



Federal Election Commission

1995
LEGISLATIVE
RECOMMENDATIONS

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PART I: LEGISLATIVE RECOMMENDATIONS TO IMPROVE EFFICIENCY AND EFFECTIVENESS OF CURRENT LAW

Disclosure

Waiver Authority (revised 1995)

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress give the Commission the authority to adjust the filing requirements or to grant general waivers or exemptions from the reporting requirements of the Act.

Explanation: In cases where reporting requirements are excessive or unnecessary, it would be helpful if the Commission had authority to suspend the reporting requirements of the Act. For example, the Commission has encountered several problems relating to the reporting requirements of authorized committees whose respective candidates were not on the election ballot. The Commission had to consider whether the election-year reporting requirements were fully applicable to candidate committees operating under one of the following circumstances:

- The candidate withdraws from nomination prior to having his or her name placed on the ballot.
- The candidate loses the primary and therefore is not on the general election ballot.
- The candidate is unchallenged and his or her name does not appear on the election ballot.

Unauthorized committees also face unnecessary reporting requirements. For example, the 1996 October Monthly report will be due three days before the 12-Day Pre-General Election Report; however, both reports will need to be mailed on the same day. A waiver authority would enable the Commission to eliminate the requirement to file the monthly report, as long as the committee includes the activity in the Pre-General Election Report and files the report on time. The same disclosure would be available before the election, but the committee would only have to file one report.

In other situations, disclosure would be served if the Commission had the authority to adjust the filing requirements, as is currently allowed for special elections. For example, runoff elections are often scheduled shortly after the primary election. In many instances, the close of books for the runoff pre-election

report is the day after the primary—the same day that candidates find out if there is to be a runoff and who will participate. When this occurs, the 12-day pre-election report discloses almost no runoff activity. In such a situation, the Commission should have the authority to adjust the filing requirements to allow for a 7-day pre-election report (as opposed to a 12-day report), which would provide more relevant disclosure to the public.

Granting the Commission the authority to waive reports or adjust the reporting requirements would reduce needlessly burdensome disclosure demands.

Campaign-Cycle Reporting (revised 1995)

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress revise the law to require authorized candidate committees to report on a campaign-to-date basis, rather than a calendar year cycle, as is now required.

Explanation: Under the current law, authorized committees must track contributions received in two different ways. First, to comply with the law's reporting requirements, the committee must track donations on a calendar year basis. Second, to comply with the law's contribution limits, the committee must track contributors' donations on a per-election basis. Simplifying the law's reporting requirement to allow reporting on a campaign-to-date basis would make the law's recordkeeping requirements less burdensome to committees. (Likewise, the Commission recommends that contribution limits be placed on a campaign-cycle basis as well. See the recommendation entitled "Election Period Limitations.")

This change would also benefit public disclosure of campaign finance activity. Currently, contributions from an individual are itemized only if the individual donates more than \$200 in the aggregate during a calendar year. Likewise, disbursements are itemized only if payments to a specific payee aggregate in excess of \$200 during a calendar year. Requiring itemization once contributions from an individual or disbursements to a payee aggregate in excess of \$200 during the campaign would capture information

of interest to the public that is currently not available. Moreover, to determine the actual campaign finance activity of a committee, reporters and researchers must compile the total figures from several year-end reports. In the case of Senate campaigns, which may extend over a six-year period, this change would be particularly helpful.

Monthly Reporting for Congressional Candidates

Section: 2 U.S.C. §434(a)(2)

Recommendation: The Commission recommends that the principal campaign committee of a Congressional candidate have the option of filing monthly reports in lieu of quarterly reports.

Explanation: Political committees, other than principal campaign committees, may choose under the Act to file either monthly or quarterly reports during an election year. Committees choose the monthly option when they have a high volume of activity. Under those circumstances, accounting and reporting are easier on a monthly basis because fewer transactions have taken place during that time. Consequently, the committee's reports will be more accurate.

Principal campaign committees can also have a large volume of receipts and expenditures. This is particularly true with Senatorial campaigns. These committees should be able to choose a more frequent filing schedule so that their reporting covers less activity and is easier to do.

Reporting Deadlines for Semiannual, Year-End and Monthly Filers

Section: 2 U.S.C. §§434(a)(3)(B) and (4)(A) and (B)

Recommendation: The Commission recommends that Congress change the reporting deadline for all semi-annual, year-end and monthly filers to 15 days after the close of books for the report.

Explanation: Committees are often confused because the filing dates vary from report to report. Depending on the type of committee and whether it is an election year, the filing date for a report may fall on the 15th, 20th or 31st of the month. Congress should require

that monthly, quarterly, semiannual and year-end reports are due 15 days after the close of books of each report. In addition to simplifying reporting procedures, this change would provide for more timely disclosure, particularly in an election year. In light of the increased use of computerized recordkeeping by political committees, imposing a filing deadline of the fifteenth of the month would not be unduly burdensome.

Computer Filing of Reports (revised 1995)

Section: 2 U.S.C. §§432(g) and 434(a)(1)

Recommendation: The Commission recommends that Congress clarify that the Commission is explicitly authorized to accept reports filed electronically and to prescribe rules and procedures which identify eligible committees and the process by which they can submit their reports, including standards to ensure compliance with the signatory duties and responsibilities of treasurers.

Explanation: Since the passage and amendment of the Act's reporting provisions in 1971 and 1979, technology has advanced dramatically. Today, computer technology makes it possible for committees to file their reports electronically. For example, taxpayers may now file tax returns electronically. The advantages of electronic filing include increased convenience for filers and more timely, accurate and thorough disclosure.

The ability of the Commission to move toward electronic filing is hampered, however, in part, by uncertainty regarding the Commission's legal authority to require committees to file using electronic technology. The current law does not give the Commission explicit authority to require committees to use such technology. While the Commission might persuade some filers to voluntarily provide some or all disclosure information in an electronic format, clear authority to mandate that at least some committees file electronically would greatly facilitate such a program. At the same time, the Commission recognizes that some committees choose not to use computers to generate their reports. To alleviate the possible expense and burden to smaller committees, Congress could

authorize the Commission to establish minimum financial thresholds for mandated electronic filing by different categories of committees.

In addition, some clarification would be needed concerning how to meet the treasurers' signature requirement. The law requires an original signature by treasurers, attesting to the accuracy of the reports they file. Any statutory change should authorize the Commission to develop a mechanism to meet the signature requirement.

Finally, electronic filing might require some changes within the offices of the Clerk of the House and the Secretary of the Senate. Under the law, these offices are the points of entry for House and Senate reports. Currently, neither office possesses the technology needed to accept electronic filings. Should electronic filing be adopted for House and Senate campaigns, the computer capabilities of the Clerk of the House and the Secretary of the Senate would have to be updated accordingly.

Alternatively, the Commission could be made the point of entry for such filers. Some economies could be realized if separate computer equipment and facilities did not have to be maintained for receiving and processing disclosure information in all three offices. If House and Senate campaign committees filed directly with the Commission, and if the data were in an electronic format, easy access at Senate and House locations could be assured at relatively little cost. (See the recommendation "Commission as Sole Point of Entry for Disclosure of Documents" for a statement of the benefits of this approach.)

Commission as Sole Point of Entry for Disclosure Documents

Section: 2 U.S.C. §432(g)

Recommendation: The Commission recommends that it be the sole point of entry for all disclosure documents filed by federal candidates and political committees. This would affect the House and Senate candidate committees only. Under current law, those committees alone file their reports with the Clerk of the House and the Secretary of the Senate, respectively, who then forward microfilmed copies to the FEC.

Explanation: The Commission has offered this recommendation for many years. The experience of handling the year-end report (filed in January 1992) provides an excellent illustration of why a single point of entry is desirable. Some 234 reports filed by House and Senate candidate committees were mistakenly filed with the Federal Election Commission instead of with the Clerk of the House and the Secretary of the Senate. Consequently, every day, for two weeks around the filing deadline, the FEC shipped back to the Clerk and the Secretary packages filled with House and Senate reports that were filed with the FEC in error. The result? Disclosure to the public was delayed, and government resources were wasted.

Moreover, if the FEC received the original report, it could use it directly for data entry, as it now uses the reports filed by PACs, party committees and Presidential committees.

Should Congress decide to codify the previous recommendation on computerized reports, the Commission should become the sole point of entry to process these reports, avoiding the need for all three offices to obtain the technology necessary to accept electronic filings.

We also reiterate here the statement we have made in previous years because it remains valid. A single point of entry for all disclosure documents filed by political committees would eliminate any confusion about where candidates and committees are to file their reports. It would assist committee treasurers by having one office where they would file reports, address correspondence and ask questions. At present, conflicts may arise when more than one office sends out materials, makes requests for additional information and answers questions relating to the interpretation of the law. A single point of entry would also reduce the costs to the federal government of maintaining three different offices, especially in the areas of personnel, equipment and data processing.

The Commission has authority to prepare and publish lists of nonfilers. It is extremely difficult to ascertain who has and who has not filed when reports may have been filed at or are in transit between two different offices. Separate points of entry also make it difficult for the Commission to track responses to

compliance notices. Many responses and/or amendments may not be received by the Commission in a timely manner, even though they were sent on time by the candidate or committee. The delay in transmittal between two offices sometimes leads the Commission to believe that candidates and committees are not in compliance. A single point of entry would eliminate this confusion.

Finally, the Commission notes that the report of the Institute of Politics of the John F. Kennedy School of Government at Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-78*, prepared for the House Administration Committee, recommended that all reports be filed directly with the Commission (Committee Print, 96th Cong., 1st Sess., at 122 (1979)).

Facsimile Machines

Section: 2 U.S.C. §434(b)(6)(B)(iii) and (c)(2)

Recommendation: The Commission recommends that Congress modify the Act to provide for the acceptance and admissibility of 24-hour notices of independent expenditures via telephone facsimiles.

Explanation: Independent expenditures that are made between 20 days and 24 hours before an election must be reported within 24 hours. The Act requires that a last-minute independent expenditure report must include a certification, under penalty of perjury, stating whether the expenditure was made "in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee." This requirement appears to foreclose the option of using a facsimile machine to file the report. The next report the committee files, however, which covers the reporting period when the expenditure was made, must also include the certification, stating the same information. Given the time constraint for filing the report, the requirement to include the certification on the subsequent report, and the availability of modern technology that would facilitate such a filing, Congress should consider allowing such filings via telephonically transmitted facsimiles ("fax" machines). This could be accomplished by allowing the committee to

fax a copy of the schedule disclosing the independent expenditure and the certification. The original schedule would be filed with the next report. Acceptance of such a filing method would facilitate timely disclosure and simplify the process for the filer.

State Filing for Presidential Candidate Committees

Section: 2 U.S.C. §439

Recommendation: The Commission recommends that Congress consider clarifying the state filing provisions for Presidential candidate committees to specify which particular parts of the reports filed by such committees with the FEC should also be filed with states in which the committees make expenditures. Consideration should be given to both the benefits and the costs of state disclosure.

Explanation: Both states and committees have inquired about the specific requirements for Presidential candidate committees when filing reports with the states. The statute requires that a copy of the FEC reports shall be filed with all states in which a Presidential candidate committee makes expenditures. The question has arisen as to whether the full report should be filed with the state, or only those portions that disclose financial transactions in the state where the report is filed.

The Commission has considered two alternative solutions. The first alternative is to have Presidential candidate committees file, with each state in which they have made expenditures, a copy of the entire report filed with the FEC. This alternative enables local citizens to examine complete reports filed by candidates campaigning in a state. It also avoids reporting dilemmas for candidates whose expenditures in one state might influence a primary election in another.

The second alternative is to require that reports filed with the states contain all summary pages and only those receipts and disbursements schedules that show transactions pertaining to the state in which a report is filed. This alternative would reduce filing and storage burdens on Presidential candidate committees and states. It would also make state filing

requirements for Presidential candidate committees similar to those for unauthorized political committees. Under this approach, any person still interested in obtaining copies of a full report could do so by contacting the Public Disclosure Division of the FEC.

Public Disclosure at State Level (revised 1995)

Section: 2 U.S.C. §439

Recommendation: The Commission recommends that Congress consider relieving both political committees (other than candidate committees) and state election offices of the burdens inherent in the current requirement that political committees file copies of their reports with the Secretaries of State. One way this could be accomplished is by providing a system whereby the Secretary of State (or equivalent state officer) would tie into the Federal Election Commission's computerized disclosure data base.

Explanation: At the present time, multicandidate political committees are required to file copies of their reports (or portions thereof) with the Secretary of State in each of the states in which they support a candidate. State election offices carry a burden for storing and maintaining files of these reports. At the same time, political committees are burdened with the responsibility of making multiple copies of their reports and mailing them to the Secretaries of State.

With advances in computer technology, it is now possible to facilitate disclosure at the state level without requiring duplicate filing. Instead, state election offices would tie into the FEC's computer data base. The local press and public could access reports of local political committees through a computer hookup housed in their state election offices. All parties would benefit: political committees would no longer have to file duplicate reports with state offices; state offices would no longer have to provide storage and maintain files; and the FEC could maximize the cost effectiveness of its existing data base and computer system.

Such a system already exists in 30 states and has proven inexpensive and effective. Initially, we would propose that candidate committees and in-state party committees continue to file their reports both in Washington, D.C., and in their home states, in

response to the high local demand for this information. Later, perhaps with improvements in information technology, the computerized system could embrace these committees as well.

Contributions and Expenditures

Election Period Limitations for Contributions to Candidates (revised 1995)

Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that limits on contributions to candidates be placed on an election cycle basis, rather than the current per election basis.

Explanation: The contribution limitations affecting contributions to candidates are structured on a "per election" basis, thus necessitating dual bookkeeping or the adoption of some other method to distinguish between primary and general election contributions. The Commission has had to adopt several rules to clarify which contributions are attributable to which election and to assure that contributions are reported and used for the proper election. Many enforcement cases have been generated where contributors' donations are excessive *vis-a-vis* a particular election, but not *vis-a-vis* the \$2,000 total that could have been contributed for the cycle. Often this is due to donors' failure to fully document which election was intended. Sometimes the apparent "excessives" for a particular election turn out to be simple reporting errors where the wrong box was checked on the reporting form. Yet, substantial resources must be devoted to examination of each transaction to determine which election is applicable. Further, several enforcement cases have been generated based on the use of general election contributions for primary election expenses or *vice versa*.

Most of these complications would be eliminated with adoption of a simple "per cycle" contribution limit. Thus, multicandidate committees could give up to \$10,000 and all other persons could give up to \$2,000 to an authorized committee at any point during the election cycle. The Commission and committees could get out of the business of determining whether

contributions are properly attributable to a particular election, and the difficulty of assuring that particular contributions are used for a particular election could be eliminated.

It would be advisable to clarify that if a candidate has to participate in more than two elections (e.g., in a post-primary runoff as well as a primary and general), the campaign cycle limit would be \$3,000. In addition, because at the Presidential level candidates might opt to take public funding in the general election and thereby be precluded from accepting contributions, the \$1,000/5,000 "per election" contribution limits should be retained for Presidential candidates.

A campaign cycle contribution limit may allow donors to target more than \$1,000 toward a particular primary or general election, but this would be tempered by the tendency of campaigns to plan their fundraising and manage their resources so as not to be left without fundraising capability at a crucial time.

Application of \$25,000 Annual Limit

Section: 2 U.S.C. §441a(a)(3)

Recommendation: The Commission recommends that Congress consider modifying the provision that limits individual contributions to \$25,000 per calendar year so that an individual's contributions count against his or her annual limit for the year in which they are made.

Explanation: Section 441a(a)(3) now provides that a contribution to a candidate made in a nonelection year counts against the individual donor's limit for the year in which the candidate's election is held. This provision has led to some confusion among contributors. For example, a contributor wishing to support Candidate Smith in an election year contributes to her in November of the year before the election. The contributor assumes that the contribution counts against his limit for the year in which he contributed. Unaware that the contribution actually counts against the year in which Candidate Smith's election is held, the contributor makes other contributions during the election year and inadvertently exceeds his \$25,000 limit. By requiring contributions to count against the limit of the calendar year in which the donor contributes,

confusion would be eliminated and fewer contributors would inadvertently violate the law. The change would offer the added advantage of enabling the Commission to better monitor the annual limit. Through the use of our data base, we could more easily monitor contributions made by one individual regardless of whether they were given to retire the debt of a candidate's previous campaign, to support an upcoming election (two, four or six years in the future) or to support a PAC or party committee. Such an amendment would not alter the per candidate, per election limits. Nor would it affect the total amount that any individual could contribute in connection with federal elections.

Enforcement

Ensuring Independent Authority of FEC in All Litigation (revised 1995)

Section: 2 U.S.C. §§437c(f)(4) and 437g

Recommendation: Congress has granted the Commission authority to conduct its own litigation independent of the Department of Justice. This independence is an important component of the statutory structure designed to ensure nonpartisan administration and enforcement of the campaign financing statutes. The Commission recommends that Congress make the following four clarifications that would help solidify the statutory structure:

1. Congress should clarify that the Commission is explicitly authorized to petition the Supreme Court for *certiorari* under Title 2, i.e., to conduct its Supreme Court litigation.

2. Congress should amend the Act to specify that local counsel rules (requiring district court litigants to be represented by counsel located within the district) cannot be applied to the Commission.

3. Congress should give the Commission explicit authorization to appear as an *amicus curiae* in cases that affect the administration of the Act, but do not arise under it.

4. Congress should require the United States Marshal's Service to serve process, including summonses and complaints, on behalf of and at no expense to the Federal Election Commission.

Explanation: The first recommendation states explicitly that the Commission is authorized to petition the Supreme Court for a writ of *certiorari* in cases relating to the Commission's administration of Title 2 and to independently conduct its Supreme Court litigation under that Title. The Commission explicitly has this authority under Title 26 and had a long-standing practice of doing so under Title 2, until the Supreme Court ruled that Title 2 does not grant the Commission such authority. See *FEC v. NRA Political Victory Fund*, 63 U.S.L.W. 4027 (U.S. No. 93-1151, Dec. 6, 1994). Under this ruling, the Commission must now obtain permission from the Solicitor General before seeking *certiorari* in a Title 2 case. The Solicitor General may decline to authorize this action in cases where the Commission believes Supreme Court review is advisable. Even where acting in accordance with the Commission's recommendation to seek *certiorari* in a given case, the Solicitor General would still control the position taken in the case and the arguments made on behalf of the Commission. This transfer of the Commission's Supreme Court litigation authority to the Solicitor General, who is an appointee of and subject to removal by the President, misconstrues Congressional intent in establishing the Commission as a bipartisan and independent civil enforcement agency. Pertinent provisions of Title 2 should be revised to clearly state the Commission's exclusive and independent authority on all aspects of Supreme Court litigation in all cases it has litigated in the lower courts.

With regard to the second of these recommendations, most district courts have rules requiring that all litigants be represented by counsel located within the district. The Commission, which conducts all of its litigation nationwide from its offices in Washington, D.C., is unable to comply with those rules without compromising its independence by engaging the local United States Attorney to assist in representing it in courts outside of Washington, D.C. Although most judges have been willing to waive applying these local counsel rules to the Commission, some have insisted

that the Commission obtain local representation. An amendment to the statute specifying that such local counsel rules cannot be applied to the Commission would eliminate this problem.

Concerning the third recommendation, the FECA explicitly authorizes the Commission to "appear in and defend against any action instituted under this Act," 2 U.S.C. §437c(f)(4), and to "initiate...defend...or appeal any civil action...to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26," 2 U.S.C. §437d(a)(6). These provisions do not explicitly cover instances in which the Commission appears as an *amicus curiae* in cases that affect the administration of the Act, but do not arise under it. A clarification of the Commission's role as an *amicus curiae* would remove any questions concerning the Commission's authority to represent itself in this capacity.

Concerning the final recommendation, prior to its amendment effective December 1, 1993, Rule 4(c)(B) of the Federal Rules of Civil Procedure provided that a summons and complaint shall be served by the United States Marshal's Service on behalf of the United States or an officer or agency of the United States. Rule 4, as now amended, requires all plaintiffs, including federal government plaintiffs such as the Commission, to seek and obtain a court order directing that service of process be effected by the United States Marshal's Service. Given that the Commission must conduct litigation nationwide from its offices in Washington, D.C., it is burdensome and expensive for it to enlist the aid of a private process server or, in the alternative, seek relief from the court, in every case in which it is a plaintiff. Returning the task of serving process for the Commission to the United States Marshal's Service would alleviate this problem and assist the Commission in carrying out its mission.

Enhancement of Criminal Provisions

Section: 2 U.S.C. §437g(a)(5)(C) and (d)

Recommendation: The Commission recommends that it have the ability to refer appropriate matters to the Justice Department for criminal prosecution at any stage of a Commission proceeding.

Explanation: The Commission has noted an upsurge of §441f contribution reimbursement schemes, that may merit heavy criminal sanction. Although there is no prohibition preventing the Department of Justice from initiating criminal FECA prosecutions on its own, the vehicle for the Commission to bring such matters to the Department's attention is found at §437g(a)(5)(C), which provides for referral only after the Commission has found probable cause to believe that a criminal violation of the Act has taken place.¹ Thus, even if it is apparent at an early stage that a case merits criminal referral, the Commission must pursue the matter to the probable cause stage before referring it to the Department for criminal prosecution. To conserve the Commission's resources, and to allow the Commission to bring potentially criminal FECA violations to the Department's attention at the earliest possible time, the Commission recommends that consideration be given to explicitly empower the Commission to refer apparent criminal FECA violations to the Department at any stage in the enforcement process.

Random Audits

Section: 2 U.S.C. §438(b)

Recommendation: The Commission recommends that Congress consider legislation that would require the Commission to randomly audit political committees in an effort to promote voluntary compliance with the election law and ensure public confidence in the election process.

Explanation: In 1979, Congress amended the FECA to eliminate the Commission's explicit authority to conduct random audits. The Commission is concerned that this change has weakened its ability to deter abuse of the election law. Random audits can be an effective tool for promoting voluntary compliance with

the Act and, at the same time, reassuring the public that committees are complying with the law. Random audits performed by the IRS offer a good model. As a result of random tax audits, most taxpayers try to file accurate returns on time. Tax audits have also helped create the public perception that tax laws are enforced.

There are many ways to select committees for a random audit. One way would be to randomly select committees from a pool of all types of political committees identified by certain threshold criteria such as the amount of campaign receipts and, in the case of candidate committees, the percentage of votes won. With this approach, audits might be conducted in many states throughout the country.

Another approach would be to randomly select several Congressional districts and audit all political committees in those districts (with the exception of certain candidates whose popular vote fell below a certain threshold) for a given election cycle. This system might result in concentrating audits in fewer geographical areas.

Such audits should be subject to strict confidentiality rules. Only when the audits are completed should they be published and publicized. Committees with no problems should be commended.

Regardless of how random selections were made, it would be essential to include all types of political committees—PACs, party committees and candidate committees—and to ensure an impartial, evenhanded selection process.

Expedited Enforcement Procedures and Injunctive Authority

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider whether the FECA should provide for expedited enforcement of complaints filed shortly before an election, permit injunctive relief in certain

¹ The Commission has the general authority to report apparent violations to the appropriate law enforcement authority (see 2 U.S.C. §437d(a)(9)), but read together with §437g, §437d(a)(9) has been interpreted by the Commission to refer to violations of law unrelated to the Commission's FECA jurisdiction.

cases, and allow the Commission to adopt expedited procedures in such instances.²

Explanation: The statute now requires that before the Commission proceeds in a compliance matter it must wait 15 days after notifying any potential respondent of alleged violations in order to allow that party time to file a response. Furthermore, the Act mandates extended time periods for conciliation and response to recommendations for probable cause. Under ordinary circumstances such provisions are advisable, but they are detrimental to the political process when complaints are filed immediately before an election. In an effort to avert intentional violations that are committed with the knowledge that sanctions cannot be enforced

²Commissioner Elliott filed the following dissent:

The Act presently enables the Commission to seek injunctive relief after the administrative process has been completed and this is more than sufficient. (See 2 U.S.C. §437g(a)(6)(A).)

I am unaware of any complaint filed with the Commission which, in my opinion, would meet the four standards set forth in the legislative recommendations. Assuming a case was submitted which met these standards, I believe it would be inappropriate for the Commission to seek injunctive relief prior to a probable cause finding.

First, the very ability of the Commission to seek an injunction, especially during the "heat of the campaign," opens the door to allegations of an arbitrary and politically motivated enforcement action by the Commission. The Commission's decision to seek injunction in one case while refusing to do so in another could easily be seen by candidates and respondents as politicizing the enforcement process.

Second, the Commission might easily be flooded with requests for injunctive relief for issues such as failure to file an October quarterly or a 12-day pre-general report. Although the Commission would have the discretion to deny all these requests for injunctive relief, in making that decision the Commission would bear the administrative burden of an immediate review of the factual issues.

Third, although the courts would be the final arbiter as to whether or not to grant an injunction, the mere decision by the Commission to seek an injunction during the final weeks of a campaign would cause a diversion of time and money and adverse publicity for a candidate during the most important period of the campaign.

For these reasons, I disagree with the recommendation to expand the power of the Commission to seek injunctive relief except as presently provided for the Act.

prior to the election and to quickly resolve matters for which Commission action is not warranted, Congress should consider granting the Commission some discretion to deal with such situations on a timely basis.

Even when the evidence of a violation has been clear and the potential impact on a campaign has been substantial, without the authority to initiate a civil suit for injunctive relief, the Commission has been unable to act swiftly and effectively in order to prevent a violation. The Commission has felt constrained from seeking immediate judicial action by the requirement of the statute that conciliation be attempted before court action is initiated, and the courts have indicated that the Commission has little if any discretion to deviate from the administrative procedures of the statute. *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982); *Durkin for U.S. Senate v. FEC*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 9147 (D.N.H. 1980). If Congress allows for expedited handling of compliance matters, it should authorize the Commission to implement changes in such circumstances to expedite its enforcement procedures. As part of this effort, Congress should consider whether the Commission should be empowered to promptly initiate a civil suit for injunctive relief in order to preserve the status quo when there is clear and convincing evidence that a substantial violation of the Act is about to occur. Congress should consider whether the Commission should be authorized to initiate such civil action in a United States district court, under expressly stated criteria, without awaiting expiration of the 15-day period for responding to a complaint or the other administrative steps enumerated in the statute. The person against whom the Commission brings the action would enjoy the procedural protections afforded by the courts.

The Commission suggests the following legislative standards to govern whether it may seek prompt injunctive relief:

1. The complaint sets forth facts indicating that a potential violation of the Act is occurring or will occur;

2. Failure of the Commission to act expeditiously will result in irreparable harm to a party affected by the potential violation;
3. Expeditious action will not result in undue harm or prejudice to the interests of other persons; and
4. The public interest would be served by expeditious handling of the matter.

Public Financing

State Expenditure Limits for Publicly Financed Presidential Primary Campaigns (revised 1995) Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that the state-by-state limitations on expenditures for publicly financed Presidential primary candidates be eliminated.

Explanation: The Commission has now administered the public funding program in five Presidential elections. Based on our experience, we believe that the limitations could be removed with no material impact on the process.

Our experience has shown that, in past years, the limitations have had little impact on campaign spending in a given state, with the exception of Iowa and New Hampshire. In most other states, campaigns have been unable or have not wished to expend an amount equal to the limitation. In effect, then, the administration of the entire program has resulted in limiting disbursements in these two primaries alone.

In 1996, however, many larger states (such as New York, California and Texas) will move their primaries to February and March. Consequently, a campaign will have to diversify its resources among more states in the early primaries in order to secure the nomination, and will be far less likely to exceed the spending limit for any particular state.

With an increasing number of primaries vying for a campaign's limited resources, however, it would not be possible to spend very large amounts in these early primaries and still have adequate funds available for the later primaries. Thus, the overall national limit would serve as a constraint on state spending, even in the early primaries. At the same time,

candidates would have broader discretion in the running of their campaigns.

Our experience has also shown that the limitations have been only partially successful in limiting expenditures in the early primary states. The use of the fundraising limitation, the compliance cost exemption, the volunteer service provisions, the unreimbursed personal travel expense provisions, the use of a personal residence in volunteer activity exemption, and a complex series of allocation schemes have developed into an art which, when skillfully practiced, can partially circumvent the state limitations.

Finally, the allocation of expenditures to the states has proven a significant accounting burden for campaigns and an equally difficult audit and enforcement task for the Commission. For all these reasons, the Commission decided to revise its state allocation regulations for the 1992 Presidential election. Many of the requirements, such as those requiring distinctions between fundraising and other types of expenditures, were eliminated. However, the rules could not undo the basic requirement to demonstrate the amount of expenditures relating to a particular state. Given our experience to date, we believe that this change to the Act would still be of substantial benefit to all parties concerned.

Fundraising Limitation for Publicly Financed Presidential Primary Campaigns

Section: 2 U.S.C. §§431(9)(B)(vi) and 441a

Recommendation: The Commission recommends that the separate fundraising limitation provided to publicly financed Presidential primary campaigns be combined with the overall limit. Thus, instead of a candidate's having a \$10 million (plus COLA³) limit for campaign expenditures and a \$2 million (plus COLA) limit for fundraising (20 percent of overall limit), each candidate would have one \$12 million (plus COLA) limit for all campaign expenditures.

³Spending limits are increased by the cost-of-living adjustment (COLA), which the Department of Labor calculates annually.

Explanation: Campaigns that have sufficient funds to spend up to the overall limit usually allocate some of their expenditures to the fundraising category. These campaigns come close to spending the maximum permitted under both their overall limit and their special fundraising limit. Hence, by combining the two limits, Congress would not substantially alter spending amounts or patterns. For those campaigns which do not spend up to the overall expenditure limit, the separate fundraising limit is meaningless. Many smaller campaigns do not even bother to use it, except in one or two states where the expenditure limit is low, e.g., Iowa and New Hampshire. Assuming that the state limitations are eliminated or appropriately adjusted, this recommendation would have little impact on the election process. The advantages of the recommendation, however, are substantial. They include a reduction in accounting burdens and a simplification in reporting requirements for campaigns, and a reduction in the Commission's auditing task. For example, the Commission would no longer have to ensure compliance with the 28-day rule, i.e., the rule prohibiting committees from allocating expenditures as exempt fundraising expenditures within 28 days of the primary held within the state where the expenditure was made.

Eligibility Threshold for Public Financing (revised 1995)

Section: 26 U.S.C. §9033

Recommendation: The Commission recommends that Congress raise the eligibility threshold for publicly funded Presidential primary candidates.

Explanation: The Federal Election Commission has administered the public funding provisions in five Presidential elections. The statute provides for a cost-of-living adjustment (COLA) of the overall primary spending limitation. There is, however, no corresponding adjustment to the threshold requirement. It remains exactly the same as it was in 1974. An adjustment to the threshold requirement would ensure that funds continue to be given only to primary candidates who demonstrate broad national support. To reach this higher threshold, the Commission

recommends increasing the number of states in which the candidate had to raise the qualifying amount of matchable contributions; and/or increase the total amount of qualifying matchable contributions that had to be raised in each of the states.

Eligibility Requirements for Public Financing Section: 26 U.S.C. §§9002, 9003, 9032 and 9033

Recommendation: The Commission recommends that Congress amend the eligibility requirements for publicly funded Presidential candidates to make clear that candidates who have been convicted of a willful violation of the laws related to the public funding process or who are not eligible to serve as President will not be eligible for public funding.

Explanation: Neither of the Presidential public financing statutes expressly restricts eligibility for funding because of a candidate's prior violations of law, no matter how severe. And yet public confidence in the integrity of the public financing system would risk serious erosion if the U.S. Government were to provide public funds to candidates who had been convicted of felonies related to the public funding process. Congress should therefore amend the eligibility requirements to ensure that such candidates do not receive public financing for their Presidential campaigns. The amendments should make clear that a candidate would be ineligible for public funds if he or she had been convicted of fraud with respect to raising funds for a campaign that was publicly financed, or if he or she had failed to make repayments in connection with a past publicly funded campaign or had willfully disregarded the statute or regulations. In addition, Congress should make it clear that eligibility to serve in the office sought is a prerequisite for eligibility for public funding. See *LaRouche v. FEC*, 992 F.2d 1263 (D.C. Cir. 1993) *cert. denied*, 114 S. Ct. 550 (1993).

Deposit of Repayments

Section: 26 U.S.C. §9007(d)

Recommendation: The Commission recommends that Congress revise the law to state that: All payments

received by the Secretary of the Treasury under subsection (b) shall be deposited by him or her in the Presidential Election Campaign Fund established by §9006(a).

Explanation: This change would allow the Fund to recapture monies repaid by convention-related committees of national major and minor parties, as well as by general election grant recipients. Currently the Fund recaptures only repayments made by primary matching fund recipients.

PART II: GENERAL LEGISLATIVE RECOMMENDATIONS

Disclosure

Consolidated Reporting of Events

Section: 2 U.S.C. §434(b)

Recommendation: The Commission recommends that Congress consider strengthening disclosure by requiring Presidential committees to identify all receipts from a political fundraising event that grosses over \$50,000 in itemizable receipts. Congress may wish to require committees to file an event schedule, listing all event-related contributions that meet the itemization threshold.

Explanation: Under present law, it is difficult to see the contribution patterns of major fundraising events. More detailed reporting of major fundraising events would give the public an improved picture of how Presidential committees raise campaign funds.

Candidates and Principal Campaign Committees

Section: 2 U.S.C. §§432(e)(1) and 433(a)

Recommendation: The Commission recommends that Congress revise the law to require a candidate and his or her principal campaign committee to register simultaneously.

Explanation: An individual becomes a candidate under the FECA once he or she crosses the \$5,000 threshold in raising contributions or making expenditures. The candidate has 15 days to file a statement designating the principal campaign committee, which will subsequently disclose all of the campaign's financial activity. This committee, in turn, has 10 days from the candidate's designation to register. This schedule allows 25 days to pass before the committee's reporting requirements are triggered. Consequently, the financial activity that occurred prior to the registration is not disclosed until the committee's next upcoming report. This period is too long during an election year. For example, should a report be due 20 days after an individual becomes a candidate, the unregistered committee would not have to file a report on that date and disclosure would be delayed. The next report might not be filed for 3 more months. By requiring

simultaneous registration, the public would be assured of more timely disclosure of the campaign's activity.

PACs Created by Candidates

Section: 2 U.S.C. §441a(a)

Recommendation: The Commission recommends that Congress consider whether PACs created by candidates should be deemed affiliated with the candidate's principal campaign committee.

Explanation: A number of candidates for federal office, including incumbent officeholders, have created PACs in addition to their principal campaign committees. Under current law, such PACs generally are not considered authorized committees. Therefore, they may accept funds from individuals up to the \$5,000 limit permitted for unauthorized committees in a calendar year and may make contributions of up to \$5,000 per election to other federal candidates once they achieve multicandidate status. In contrast, authorized committees may not accept more than \$1,000 per election from individuals and may not make contributions in excess of \$1,000 to other candidates.

The existence of PACs created by candidates can present difficult issues for the Commission, such as when contributions are jointly solicited with the candidate's principal campaign committee or the resources of the PAC are used to permit the candidate to gain exposure by traveling to appearances on behalf of other candidates. At times the operations of the two committees can be difficult to distinguish.

If Congress concludes that there is an appearance that the limits of the Act are being evaded through the use of PACs created by candidates, it may wish to consider whether such committees are affiliated with the candidate's principal campaign committee. As such, contributions received by the committees would be aggregated under a single contribution limit and subjected to the limitations on contributions to authorized committees. The same treatment would be accorded to contributions made by them to other candidates.

Require Monthly Filing for Certain Multicandidate Committees

Section: 2 U.S.C. §434(a)(4)

Recommendation: The Commission recommends that multicandidate committees which have raised or spent, or which anticipate raising or spending, over \$100,000 be required to file on a monthly basis during an election year.

Explanation: Under current law, multicandidate committees have the option of filing quarterly or monthly during an election year. Quarterly filers that make contributions or expenditures on behalf of primary or general election candidates must also file pre-election reports.

Presidential candidates who anticipate receiving contributions or making expenditures aggregating \$100,000 or more must file on a monthly basis. Congress should consider applying this same reporting requirement to multicandidate committees which have raised or spent, or which anticipate raising or spending, in excess of \$100,000 during an election year. The requirement would simplify the filing schedule, eliminating the need to calculate the primary filing periods and dates. Filing would be standardized—once a month. This change would also benefit disclosure; the public would know when a committee's report was due and would be able to monitor the larger, more influential committees' reports. Although the total number of reports filed would increase, most reports would be smaller, making it easier for the Commission to enter the data into the computer and to make the disclosure more timely.

Reporting of Last-Minute Independent Expenditures

Section: 2 U.S.C. §434(c)

Recommendation: The Commission recommends that Congress clarify when last-minute independent expenditures must be reported.

Explanation: The statute requires that independent expenditures aggregating \$1,000 or more and made after the 20th day, but more than 24 hours, before an

election be *reported* within 24 hours after they are made. This provision is in contrast to other reporting provisions of the statute, which use the words "shall be filed." Must the report be received by the filing office within 24 hours after the independent expenditure is made, or may it be sent certified/registered mail and postmarked within 24 hours of when the expenditure is made? Should Congress decide that committees must report the expenditure within 24 hours after it is made, committees should be able to file via facsimile (fax) machine. (See Legislative Recommendation titled "Facsimile Machines.") Clarification by Congress would be very helpful.

Reporting Last-Minute Coordinated Party Expenditures by Party Committees

Section: 2 U.S.C. §§434 and 441a(d)

Recommendation: The Commission recommends that Congress consider requiring state and national party committees to file 48-hour notices when they make coordinated expenditures shortly before an election.

Explanation: Party committees must file pre-general election reports when they make contributions or expenditures supporting general election candidates prior to the 19th day before the election. Candidate committees must file 48-hour notices when they receive last-minute contributions prior to the election. Coordinated expenditures made after the close of books of the pre-election report, however, are not disclosed until after the election. In order to disclose this important financial activity, the Commission recommends that Congress consider requiring state and national party committees to file 48-hour notices when they make coordinated expenditures during the period beginning with the close of books of the pre-election report and continuing through 48 hours before the election. The Commission shall receive this notice within 48 hours of the committee making the expenditure.

Reporting and Recordkeeping of Payments to Persons Providing Goods and Services

Section: 2 U.S.C. §§432(c), 434(b)(5)(A), (6)(A) and (6)(B)

Recommendation: The current statute requires reporting "the name and address of each...person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure." The Commission recommends that Congress clarify whether this is meant, in all instances, to require reporting committees to disclose only the payments made by the committee or whether additional reporting is required, in some instances, when a payment is made to an intermediary contractor or consultant who, in turn, acts as the committee's agent by making expenditures to other payees. If Congress determines that disclosure of secondary payees is required, the Act should require that committees maintain the name, address, amount and purpose of the disbursement made to the secondary payees in their records and disclose it to the public on their reports. Congress should limit such disclosure to secondary payments above a certain dollar threshold or to payments made to independent subcontractors.

Explanation: The Commission has encountered on several occasions the question of just how detailed a committee's reporting of disbursements must be. See, e.g., Advisory Opinion 1983-25, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5742 (Dec. 22, 1983) (Presidential candidate's committee not required to disclose the names, addresses, dates or amounts of payments made by a general media consultant retained by the committee); Advisory Opinion 1984-8, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5756 (Apr. 20, 1984) (House candidate's committee only required to itemize payments made to the candidate for travel and subsistence, not the payments made by the candidate to the actual providers of services); Financial Control and Compliance Manual for Presidential Primary Election Candidates Receiving Public Financing, Federal Election Commission, pp. 123-130 (1992)

(distinguishing committee advances or reimbursements to campaign staff for travel and subsistence from other advances or reimbursements to such staff and requiring itemization of payments made by campaign staff only as to the latter). Congressional intent in the area is not expressly stated, and the Commission believes that statutory clarification would be beneficial. In the area of Presidential public financing, where the Commission is responsible for monitoring whether candidate disbursements are for qualified campaign expenses (see 26 U.S.C. §§9004(c) and 9038(b)(2)), guidance would be particularly useful.

Incomplete or False Contributor Information

Section: 2 U.S.C. §434

Recommendation: The Commission recommends that Congress consider amending the Act to address the recurring problem of committees' inability to provide full disclosure about their contributors.

Explanation: Concern has been expressed by the Commission, the public, and the press about the failure of candidates and political committees to report the addresses and occupations of many of their contributors. While the Commission revised its regulations in 1994 to further ensure that committees make their "best efforts" to obtain and report contributor information, Congress may want to strengthen the law further.

Excluding Political Committees from Protection of the Bankruptcy Code

Section: 2 U.S.C. §433(d)

Recommendation: The Commission recommends that Congress clarify the distribution of authority over insolvent political committees between the Commission's authority to regulate insolvency and termination of political committees under 2 U.S.C. §433(d), on one hand, and the authority of the bankruptcy courts, on the other hand.

Explanation: In 2 U.S.C. §433(d), the Commission is given authority to establish procedures for "the determination of insolvency" of any political committee, the

“orderly liquidation of an insolvent political committee,” the “application of its assets for the reduction of outstanding debts,” and the “termination of an insolvent political committee after such liquidation...” However, the Bankruptcy Code, 11 U.S.C. §101 *et seq.*, generally grants jurisdiction over such matters to the bankruptcy courts, and at least one bankruptcy court has exercised its jurisdiction under Chapter 11 of the Bankruptcy Code to permit an ongoing political committee to compromise its debts with the intent thereafter to resume its fundraising and contribution and expenditure activities. *In re Fund for a Conservative Majority*, 100 B.R. 307 (Bankr. E.D.Va. 1989). Not only does the exercise of such jurisdiction by the bankruptcy court conflict with the evident intent in 2 U.S.C. §433(d) to empower the Commission to regulate such matters with respect to political committees, but permitting a political committee to compromise debts and then resume its political activities can result in corporate creditors effectively subsidizing the committee’s contributions and expenditures, contrary to the intent of 2 U.S.C. §441b(a). The Commission promulgated a regulation generally prohibiting ongoing political committees from compromising outstanding debts, 11 CFR 116.2(b), but the continuing potential jurisdiction of the bankruptcy courts over such matters could undermine the Commission’s ability to enforce it. Accordingly, Congress may want to clarify the distribution of authority between the Commission and the bankruptcy courts in this area. In addition, Congress should specify whether political committees are entitled to seek Chapter 11 reorganization under the Bankruptcy Code.

Fundraising Projects Operated by Unauthorized Committees

Section: 2 U.S.C §432(e)

Recommendation: The Commission recommends that Congress specifically require that contributions solicited by an unauthorized committee (i.e., a committee that has not been authorized by a candidate as his/her campaign committee) be made payable to the registered name of the committee and that unauthorized committees be prohibited from accepting checks payable to any other name.

Explanation: Unauthorized committees are not permitted to use the name of a federal candidate in their name or in the name of a fundraising project. However, unauthorized committees (those not authorized by candidates) often raise funds through fundraising efforts that name specific candidates. As a result, contributors are sometimes confused or misled, believing that they are contributing to a candidate’s authorized committee when, in fact, they are giving to the nonauthorized committee that sponsors the event. This confusion sometimes leads to requests for refunds, allegations of coordination and inadequate disclaimers, and inability to monitor contributor limits. Contributor awareness might be enhanced if Congress were to modify the statute by requiring that all checks intended for an unauthorized committee be made payable to the registered name of the unauthorized committee and by prohibiting unauthorized committees from accepting checks payable to any other name.

Disclaimer Notices (revised 1995)

Section: 2 U.S.C. §441d

Recommendation: The Commission recommends that Congress revise the FECA to require registered political committees to display the appropriate disclaimer notice (when practicable) in any communication issued to the general public, regardless of its content or how it is distributed. Congress should also revise the Federal Communications Act to make it consistent with the FECA’s requirement that disclaimer notices state who paid for the communication.

Explanation: Under 2 U.S.C. §441d, a disclaimer notice is only required when “expenditures” are made for two types of communications made through “public political advertising”: (1) communications that solicit contributions and (2) communications that “expressly advocate” the election or defeat of a clearly identified candidate. The Commission has encountered a number of problems with respect to this requirement.

First, the statutory language requiring the disclaimer notice refers specifically to “expenditures,”

suggesting that the requirement does not apply to disbursements that are exempt from the definition of "expenditure" such as "exempt activities" conducted by local and state party committees under, for example, 2 U.S.C. §431(9)(B)(viii). This proposal would make clear that all types of communications to the public would carry a disclaimer.

Second, the Commission has encountered difficulties in interpreting "public political advertising," particularly when volunteers have been involved with the preparation or distribution of the communication.

Third, the Commission has devoted considerable time to determining whether a given communication in fact contains "express advocacy" or "solicitation" language. The recommendation here would erase this need.

The Commission has issued a Notice of Proposed Rulemaking and plans to schedule a public hearing to seek comments on revising its regulations to address these issues. See 59 FR 50708 (October 5, 1994). Most of these problems would be eliminated, however, if the language of 2 U.S.C. §441d were simplified to require a registered committee to display a disclaimer notice whenever it communicated to the public, regardless of the purpose of the communication and the means of preparing and distributing it. The Commission would no longer have to examine the content of communications or the manner in which they were disseminated to determine whether a disclaimer was required.

This proposal is not intended to eliminate exemptions for communications appearing in places where it is inconvenient or impracticable to display a disclaimer.

Finally, Congress should change the sponsorship identification requirements found in the Federal Communications Act to make them consistent with the disclaimer notice requirements found in the FECA. Under the Communications Act, federal political broadcasts must contain an announcement that they were furnished to the licensee, and by whom. See FCC and FEC Joint Public Notice, FCC 78-419 (June 19, 1978). In contrast, FECA disclaimer notices focus on who authorized and paid for the communication. The Communications Act should be revised to ensure that the additional information required by the FECA

is provided without confusion to licensees and political advertisers. In addition, the FECA should be amended to require that the disclaimer appear at the end of all broadcast communications.

Fraudulent Solicitation of Funds

Section: 2 U.S.C. §441h

Recommendation: The current §441h prohibits fraudulent misrepresentation such as speaking, writing or acting on behalf of a candidate or committee on a matter which is damaging to such candidate or committee. It does not, however, prohibit persons from fraudulently soliciting contributions. The Commission recommends that a provision be added to this section prohibiting persons from fraudulently misrepresenting themselves as representatives of candidates or political parties for the purpose of soliciting contributions which are not forwarded to or used by or on behalf of the candidate or party.

Explanation: The Commission has received a number of complaints that substantial amounts of money were raised fraudulently by persons or committees purporting to act on behalf of candidates. Candidates have complained that contributions which people believed were going for the benefit of the candidate were diverted for other purposes. Both the candidates and the contributors were harmed by such diversion. The candidates received less money because people desirous of contributing believed they had already done so. The contributors' funds were used in a manner they did not intend. The Commission has been unable to take any action on these matters because the statute gives it no authority in this area.

Draft Committees

Section: 2 U.S.C. §§431(8)(A)(i) and (9)(A)(i), 441a(a)(1) and 441b(b)

Recommendation: The Commission recommends that Congress consider the following amendments to the Act in order to prevent a proliferation of "draft" committees and to reaffirm Congressional intent that draft committees are "political committees" subject to the Act's provisions.

1. *Bring Funds Raised and Spent for Undeclared but Clearly Identified Candidates Within the Act's Purview.* Section 431(8)(A)(i) should be amended to include in the definition of "contribution" funds contributed by persons "for the purpose of influencing a clearly identified *individual* to seek nomination for election or election to Federal office...." Section 431(9)(A)(i) should be similarly amended to include within the definition of "expenditure" funds expended by persons on behalf of such "a clearly identified *individual*."

2. *Restrict Corporate and Labor Organization Support for Undeclared but Clearly Identified Candidates.* Section 441b(b) should be revised to expressly state that corporations, labor organizations and national banks are prohibited from making contributions or expenditures "for the purpose of influencing a clearly identified *individual* to seek nomination for election or election..." to federal office.

3. *Limit Contributions to Draft Committees.* The law should include explicit language stating that no person shall make contributions to *any* committee (including a draft committee) established to influence the nomination or election of a clearly identified *individual* for any federal office which, in the aggregate, exceed that person's contribution limit, per candidate, per election.

Explanation: These proposed amendments were prompted by the decisions of the U.S. Court of Appeals for the District of Columbia Circuit in *FEC v. Machinists Non-Partisan Political League* and *FEC v. Citizens for Democratic Alternatives in 1980* and of the U.S. Court of Appeals for the Eleventh Circuit in *FEC v. Florida for Kennedy Committee*. The District of Columbia Circuit held that the Act, as amended in 1979, regulated only the *reporting requirements* of draft committees. The Commission sought review of this decision by the Supreme Court, but the Court declined to hear the case. Similarly, the Eleventh Circuit found that "committees organized to 'draft' a person for federal office" are not "political committees" within the Commission's investigative authority. The Commission believes that the appeals court rulings create a serious imbalance in the election law and the political process because a nonauthorized group

organized to support someone who has not yet become a candidate may operate completely outside the strictures of the Federal Election Campaign Act. However, any group organized to support someone who has in fact become a candidate is subject to the Act's registration and reporting requirements and contribution limitations. Therefore, the potential exists for funneling large aggregations of money, both corporate and private, into the federal electoral process through unlimited contributions made to nonauthorized draft committees that support a person who has not yet become a candidate. These recommendations seek to avert that possibility.

Contributions and Expenditures

Candidate's Use of Campaign Funds (1995)

Section: 2 U.S.C. §439a

Recommendation: Congress may wish to examine whether the use of campaign funds to pay a salary to the candidate is considered to be a "personal use" of those funds.

Explanation: Under §439a of the Act, excess campaign funds cannot be converted by any person to personal use. The Commission has recently approved final draft rules on what would constitute "personal use" of excess funds. It was unable, however, to decide whether excess campaign funds may be used to pay a salary to the candidate. In the past, some have argued before the Commission that candidate salary payments are legitimate campaign expenditures, while others have felt that such payments constitute a personal use of excess funds prohibited by §439a. Congressional guidance on this issue would be helpful.

Disposition of Excess Campaign Funds

Section: 2 U.S.C. §439a

Recommendation: In those cases where a candidate has largely financed his campaign with personal funds, the Commission recommends that Congress consider limiting the amount of excess campaign funds that the campaign may transfer to a national,

state or local committee of any political party to \$100,000 per year.

Explanation: Under current law, a candidate may transfer unlimited amounts of excess campaign funds to a political party. This makes it possible for a candidate to contribute unlimited personal funds to his campaign, declare these funds excess and transfer them to a political party, thus avoiding the limit on individual contributions to political parties.

Contributions and Expenditures to Influence Federal and Nonfederal Elections

Section: 2 U.S.C. §§434 and 441

Recommendation: The Commission recommends that Congress consider whether new legislation is needed to regulate the use of "soft money" in federal elections.

Explanation: The law requires that all funds spent to influence federal elections come from sources that are permissible under the limitations and prohibitions of the Act. Problems arise with the application of this provision to committees that engage in activities that support both federal and nonfederal candidates. The Commission attempted to deal with this problem by promulgating regulations that required such committees to allocate disbursements between federal and nonfederal election activity. The focus of these regulations was on how the funds were spent. The public, however, has been equally concerned about the source of money that directly or indirectly influences federal politics. Much discussion has centered on the perception that soft money is being used to gain access to federal candidates. ("Soft money" is generally understood to mean funds that do not comply with the federal prohibitions and limits on contributions.) Even if soft money is technically used to pay for the nonfederal portion of shared activities (federal and nonfederal), the public may perceive that the contributors of soft money have undue influence on federal candidates and federally elected officials. In light of this public concern, Congress should consider amending the law in this area as it affects the *raising* of soft money. Such changes could include any or all of the

following: (1) more disclosure of nonfederal account receipts (as well as "building fund" proceeds exempted under 2 U.S.C. §431(8)(B)(viii)); (2) limits on nonfederal account donations coupled with tighter affiliation rules regarding party committees; (3) prohibiting nonfederal accounts for certain types of committees; (4) prohibiting the use of a federal candidate's name or appearance to raise soft money; and (5) confining soft money fundraising to nonfederal election years.

In addition, further restrictions on the *spending* of soft money should be considered, such as: (1) requiring all party committees to disclose all nonfederal activity that is not exclusively related to nonfederal candidate support and expressly preempting duplicative state reporting requirements; (2) requiring that all party activity which is not exclusively on behalf of nonfederal candidates be paid for with federally permissible funds; and (3) limiting the use of soft money to nonfederal election year activity.

Broader Prohibition Against Force and Reprisals

Section: 2 U.S.C. §441b(b)(3)(A)

Recommendation: The Commission recommends that Congress revise the FECA to make it unlawful for a corporation, labor organization or separate segregated fund to use physical force, job discrimination, financial reprisals or the threat thereof to obtain a contribution or expenditure on behalf of any candidate or political committee.

Explanation: Current §441b(b)(3)(A) could be interpreted to narrowly apply to the making of contributions or expenditures by a separate segregated fund which were obtained through the use of force, job discrimination, financial reprisals and threats. Thus, Congress should clarify that corporations and labor organizations are prohibited from using such tactics in the solicitation of contributions for the separate segregated fund. In addition, Congress should include language to cover situations where the funds are solicited on behalf of and given directly to candidates.

Use of Free Air Time

Section: 2 U.S.C. §§431(9)(B)(i) and 441b

Recommendation: The Commission recommends that Congress revise the FECA to indicate whether an incorporated broadcaster may donate free air time to a candidate or political committee and, if so, under what conditions and restrictions.

Explanation: The Federal Election Campaign Act prohibits a corporation from providing "anything of value" to a candidate without full payment. However, §§312(a)(7) and 315(b) of the Communications Act require that broadcast stations provide "reasonable access" to federal candidates, and prohibit stations from charging candidates more than the "lowest unit charge" for the same class and amount of time in the same time period. Under FCC rules, broadcasters may satisfy their "reasonable access" obligations by providing free air time to candidates, although the Federal Communications Commission does not require them to provide free time. Therefore, the question has been raised as to whether the donation of free air time by an incorporated broadcaster is a prohibited corporate contribution under the FECA, or whether such a donation comes within the exemption for news stories, commentaries and editorials. The Commission has twice considered and been unable to resolve this issue. Hence, Congress may want to consider offering guidance on whether donations of free air time are permissible under the FECA and, if so, under what conditions and restrictions.

Distinguishing Official Travel from Campaign Travel

Section: 2 U.S.C. §431(9)

Recommendation: The Commission recommends that Congress amend the FECA to clarify the distinctions between campaign travel and official travel.

Explanation: Many candidates for federal office hold elected or appointed positions in federal, state or local government. Frequently, it is difficult to determine whether their public appearances are related to their official duties or whether they are campaign related. A

similar question may arise when federal officials who are not running for office make appearances that could be considered to be related to their official duties or could be viewed as campaign appearances on behalf of specific candidates.

Another difficult area concerns trips in which both official business and campaign activity take place. There have also been questions as to how extensive the campaign aspects of the trip must be before part or all of the trip is considered campaign related. Congress might consider amending the statute by adding criteria for determining when such activity is campaign related. This would assist the committee in determining when campaign funds must be used for all or part of a trip. This will also help Congress determine when official funds must be used under House or Senate Rules.

Coordinated Party Expenditures (revised 1995)

Section: 2 U.S.C. §441a(d)

Recommendation: The Commission recommends that Congress clarify the number of coordinated party expenditure limits that are available to party committees during the election cycle.

In addition, Congress may want to clarify the distinction between coordinated party expenditures made in connection with general elections and generic party building activity.

Explanation: Section 441a(d) provides that national and state party committees may make expenditures in connection with the general election campaigns of the party's nominees for House and Senate. The national party committees may also make such expenditures on behalf of the party's general election Presidential and Vice Presidential nominees. The Commission has interpreted these provisions to permit party committees to make nearly any type of expenditure they deem helpful to their nominees short of donating the funds directly to the candidates. Expenditures made under §441a(d) are subject to a special limit, separate from contribution limits.

The Commission has been faced several times with the question of whether party committees have one or two coordinated party expenditure limits in a

particular election campaign. In particular, the issue has been raised in special election campaigns. Some state laws allow the first special election either to narrow the field of candidates, as a primary would, or to fill the vacancy if one candidate receives a majority of the popular vote. If a second special election becomes necessary to fill the vacancy, the question has arisen as to whether the party committees may spend against a second coordinated party expenditure limit since both special elections could have filled the vacancy. In a parallel manner, the Commission has been faced with the question of whether party committees have one or two coordinated party expenditure limits in a situation that includes an election on a general election date and a subsequent election, required by state law, after the general election. Although in the latter situation, a district court has concluded that only one coordinated party expenditure limit would apply (see *Democratic Senatorial Campaign Committee v. FEC* (No. 93-1321) (D.D.C., November 14, 1994)), broader Congressional guidance on this issue would be helpful.

Party committees may also make expenditures for generic party-building activities, including get-out-the-vote and voter registration drives. These activities are not directly attributable to a clearly identified candidate. In contrast to coordinated party expenditures, these activities are not subject to limitation.

When deciding, in advisory opinions and enforcement matters, whether an activity is a §441a(d) expenditure or a generic activity, the Commission has considered the timing of the expenditure, the language of the communication, and whether it makes reference only to candidates seeking a particular office or to all the party's candidates, in general. However, the Commission still has difficulty determining, in certain situations, when a communication or other activity is generic party building activity or a coordinated party expenditure. Congressional guidance on this issue would be helpful.

Volunteer Participation in Exempt Activity

Section: 2 U.S.C. §§431(8)(B)(x) and (xii); 431(9)(B)(viii) and (ix)

Recommendation: The Commission recommends that Congress clarify the extent to which volunteers must conduct or be involved in an activity in order for the activity to qualify as an exempt party activity.

Explanation: Under the Act, certain activities conducted by state and local party committees on behalf of the party's candidates are exempt from the contribution limitations if they meet specific conditions. Among these conditions is the requirement that the activity be conducted by volunteers. However, the actual level of volunteer involvement in these activities has varied substantially.

Congress may want to clarify the extent to which volunteers must be involved in an activity in order for that activity to qualify as an exempt activity. For example, if volunteers are assisting with a mailing, must they be the ones to stuff the envelopes and sort the mail by zip code or can a commercial vendor perform that service? Is it sufficient involvement if the volunteers just stamp the envelopes or drop the bags at the post office?

Colleges and Universities

Section: 2 U.S.C. §§441a and 441b

Recommendation: The Commission recommends that Congress consider amending the FECA to spell out the circumstances in which colleges, universities and other educational institutions may engage in political activities such as sponsoring candidate appearances and candidate debates, and conducting voter registration drives.

Explanation: Under 2 U.S.C. §441b, incorporated private educational institutions, like other corporations, are prohibited from making contributions in connection with any Federal election. Similarly, state-operated educational institutions, if unincorporated, are "persons" and thus subject to the contribution limitations of 2 U.S.C. §441a. Within the existing framework of the FECA, the Commission is currently

considering the conditions under which an educational institution may sponsor a candidate appearance or candidate debate or conduct a voter drive, and the conditions under which such activities will constitute in-kind contributions. However, Congress may wish to consider whether the important educational role these institutions play in the democratic process warrants treating them differently from the way other corporations are treated with respect to these or other forms of political activities. The Commission notes that safeguards against certain political activities already exist. For example, under the Internal Revenue Code, private schools that qualify as nonprofit corporations under §501(c)(3) of the Internal Revenue Code may not participate or intervene in political campaigns. Similarly, state-operated schools may be required to ensure that state funds are not used for political purposes.

Direction or Control

Section: 2 U.S.C. §441a(a)(8)

Recommendation: The Commission recommends that Congress consider whether the Act's provisions regarding earmarked contributions should incorporate the concept in the legislative history that contributions count toward a conduit's or intermediary's contribution limits when the conduit or intermediary exercises direction or control over them. If Congress does determine that such contributions count toward a conduit's or intermediary's contribution limit, then the Commission recommends that Congress also include a definition of what constitutes direction or control.

Explanation: Under 2 U.S.C. §441a(a)(8), contributions made by any person which are earmarked through a conduit or intermediary to a particular candidate are treated as contributions from that person to the candidate. The Commission has seen an increase in conduit activity in recent years.

Congress has indicated that "if a person exercises any direct or indirect control over the making of a contribution, then such contribution shall count toward the limitation imposed with respect to such person [under current 2 U.S.C. §441a], but it will not count toward such a person's contribution limitation when it

is demonstrated that such person exercised no direct or indirect control over the making of the contribution involved." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 16 (1974). The Commission believes that the FECA should be amended to expressly reflect Congressional intent that contributions count toward a conduit's limits if the conduit exercises direction or control over the making of those earmarked contributions. In addition, determining what actions on the part of a conduit or intermediary constitute direction or control has presented difficulties for the Commission. Therefore, an amendment to the Act should also include standards for determining when "direction or control" has been exercised over the making of a contribution.

Nonprofit Corporations (revised 1995)

Section: 2 U.S.C. §441b

Recommendation: In light of the decision of the U.S. Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Commission recommends that Congress consider amending the provision prohibiting corporate and labor spending in connection with federal elections in order to incorporate into the statute the text of the court's decision. Congress may also wish to include in the Act a definition for the term "express advocacy."

Explanation: In the Court's decision of December 15, 1986, the Court held that the Act's prohibition on corporate political expenditures was unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit corporation. The Court determined, however, that these nonprofit corporations had to disclose some aspect of their financial activity—in particular, independent expenditures exceeding \$250 and identification of persons who contribute over \$200 to help fund these expenditures. The Court further ruled that spending for political activity could, at some point, become the major purpose of the corporation, and the organization would then become a political committee. The Court also indicated that the prohibition on corporate expenditures for communications is limited to communications expenditures containing express advocacy.

Since the Court decision and subsequent related decisions (e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)), the Commission has engaged in a rulemaking proceeding to consider what regulatory changes are needed. However, the Commission believes that statutory clarification would also be beneficial.

Congress should consider whether statutory changes are needed: (1) to exempt independent expenditures made by certain nonprofit corporations from the statutory prohibition against corporate expenditures; (2) to specify the reporting requirements for these nonprofit corporations; and (3) to provide a definition of express advocacy.

Transfer of Campaign Funds from One Committee to Another

Section: 2 U.S.C. §441a(a)(1) and (5)(C)

Recommendation: The Commission recommends that Congress consider requiring contributors to redesignate contributions before they are transferred from one federal campaign to another federal campaign of the same candidate, and to clarify whether such contributions count against the contributors' limits for the transferee committee.

Explanation: The Commission has traditionally permitted a committee to transfer funds from one campaign to another (e.g., from a 1992 election to a 1994 election committee) without the original contributor's redesignation of the contribution or approval of the transfer. Congress may wish to re-examine whether such transfers are acceptable, and if so, how should they affect the original contributor's contribution limit vis-à-vis both committees.

Contributions from Minors

Section: 2 U.S.C. §441a(a)(1)

Recommendation: The Commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.

Explanation: The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Application of Contribution Limitations to Family Members

Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that Congress examine the application of the contribution limitations to immediate family members.

Explanation: Under the current posture of the law, a family member is limited to contributing \$1,000 per election to a candidate. This limitation applies to spouses and parents, as well as other immediate family members. (See S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess., 58 (1974) and *Buckley v. Valeo*, 424 U.S. 1, 51 (footnote 57)(1976).) This limitation has caused the Commission substantial problems in attempting to implement and enforce the contribution limitations.⁴

Problems have arisen in enforcing the limitations where a candidate uses assets belonging to a parent. In some cases, a parent has made a substantial gift to his or her candidate-child while cautioning the candidate that this may well decrease the amount which the candidate would otherwise inherit upon the death of the parent.

Problems have also occurred in situations where the candidate uses assets held jointly with a spouse. When the candidate uses more than one-half of the value of the asset held commonly with the spouse (for example, offering property as collateral for a loan), the amount over one-half represents a contribution from

⁴While the Commission has attempted through regulations to present an equitable solution to some of these problems (see Final Rule, 48 Fed. Reg. 19019, April 27, 1983, as prescribed by the Commission on July 1, 1983), statutory resolution is required in this area.

the spouse. If that amount exceeds \$1,000, it becomes an excessive contribution from the spouse.

The Commission recommends that Congress consider the difficulties arising from application of the contribution limitations to immediate family members.

Lines of Credit and Other Loans Obtained by Candidates

Section: 2 U.S.C. §431(8)(B)(vii)

Recommendation: The Commission recommends that Congress provide guidance on whether candidate committees may accept contributions which are derived from advances on a candidate's brokerage account, credit card, or home equity line of credit, and, if so, Congress should also clarify how such extensions of credit should be reported.

Explanation: The Act currently exempts from the definition of "contribution" loans that are obtained by political committees in the ordinary course of business from federally-insured lending institutions. 2 U.S.C. §431(8)(B)(vii). Loans that do not meet the requirements of this provision are either subject to the Act's contribution limitations, if received from permissible sources, or the prohibition on corporate contributions, as appropriate.

Since this aspect of the law was last amended in 1979, however, a variety of financial options have become more widely available to candidates and committees. These include a candidate's ability to obtain advances against the value of a brokerage account, to draw cash advances from a candidate's credit card, or to make draws against a home equity line of credit obtained by the candidate. In many cases, the credit approval, and therefore the check performed by the lending institution regarding the candidate's creditworthiness, may predate the candidate's decision to seek federal office. Consequently, the extension of credit may not have been made in accordance with the statutory criteria such as the requirement that a loan be "made on a basis which assures repayment." In other cases, the extension of credit may be from an entity that is not a federally-insured lending institution. The Commission recommends that Congress clarify whether these alternative sources of financing are permissible and, if

so, should specify standards to ensure that these advances are commercially reasonable extensions of credit.

Honorarium

Section: 2 U.S.C. §431(8)(B)(xiv)

Recommendation: The Commission recommends that Congress should make a technical amendment, deleting 2 U.S.C. §431(8)(B)(xiv), now contained in a list of definitions of what is not a contribution.

Explanation: The 1976 amendments to the Federal Election Campaign Act gave the Commission jurisdiction over the acceptance of honoraria by all federal officeholders and employees. 2 U.S.C. §441i. In 1991, the Legislative Branch Appropriations Act repealed §441i. As a result, the Commission has no jurisdiction over honorarium transactions taking place after August 14, 1991, the effective date of the law.

To establish consistency within the Act, the Commission recommends that Congress make a technical change to §431(8)(B)(xiv) deleting the reference to honorarium as defined in former §441i. This would delete honorarium from the list of definitions of what is not a contribution.

Acceptance of Cash Contributions

Section: 2 U.S.C. §441g

Recommendation: The Commission recommends that Congress modify the statute to make the treatment of 2 U.S.C. §441g, concerning cash contributions, consistent with other provisions of the Act. As currently drafted, 2 U.S.C. §441g prohibits only the *making* of cash contributions which, in the aggregate, exceed \$100 per candidate, per election. It does not address the issue of *accepting* cash contributions. Moreover, the current statutory language does not plainly prohibit cash contributions in excess of \$100 to political committees other than authorized committees of a candidate.

Explanation: Currently this provision focuses only on persons making the cash contributions. However, these cases generally come to light when a

committee has accepted these funds. Yet the Commission has no recourse with respect to the committee in such cases. This can be a problem, particularly where primary matching funds are received on the basis of such contributions.

While the Commission, in its regulations at 11 CFR 110.4(c)(2), has included a provision requiring a committee receiving such a cash contribution to promptly return the excess over \$100, the statute does not explicitly make acceptance of these cash contributions a violation. The other sections of the Act dealing with prohibited contributions (i.e., §§ 441b on corporate and labor union contributions, 441c on contributions by government contractors, 441e on contributions by foreign nationals, and 441f on contributions in the name of another) all prohibit both the making and accepting of such contributions.

Secondly, the statutory text seems to suggest that the prohibition contained in §441g applies only to those contributions given to candidate committees. This language is at apparent odds with the Commission's understanding of the Congressional purpose to prohibit any cash contributions which exceed \$100 in federal elections.

Independent Expenditures by Principal Campaign Committees

Section: 2 U.S.C. §432(e)(3)

Recommendation: The Commission recommends that Congress consider amending the definition of principal campaign committee to clarify whether these committees may make independent expenditures on behalf of other principal campaign committees.

Explanation: A principal campaign committee is defined as an authorized committee which has not supported more than one federal candidate. It is not clear, however, whether the term "support" is intended to include both contributions and independent expenditures or whether it refers to contributions alone. The same section states that the term "support" does not include a contribution by any authorized committee to another authorized committee of \$1,000 or less (2 U.S.C. §432(e)(3)(B)), but it is silent on the question of independent expenditures. The current language

does not clearly indicate whether authorized committees can make independent expenditures on behalf of other committees, or whether Congress intended to preclude authorized committees from making independent expenditures.

Certification of Voting Age Population Figures and Cost-of-Living Adjustment

Section: 2 U.S.C. §441a(c) and (e)

Recommendation: The Commission recommends that Congress consider removing the requirement that the Secretary of Commerce certify to the Commission the voting age population of each Congressional district. At the same time, Congress should establish a deadline of February 15 for supplying the Commission with the remaining information concerning the voting age population for the nation as a whole and for each state. In addition, the same deadline should apply to the Secretary of Labor, who is required under the Act to provide the Commission with figures on the annual adjustment to the cost-of-living index.

Explanation: In order for the Commission to compute the coordinated party expenditure limits and the state-by-state expenditure limits for Presidential candidates, the Secretary of Commerce certifies the voting age population of the United States and of each state. 2 U.S.C. §441a(e). The certification for each Congressional district, also required under this provision, is not needed.

In addition, under 2 U.S.C. §441a(c), the Secretary of Labor is required to certify the annual adjustment in the cost-of-living index. In both instances, the timely receipt of these figures would enable the Commission to inform political committees of their spending limits early in the campaign cycle. Under present circumstances, where no deadline exists, the Commission has sometimes been unable to release the spending limit figures before June.

Enforcement

Candidate Liability

Section: 2 U.S.C. §§432(e)(2) and 437g

Recommendation: The Commission recommends that Congress review who is liable for committee obligations to pay civil penalties for violations of the FECA. Congress may want to include in this review whether candidates should be jointly and severally liable for civil penalties incurred by their campaign committees.

Explanation: In enforcement cases, the Commission proceeds against both committees and their treasurers because the treasurers are responsible for complying with most requirements of the FECA. In many cases, civil penalties are paid from the principal campaign committee's funds. Because committees may change treasurers several times before a matter is resolved, and it may be very difficult to locate the individual who was treasurer at the time the violation occurred, the Commission generally proceeds against the individual who is currently treasurer at the time of the enforcement matter. This can place a large burden on those who agree to become treasurers, particularly when the campaign committee does not have sufficient funds to pay the civil penalty. Treasurers may be held jointly and severally liable for civil penalties, even in situations where the preparation and review of the reports was done by an assistant treasurer, bookkeeper, or other individual. Treasurers' liability may also make it more difficult for candidates to find individuals who are willing to serve as treasurers for their campaign committees.

While the Commission does make findings against candidates when they are directly involved in the activities that constitute a violation, it does not do so absent such involvement. Under 2 U.S.C. §432(e)(2), candidates are agents of their campaign committees for purposes of receiving contributions and loans, and making disbursements. This statutory provision implies that the candidate is not the principal of the committee, and is therefore not responsible for committee actions absent personal involvement. Accordingly, Congress may want to review whether it would be

preferable for liability to be placed on the current treasurer, or the treasurer at the time of the violation, or the candidate.

Persons Who Can Be Named As Respondents

Section: 2 U.S.C. §§434(a)(1), 441a(f), 441b and 441f

Recommendation: The Commission recommends that Congress consider amending the enforcement provisions of the Act to include a section that makes it a violation for anyone to actively assist another party in violating the Act.

Explanation: Many sections of the Act specifically list the parties that can be found in violation of those sections. See, e.g., 2 U.S.C. §§434(a)(1), 441a(f), 441b, and 441f. Oftentimes, however, parties other than those listed are actively involved in committing the violations. For example, §441b makes it illegal for an officer or director of a corporation, national bank or labor union to consent to the making of a contribution prohibited under that section. The Commission has seen many instances where these types of organizations have made prohibited contributions which were consented to by individuals who have the authority to approve the making of the contributions, even though those individuals did not hold the titles listed in the statute.

This issue has also been addressed on a limited basis in the context of 2 U.S.C. §441f. That section prohibits anyone from making or knowingly accepting a contribution made in the name of another, or from knowingly allowing his/her name to be used to effect such a contribution. In many situations involving this section, there are additional parties, not specified in the statute, who are actively involved in carrying out the violation. Without an "assisting" standard, those active participants cannot be found to have violated that section. The court has recognized such a standard with regard to §441f, *FEC v. Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987)(unpublished order denying motion for summary judgment), and the Commission has reflected that decision in its regulations at 11 CFR 110.4.

Although these actions have provided a basis for pursuing additional violators in a limited context, the preferable approach would be to codify the explicit statutory authority to pursue those who actively assist in carrying out all types of violations.

Audits for Cause

Section: 2 U.S.C. §438(b)

Recommendation: The Commission recommends that Congress expand the time frame, from 6 months to 12 months after the election, during which the Commission can initiate an audit for cause.

Explanation: Under current law, the Commission must initiate audits for cause within 6 months after the election. Because year-end disclosure does not take place until almost 2 months after the election, and because additional time is needed to computerize campaign finance information and review reports, there is little time to identify potential audits and complete the referral process within that 6-month window.

Modifying Standard of "Reason to Believe" Finding

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress modify the language pertaining to "reason to believe," contained at 2 U.S.C. §437g, so as to allow the Commission to open an investigation with a sworn complaint, or after obtaining evidence in the normal course of its supervisory responsibilities. Essentially, this would change the "reason to believe" standard to "reason to open an investigation."

Explanation: Under the present statute, the Commission is required to make a finding that there is "reason to believe a violation has occurred" before it may investigate. Only then may the Commission request specific information from a respondent to determine whether, in fact, a violation has occurred. The statutory phrase "reason to believe" is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent

has violated the Act. In fact, however, a "reason to believe" finding simply means that the Commission believes a violation may have occurred if the facts as described in the complaint are true. An investigation permits the Commission to evaluate the validity of the facts as alleged.

It would therefore be helpful to substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.

In order to avoid perpetuating the erroneous conclusion that the Commission believes a respondent has violated the law every time it finds "reason to believe," the statute should be amended.

Protection for Those Who File Complaints or Give Testimony

Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that the Act be amended to make it unlawful to improperly discriminate against employees or union members solely for filing charges or giving testimony under the statute.

Explanation: The Act requires that the identity of anyone filing a complaint with the Commission be provided to the respondent. In many cases, this may put complainants at risk of reprisals from the respondent, particularly if an employee or union member files a complaint against his or her employer or union. This risk may well deter many people from filing complaints, particularly under §441b. *See, e.g., NLRB v. Robbins Tire & Rubber Company*, 437 U.S. 214, 240 (1978); *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 302 (8th Cir. 1974); *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 134 (5th Cir. 1964). In other statutes relating to the employment relationship, Congress has made it unlawful to discriminate against employees for filing charges or giving testimony under the statute. *See, e.g.,* 29 U.S.C. §158(a)(4) (National Labor Relations Act); 29 U.S.C. §215(3) (Fair Labor Standards Act); 42 U.S.C. §2000e-3(a) (Equal Employment Opportunity Act). The Commission recommends that Congress consider including a similar provision in the FECA.

Public Financing

Compliance Fund

Section: 2 U.S.C. §441a(b)(1)(B); 26 U.S.C. §§9002(11), 9003(b) and (c), and 9004(c)

Recommendation: The Commission recommends that Congress clarify what funds Presidential Election Campaign Fund recipients may utilize to meet the accounting and compliance requirements imposed upon them by the Federal Election Campaign Act. If private funds are not to be used, Congress may wish to either raise the spending limits to accommodate such costs or establish a separate fund of the Treasury to be used for this purpose.

Explanation: Through regulation, the Commission has provided for the establishment by Presidential committees of a General Election Legal and Accounting Compliance Fund (GELAC fund) consisting of private contributions otherwise within the limits acceptable for any other Federal election. The GELAC funds, which supplement funds provided out of the U.S. Treasury, may be used to pay for costs related to compliance with the campaign laws. Determining which costs may be paid is sometimes difficult and complex. Contributions to the GELAC fund are an exception to the general rule that publicly funded Presidential general election campaigns may not solicit or accept private contributions. Congress should clarify whether GELAC funds are appropriate and, if not, specify whether additional federal grants are to be used. If GELAC funds are appropriate, Congress should provide guidelines indicating which compliance costs are payable from such funds.

Supplemental Funding for Publicly Funded Candidates

Section: 26 U.S.C. §§9003 and 9004

Recommendation: The Commission recommends that Congress consider whether to modify the general election Presidential public funding system in instances where a nonpublicly funded candidate exceeds the spending limit for publicly funded candidates.

Explanation: Major party Presidential candidates who participate in the general election public funding process receive a grant for campaigning. In order to receive the grant, the candidate must agree to limit expenditures to that amount. Candidates who do not request public funds may spend an unlimited amount on their campaign. Congress may want to consider whether the statute should ensure that those candidates who are bound by limits are not disadvantaged.

Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund

Section: 26 U.S.C. §§9006(b), 9008(b)(3) and 9037.

Recommendation: The Commission recommends that Congress clarify that committees receiving public financing payments from the Presidential Election Campaign Fund are exempt from the requirements of Title VI of the Civil Rights Act of 1964, as amended.

Explanation: This proposed amendment was prompted by the decision of the U.S. District Court for the District of Columbia in *Freedom Republicans, Inc., and Lugenia Gordon v. FEC*, 788 F. Supp. 600 (1992), *vacated*, No. 92-5214 (D.C. Cir. January 18, 1994). The Freedom Republicans' complaint asked the district court to declare that the Commission has jurisdiction to regulate the national parties' delegate selection process under Title VI. It also requested the court to order the Commission to adopt such regulations, direct the Republican Party to spend no more of the funds already received for its 1992 national nominating convention, and seek refunds of moneys already disbursed if the Republican Party did not amend its delegate selection and apportionment process to comply with Title VI. The district court found that the Commission "does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds." 788 F. Supp. at 601.

The Commission appealed this ruling on a number of procedural and substantive grounds, including that Title VI does not apply to the political parties' apportionment and selection of delegates to their

conventions. However, the court of appeals overruled the district court decision on one of the non-substantive grounds, leaving the door open for other lawsuits involving the national nominating conventions or other recipients of federal funds certified by the Commission. No. 92-5214, slip op. at 15.

In the Commission's opinion, First Amendment concerns and the legislative history of the public funding campaign statutes strongly indicate that Congress did not intend Title VI to permit the Commission to dictate to the political parties how to select candidates or to regulate the campaigns of candidates for federal office. Nevertheless, the potential exists for persons immediately prior to an election to invoke Title VI in the federal courts in a manner that might interfere with the parties' nominating process and the candidates' campaigns. The recommended clarification would help forestall such a possibility.

For these reasons, Congress should consider adding the following language to the end of each public financing provision cited above: "The acceptance of such payments will not cause the recipient to be conducting a 'program or activity receiving federal financial assistance' as that term is used in Title VI of the Civil Rights Act of 1964, as amended."

Enforcement of Nonwillful Violations

Section: 26 U.S.C. §§9012 and 9042

Recommendation: The Commission recommends that Congress consider amending the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act to clarify that the Commission has authority for civil enforcement of nonwillful violations (as well as willful violations) of the public funding provisions.

Explanation: Section 9012 of the Presidential Election Campaign Fund Act and §9042 of the Presidential Primary Matching Payment Account Act provide only for "criminal penalties" for knowing and willful violations of the spending and contribution provisions and the failure of publicly funded candidates to furnish all records requested by the Commission. The lack of a specific reference to nonwillful violations of these provisions has raised questions regarding the

Commission's ability to enforce these provisions through the civil enforcement process.

In some limited areas, the Commission has invoked other statutes and other provisions in Title 26 to carry out its civil enforcement of the public funding provisions. It has relied, for example, on 2 U.S.C. §441a(b) to enforce the Presidential spending limits. Similarly, the Commission has used the candidate agreement and certification processes provided in 26 U.S.C. §§9003 and 9033 to enforce the spending limits, the ban on private contributions, and the requirement to furnish records. Congress may wish to consider revising the public financing statutes to provide explicit authority for civil enforcement of these provisions.

Contributions to Presidential Nominees Who Receive Public Funds in the General Election

Section: 26 U.S.C. §9003

Recommendation: The Commission recommends that Congress clarify that the public financing statutes prohibit the making and acceptance of contributions (either direct or in-kind) to Presidential candidates who receive full public funding in the general election.

Explanation: The Presidential Election Campaign Fund Act prohibits a publicly financed general election candidate from accepting private contributions to defray qualified campaign expenses. 26 U.S.C. §9003(b)(2). The Act does not, however, contain a parallel prohibition against the *making* of these contributions. Congress should consider adding a section to 2 U.S.C. §441a to clarify that individuals and committees are prohibited from making these contributions.

Miscellaneous

Statutory Gift Acceptance Authority

Section: 2 U.S.C. §437c

Recommendation: The Commission recommends that Congress give the Commission authority to accept funds and services from private sources to enable the Commission to provide guidance and conduct

research on election administration and campaign finance issues.

Explanation: The Commission has been very restricted in the sources of private funds it may accept to finance topical research, studies, and joint projects with other entities because it does not have statutory gift acceptance authority. In view of the Commission's expanding role in this area, Congress should consider amending the Act to provide the Commission with authority to accept gifts from private sources. Permitting the Commission to obtain funding from a broader range of private organizations would allow the Commission to have more control in structuring and conducting these activities and avoid the expenditure of government funds for these activities. If this proposal were adopted, however, the Commission would not accept funds from organizations that are regulated by or have financial relations with the Commission.