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

Re: Notice 2002-14; Notice of Proposed Rulemaking re Contribution Limitations and Prohibitions

Dear Ms. Dinh:

These comments are submitted by the undersigned attorneys at Ryan, Phillips, Utrecht & MacKinnon and not on behalf of any of the firm's clients, regarding Reattribution and Redesignation requirements in 11 CFR Part 110. We applaud the Commission's consideration of updating and streamlining these regulations. As the Commission has pointed out in the Notice of Proposed Rulemaking (NPR), the current regulations are confusing and burdensome both for committees and contributors.

Designation for a particular election

Based on our experience, we believe that the vast majority of individual contributors—particularly those who make the maximum $1,000 contributions under the current law—are aware that the limits are $1,000 for the primary and $1,000 for the general. When these individuals write a check for $2,000 prior to a candidate's primary they intend that their contribution be lawful and that it be applied $1,000 primary/$1,000 general. The current requirement that this designation for the general be in writing is little understood and burdensome. We also do not believe that the written designation requirement is in any way required by the statute.[1] Section 441a

[1] The current written designation requirement has also led to some bizarre circumstances in audits in which the auditors have questioned whether a written designation was made by the contributor or by some other person. Indeed, the auditors have in some instances performed their own handwriting analysis to conclude that a printed memo entry notation looks different from

simply states that the contribution limit is a "per election" limit. It does not require that a written designation be obtained.

We agree fully with the Commission's proposal to presume that a contribution written prior to a primary date is intended to be applied first to the contributor's primary and second to the contributor's general election contribution limit, unless the committee has information that it is intended to be a joint contribution (e.g. a notation on the check, donor card or letter or a verbal instruction). For contributions made within an election cycle, we do not believe that there is any need for the regulations to require that the candidate notify the contributor of this, since our sense, based on our collective years of experience, is that this presumption is consistent with contributor intent. Further, this approach is consistent with the change in the individual aggregate annual contribution limit to an election cycle basis as provided with the Bipartisan Campaign Reform Act. For contributions that would be excessive if not attributed to a future cycle, we believe that the Commission could reasonably take the approach that under those circumstances, a committee should have the responsibility to notify a contributor as to how the contribution is being allocated. This would also notify the contributor that a portion of his or her contribution would be attributable to a future aggregate cycle limit. The contributor should not, however, be required to respond to the committee's notification, unless he or she chooses to request a refund. In the case of a contributor who did not make a contribution prior to the primary, but makes one after the primary, we would suggest that a committee should be able to attribute a portion of that contribution to the primary election of the same cycle if the committee had an outstanding debt. Similarly, if a committee receives a check after the general election, it should be able to attribute a portion to either the primary or general if the committee had an outstanding debt for either election. In order to make any allocation outside the current election cycle, however, a committee could be required to notify the contributor.

Therefore, we recommend adoption of the Commission's proposed Alternative 1-A on page 54376 of the NPR. While Alternative 1-B would be preferable to the current regulations, it would pose an administrative burden on committees that we do not think is necessary given the likelihood that the contributor's intent is to make lawful contributions to the primary and general elections.

Requirement to segregate primary and general funds

We believe that the current regulations are sufficient to deal with the problem of committees spending general election funds prior to the primary. In an audit situation, the Commission already has the ability to make this determination. Even if funds had to be segregated in a separate account,

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a cursive signature, with all of this analysis being performed on a photocopy of a check, not even an original. The rules should not depend on subjective handwriting determinations that would not be necessary if the rules were more likely to be consistent with contributor intent--that is, that a contributor intended to make the maximum legal contribution possible.

unless the Commission required separate reporting of that account, the public record would not provide any additional information. Under the current practice, contributions are already reported as "primary" or "general". Any egregious use of general election funds can be seen at least roughly from the public record if a committee appears to have spent more money before the primary than it reported in primary election contributions.

Attribution of joint contributions

With respect to contributions drawn on a joint account, we do not believe that both signatures should be required. Our experience suggests that in virtually every instance it is clear when contributors intend a joint contribution. We have seen many instances in Commission audits where the intent to make a joint contribution is clear, but in the absence of two signatures, the contribution is treated as excessive. For example, many contributions come with a cover letter stating, e.g., that the contribution is from "both of us" or "my wife and me". Frequently there is a notation in the check memo that indicates a joint contribution. In other instances, there is a donor card with both names printed on it, but only one signature. The requirement for two signatures is often unknown by the contributor and is not a requirement that is likely to be intuited since it is a rare household in which both accountholders routinely sign the same checks. Contributor intent should not be defeated by an requirement for two signatures. We suggest that contributions accompanied by an indication that it is intended to be a joint contribution (e.g., a memo notation, a donor card, a letter) should be attributed equally to both accountholders without the requirement to notify the accountholders. In the absence of such an indication, a contribution drawn on a joint account, signed by only one accountholder, and within the individual contribution limit, should be attributed only to the person signing the check. In the case of a contribution that would exceed the individual contribution limit, drawn on a joint account, signed only by one person, without any indication that it is intended to be a joint contribution (i.e., no other notation on the check, the donor card or a letter), the committee should be able to attribute it to both accountholders, but should notify them of the attribution and give them an opportunity to request a refund or make an alternative attribution. No response should be required for a contribution attributed equally.

Requirement for written reattribution or redesignation

We recommend that the Commission should permit committees to notify contributors of any reattributions or redesignations in situations not covered by the comments above, in lieu of the requirement to receive reattributions and redesignations from contributors. Moreover, in any instance in which the Commission requires a reattribution or redesignation, it should not require that the reattribution or redesignation be through a written signature. A memo, an e-mail, a fax, or a record of a conversation by committee staff should suffice. E-mail in particular is becoming an increasingly common means of communication between committees and donors and the Commission should acknowledge and facilitate the use of e-mail whenever possible.

Conclusion

Having reviewed numerous committee's reattribution and redesignation documents and practices, it is our sense that in the vast majority of cases the contributor's intent is clear when you view the invitation or solicitation letter, the check, the donor card and any accompanying letter. Committees should be given leeway to make judgments based on the presumption that a contributor intended to make the maximum legal contribution. We thank the Commission for the opportunity to comment and urge the Commission to adopt changes to Part 110 consistent with these comments.

Sincerely,

Patricia A. Fiori
Eric Kleinfeld
James Lamb
Lyn Utrecht