was the appropriate standard to be applied when the statute was silent); *United States v. Bailey*, 444 U.S. 394, 404 (1980) (adopting approach of the Model Penal Code that "knowledge" is the appropriate level of intent where a statute in question fails to indicate); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *Osguthorpe*, 13 F. Supp. 2d at 1218-19 ("The Supreme Court has consistently looked to the Model Penal Code as an avenue of resolving questions of [the appropriate mens rea].")(*citing United States v. Bailey, supra*). *See generally United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 495-96 (E.D.N.Y. 1993) (providing an overview of the history of strict liability and observing that the standard is generally limited to the narrow categories of "public-welfare offenses" and statutory rape); American Law Institute, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955).

We support the proposed mens rea standards of "actual knowledge," "reason to know," and "willful blindness." The NRCC is not in the business of seeking contributions from foreign nationals, nor do we see any reason to do so. We hope our good faith efforts to comply with federal law will be assisted by clear guidelines from the Commission concerning what the NRCC should do to prevent the acceptance of illegal contributions. Likewise, we hope that our reasonable efforts to follow these guidelines will not be second-guessed if, due to no fault of our own, a few individuals manage to

devise a way around the regulatory safeguards. Consequently, we request that the Commission expressly create a "safe harbor" for political committees.

The absence of a "safe harbor" provision or the like could prove troubling. Today, merely because a contributor's name is "Kim," "Chang," "Rodriquez" or "Sultan" is of no consequence – there is no presumption or inference to be drawn from names that "sound foreign" or otherwise fit into outdated stereotypes. The Commission must be careful to ensure that any new rule does not inadvertently result in a change in this practice. Instead, such inquiries should be based only on objective factors – like a foreign address or a foreign bank. In those instances, political committees ought to be required to acquire proof disproving foreign national status.

B. Prohibitions on Contributions by Minors

Some of the Commission's proposed regulations concerning the ban on contributions by minors are an exercise in regulatory overreaching lacking any reasonable justification. The new § 441k states: "An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party." The proposed regulations extend the prohibition to all contributions by minors to state, district, and local committees of a political party.

The only constitutionally-required federal nexus suggested by the Commission is the possibility that state or local funds intended for use as "Levin funds" would somehow be tainted by contributions from 17-year-olds. That rationale is insufficient to justify the flat, universal ban proposed by the Commission. If there are concerns about whether minor contributions will impact Levin funds, they should be raised during the Levin fund rulemaking. Therefore, the more narrow alternative construction proposed, whereby a minor may make a contribution to the state or local party if the committee can show through reasonable accounting methods that the donation is used exclusively for certain purposes, should also be rejected at this time.

A reasonable interpretation of BCRA is that, as a general rule, the prohibition on contributions by minors should not envelope state and local parties. The purported purpose of prohibiting contributions to minors is to prevent parents from funneling contributions through their children in order to evade the federal hard money limitations. But aside from the Levin fund exception (which could be so complicated that no one will attempt to take advantage of the provision), the new law does not limit the amount of contributions parents can give to state and local parties. Therefore, the rational for prohibiting contributions by minors to state and local parties is absent. For the same reason, emancipated minors should be exempt from the prohibition—barring the remote possibility that parents will divorce their children in order to more fully exercise their constitutional right to free speech.

C. The BCRA Does Not Require the Commission to Alter Its Current Rules Regarding United States Subsidiaries

The actual language of the BCRA makes no mention of U.S. subsidiaries. In fact, the House considered an amendment that would have restricted contributions to U.S. citizens and nationals. That amendment failed. The Commission's own notice states that the "BCRA does no mandate a rule-making regarding U.S. subsidiaries." Thus, we suggest that the Commission leave the current rules and advisory opinions in place.

Thank you for your attention to this matter. We ask that we be permitted to testify on this matter before the Commission.

Respectfully Submitted,

Donald F. McGahn II
General Counsel

Kristofor Hammond
Assistant Counsel

NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE