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AFFILIATION OF POLITICAL ACTION COMMITTEES UNDER THE ANTIPROLIFERATION AMENDMENTS TO THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

Through the Federal Election Campaign Act of 1971, Congress sought to remedy the "excessive influence of great wealth" on campaigns for federal office. To accomplish this objective, the Act incorporated provisions of the Federal Corrupt Practices Act of 1925 and the Labor Management Relations Act of 1947 that make it unlawful for corporations or labor organizations to contribute funds in connection with a federal election campaign. These provisions do not, however, prohibit the creation of political action committees (PAC's) to solicit and collect voluntary political contributions which are separate and segregated from general treasury funds. Thus, a corporation or a labor organization, prohibited by federal law from contributing funds to a federal election campaign, may establish a PAC with contributions from its directors and employees and distribute those funds to the candidates of its choice.

Since the enactment of the 1974 amendments, the Act has imposed stringent dollar limits on the amount of contributions made to candidates.

6. Id. § 441b(b)(2)(C). See United States v. Boyle, 482 F.2d 755, 761 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973) (contributions permitted from separate segregated funds if the contributions to it are voluntary).
7. Contributions and expenditures made by corporations, labor organizations, membership organizations, cooperatives, or corporations without capital stock may be lawful if they relate to "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes . . . ." 2 U.S.C. § 441b(b)(2)(C) (1976).
for federal office. These contribution ceilings, in combination with the prohibition against corporate and labor union contributions, provide a political candidate incentive to appeal to a wide range of campaign fund sources and underscore the importance of PAC's as the sole means of corporate and labor union input in the political fund-raising process. The obvious temptation faced by corporate and labor campaign contributors is to maximize their restricted input by increasing the number of PAC's; that is, to "proliferate." \(^9\)

Recognizing the potential for abuse, Congress enacted "antiproliferation amendments" in 1976.\(^\text{10}\) These amendments, although designed to curtail the "vertical" proliferation\(^\text{12}\) of political committees\(^\text{13}\) and otherwise to prevent corporations and other groups from evading the contribution lim-

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\(^9\) The Act provides in pertinent part:

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year...


\(^\text{12}\) "Vertical proliferation" is not specifically defined in the legislative history, but its intended meaning may be inferred from several sources. See notes 14, 33, 95, 96 and accompanying text infra. For purposes of this Note, "vertical proliferation" describes the situation of a single collective entity, e.g., a corporation or a labor organization whose campaign contribution input is limited to the $5,000 per candidate per election its PAC may contribute, which seeks to exceed that limitation by increasing the number of PAC's to which the entity's directors and employees may contribute. For a proliferation of PAC's to be an effective vehicle toward realization of an entity's political interests, the parent PAC must exercise some control over the disposition of contributions made by the newly created PAC's. See note 10 and accompanying text supra.
its,\textsuperscript{14} provide little guidance to the Federal Election Commission (Commission)\textsuperscript{15} in determining when proliferation has actually occurred. Particularly unclear is the status of contributions made to one candidate from both a trade association's PAC and the PAC of one of its member corporations or from both the AFL-CIO's PAC and the PAC of one of its member unions. Depending upon the circumstances, these contributions may or may not be instances of vertical proliferation of political committees.

This Note examines the Commission's performance in applying the statutory and regulatory standards that define occurrences of proliferation. It focuses on the relationships between the AFL-CIO and its member unions and between a trade association and its member corporations because these relationships currently produce great potential for uncertainty to both candidates and contributors. Finally, the Note attempts to mitigate some of that uncertainty by identifying the factual indicia that will most likely result in judicial findings of proliferation and suggests an interpretive principle to guide future determinations concerning the existence of proliferation.

I. THE EMERGENCE OF LEGISLATIVE AND REGULATORY STANDARDS GOVERNING PROLIFERATION

The primary objectives of the Federal Election Campaign Act of 1971\textsuperscript{16} were to render the media more accessible and less expensive to candidates for federal office\textsuperscript{17} and to obtain broad disclosure of federal campaign funds.\textsuperscript{18} To effectuate these goals, Title I of the Act (Campaign Communications Reform Act) established ceilings for the expenditure of campaign funds on television advertising\textsuperscript{19} but maintained the candidates' access to the media by requiring that candidates be charged no more than the "lowest unit rate" charged to commercial advertisers.\textsuperscript{20} Title III required all individuals contributing over $100\textsuperscript{21} and all political committees contribu-
utiong over $1,000 to account for campaign expenditures and receipts\textsuperscript{22} and to submit financial reports\textsuperscript{23} for public inspection.\textsuperscript{24}

The disclosure provisions were intended to discourage the solicitation and acceptance of large sums of money from single contributions. The Act, however, did not become effective until April 7, 1972, too late for those provisions to have any cognizable effect on contributions to the 1972 Presidential campaigns. The spectacle of the last-minute "scramble" to raise large-sum political contributions prior to April 7, and thus avoid the new disclosure provisions, subjected the Act to intense criticism for its lack of any express contribution limitations.\textsuperscript{25}

The 1974 amendments to the Act represented Congress' response to that criticism. In addition to establishing an independent federal agency, the Federal Election Commission\textsuperscript{26}, the amendments limited the amount of money a person or committee could contribute to a political candidate. Contributions by private individuals and by PAC's were limited to $1,000 and $5,000 respectively per candidate per election.\textsuperscript{27}

Shortly after the passage of the 1974 amendments, the Commission was alerted to the susceptibility of those contribution ceilings to circumvention by those who might attempt to establish multiple PAC's.\textsuperscript{28} An early case

\begin{itemize}
\item \textsuperscript{22} Id. § 432(c), (d).
\item \textsuperscript{23} Id. § 434(a).
\item \textsuperscript{24} Id. § 439.
\item \textsuperscript{25} S. REP. NO. 689, 93d Cong., 2d Sess. 2, reprintedin [1974] U.S. CODE CONG. & AD. NEWS 5587, 5588.
\item \textsuperscript{26} See note 15 supra.
\item \textsuperscript{27} 2 U.S.C. § 441a(a)(1), (2) (1976).
\item \textsuperscript{28} The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." Id. § 431(d). The Act also mandates that each candidate for federal office designate his "principal campaign committee." Id. § 432(e)(1). Expenditures made by and contributions made to a candidate's principal campaign committee are deemed to be made to or on behalf of the candidate himself for the purposes of expenditure and contribution limitations. Id. § 441a(a)(1)(A), (a)(2)(A), (b)(2)(A), (b)(2)(B). The primary function of this "committee" is to centralize a candidate's financial affairs to help streamline the Commission's work in monitoring each candidate's campaign.

Under the Act's definition of "multicandidate political committee," a committee may contribute up to $5,000 per candidate per election only if the committee: (a) has been registered pursuant to 2 U.S.C. § 433 (1976) for at least six months; (b) has received contributions from more than 50 persons; and, (c) has made contributions to at least five candidates for federal office. Id. § 441a(a)(4). Any "committee" that does not meet these standards might still fulfill the requirements of "committee" for disclosure and registration purposes but would be deemed a "person" for purposes of the contribution limitations of § 441a. See id. § 431(b) (person "means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons"). Such a committee would thus be subject to the $1,000 contribution limitation of § 441a(a)(1) and would not be entitled to the $5,000 limitation of § 441a(a)(2). This Note is primarily concerned with the
involved the establishment of several PAC's in 1975 by the Agricultural and Dairy Educational Political Trust (ADEPT), a multicandidate PAC under the Act. ADEPT requested an advisory opinion from the Commission to determine whether the contribution limitations of section 441a(a)(2) would apply to ADEPT and each new PAC separately or in the aggregate. The Commission responded that, if two or more committees were controlled by the same person or group of persons, those committees would be regarded as one entity and the aggregate amount contributed by them to any one candidate could not exceed the $5,000 limitation imposed by section 441a(a)(2). The Commission found the proposed PAC's to be commonly controlled by ADEPT primarily on the basis of their total dependence on fund transfers from ADEPT, and also because they would presumably share their treasurer and membership with ADEPT. Those factors combined to limit the extent to which the new PAC's could exercise "independent judgment" in selecting the recipients of their campaign contributions.

The Commission observed that it was actively reviewing the entire area of commonly controlled multicandidate committees and would, "in determining the existence of common control, look beyond form to the substance of relationships between committees."

Before the Commission could promulgate regulations or define the scope of common control envisioned in its ADEPT Advisory Opinion, Congress enacted the 1976 amendments to the Act. These amendments set forth the statutory standard for "proliferation" and established the somewhat cryptic analytical framework for examination of common control of political committees. For purposes of the $5,000 limitation imposed on PAC contributions, section 441a(a)(5) was added, providing that:

all contributions made by political committees established or

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30. Advisory opinions may be requested of the Commission by any individual holding Federal office, any candidate for Federal office, any political committee, or the national committee of any political party concerning the application of a general rule of law stated in the Act . . . or a general rule of law prescribed as a rule or regulation by the Commission, to a specific factual situation.
32. Id. at 10,073.
33. Id.
34. Id.
35. See note 11 supra.
financed or maintained or controlled by any corporation, labor
organization, or any other person, including any parent, subsidi-
ary, branch, division, department, or local unit of such corpora-
tion, labor organization, or any other person, or by any group of
such persons, shall be considered to have been made by a single
political committee. . . . In any case in which a corporation and
any of its subsidiaries, branches, divisions, departments, or local
units, or a labor organization and any of its subsidiaries,
branches, divisions, departments, or local units establish or
finance or maintain or control more than one separate segregated
fund, all such separate segregated funds shall be treated as a sin-
gle separate segregated fund. . . .36

This antiproliferation provision creates two standards by which the
Commission may infer common control, or "affiliation,"37 between two or
more PAC's: a per se rule and a rule of reason. The last clause sets out the
per se rule that all PAC's created by a corporation or a labor organization
and any of its respective subdivisions are per se affiliated and subject to a
single $5,000 contribution limitation. The Commission has construed the
per se rule in its 1976 regulations to impose affiliation status upon organi-
zational relationships such as the PAC's of single corporations and their
subsidiaries, single international unions and their local unions, the AFL-
CIO and all its state and local central bodies, membership organizations,
including trade associations and the Chamber of Commerce, and their lo-
cal bodies, and "multiple committees established by a group of persons."38
Indicia of affiliation in such cases need not even be investigated.

The first clause of section 441a(a)(5), however, reflects the Commission's
commitment to "look beyond form to the substance of relationships be-
tween committees,"39 and establishes a rule of reason for the analysis of
affiliation. Under this provision, a PAC established by a group that is not
specifically a subsidiary, branch, division, department, or local unit of a
corporation or labor organization that has also established a PAC, may
nonetheless be found to be affiliated with that corporation or labor organi-
ization if both PAC's are established, financed, maintained, or controlled
by a common entity. The Commission's regulations outline a number of
factors it will look to in determining whether two or more PAC's are com-

37. This Note uses "affiliated" as a synonym for "established or financed or maintained
or controlled." Id. The term as a word of art appears to have been coined by the Commis-
sion in its regulations. See 11 C.F.R. §§ 100.14(c), 110.3 (1977).
monly controlled. These indicia of affiliation include: ownership of controlling interests in voting shares or securities; provisions of bylaws or constitutions by which one entity has the authority or the ability to direct the affairs of another; the authority of one entity to make personnel decisions for another; similar patterns of contributions; or the transfer of a substantial portion of one entity's funds to another.\(^4\)

Due to their general nature, the dual statutory antiproliferation standards require substantial judicial and administrative interpretation. Although the Commission's regulations specify some examples of *per se* affiliation and enumerate some indicia to be considered in a rule of reason analysis of affiliation, the application and effect of both standards on a wide variety of political fund-raising organizations have yet to be conclusively determined. More specifically, the status of the relationships between the AFL-CIO and its member unions and between trade associations and their member corporations remains unresolved for failure of the statute and the administrative regulations expressly to address those relationships. While the antiproliferation standards and indicia can be rather routinely applied to blatant occurrences of proliferation, their application to situations involving membership organizations is much less certain. These relationships raise questions of affiliation because they often involve groups with similar political interests that pursue common political goals in a spirit of coalition and cooperation. To conclude that these groups are affiliated, however, may not be consistent with the purposes of the legislation. Whether such situations manifest occurrences of proliferation requires an examination of the intended parameters of the *per se* rule of affiliation and an examination of those affiliation indicia that most accurately reflect the abuses sought to be remedied by the 1976 amendments.

II. *Walther v. Federal Election Commission* — Application of the *Per Se* Rule Does Not Extend to Instances of Nonaffiliation

Only one case, *Walther v. Federal Election Commission*,\(^4\) has addressed squarely the issue of the *per se* rule's applicability to membership organizations. In *Walther*, the Commission argued that section 441a(a)(5) implies, in effect, a *per se* rule of nonaffiliation between the AFL-CIO's PAC (the Committee on Political Education — COPE) and the PAC's of AFL-CIO member unions. In October and November of 1978, the Commission had reviewed forty-five complaints filed by Henry Walther and the Na-


tional Right to Work Committee (NRWC). Each complaint alleged that a candidate or his principal campaign committee had violated the Act by knowingly accepting illegal campaign contributions. The NRWC alleged that these candidates had accepted contributions totaling more than $5,000 from COPE and from the PAC's of AFL-CIO member unions. According to the NRWC, since the AFL-CIO and its member unions were affiliated within the meaning of section 441a(a)(5), the contributions exceeded the $5,000 statutory ceiling. The Commission dismissed the complaints without investigation, stating that the AFL-CIO and its members were not affiliated under section 441a(a)(5) and, therefore, the NRWC had not stated a claim upon which relief could be granted.

Upon Walther's filing of a petition with the United States District Court for the District of Columbia, alleging that the Commission had improperly dismissed the forty-five complaints, the Commission filed a motion to dismiss, again arguing that the complaints failed to state a violation of the Act. The Commission relied most heavily on the catalog of per se affili-

42. Id. at 1237. 2 U.S.C. § 437g(a)(1) (1976) provides that "[a]ny person who believes a violation of this Act . . . has occurred may file a complaint with the Commission."
43. 468 F. Supp. at 1237. The Act states:
No candidate or political committee shall knowingly accept any contribution or
make any expenditure in violation of the provisions of this section. No officer or
employee of a political committee shall knowingly accept a contribution made for
the benefit or use of a candidate, or knowingly make any expenditure on behalf of
a candidate, in violation of any limitation imposed on contributions and expendi-
tures under this section.
44. 468 F. Supp. at 1237. For an example of the complaints filed with the Commission, see In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1048-50 (D.D.C. 1979).
45. 468 F. Supp. at 1237-38.
47. 468 F. Supp. at 1237. The Act provides:
(A) Any party aggrieved by an order of the Commission dismissing a complaint
filed by such party under [§ 437g(a)(1)], or by a failure on the part of the Commis-
sion to act on such complaint in accordance with the provisions of this section
within 90 days after the filing of such complaint, may file a petition with the United
States District Court for the District of Columbia.

(C) [T]he court may declare that the dismissal of the complaint or the action, or
the failure to act, is contrary to law and may direct the Commission to proceed in
conformity with such declaration within 30 days, failing which the complainant
ated relationships set forth in the Commission’s regulations. From these per se inclusionary provisions, the Commission attempted to infer a per se exclusionary rule that would automatically remove the relationship between COPE and the PAC’s of AFL-CIO member unions from the scope of section 441a(a)(5). The Commission reasoned that if the Conference drafters had intended to treat the AFL-CIO and its member unions as per se affiliated for purposes of section 441a(a)(5), they would have expressly stated their intent. Judge Richey rejected this position, referring to one of the Commission’s own regulations treating all political committees set up by the same group of persons as a single political committee. This regulation, the court stated, was far more relevant to the relationship between the AFL-CIO and its member unions than was the Commission’s inference of a per se rule of exclusion.

In addition, since the relationship between the AFL-CIO and its member unions was not the subject of any statutory or regulatory per se rule, the substance of the relationship warranted examination in terms of a rule of reason and specific indicia of affiliation. Finding that “the relationship alleged in [Walther’s] complaint may constitute a violation,” the court denied the Commission’s motion to dismiss.

The Commission took preliminary steps to appeal the denial of its motion to dismiss, maintaining that the legislative history of the 1976
amendments\textsuperscript{53} demonstrated Congress' intention to establish separate limitations for the AFL-CIO and for its member unions.\textsuperscript{54} The appeal, however, was rendered moot by the granting of summary judgment in the Commission's favor.\textsuperscript{55} On cross-motions for summary judgment, Judge Richey first analyzed the standard of judicial review of a Commission decision to dismiss or refuse to investigate a complaint. The court held that the Commission must take all "available" information into consideration in reaching a decision to dismiss but did not require it to initiate an investigation on the basis of every complaint received.\textsuperscript{56} Stating that it would reverse an administrative decision to dismiss or refuse to investigate only if that decision were arbitrary and capricious,\textsuperscript{57} the court found the Commission's decision "eminently reasonable" and granted its motion for summary judgment.\textsuperscript{58} Since Walther's complaints to the Commission were a factually inadequate "shambles,"\textsuperscript{59} the court, in effect, deferred to the Commission's judgment in deciding not to engage in a full-scale judicial investigation of what it found to be nonmeritorious allegations.\textsuperscript{60} Thus, the court found that the Commission's duty to investigate was not unqualified.\textsuperscript{61}


\textsuperscript{54} Memorandum of Law in Support of Motion to Amend April 17, 1979 Order at 3-5, Walther v. Federal Election Comm'n, note 46 supra.


\textsuperscript{56} Id. at 1046.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 1046, 1048.

\textsuperscript{59} Id. at 1047.

\textsuperscript{60} Id. Walther alleged that certain candidates knowingly accepted contributions in excess of the limits imposed by § 441a(a)(1) & (2). Knowing acceptance is a violation of § 441a(f). See note 43 supra. Walther, however, incorrectly alleged a violation of § 441a(a)(2). In addition, he made no showing of any knowledge of illegality on the part of the candidates accepting the contributions. Moreover, he offered no evidence of affiliation between COPE and the various labor union PAC's. In all of the complaints, he alleged only that "[i]t is clear from the past statements of Mr. Meany and Mr. Barkan, his political staffer, that the political efforts of the AFL-CIO and its member unions, are coordinated and commonly directed in exactly the way contemplated by the statute's prohibition." 474 F. Supp. at 1048.

\textsuperscript{61} Id. at 1046-48. 2 U.S.C. § 437g(a)(2) (1976) provides:

The Commission, upon receiving a complaint under [§ 437g(a)(1)], and if it has reason to believe that any person has committed a violation of this Act . . . or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

\textit{Id.} (emphasis added).
III. APPLICATION OF THE RULE OF REASON: INDICIA OF AFFILIATION

Despite the Walther court's refusal to imply a *per se* rule of nonaffiliation, language appearing in the legislative history of the 1976 amendments suggests that *per se* nonaffiliation was intended by the drafters to apply to the relationship between the AFL-CIO and its member unions. The Senate version of the antiproliferation amendments contained three exceptions, the third of which stated that the PAC of a national organization would not be precluded from contributing to a candidate merely because it is affiliated with the PAC of another national organization which has already made the maximum contribution to the same candidate. Senator Cannon, in support of this exception, noted that the amendments, while requiring aggregation of maximum contributions from a national union PAC and the PAC of one of its locals, would allow maximum contributions from both the national union's PAC and the AFL-CIO's COPE.

The Walther court correctly observed that Senator Cannon's remarks referred to an exception in the Senate bill that was not included in the final conference version. It is apparent, however, that the members of the House, whose version of the bill ultimately was adopted by the Conference Committee, read that exception into the bill even though it was not expressly included in the House version. Chairman Hays of the House Committee on Administration, for example, in explaining the antiproliferation provisions to his colleagues on the Committee, cited the relationship between a trade association PAC and the PAC of a member corporation and the relationship between COPE and the PAC's of AFL-CIO member unions as "specifically exempted" from the aggregation provisions of section 441a(a)(5). Although such a specific exemption is absent from the lan-

63. According to Senator Cannon, [t]he proposed rule . . . would not preclude a national union through its political committee, such as for example, the boilermakers, from making a maximum contribution to a candidate through its national political committee in the event that COPE, the political committee of the AFL-CIO, with which the boilermakers are affiliated, has already made its maximum contribution to that candidate. On the other hand, the proposed rule would prevent the various local unions of the boilermakers from making a similar maximum contribution through their local political committees when such a maximum contribution has already been made from the national political committee of the boilermakers.
65. Federal Election Campaign Act Amendments of 1976: Hearings on H.R. 12406 Before the House Comm. on House Administration, 94th Cong., 1st Sess. 13 (March 9, 1976), [here-
language of both the statute and the regulations, it nevertheless is arguable that such an exemption was contemplated by the drafters at the time of the enactment of the 1976 amendments.

The Walther court, however, refused to base its decision on nonexistent statutory language, instead determining that no per se rule of nonaffiliation applies to the relationship between the AFL-CIO and its member unions. Rather, that relationship, as it involves the contribution limits of section 441a(a)(5), must be determined by a Commission investigation of the various indicia of affiliation. 66 By granting summary judgment in the Commission’s favor, the Walther court did not have to identify the factual circumstances that it would require for stating a meritorious claim under the Act. The formulation of standards by which to identify those circumstances requires an examination of the various indicia of affiliation that the Commission has employed in the past. By themselves, the affiliation indicia in the Commission’s regulations 67 provide little guidance as to what combination of circumstances warrant a finding of affiliation; 68 however, some consistent standards have emerged from the Commission’s advisory opinions.

The Commission consistently has found franchisees and franchisors affiliated, for example, primarily on the basis of contractual obligations be-

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66. 468 F. Supp. at 1241. See generally text accompanying note 40 supra.
67. See note 40 supra.
between the two regarding business policies, practices, and procedures. The Commission noted that licensees and franchisees of fast-food chains were required to abide by the strict standards and policies of their agreements with the franchisors. As an illustration, the “McDonald’s System” provided an elaborate scheme which detailed all operations of each restaurant and severely restricted the transferability of licenses. Enforcement of the scheme was accomplished by prompt termination of the license upon material breach of its terms. On these facts, the licensing corporation exercised sufficient control over the franchisees to amount to affiliation.

Commissioners Staebler and Harris dissented to the franchisor-franchisee advisory opinions. Although recognizing the pervasiveness of the control exercised by the franchisors in these cases, the dissenters appeared to advocate a per se rule of nonaffiliation in the context of franchisor-franchisee relationships. They found the variety of franchise relationships too numerous and complex to justify a conclusion of affiliation. Furthermore, the dissenters contended that if all franchisor-franchisee relationships were not excluded from the scope of affiliation, they should be

71. Id. See also Advisory Op. No. 1978-61, supra note 69.

McDonald’s had requested a finding of affiliation between it and its franchisees so that it might solicit them for contributions to its PAC pursuant to the requirements of 2 U.S.C. § 441b(b)(4)(A) (1976) and 11 C.F.R. § 114.5(g)(1) (1977). The regulation provides:

A corporation, or a separate segregated fund established by a corporation is prohibited from soliciting contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families. A corporation may solicit the executive or administrative personnel of its subsidiaries, branches, divisions, and affiliates and their families.


But cf. Advisory Op. No. 1978-75, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 5368 (Oct. 30, 1978) (PAC of a subsidiary corporation may solicit the shareholders of the parent corporation). “Affiliates” is not defined by the regulations, but apparently the Commission felt that the same indicia applied to both affiliated committees and corporate “affiliates.”

73. Advisory Op. No. 1977-70, supra note 69, at 10,264 (Staebler, Comm’r, dissenting):

[T]here is considerable danger that this decision may set a precedent which will subject the wide field of franchising to similar inclusion within the definition of affiliation and thus bring under the control of a franchisor company, for the purpose of solicitation of political contributions, a wide range of small businesses and individuals who would not otherwise be included within the scope of executive or administrative personnel or stockholders of the franchisor company.

Id.
included by regulatory change only.\textsuperscript{74} Nothing in the legislative history, they urged, suggested that the term “affiliates” was intended to include franchise arrangements.\textsuperscript{75} The division of opinion represented in the \textit{McDonald}’s decision\textsuperscript{76} underscores a significant problem posed by the antiproliferation amendments pointed out by the dissenters: the absence of reliable guidelines “threaten[s] widespread confusion and raise[s] the possibility of such massive non-compliance as to undermine the credibility of the Act.”\textsuperscript{77}

The element of contractual control that the Commission found determinative in the franchise context was also found to be persuasive in a hybrid franchise-trade association.\textsuperscript{78} The International Association of Holiday Inns, Inc. (Association) was a trade association comprised of both franchised hotels and those owned and operated by Holiday Inns, Inc. itself. The Commission noted that the Association was a separately incorporated body and that it was financially self-sufficient.\textsuperscript{79} Finding, however, that the corporation contractually authorized the Association’s formation and that it retained the authority to appoint its board members to the Association, the Commission found the two bodies affiliated for the purposes of section 441a(a)(5).\textsuperscript{80} The Commission also noted that the corporation had reserved the power to act as collection agent and arbiter for the Association and that it imposed substantial restrictions on the Association’s advertising, marketing, and use of the Holiday Inn trademark.\textsuperscript{81} Thus, the Commission’s reliance on the contractual obligations and restrictions present in the relationship between the Association and Holiday Inns, Inc., led it to infer affiliation in what it stated was an ordinarily unaf-
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Although, as the Commission noted, the relationships between franchisors and franchisees and between trade associations and corporations were not of the kind typically contemplated to come within the definition of affiliation, the tests applied by the Commission nevertheless sought to identify criteria of affiliation that reliably described the elements of one PAC’s control over another.

Another indication of affiliation to which the Commission has looked is the transfer of campaign funds between committees. The importance of this factor was recognized even before the antiproliferation amendments were passed and has since been the basis for an administrative regulation affirming the affiliated status of PAC’s that are parties to such arrangements. In reliance on this regulation, the Commission found affiliation between the Good Government Committee of First Federal Savings of Miami and the Florida Savings Political Action Committee (FSPAC) when the former transferred forty percent of its receipts to the latter.

The Commission has also considered similar patterns of contributions to substantiate findings of affiliation. In its FSPAC opinion, the Commission found, in addition to a funds transfer scheme, the existence of similar patterns of contributions between two PAC’s and based its finding of affiliation, in part, on that criterion. Similarly, the Commission found the Constructive Congress Committee (CCC), a PAC, to be affiliated with the National Association of Electric Companies (NAEC), a trade association,

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82. "[T]he described manifestations of corporate authority enjoyed by Holiday Inns, Inc. as to the purpose and functions of the Association are what make the situation presented here unique in comparison to the typical relationships between a trade association and its corporate membership." Id. at 10,376.

83. See notes 75, 82 and accompanying text supra.


85. "Indicia of affiliation may include . . . [t]he transfer of funds between committees which represent a substantial portion of the funds of either the transferor or transferee committee . . . ." 11 C.F.R. § 110.3(a)(1)(iii)(E) (1977). See also 11 C.F.R. § 100.14(c)(2)(ii)(E) (1977).

86. See Advisory Op. No. 1976-104, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 5255, at 10,201-02 (June 20, 1977).

87. 11 C.F.R. § 110.3(a)(1)(iii)(D) (1977). See also 11 C.F.R. § 100.14(c)(2)(ii)(D) (1977). One of the goals of antiproliferation is to preserve the “independent judgment” of PAC’s in their selection of candidates to whom they wish to contribute. See note 33 and accompanying text supra. If independent judgment is preserved, then one may expect to see such independence manifested by varied patterns of campaign contributions. In the absence of such a manifestation, subsection (D) would appear to presume the existence of affiliation.

88. “Two-thirds of the Federal candidates to whom the Committee made contributions also received contributions from FSPAC; one-third of the Federal candidates to whom FSPAC made contributions also received contributions from the Committee.” Advisory Op. No. 1976-104, supra note 86, at 10,202.
in part because CCC fund-raising efforts evidenced a "continuing pattern of directing solicitations to personnel of NAEC members" and a large percentage of CCC funds were contributed by NAEC personnel.

While contractual obligations and transfers of funds are reasonable indications of common control, the Commission's delineation of similar contribution and solicitation patterns as giving rise to affiliated status raises problems of overinclusiveness. Since the avowed goal of the antiproliferation amendments is to "curtail the vertical proliferation of political committee contributions," then the Commission must consider only those indicia of affiliation that truly reflect vertically affiliated relationships which control and limit the exercise of independent political judgment. The per se standards of section 441a(a)(5), by directing their proscriptions at elements of the corporate organizational framework within which PAC's are created, reliably indicate those elements of the relationship between two PAC's that allow one PAC to control the affairs of the other. A number of affiliation indicia similarly describe such a relationship among PAC's: contractual control of one entity over another; one entity's share in the ownership of another; and the transfer of substantial funds from one entity to another. Under an analysis using these indicia, the relationship among PAC's as alleged in Walther's original complaints would not warrant a finding of affiliation because no element of that relationship would be shown to afford the AFL-CIO the opportunity or the ability to control the political affairs of its member unions.

Similar patterns of contributions or solicitations relied upon in the FSPAC and CCC opinions, however, represent affiliation indicia distinct from those that reflect elements of control. These factors focus more on manifestations of common political interests and may not necessarily reflect the lack of a committee's political independence. Moreover, Commission findings that emphasize similar patterns of political fund-raising activities are likely to be overinclusive. It is conceivable, for example, that a number of otherwise independent labor union PAC's (or corporate PAC's) could attract remarkably similar patterns of campaign contributions from essentially the same mailing list of contributors and distribute them to the same political candidates. Under an analysis focusing on those indicia of a relationship that most strongly describe elements of control,
nothing in this situation would indicate any subversion of one PAC's independent political judgment by another PAC. Nonetheless, the similar patterns of contributions factor is incorporated in the Commission's regulations, and, if applied by the Commission in an analysis similar to that employed in the FSPAC opinion, the Commission might find horizontal affiliation between such labor union (or corporation) PAC's and limit them to one $5,000 contribution. The Act does not specifically limit its application to vertical proliferation, but the narrow function of the 1976 amendments was to curb the abuse of one entity establishing more than one PAC, not to impose severe restrictions on the ability and willingness of like-minded interest groups and constituencies to contribute to the candidates of their choice.

The context within which such restrictions may arise, of course, is not limited to the possibility of findings of horizontal affiliation. Findings of affiliation between organizations that are ostensibly vertical similarly stray from the narrow function of the antiproliferation amendments if they are based on indicia like similarity of patterns of contributions or solicitations. In the trade association context, for example, there may be no evidence of control exercised by the association over the political independence of the association's membership. Indeed, rather than exercising such control over its members, a trade association may more likely be characterized by its members' conscious decision to join together to promote their collective self-interest. However, in the likely event that the trade association and its members exhibit similar patterns of fund-raising activity, reliance on indicia such as similar patterns of contributions could be the basis for an affiliation finding where no control exists.

The threshold danger in an expansive definition of affiliation that embraces more than the specific elements of control inherent in a particular relationship is that it threatens to link PAC's on the basis of their political ideology and not of their organizational structure. Findings of affiliation

93. See note 87 and accompanying text supra.
95. The antiproliferation amendments were summarized by Representative Hays: "Locals of a union, subsidiaries of a corporation, and other similarly structured groups are treated as part of the parent with respect to the $5,000 limitation on contributions to one candidate or political committee." 122 CONG. REC. 12,201 (May 3, 1976) (remarks of Rep. Hays) (emphasis added).
96. Implicit in several subsections of the 1976 amendments is the notion that two or more PAC's might have common political aims and may, in fact, cooperate to achieve those aims without being affiliated for purposes of the contribution limitations. For example, § 441a(a)(5)(A) excludes transfers between political committees of funds raised through joint fund-raising efforts from the antiproliferation provisions. Section 441a(a)(2)(C) allows one PAC to contribute up to $5,000 to another PAC.
would thus fail to conform to the legislative purposes of the antiproliferation amendments. The resulting uncertainty faced by candidates offered campaign funds by such potentially affiliated organizations could strain the credibility of the Act.

If the court's decision in Walther means that a per se rule of nonaffiliation is, in fact, nonexistent, then most proliferation problems will require an analysis of indicia of affiliation. Such an analysis will succeed in recognizing instances of the proliferation of PAC's from a source of common control only if the Commission consistently employs indicia of affiliation that most nearly reflect the circumstances of proliferation that the 1976 amendments were designed to prohibit. Thus, the Commission's analysis will recognize proliferation and find affiliation among PAC's when it is shown that specific elements of a parent entity's relationship with its subordinate entities provide for the parent entity's authority and ability to exercise control over the affairs of the subordinate entities. The exercise of such control compromises the independent character of contributions from the PAC's of those entities. When, on the other hand, nothing more is shown of the relationships among PAC's than similar patterns of political activity, then the imposition of affiliation status on those PAC's is unrelated to any element of control among those PAC's and fails to address the proliferation of commonly controlled PAC's to which the 1976 amendments were directed.

Analyses of the indicia of affiliation severely tax both the time and the resources of the Commission. If Walther's emphasis on such analyses increases that burden, an expansive approach to affiliation may tax the Commission's adjudicative machinery even more. In addition, the time lag that necessarily accompanies a Commission investigation of affiliation indicia prejudices the efforts of candidates to plan their election campaigns efficiently. In view of the district court's interpretation of section 441a(a)(5) in Walther and the pending of other complaints from Walther and the NRWC, any candidate who accepts contributions from COPE


98. The Commission's budget for Fiscal Year 1979 was $8 million. FEC Annual Report 34 (1978).

99. Walther and the NRWC apparently plan to file new complaints that will attempt to avoid the flaws that proved fatal to their earlier actions. See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Voluntary Dismissal of Actions Joined as M.D.L. Docket No. 372 at 1-2, In re Federal Election Campaign Act Litigation, 474 F.
and the PAC's of AFL-CIO member unions totalling more than $5,000 will be unsure of whether he has accepted funds in violation of the Act. 100

IV. CONCLUSION

The 1976 amendments to the Federal Election Campaign Act treat all political action committees affiliated with a corporation or labor organization as one committee and limit those committees to a single $5,000 contribution per candidate per election in order to prevent a corporation or labor organization from evading the campaign contribution limits of the Act. The amendments create two standards by which affiliation is determined: a per se rule of affiliation and a rule of reason approach that requires case-by-case analysis based on various indicia of affiliation.

The Walther decision restricted the application of the per se rule, requiring the Commission to analyze the status of all arguably affiliated organizations. Yet, the application of the affiliation provisions to corporations and labor organizations remains largely undetermined at a time when the approaching 1980 elections demand clarity and certainty of interpretation for prospective contributors and candidates. Absent an established judicial approach to the affiliation question, candidates and contributors must operate in an atmosphere of some uncertainty regarding the legality of particular campaign contributions. Such uncertainty can be minimized, however, by a Commission focus on indicia of affiliation that reflect common control. Such factors address the abuse at which the antiproliferation amendments were directed; namely, the creation of multiple political action committees subservient to the political orientation of the organization establishing them. Reliance on indicators such as similar patterns of political activity, on the other hand, may yield an overinclusive definition of affiliation that will confuse campaign participants, overburden the Federal Election Commission, and obscure the true goals of the antiproliferation amendments.

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100. Despite the Commission's indecision regarding the AMPAC matter, see note 97 supra, it advised candidates that if it eventually determines that AMPAC and the state medical association PAC's were affiliated, the candidates would have to return the excessive contributions and may be found to be in violation of the Act. See, e.g., Advisory Op. No. 1977-40, supra note 97, at 10,247.