FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**
Staff Director
General Counsel
Chief Communications Officer
FEC Press Office
FEC Public Disclosure

FROM: **Office of the Commission Secretary**

DATE: **November 15, 2012**

SUBJECT: **Late Comment on AOR 2012-34**

Transmitted herewith is a late submitted comment by Mark Erik Elias and Brian G. Svoboda regarding the above-captioned matter.

Attachment

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November 15, 2012

Ms. Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2012-34

Dear Ms. Werth:

As attorneys in the Perkins Coie LLP Political Law Group, we write to urge the Commission to reject Draft B in the above-referenced advisory opinion request. We file these comments individually, and not on behalf of any client – but as attorneys who frequently advise federal candidates and their campaigns on the lawful use of their funds.

With hardly any opportunity for comment, Draft B would overturn a well-settled principle: that a candidate and his campaign have wide discretion in spending their own funds, other than for personal use, and except when otherwise expressly prohibited by the Federal Election Campaign Act. *See, e.g.*, Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,962, 76,972 (2002). Congress was so committed to this principle that it moved in 2005 to restore language that explicitly allowed candidates to use their campaign funds for any lawful purpose other than personal use, seeking to remove any confusion about BCRA's effect in this regard. *See* 2 U.S.C. § 439a(a)(6). *See also* Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose Other Than Personal Use, 72 Fed. Reg. 56,245 (2007).

In purporting to bar a former candidate from donating $10,000 of his campaign funds to an independent expenditure-only PAC, Draft B relies on 2 U.S.C. § 441i(e)(1)(A). Draft B claims that, because the campaign is the authorized committee of a candidate, and because it cannot solicit, receive, direct, transfer or spend funds beyond federal limits, the campaign may not give more than $5,000 to the PAC.

This claim errs in these ways:

First, Draft B misreads the statute. *All* of the funds involved "are subject to the limitations, prohibitions, and reporting requirements" of FECA. 2 U.S.C. § 441i(e)(1)(A). The candidate presumably raised all of these funds in $2,500 or $5,000 increments, from federally permissible sources that were fully disclosed on his FEC reports.

~~Not even BCRA's strongest proponents have claimed that a candidate is "corrupted" when his~~ campaign issues a check to someone else in excess of $5,000. To the contrary, when the Campaign Legal Center and Democracy 21 filed a complaint against Representative Schock for allegedly soliciting Representative Cantor's leadership PAC for a $25,000 contribution to an independent expenditure PAC, they made clear that they were "not challenging the legality of the donations by Cantor and Schock ..." John Bresnahan, *Schock hit with FEC complaint,* Politico, Apr. 30, 2012, *available at,* http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1709:april-30-2012-politico-schock-hit-with-fec-complaint&catid=64:press-articles-of-interest&Itemid=62/. Rather, they were "focusing on Schock soliciting Cantor for a donation to [the super PAC]." *Id.*

Until Draft B, the law was clear: 2 U.S.C. § 441i(e) restricts what a candidate, his campaign and his leadership PAC may raise from *others.* It does not affect how they may spend the federal funds they have already raised and disclosed *themselves.*

Second, Draft B would wreak havoc with other parts of section 439a, in ways that Congress never intended, and the Commission has never even intimated. If section 441i(e) places additional restrictions on top of section 439a, when a campaign spends its federal funds, then a candidate must ask whether a charity described in section 170(c) of the Internal Revenue Code is politically active, before safely making the unlimited contributions that section 439a(a)(3) expressly allows. *See* Advisory Opinion 2003-32.

Similarly, before giving to state or local candidates, the campaign would have to see that the donations do not exceed $2,500, even though the statute says they are subject only "to the provisions of state law ...." *See* 2 U.S.C. § 439a(5). In past enforcement actions, the Commission found no violation when a federal campaign donated $1 million to a nonfederal campaign, characterizing the transfer as "a permissible use under 2 U.S.C. § 439a(a)(5) ...." Factual and Legal Analysis, MUR 6263, at 7 n.2. Draft B would render this same transaction impermissible, even though the statute expressly allowed it.

Finally, Draft B would supersede Advisory Opinion 2006-04, which allowed a federal candidate to donate unlimited campaign funds to a ballot initiative committee under 2 U.S.C. § 439a(a), so long as he did not give so much as to "finance" the committee under section 441i(e). At issue in Advisory Opinion 2006-04 was not whether the donations were permissible, but rather what they would say about the candidate's relationship with the recipient, and whether the recipient's

activities would be imputed to the candidate because of the nature and extent of his involvement. *See also* Advisory Opinion 2003-12.

The point of the soft money ban was to sever the connection between current and future federal officeholders, on the one hand, and, on the other, the corrupting influence that large, secret and undisclosed donations can present. It was obvious to the Supreme Court, when it narrowed section 441i, that to restrict the donation of "funds already raised in compliance with [the contribution limits] does little to further Congress' goal of preventing corruption or the appearance of corruption of federal candidates and officeholders." *McConnell v. FEC*, 540 U.S. 93, 179 (2003). Adopting Draft B is inconsistent with the principles, and more generally, with the relevant law.

We urge the rejection of Draft B.

Very truly yours,

Marc E. Elias/

Marc Erik Elias
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