



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

JAN - 5 2009

Mark Shonkwiler
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

BY: E-Mail

Dear Mr. Shonkwiler:

This comment is submitted in response to a notice of public hearing and request for comments (the request) that the Federal Election Commission (FEC) published in the Federal Register on December 8, 2008. Federal Register Vol. 73, No 236, Pp 74494 through 74500. Among other issues, subsection 1(H) of the request seeks comments concerning the impact of the Bi-Partisan Campaign Reform Act of 2002 (BCRA) on the 1977 Memorandum of Understanding between the FEC and the Department of Justice (MOU), and in particular those provisions currently contained in Section 2 of the MOU that address the duty of the FEC to refer potential criminal violations of the Federal Election Campaign Act (FECA) to the Department for prosecutive evaluation.

Section 2 of the 1977 MOU provides that the FEC will refer violations of the FECA to the Department when it finds (presumably by an affirmative vote of at least four Commissioners pursuant to 2 U.S.C. 437c©) that such violations were committed "knowingly and willfully," and then only when a particular violation is "significant and substantial and which may be described as aggravated in the intent with which [it was] committed, or in the monetary amount involved." Of course, even under the MOU the Department retained the right in its discretion to initiate a federal criminal investigation when presented with information warranting such action.

In view of significant enhancements to the criminal penalties for knowing and willful violations of the FECA that Congress enacted through BCRA, we believe these current standards and processes represent neither an adequate nor an appropriate demarcation of our respective responsibilities for enforcing the various sanctions for violations of the FECA.

Prior to BCRA, criminal violations of the FECA were misdemeanors, 2 U.S.C. 437g(d) – 2001 Supp., and there was no sentencing guideline to guide the imposition of sanctions for this type of crime. BCRA changed this significantly.

Specifically, BCRA Section 312 raised all “knowing and willful” violations of the Act that involve aggregate values of at least \$25,000 in a given calendar year to the status of federal felonies punishable by imprisonment for up to five years. 2 U.S.C. 437g(d)(1)(A) – 2002 Supp. BCRA Section 315 raised all “knowing and willful” violations of the FECA’s prohibition on conduit contributions (2 U.S.C. 441f) that involved aggregate values of over \$10,000 in a given calendar year to the status of felonies punishable by up to two years imprisonment, in addition to severe mandatory minimum fines. 2 U.S.C. 437g(d)(1)(D) – 2002 Supp. BCRA Section 313 raised the statute of limitations for FECA criminal violations from three to five years. 2 U.S.C. 455 – 2002 Supp. Finally, BCRA Section 314(b) required the United States Sentencing Commission to promulgate a sentencing guideline specifically applicable to FECA crimes and carrying a number of statutorily-mandated enhancements to reflect Congress’ stated view that this sort of crime should be accorded treatment as a serious offense. The resulting Guideline, 2C1.8, currently carries a base level of 8, with enhancements based on the fraud-loss table in Guideline 2B1.1(b)(1), and with additional statutorily-mandated two- to four-level enhancements for various other aggravating circumstances.

As a practical matter, these changes to the FECA legislated through BCRA have resulted in an offense level of 14 for knowing and willful FECA violations that aggregate at least \$30,000 in a calendar year. See Chapter Six of Federal Prosecution of Election Offenses, 7th Edition (August 2007). A crime possessing an offense level of 14 is punishable by a minimum of 15 months incarceration.

Additionally, in the recent past the Department has often been required, during pre-trial litigation in FECA criminal cases, to square the facts involved with administrative dispositions taken by the FEC in compliance matters (“MURs”) of which the Department had no knowledge and on which the Department had no input. In our view, such a circumstance is not consistent with the fair and efficient administration of penal justice.

We believe that these significant recent developments reflect a congressional intent that violations of the FECA that the Commission or its staff recognize may suggest evidence of potential FECA crimes be evaluated by the competent prosecutorial authority - - in this case by the Department -- before any alternative administrative disposition is considered, and that in such situations all administrative dispositions be coordinated with a federal prosecutor.

We urge the FEC to join with us in amending the 1977 MOU accordingly.

Thank you for soliciting our views on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig C. Donsanto". The signature is stylized and fluid, with a large, sweeping flourish extending from the end of the name.

Craig C. Donsanto
Director, Election Crimes Branch
Public Integrity Section